

# DECISIONS

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AND THE GENERAL LAND OFFICE

IN

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THE PUBLIC LANDS

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TIME COVERED BY THIS REPORT.

GEORGE W. WOODRUFF, *Assistant Attorney-General.*

F. H. BARCLAY.

E. F. BEST.

G. N. BROWN.

E. B. CARRIER.

F. W. CLEMENTS.

G. B. GARDNER.

C. J. GROSECLOSE.

D. C. HAMMETT.

E. J. HARTSHORN.

G. J. HESSELMAN.

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A. W. PATTERSON.

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C. E. WRIGHT.

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# DECISIONS

RELATING TO

## THE PUBLIC LANDS.

RIGHT OF WAY—PASTURE RESERVE NO. 1—ACT OF MARCH 3, 1875.

LAWTON, TEXAS AND NORTHWESTERN R. R. Co.

Lands in Pasture Reserve No. 1, in the former Kiowa, Comanche and Apache Indian reservations, opened to entry by proclamation of September 19, 1906, in accordance with the provisions of the act of June 5, 1906, are not public lands of the United States within the meaning of the act of March 3, 1875, granting a right of way "through the public lands of the United States," and are therefore not subject to the operation of that act.

*Acting Secretary Woodruff to the Commissioner of the General Land*  
(S. V. P.) *Office, July 1, 1907.* (F. W. C.)

The Department has considered the appeal by the Lawton, Texas and Northwestern Railroad Company from your office decision of January 23, 1907, refusing to submit for departmental approval three separate maps of definite location, filed by said company; also three several plats showing station grounds selected adjacent to the line of road shown upon said maps, application for the approval of which was made under the provisions of the act of March 3, 1875 (18 Stat., 482), for the reason that the lands affected by the proposed right of way are within the limits of Grazing Reserve No. 1, in the former Kiowa, Comanche and Apache Indian reservations, and are therefore not public lands of the United States subject to the provisions of the act under which the approval is sought.

The act of March 3, 1875, grants a right of way "through the public lands of the United States," "and by public lands, as it has long been settled, is meant such land as is open to sale or other disposition under general laws." (*Bardon v. Northern Pacific Railroad Co.* (145 U. S., 535). With respect to the lands in Pasture Reserve No. 1, the same have, in accordance with the provisions of the act of June 5, 1906 (34 Stat., 213), and the President's proclamation dated September 19, 1906 [35 L. D., 238], been disposed of at an average

price of about \$10 per acre, and by the provisions of the act of June 5, 1906, moneys arising from the sales of these lands are to be paid into the Treasury of the United States and placed to the credit of said tribe of Indians.

The effect of this legislation is clearly to appropriate these lands to be disposed of in the particular manner indicated, for the benefit of the Indians. Lands having such a status are clearly not public lands of the United States within the definition given to such term by the supreme court. It follows as a consequence, that no error was committed on the part of your office in holding that these lands are not subject to the operation of the act of March 3, 1875.

The appeal, however, further contends that as this company has been shown to be duly qualified to receive the grant made by the act of March 3, 1875, the approval of its application by the Secretary of the Interior is but formal; in other words, that the duty to be performed by the Secretary of the Interior under this act is but ministerial, and in this connection the decision of the supreme court in case of *Noble v. Union River Logging Co.* (147 U. S., 165), is referred to. An examination of that case, however, clearly shows that the act of the Secretary of the Interior in giving approval to the map of location filed by the Union River Logging Company was treated as a proceeding of a judicial nature and likened to the issue of a patent under the homestead or other public land laws. The lands in question not being public lands within the meaning of the act of 1875, the Secretary of the Interior is without authority to approve a map of location across the same, and having determined that the lands are not public lands he has not only the authority, but it is his duty, to refuse to give his approval to a map of location filed under said act.

After a most careful consideration of the matter the Department must refuse to give approval to the maps under consideration.

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NORTHERN PACIFIC RY. CO. *v.* PEONE ET AL.

Motion for review of departmental decision of December 31, 1906, 35 L. D., 359, denied by Acting Secretary Woodruff, July 2, 1907.

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**ADDITIONAL HOMESTEAD ENTRY—KINKAID ACT—ACT OF MARCH  
2, 1907.**

**RANEY *v.* BURNETT.**

The act of March 2, 1907, amended the act of April 28, 1904, to permit persons who made entry between April 28, and June 28, 1904, to make additional entry in the same manner as those who made entry prior to April 28, "subject to existing rights;" and where an additional entry under section

2 of the act of April 28, based upon an original entry made between the dates mentioned in the amendatory act, was prior to the date of that act held for cancellation, upon contest, on the sole ground that it was invalid because based upon an original entry made subsequently to the passage of the act of April 28, the additional entry will be held intact, the invalidity being cured by the amendatory act and the rights of the entryman being superior to those of the contestant.

*Acting Secretary Woodruff to the Commissioner of the General Land*  
(S. V. P.) *Office, July 2, 1907.* (E. O. P.)

James Burnett has appealed to the Department from your office decision of December 5, 1906, holding for cancellation his homestead entry, made June 29, 1904, under the provisions of section 2 of the act of April 28, 1904 (33 Stat., 547), for the E.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , NE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , W.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , W.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , E.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 28, T. 12 N., R. 34 W., North Platte land district, Nebraska, upon contest instituted by Dee Raney.

The contest involved also the original entry of Burnett, made May 23, 1904, for the SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , of said Sec. 12, these tracts, together with those embraced in his second entry, being the whole of the section. The right of Burnett to retain the tracts last described has been finally settled favorably to him, and the only question presented by the present appeal concerns his entry under section 2 of the act of April 28, 1904, *supra*. All the charges made the basis of contest have been determined except the one respecting the invalidity of said entry.

Your office held the same for cancellation because allowed without authority of law, the original entry of Burnett, upon which the right to make such second entry depended, having been made after the passage of the act heretofore mentioned. That the entry was erroneously allowed is practically conceded by counsel for the claimant. That such is the case is settled by numerous decisions of the Department. Robert Knoetzel (34 L. D., 134); David H. Briggs (*ib.*, 60); Circular of April 10, 1906 (*ib.*, 546).

Since the rendition of your said decision Congress passed an act (March 2, 1907—34 Stat., 1224) permitting those persons who made entries between April 28 and June 28, 1904, to make additional entries in the same manner as those who made entry prior to April 28, 1904, "subject to all existing rights." The second entry of Burnett falls clearly within the provisions of this act and unless Raney, by virtue of his contest, initiated such a right as it was the intention of the act of March 2, 1907, *supra*, to preserve, his contest must be dismissed. In the opinion of the Department the act in question contemplated no more than the preservation of "existing rights" to enter the land, which the persons intended to be benefited could

not enter until relieved of the disqualification resulting from a former entry. The statute is a remedial one, and should be liberally construed. After its passage no person other than an actual settler or prior applicant possessed any existing right of entry. Neither is the right of a contestant superior to the claim of a record entryman whose entry, previously invalid, is validated by the statute. On the contrary, the equities of the claimant are superior to those of a contestant who seeks a cancellation of the entry upon the sole ground of such invalidity, and the authority of Congress to protect such claims is unquestioned. As by said act the basis of the present contest has been destroyed, the other charges made not having been established, the same will be dismissed and the entry of Burnett held intact.

The decision appealed from is, for the reasons herein stated, reversed.

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DUNCAN *v.* ARCHAMBAULT.

Motion for review of departmental decision of April 11, 1907, 35 L. D., 498, denied by Acting Secretary Woodruff, July 2, 1907.

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**FINAL CERTIFICATE—VALIDITY—PROCEEDINGS BY GOVERNMENT.**

SAMUEL H. SHANNON.

A final certificate is without validity if it be determined by the land department, as the result of proceedings instituted prior to the expiration of two years from issuance thereof, that the person to whom it issued had not, at the date of final proof, earned title to the land by full compliance with all legal requirements, and nothing done after final proof can be accepted as curing such default; nor does the death of the person to whom the certificate issued in any wise affect the right of the land department to investigate the validity of the entry and cancel the same if found to be invalid.

*Acting Secretary Woodruff to the Commissioner of the General Land*  
(S. V. P.) *Office, July 2, 1907.* (E. P.)

December 3, 1901, Samuel H. Shannon made homestead entry of the NE.  $\frac{1}{4}$  of section 26, T. 105 N., R. 73 W., Chamberlain land district, South Dakota, and on November 4, 1904, submitted commutation proof thereon upon which final certificate issued the same day.

December 19, 1904, a special agent of your office reported that from December, 1901, to May, 1904, claimant never resided on or slept a single night on the land, although working about twenty rods from his house from December, 1901, to April, 1903; that he resided on the land from May 9, 1904, to July 14, 1904; that he then went west

and did not again go to the land until he made proof November 4, 1904; that no use was ever made of the land for agricultural or grazing purposes.

By letter of February 4, 1905, your office suspended the entry and directed that notice of the charges contained in the report of the special agent be served upon the entryman.

It appears that the entryman died on or about June 17, 1905, before notice of said charges could be served upon him, but that the notice was served upon the entryman's heirs, and also upon one D. H. Henry, described as mortgagee.

May 19, 1905, Henry filed in the local office an affidavit executed by himself, alleging that on November 4, 1904, he, as president of the Bank of Chamberlain, loaned to the entryman the sum of \$350, as security for the payment of which the entryman executed to the bank a mortgage upon the tract in question; that the loan was made in good faith, the affiant believing the entryman to have complied in all respects with the requirements of the homestead law; that the entryman had no resources except the land, and that the said sum of \$350 is wholly unpaid. Affiant therefore asked that a hearing be had on the charges, and that he be afforded an opportunity to introduce testimony in support of the entryman's final proof.

November 1, 1906, there was filed in the local office what purports to be supplemental proof on behalf of the heirs of the entryman, the so-called supplemental proof consisting of a corroborated affidavit executed October 24, 1906, by Missouri King, who alleges that the entryman died June 17, 1905, unmarried and without issue, leaving as his sole heirs the affiant (his sister), and two brothers, William and Robert Shannon; that the entryman has never sold or alienated the land, but that on November 4, 1904, he mortgaged the same to the Bank of Chamberlain to secure the payment of a note for the sum of \$350 held by said bank; that the affiant lives with her husband on the land adjoining the tract in question; that at all times since the entryman's death the affiant, as one of the heirs of the entryman, has had possession and full control of the land, and has each year thereafter used and utilized the same for the grazing of stock and for the cutting of hay thereon, it being better adapted for grazing and hay purposes than for tillage; that affiant has about sixty-five acres of the land fenced; that the said heirs of the entryman are citizens of the United States.

By decision of February 11, 1907, adhered to on motion for review April 15, 1907, your office rejected the so-called supplemental proof submitted on behalf of the heirs and directed the local officers to fix a day for a hearing on the charges preferred by the special agent, and give due notice thereof to the heirs and the Bank of Chamber-

lain. It was added, however, that should the parties in interest file written consent on the part of the heirs that the final proof submitted by the entryman be rejected and the final certificate issued to him be canceled, such action would be taken and the original entry held intact, with permission to the heirs to submit new proof in the regular way, showing compliance on their own part with the requirements of the law.

From these decisions the heirs and mortgagee have filed a joint appeal, wherein it is urged that, the entryman being dead, a cancellation of the final certificate will result in the mortgagee losing its security for the money loaned by it to the entryman, even should the original entry be held intact and the heirs submit new and satisfactory proof. It is therefore contended that, for the protection of the mortgagee, the final certificate should be held intact on the informal showing already made by the heirs, and patent issued thereon, irrespective of the truth or falsity of the charges preferred by the special agent.

This contention cannot be sustained. A final certificate is without any validity if, upon proceedings instituted against it within two years after the date of its issuance, it be determined by the land department that the person to whom it issued had not, at the date of final proof, earned title to the land by full compliance with all legal requirements. Nothing done after final proof can be accepted as curing such a default. Hence upon its being charged in due time, and properly shown, that a person to whom a final certificate issued had not so earned title, the final certificate must be canceled, regardless of what may have been done upon the land after the submission of final proof. And neither the death of any person, nor any other cause, save failure to commence proceedings in due time, can affect the right of the land department to investigate a final entry, and, upon its being determined by it, after notice to all parties entitled thereto, and an opportunity to be heard afforded them, that the certificate issued on the final entry is from any cause invalid, to cancel the same. Your office therefore correctly held that a hearing should be had upon the charges preferred by the special agent against this final entry.

Irrespective, however, of any action the heirs may desire to take, the mortgagee should be afforded an opportunity to show, if it can, that the entryman had earned title to the land at the time his final proof was submitted. With this modification the decisions appealed from are affirmed.

## BELLIGERENT AND OTHER LODE MINING CLAIMS.

Motion for review of departmental decision of July 16, 1906, 35 L. D., 22, denied by Acting Secretary Woodruff, July 9, 1907.

## INDIAN LANDS—RAILROAD GRANT—INDEMNITY SELECTION.

BRADLEY *v.* NORTHERN PACIFIC RY. CO.

Lands within that portion of the ceded Gros Ventre, Piegan, Blood, Blackfeet, and River Crow Indian reservation established by executive order of April 13, 1875, and opened to entry by and in accordance with the provisions of the act of May 1, 1888, are not subject to selection as indemnity by the Northern Pacific Railway Company.

*Acting Secretary Woodruff to the Commissioner of the General Land*  
(S. V. P.) *Office, July 10, 1907.* (G. B. G.)

This is an appeal on behalf of Reuben Bradley from your office decision of October 17, 1906, rejecting his application for transfer of homestead right under the provisions of the act of February 24, 1905 (33 Stat., 813), for conflict with an indemnity selection of the Northern Pacific Railway Company as to the NW.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of Sec. 25, T. 25 N., R. 50 E., Miles City land district, Montana.

No question is made as to Bradley having a transfer right under said statute, but the railway company's selection of the tract in question was seemingly regular and admittedly prior in time to Bradley's application therefor, and the only question presented by the appeal upon this record is, whether this land is subject to the company's selection, it being within the indemnity limits of the grant to the company and free from other claims or rights.

The land lies within that portion of the ceded Gros Ventres, Piegan, Blood, Blackfoot, and River Crow Indian reservation, established by executive order of April 13, 1875, and restored to the public domain by the act of May 1, 1888 (25 Stat., 113, 133), and is "to be disposed of in the manner therein indicated." See departmental letter of instructions dated May 11, 1903 (L. & R. Misc. 485, pp. 325, 330).

Section 3 of the act of May 1, 1888, *supra*, is as follows:

That lands to which the right of the Indians is extinguished under the foregoing agreement are a part of the public domain of the United States and are open to the operation of the laws regulating homestead entry, except section twenty-three hundred and one of the Revised Statutes, and to entry under the town site laws and the laws governing the disposal of coal lands, desert lands, and mineral lands; but are not open to entry under any other laws regulating the sale or disposal of the public domain.

The Department is of opinion that this land is not subject to the company's selection. The statute above quoted is plain. The body of lands of which the tract in question is a part and to which the statute relates is "open to the operation of the laws regulating homestead entry . . . and to entry under the town site laws and the laws governing the disposal of coal lands, desert lands, and mineral lands."

These modes of disposal thus specifically indicated were expressly made, exclusive of any other manner of disposition. In other words, these lands are appropriated—that is, set apart for disposition in a particular manner, in pursuance of a defined policy. While such appropriation does not place the lands beyond the power of other disposition by Congress, so long as the law remains unaltered, it controls the action of the Secretary of the Interior, under whose direction the selection in question must be made. State of Utah (30 L. D., 301); Union Pacific Land Company (33 L. D., 487).

In the case of George L. Ramsey, decided by the Department December 23, 1903 (L. & R. 500, p. 19), there was involved an application to select under the act of June 4, 1897 (30 Stat., 36), a tract of land lying within the boundaries of this same ceded reservation. In that case, considering section 3 of the act of May 1, 1888 (hereinbefore quoted), it was said:

Congress thus specifically provided under what laws the lands should be disposed of and in express words prohibited their disposal under any other. Those modes are necessarily exclusive of any other mode of appropriation and the subsequent act of 1897, applicable to the public domain generally, did not take away this inhibition or operate as to lands for disposal of which specific provision had been so made. William C. Quinlan (30 L. D., 268); Joseph S. White (*ib.*, 536); Webb McCaslin (31 L. D., 243).

There is little force in the suggestion of your office, upon which the decision appealed from apparently rests, that inasmuch as the act making the grant to this company in terms commits the United States to the extinguishment of the Indian title to lands within the limits of the grant, therefore it was not the purpose of Congress in extinguishing the Indian title to these lands to deny the company the right to select them in satisfaction of its grant. The obligation of the government to preserve a railway right of selection in indemnity lands would seem to be more fanciful than real. But however this may be, that Congress had the power to exclude the railway company from participating in the benefits arising from the disposition of these lands can not be successfully questioned. That it has done so may not be reasonably disputed.

The decision appealed from is reversed, and the case remanded for proceedings not inconsistent herewith.

## MINING CLAIM—EXPENDITURE—IMPROVEMENTS MADE PRIOR TO LOCATION.

## TOUGH NUT No. 2 AND OTHER LODE MINING CLAIMS.

Improvements made prior to the location of the mining claim or claims to which their value is sought to be accredited are not available toward meeting the requirements of the statute relative to expenditures.

*Acting Secretary Woodruff to the Commissioner of the General Land*  
(S. V. P.) *Office, July 11, 1907.* (E. P.)

By decision of June 13, 1906 (unreported), the Department affirmed the action of your office, holding for cancellation, to the extent of the Nevada, Main Point, Colorado and Utah locations, mineral entry No. 586, made December 30, 1905, by the Crowned King Mining Company, for the Tough Nut No. 2 and seven other lode mining claims, survey No. 1777, situate in the Prescott land district, Arizona. The basis of said departmental action was that certain buildings, a part of the value of which the claimant sought to have accredited (presumably as common improvements for the benefit of all the claims comprising the group) to the four claims first above named, were not essentially mining improvements and were not shown to have been necessary to the development or operation of the group or to have been erected with that intent and purpose, and hence did not appear to be such improvements as would entitle the claimant to have any part of their value accredited to any of the claims of the group; and that the improvements of a mining character upon the said four claims were not of sufficient value to satisfy legal requirements.

The claimant has filed a motion for review of the decision of the Department, and therewith a showing to the effect that at the time the buildings in question were erected the claims were situated about fifty miles from a railroad and were remote from a center of trade or population, which facts rendered the erection of such buildings necessary to the development of the claims; that the buildings were intended when erected to facilitate the development, and have been used exclusively for the benefit, of the claims. It is contended that in view of this showing the proof should be accepted and the entry passed to patent.

It does not appear from the showing made when these buildings were erected. However, an official map of the United States Geological Survey, prepared from a survey made by it in the years 1900 and 1901, shows that at that time there was a railroad to Myer, Arizona, a point shown on said map to be scarcely twenty miles by wagon road, and about fourteen miles in a direct line, from the town of Crown King, in the immediate vicinity of which this group of

claims appears to be situated. Considering the fact thus disclosed in connection with claimant's showing that at the time the buildings were erected the claims were about fifty miles from a railroad, it is apparent that the buildings were erected prior to the completion of said survey in 1901. The Nevada, Main Point, Utah and Colorado claims were not located until the year 1903. The buildings must therefore have been erected more than a year prior to the time of said locations. Improvements made prior to the location of the claim or claims to which their value is sought to be accredited are not available toward meeting the requirements of the statute relative to expenditures; and for this reason, without more being said, it must be held that no part of the value of the buildings referred to can be accredited to any of the four claims mentioned.

The decision of the Department is therefore adhered to and the motion denied.

**SCRIP—LOCATION—LEGAL REPRESENTATIVES.**

JOHN L. HOLLCROFT.

In case the land department is not entirely satisfied as to the legal ownership of scrip, it may require that location thereof shall be in the name of the confirmee, if living, or, if dead, in the name of his legal representatives, and patent will issue accordingly, leaving it to the courts to determine who shall take title thereunder.

*Acting Secretary Woodruff to the Commissioner of the General Land*  
(S. V. P.) *Office, July 12, 1907.* (E. F. B.)

With your letter of April 18, 1907, you transmitted the appeal of John L. Hollcroft from the decision of your office of November 23, 1906, requiring him to amend his location of the SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 2, SE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 4, and NW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 8, T. 2 N., R. 15 W., Little Rock, Arkansas, made with certificate of location No. 232, issued August 8, 1859, by the surveyor-general of Illinois and Missouri, to "Reges Loisel or his legal representatives," so that said location may appear in the name of the confirmee.

From the record before the Department it appears that the location was made with the unsatisfied portion of scrip issued to "Reges Loisel or his legal representatives" in satisfaction of the claim confirmed by the act of May 24, 1858 (11 Stat., 531).

There is with the record a certificate by the surveyor-general of Illinois and Missouri, dated August 29, 1859, setting forth the names of the legal representatives of Reges Loisel and their respective interests in the claim, certifying as to their right to locate said certificate.

The attention of the Department is not called to any transfer or assignment by either of said persons to the alleged successors in

title under whom the locator claims, but it appears that R. C. Bassett, on February 20, 1904, and J. E. Taylor, on February 22, 1904, executed severally an assignment of said "certificate of location No. 232," to Edwin W. Spalding, of Washington, D. C., who on March 17, 1904, assigned the same to A. J. Mercer, of Little Rock, Arkansas; that the said Mercer commenced proceedings in the Chancery Court of Pulaski County, Arkansas, as against said J. E. Taylor and the unknown heirs of Regis Loisel to quiet title to said scrip and obtained from the court a decree finding that by verbal agreement the title to said scrip passed from the proper parties representing the heirs of Regis Loisel, deceased, and that the complainant derived title from said Taylor and Bassett.

The Department is not entirely satisfied as to the title of the locator to this scrip, but it is not necessary to discuss that question, inasmuch as the rights of the true owners can be fully protected by having the location made and the patent issued in the name of the legal representatives of Regis Loisel. If the court proceedings are conclusive and have confirmed the title in the scrip to Mercer under his assignment through Spalding from Bassett and Taylor, the title issued under the location will inure to the transferee of Mercer.

Your decision is affirmed so far as it holds that the location made with this scrip and the patent to be issued thereon must be in the name of "the legal representatives of Regis Loisel," but under the decision of the Department in the case of Lawrence W. Simpson on review (35 L. D., 609), the land in question is not subject to location with such scrip and the location must therefore be cancelled.

**SURVEYOR-GENERALS' SCRIP—AUTHENTICATION—INNOCENT PURCHASER.**

**INSTRUCTIONS.**

It is the province of the land department to determine whether assignments of military bounty land warrants or surveyor-generals' certificates or scrip issued under the act of June 2, 1858, are sufficient, independently of the adjudication of the courts, and where the validity of warrants or certificates and the assignments thereof have been authenticated by the Commissioner of the General Land Office, in the proper exercise of his jurisdiction and authority, and have passed into the hands of innocent purchasers upon the faith of such authentication, and are held or have been located by such purchasers, the question as to the regularity of the assignments should not be re-opened.

*Acting Secretary Woodruff to the Commissioner of the General Land*  
(S. V. P.) *Office, July 12, 1907.* (E. F. B.)

By letter of June 8, 1907, you call attention to locations made with surveyor-generals' scrip, issued under the act of June 2, 1858

(11 Stat., 294). You state that you would proceed to investigate these locations with a view to their cancellation if it be found that the succession proceedings and sales under which the locations were obtained were fraudulent and illegal, were it not for the decision of the Department of April 30, 1907, in the case of Herbert D. Stitt, relative to the assignment of bounty land warrants, in which it was said:

It is the province of your office to determine whether the assignments are sufficient independently of the adjudication of the courts. But in this case the judgment of your office has been exercised by your letter of September 1, 1903, which is practically a certificate of the validity of the assignment upon which third parties have acted. It is not deemed advisable that the question as to the regularity of the assignment of the warrant should be reopened after it has been located by a subsequent assignee and after the land has been purchased upon the certificate issued upon that location.

This principle should as a general rule be applied in all cases whenever certificates or scrip have been obtained and locations made therewith by *bona fide* purchasers upon the faith of the adjudication and certification of your office as to the validity of the scrip or certificate and the assignment thereof.

In disposing of these cases and in the application of the principles announced in the cases cited in your letter, it is important to distinguish between void and voidable acts, and to discriminate between purely administrative acts and acts that are judicial in their nature. There is a wide distinction between the acts of public officials who transcend their power and authority and the erroneous acts of public officials who misjudge as to such matters. In one case the acts are not the acts of the government; in the other, they are.

The act of June 2, 1858 (11 Stat., 294), under which these certificates issued, imposes upon the Commissioner of the General Land Office the duty of passing upon the validity of the scrip and to authenticate the same by certifying that it has been lawfully issued and is receivable at any land office for the location of land subject to private sale.

The act contemplated that the location of the scrip would be made the action of the surveyor-general and to determine whether the certificate of location had been obtained according to the true intent and meaning of the act, and to the orderly administration of the public land system, and to avoid having lands withheld from entry by the location of scrip that had not been properly obtained it was provided by regulation that the duty imposed upon the Commissioner to review the action of the surveyor-general and to determine whether the certificate of location was obtained according to the true intent and meaning of the act shall be performed prior to location. (Circular of August 26, 1872—Copp's Land Laws, Ed. 1875, 513, 516.)

The act of January 28, 1879 (20 Stat., 274), declared such scrip to be assignable by deed or instrument of writing "according to the form and pursuant to regulations prescribed by the Commissioner of the General Land Office," so as to vest the assignee with all the rights of the original owners of the scrip, including the right to locate the same. Pursuant to these provisions, regulations have been provided under which any assignee may submit the scrip and assignments to your office for determination and if the scrip be found free from objections and the assignment sufficient in form, your office is authorized and required to certify your approval of the same.

The duties thus devolved by law upon the surveyor-general and the Commissioner are judicial, requiring the exercise of judgment and discretion. While such judgments may be revised, vacated and otherwise controlled, so long as the Department retains jurisdiction over the subject-matter, it should not as a general rule be exercised to defeat the rights of innocent parties who have acted upon the faith of your certificate that the scrip is free from objection and that the assignments thereof are regular and in form, especially where no adverse claim is made and the right and interest of the Government is not involved.

If the court had no jurisdiction over the succession of the estates in the cases referred to in your letter, its judgment would be a mere nullity and your office would not be bound to give it recognition. Likewise, acts of your office certifying as to the validity of scrip and the regularity of assignments thereof would also be null and void if you had no authority to act in the premises. No one is protected under such acts. "A patent issued to a fictitious person is, in legal effect, no more than a declaration that the government thereby conveys the property to no one. There is in such case no room for the application of the doctrine that a subsequent *bona fide* purchaser is protected." *Moffat v. United States* (112 U. S., 24, 31); *Hyde v. Shine* (199 U. S., 62.)

For the same reason, where a valid military bounty land warrant has once been issued, the authority of the public officials as to that claim is exhausted, and a second warrant issued by them upon that claim is null and void. Such cases "are not to be regarded as the merely erroneous acts of public officials who misjudge of matters that are left by law within their power and discretion." (Opinion, Attorney-General Crittenden, 5 Op., 387, 389.)

The only authority to issue a duplicate warrant is given by section 2441, Revised Statutes, in which case the duplicate takes the place of the original, which is thereafter deemed and held to be null and void, as well as any assignment thereof, and no patent shall issue on any land located therewith, except upon due proof that the assignment

was executed by the warrantee in good faith and for valuable consideration. Revised Statutes, Sec. 2441; Andrew M. Turner (34 L. D., 606); C. L. Hood (*ib.*, 610).

There is a line of departmental decisions holding that where two warrants have been erroneously issued upon the same claim there is no authority to cancel either of them in the hands of an innocent assignee for value, who has located them, and although one was obtained by fraud both must be respected.

In these cases the principle that the public have a right to rely upon the rulings of your office as to the validity of a warrant and the regularity of the assignment and to purchase such warrants with the assurance that the title acquired by assignment is perfect, was misapplied for the reason that the claim of the soldier was satisfied by the issuance of the first warrant and the Commissioner had no authority to issue a second, his act in issuing the second was null and void.

This doctrine was denounced in the case of Andrew M. Turner (34 L. D., 606), in which the cases of Andrew Anderson (1 L. D., 1) and L. C. Black (3 L. D., 101), which rested on the opinion of Attorney-General Cushing (7 Op., 657), were overruled inadvertently, because they were supposed to sustain that doctrine.

The opinion of Attorney-General Cushing, which was followed in the cases of Anderson and Black, held that where a warrant issues in the name of a deceased person without widow or heirs or to a fictitious person, it is a mere nullity and may be rejected and cancelled, but it also held that where an assignable warrant, valid on its face, is issued to a person *in esse*, and has passed by lawful assignment to a *bona fide* purchaser for value without notice, it can not be cancelled on the ground that the Commissioner issued it in misapprehension or on imperfect or false evidence.

There is no expression in this opinion or in the cases of Anderson and Black in conflict with the doctrine announced in the opinion of Attorney-General Crittenden, and no reason appears why they should not still be followed as precedents.

In the opinion of Attorney-General Cushing the distinction is clearly drawn between acts where the Commissioner has transcended his jurisdiction and power, and the erroneous acts of officials in misjudging as to matters and questions which they are authorized to determine.

The issuance of a second warrant or of a warrant where there was no one in whom the right and title could vest, or of a deed to a fictitious person, are mere nullities and there is no room for the application of the doctrine that an innocent purchaser is protected, but as to the official acts of the Commissioner performed within the scope of his authority, it was said: "He adjudicates officially upon the evidence before him, and decides according to the apparent truth of

the case. His determination goes forth to the world, as the deliberate act of the United States. Innocent parties, knowing his certificate to be the official act of the government, proceed accordingly." (7 Op., 663.)

Whether such warrants are or are not valid and free from objection, and whether the assignments thereof are regular in form, are questions which your office is charged with the duty of determining. If it appears from your certificate that you have examined into and ascertained the facts, which confer on the warrantee and his assignee a right of property, an innocent holder of the warrant or one who has located the same should as a general rule be protected, although the warrant would not be recognized in the hands of the original owner nor in the hands of any party who purchased with knowledge of the erroneous character of the warrant, or whose contract of purchase depended upon the acquisition of title or the completion of the location by the original owner. "It is the examination of supposed facts, and certificates thereon, made by the government—it is the moral authority of the government, which gives currency to the impeached land warrants." (Ib., 661.)

It does not appear from your letter that the certificate with which the locations now pending in your office were made are void or that they were improperly issued. If the indemnity is due, the rights of the government are not involved. The only question is as to the ownership of the scrip.

In most of the similar cases that have come before the Department, the record of the court proceedings is regular on its face, showing authority of the court to act. The order of the court granting letter of administration was a judicial determination of the existence of the necessary facts to authorize the appointment. Whether such administration could be committed to the person so appointed was a matter to be considered by the court making the appointment. (*Simmons v. Saul*, 138 U. S., 439.) While the jurisdiction of the court may be inquired into, the purchaser at a sale under order of the probate court is not bound to look beyond the decree recognizing the necessity. (Ibid., 448.)

In the case of *J. G. Parker* (35 L. D., 123) the Surveyor-General had issued certificates of location to Parker, who claimed the right to such certificate by assignment from the purchaser at a judicial sale of the right to indemnity for the unlocated claim of John Brenton. The succession of Brenton was opened in the probate court of East Feliciana and the sale of said right was made by order of the court under such proceedings. Your office refused to authenticate the scrip and held the certificates for cancellation for the reason that it appeared from an investigation had by your office that the succession of Brenton had been previously opened and settled in the

parish of West Feliciana and hence the probate court of East Feliciana had no jurisdiction over said estate. Its judgment and order appointing said administrator and settling said estate was held to be null and void and your decision was affirmed by the Department. In that case there was no question as to the right of the representatives of Brenton to indemnity. The only question was whether it was the duty of the Department to deliver the certificate to Parker, who purchased with the knowledge that his delivery of the scrip depended upon the determination of your office as to his right to the same.

In distinguishing this case from the case of *Simmons v. Saul*, *supra*, it was said (page 131)—

The question as to how far the judgment of a probate court of the State of Louisiana would be conclusive and binding upon other tribunals, and under what circumstances and how it may be attacked, also came before the court in *Simmons v. Saul* (138 U. S., 439), and before the Department in the case of *Narcisse Carriere* (17 L. D., 73). In both cases the jurisdiction of the court that rendered the judgment was clearly shown and decisions were rendered accordingly, but, the rule laid down in *Thompson v. Whitman*, that inquiry may be made as to the facts necessary to confer jurisdiction, and that extrinsic evidence may be admitted to contradict the record as to the jurisdictional facts asserted therein, was adhered to and distinctly announced.

In the case of *Carriere* (17 L. D., 73) the Department did not consider it necessary to determine in what circumstances it would be justified in making inquiry into the jurisdiction of the court in such cases, it being sufficiently shown that the court had jurisdiction in that particular case.

In the letter of your office of March 12, 1904, submitting for approval a modification of the practice of the surveyor-general's office in endorsing upon certificates of location that the person named therein is the legal representative of the confirmee and entitled to assign or locate the scrip, it was said:

While there can be no question that the sales made by the administrators in very many instances were illegal and indeed actually fraudulent, it is equally true that the persons who bought the scrip for the purpose of making locations therewith, did so in good faith and very probably on account of the confidence they had in the certificate of the United States Surveyor-General endorsed on the back of the scrip to the effect that a certain party, therein named, was the legal representative of the confirmee and as such entitled to sell the scrip.

Under these circumstances and in view of the decision of the Department in the case of *L. C. Black* (3 L. D., 101), I am of the opinion that where any scrip which has been endorsed by the Surveyor-General has fallen into the hands of innocent purchasers, this office should accept the assignment or sale as valid and allow the purchaser to locate the certificate.

The Department affirmed your direction to the surveyor-general to also endorse upon the certificate that no assignment of the same by an administrator or executor would be recognized unless there is

filed in your office a certified copy of the order of the court having jurisdiction of the estate authorizing the sale and a certified copy of the act of sale showing that it was made in accordance with the laws of the State.

In approving your recommendation, the Department in its letter of March 25, 1904, said:

As to certificates heretofore issued, upon which the Surveyor-General has placed his endorsement as to the authority of a certain person named therein to make the assignment, and to locate the certificate, such assignment will be recognized by the Department and the right of the assignee to locate the scrip will be protected, unless in a particular case evidence should be presented to your office showing that such assignee or locator is not a *bona fide* purchaser or owner of the scrip.

From the foregoing it will be seen that the rule applied in the Herbert D. Stitt case is not a novel doctrine in the administration of the public land system, but has always prevailed whenever it has been necessary to protect the right of innocent third parties who have acquired a property right upon the faith of the official act of the government as expressed by your certificate, especially with reference to the class of cases referred to in your letter.

It is apparent that no general instruction can be given to govern the disposition of the entire class of cases as a whole. You should take up each particular case and determine it by the rules announced by the Department which have heretofore governed your office in similar cases. The regulations and decisions of the Department, all of which are consistent and not in conflict, furnish all the instructions required.

It is not intended to hold that your office is without authority to suspend action in any particular case for the purpose of making further investigation as to the validity of the scrip or the sufficiency of the title of the person to whom the certificate was issued, and where the scrip has not been authenticated you should employ every means to satisfy your office as to the regularity of the proceedings, both as to the right to indemnity and the title of the person applying for the same, but where the proceedings are regular upon their face and the certificate has been authenticated and is found in the hands of innocent third parties or has been located by such holders, there is no valid reason why the government should further suspend action upon such cases, simply because of the suspicion that the true owners may not be receiving the benefits granted by the act.

The material question to determine in each case is whether the assignee or locator is a *bona fide* purchaser or owner of the scrip. If you have any substantial reason for believing otherwise in any case it should be investigated.

While it is the duty of the government to see that this scrip is delivered to the true owner, as far as it is able to ascertain such ownership, and should cause investigation to be made whenever a claim of ownership adversely to the assignee is made, it can not afford to litigate in the courts as to the ownership of the certificate where no adverse claim is asserted.

The question as to the freedom of the judgment of probate courts in Louisiana from collateral attack was considered by the Circuit Court of Appeals in the cases of *Garrett et al. v. Boeing* (68 Fed. Rep., 51); *Hodge v. Palms* (Ib., 61); *Fletcher v. McArthur* (Ib., 65), and *McCants v. Peninsular Land Co.* (Ib., 66).

Your attention is called to the decision of the Department of January 31, 1907, in the case of Lawrence W. Simpson (35 L. D., 399), holding that there is no authority for the allowance of locations with this scrip on land not subject to private cash entry. Where land is not subject to entry, the location is absolutely void and, as with all other void acts, there is no room for the application of the doctrine that an innocent purchaser is protected. If the location is void, it is the duty of the Department to so declare it, as long as it retains jurisdiction over the subject matter.

**TIMBER AND STONE ACT—LANDS WITHDRAWN UNDER RECLAMATION  
ACT—CONFIRMATION.**

CHARLES O. DELAND.

No such vested right is acquired by an application to purchase lands under the timber and stone act, prior to making final proof and payment, as will prevent withdrawal thereof under the provisions of the act of June 17, 1902, and an entry erroneously allowed upon final proof and payment made subsequently to such withdrawal confers no rights upon the entryman and is not susceptible of confirmation under the provisions of section 7 of the act of March 3, 1891.

*Acting Secretary Woodruff to the Commissioner of the General Land*  
(S. V. P.) *Office, July 16, 1907.* (E. J. H.)

May 2, 1904, Charles O. DeLand filed his sworn statement for lots 1, 2, 3 and SE.  $\frac{1}{4}$  of NE.  $\frac{1}{4}$  and NE.  $\frac{1}{4}$  of SE.  $\frac{1}{4}$  of Sec. 11, T. 37 S., R. 13 E., Lakeview, Oregon, land district, under the timber and stone act of June 3, 1878 (20 Stat., 89), and on October 5, 1904, he submitted proof thereon and final certificate was issued to him therefor.

November 12, 1906, your office decision held that said entry was erroneously allowed for the reason that the lands were, on August 10, 1904, withdrawn from entry under the first form of withdrawal, for the Klamath irrigation project, under the act of June 17, 1902

(32 Stat., 388). The entry was, upon the authority of the case of Board of Control, etc. *v.* Torrence (32 L. D., 472), held for cancellation.

It was also held in said decision that while the entry was over two years old, it was not confirmed by section 7, act of March 3, 1891 (26 Stat., 1095), for the reason that the same was void from the beginning. The cases of *Mee v. Hughart* (13 L. D., 484), and *United States v. Smith* (id., 533), were cited as authority for such ruling. DeLand appealed therefrom to the Department.

February 1, 1907, counsel for the Weyerhaeuser Land Company filed in your office a deed, executed on August 14, 1906, by Charles O. DeLand and wife, conveying the lands in controversy to said company, which has been forwarded to the Department. It is alleged in the company's brief accompanying said deed that the lands were purchased in good faith for a valuable consideration, after a thorough examination of the papers relating to said timber and stone entry, by reason of which said company was satisfied that the entry was regular and without fraud or collusion, and because of the acceptance of final proof and the issuance of final receipt by the local officers.

The Department has repeatedly held that no such vested right is acquired by an application to purchase lands under the timber and stone laws, prior to the making of final proof and payment, as will deprive Congress of the power to make other disposition of said lands; also that a withdrawal made by the Secretary of the Interior of lands under the provisions of the act of June 17, 1902, has the force of a legislative withdrawal, and is effective as to all lands within the designated limits to which a right has not vested. Departmental Instructions of January 13, 1904 (32 L. D., 387); *Board of Control v. Torrence*, *supra*. It is claimed by counsel for the transferees that notice of the withdrawal of the lands should have been given DeLand by the local officers, and that by reason of their failure so to do, and their acceptance of the final proof and payment of the land, and the issuance of final receipt, the right of entry became vested in DeLand, and dated back to the time of the filing of his sworn statement.

The lands were not, however, subject to entry at the time DeLand was allowed to submit his proof and make payment therefor. The action of the local officers in receiving the same and issuing final receipt was erroneous, and did not give him any vested right to the land, though not formally notified of the withdrawal by the local officers.

With reference to the claim of confirmation of the entry under the proviso to section 7 of the act of March 3, 1891, it was held in the case of *Mee v. Hughart*, *supra*, that "an entry that is a nullity under

the law as it existed prior to the act of March 3, 1891, is not susceptible of confirmation under the proviso to section 7 of said act." To the same effect, see the case of *United States v. Smith*, *supra*. In the case of *Mee v. Hughart*, the claim was based on a soldiers' additional homestead entry, made under a power of attorney given several years before, and at the time of such entry the soldier was not living. In that of *United States v. Smith*, the entry was made on lands not subject to entry.

It is also claimed on behalf of said transferees, that—

in neither one of these cases could the action or mistakes of the local officers have been the ground for title in the hands of *bona fide* purchasers, for in both cases were the entries void from the beginning, of which a transferee could be held bound to take notice. But not so in the case at bar where the original entryman entered land open to such entry and where his rights, or those of his transferee, were never questioned until after two years from the date of issuance of final receipt.

This claim, however, is not sound. There is in fact no such distinction between the case at bar and those cited. In the case at bar DeLand had no *entry* of the land at the time of its withdrawal on August 10, 1904, and his entry therefor, erroneously allowed subsequently to the withdrawal, was void, and the transferees were bound to take notice thereof. Said entry is not therefore confirmed under the act of March 3, 1891.

Your office decision is affirmed.

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DAVID K. EMMONS.

Motion for review of departmental decision of June 17, 1907, 35 L. D., 599. denied by Acting Secretary Woodruff, July 17, 1907.

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**STATE SELECTION—APPLICATION FOR SURVEY—NOTICE—ACT OF  
AUGUST 18, 1894.**

**WILLIAMS v. STATE OF IDAHO.**

The filing on behalf of a State of an application for the survey of lands under the act of August 18, 1894, and the publication of notice thereof as provided by the act, operate as a withdrawal thereof, notwithstanding no formal notice of withdrawal was given the local officers.

*Acting Secretary Woodruff to the Commissioner of the General Land  
(S. V. P.) Office, July 17, 1907. (F. W. C.)*

The Department has considered the appeal of J. Emerson Williams from your office decision of June 16, 1906, holding for cancellation

his homestead entry covering the W.  $\frac{1}{2}$  SW.  $\frac{1}{4}$  of Sec. 15, and E.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 16, T. 44 N., R. 3 E., B. M., Coeur d'Alene land district, Idaho, for conflict with selection made of said land by the State as school indemnity within the period of preference right granted the State by the act of August 18, 1894 (26 Stat., 372, 394).

In this case the governor made application for the survey of this township July 5, 1901, and publication thereof was made in the "Idaho State Tribune," of Wallace, Idaho, for six weeks, commencing July 10, 1901, and continuing up to and including August 14, 1901.

Williams alleges settlement on this land April 1, 1902, subsequently to the filing of the governor's application for the survey of the township. Williams made entry July 17, 1905, the day the plat of the township was officially filed.

The State's list of indemnity selections was filed within the 60 days following the filing of the township plat of survey, so that the only question presented by this record is: Were the lands withdrawn under the act of 1894 upon the governor's application? Your office decision finds that the State had complied with all the conditions of the act of 1894, but a formal notice of the withdrawal was not forwarded by your office to the local officers. This is presumably due to the fact that at the time of the filing of the governor's application, which covered more than 18 townships, an inquiry was instituted on the part of your office to ascertain whether the withdrawals theretofore made under the statute were not sufficient to satisfy the several grants to the State. Response was made thereto on behalf of the State, which was considered satisfactory because many other applications have since been filed and notice of withdrawals issued thereon by your office.

In the case of Stephen A. Thorpe *et al. v. State of Idaho*, a somewhat similar question was presented. In that case an application for survey had been filed in 1899, upon which your office issued a notice of withdrawal to the local officers, but the State never entitled itself to the withdrawal upon said application because no publication was made thereon as required by the statute. The notice of withdrawal stood unrevoked, and at a later date a second application for survey of the same township was filed, due publication being made, but no formal notice of the withdrawal upon the second application was given the local officers. In disposing of that case it was stated in a decision rendered June 27, 1907 (35 L. D., 640), that—

If the State had fully performed the conditions upon which a reservation was directed by the statute, the mere failure on the part of your office to give proper notice to the local officers or the miscarriage of said notice, in the event it was directed to your office, should not prejudice the rights of the State. The law prescribes the publication for the purpose of giving information to

the public of each application for survey, and the direction with respect to the notice to be given the local officers, while it would serve, in a measure, the same purpose, was primarily intended for information to the local officers that their records might be properly noted.

Applying this holding to the case under consideration, it must be held that a withdrawal attached upon the State's application for the survey of this township upon the filing of the application by the governor, and as a consequence all subsequent settlements were subject to the superior claim of the State, if proper selection was filed within the period of preferential right granted by the act of 1894.

The State's application appears to be a proper one and upon its final acceptance by your office, Williams's entry will be canceled. The State's claim to the tract in section 16 is on account of its grant in place and not dependent upon a selection. Under the act of February 28, 1891 (26 Stat., 796), settlements made upon sections 16 and 36 prior to survey in the field are protected, but this application was made for the survey of this township under the act of 1894. In view of the decision in the case of *Ensign v. State of Montana* (34 L. D., 433), such settlements only are protected as were made prior to the withdrawal upon the governor's application for the survey of the township. This is in lieu of the decision of June 27th, last, not promulgated, which is hereby recalled and vacated.

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DELLAGE *v.* LARKIN.

Motion for review of departmental decision of January 17, 1907, 35 L. D., 378, denied by Acting Secretary Woodruff, July 20, 1907.

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CALIFORNIA SCHOOL LAND—ACT OF MARCH 1, 1877.

WHITE *v.* SWISHER.

An indemnity selection by the State of California, approved prior to the act of March 1, 1887, in lieu of lands in a school section supposed to be lost to the State by reason of being included in a Mexican grant, but subsequently upon final survey found not to be within the grant, was confirmed by section 2 of said act, and the base land thereupon became a part of the public lands of the United States, subject to disposal as other public lands; but where the base land is in possession of one claiming under a patent from the State, such possession, although conferring no right as against the United States, should, if *bona fide* and notorious, be recognized as reasonable ground for according the claimant priority of right to secure title under the public land laws, if qualified, or for affording the State an opportunity to make good the title purported to have been conveyed by it, by assigning a proper and sufficient basis and making selection of the land under its school grant.

*Acting Secretary Woodruff to the Commissioner of the General Land*  
(S. V. P.) *Office, July 22, 1907.* (E. F. B.)

This case, which comes before the Department upon the cross appeals of Edward F. O. Swisher and William D. White from the decision of your office of March 13, 1907, involves the right to the N.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$ , Sec. 36, T. 13 S., R. 1 W., Los Angeles, California, embraced in the homestead entry of Edward F. O. Swisher, to which an adverse claim is asserted by William D. White under a title emanating from the State of California.

Swisher made homestead entry of said tract and the S.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  of said section 36 on August 5, 1905. He appeals from your decision so far as it holds for cancellation that part of his homestead entry described as the N.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  of said section, subject to the right of White to make entry of the same. White appeals from your decision so far as it holds that the cancellation of the entry of Swisher as to the tract in controversy is subject to the condition that he, White, make homestead entry of the tract. His contention is that his title, acquired through mesne conveyances from the State, must be recognized as valid, and that title to the land can not be acquired under the public-land laws, as the land is not a part of the public lands of the United States.

The tract in controversy is part of an original school section which was supposed to be lost to the State by being included within the lands of a Mexican grant. In 1868 the State of California selected three hundred and twenty acres of other lands as indemnity for the west half of said section 36, which was approved by the Secretary of the Interior January 20, 1870, and January 24 thereafter the land was certified to the State.

The plat of survey of the Mexican grant which was supposed to embrace said section within its boundaries was surveyed March 1, 1870, and the survey was approved by your office July 18, 1872. From that survey it appears that no part of the west half of said section 36 was within the limits of the grant.

Section 2 of the act of March 1, 1877 (19 Stat., 267), provides:

That where indemnity school selections have been made and certified to said state, and said selection shall fail, by reason of the land in lieu of which they were taken not being included within such final survey of a Mexican grant, or are otherwise defective or invalid, the same are hereby confirmed, and the sixteenth or thirty-sixth section, in lieu of which the selection was made, shall, upon being excluded from such final survey, be disposed of as other public lands of the United States.

Under this provision of the statute the title of the State of California to the land selected and certified to it as indemnity for the west half of said section 36, which was supposed to be lost, was

confirmed; and the west half of the 36th section in lieu of which the selection was made, upon being excluded from the final survey of the grant, became a part of the public lands of the United States, to "be disposed of as other public lands."

Notwithstanding such exchange of titles by operation of the statute, the State of California, by a patent dated February 16, 1887, assumed to convey the N.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  of said section 36, as part of its school grant. White claims under that title.

The intent and purpose of the act of March 1, 1877, which act was induced by the State, has been so clearly defined and indicated by the Supreme Court of the United States, in *Durand v. Martin* (120 U. S., 366), and *Mower v. Fletcher* (116 U. S., 381), and by the supreme court of California, and the decisions of the Department, as to be no longer a matter of controversy. *Martin v. Durand* (63 Cal., 39); *Hambleton v. Duhain* (71 Cal., 136, 141); *Daniels v. Gualala Mill Co.* (77 Cal., 300); *D. C. Powell* (6 L. D., 552); *Martin A. Baker* (14 L. D., 252); *State of California v. Nolan* (15 L. D., 477); *State of California v. Herbert* (Ib., 519); *Noyo Lumber Co.* (19 L. D., 432).

The act operated by its own force not only to confirm all defective and invalid selections, but also to reinvest in the United States the title to the school section in place that had passed to the State prior to the passage of the act and the selection of indemnity in lieu thereof.

In *Durand v. Martin* the court said that the language of the statute was certainly broad enough to include every defective selection, "and, in order that the United States may be protected from loss, it was provided that, if the sixteenth or thirty-sixth section, in lieu of which the selection was made, should be found outside the Mexican grant, the United States would accept that in lieu of the selected land, and confirm the selection."

The statute provided for the confirmation of three classes: (1) Where the State was entitled to indemnity, but the selection was defective in form; (2) where the original school sections were actually in place, as in the case under consideration, and the State was not entitled to indemnity on their account; and (3) where the State was not entitled to indemnity because there never had been such a section 16 or 36, as was represented when the selection was made and the official certificate given.

Referring to the effect of the statute upon the different classes of selections, the court said:

As to the second, 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 effect this was an exchange of lands between the United States and the state. . . . 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.

The general design of the act was to make good the selections without loss to the United States, and to that end "no selection was made good unless it had been certified, and not then unless the United States got an equivalent either in land or in money." (Ibid., p. 375.)

In that case the controversy was as to the validity of the title of the State to the indemnity section, but in *California v. Nolan* (15 L. D., 477), the question at issue was as to the title of the United States to a section 36, for which indemnity had been certified, and which was confirmed by the act of March 1, 1877.

The facts in that case were in all respects similar to the case at bar, and the questions therein presented and passed upon were identical with those at issue herein.

As the act, in confirming the title in the State of California to the selected land at the same time reinvested the United States with the title to the lands in lieu of which the selection was made, it follows that the land in controversy is public land which, by the express terms of the statute, is to "be disposed of as other public lands of the United States." So that, whatever action the land department may see proper to take with reference to the disposal of the land, or whatever recognition it may give to the equities of any occupant of said land by virtue of his continued possession under color of title, it can only be disposed of under the general land laws, or under some statute authorizing the disposal of it as public land, and no recognition or consideration can be given to the patent of the State as conveying any right or title therein.

In this case it is evident that Swisher knew that he was intruding upon White's possession, held under color of title, through mesne conveyances, from the State. While such possession confers no right as against the United States, it should, if it is *bona fide* and notorious, afford at least a reasonable ground for priority of right in securing title to the land as public land under some law authorizing its disposal. To this end no reason is perceived why he may not, under the principle announced in the case of *Burtis v. Kansas* (34 L. D., 304), invoke the aid of the State, and why the State may not be given the opportunity to select the tract as public land, if it can furnish a valid and sufficient base; or why he may not, as allowed by your decision, be given the opportunity of making entry of the land under the homestead law, if he is qualified to make entry under that law.

You will notify contestant, White, that he will be allowed sixty days in which to perfect his right and title to the land in the manner above indicated. In the meantime, the entry of Swisher will remain intact, subject to cancellation as to the tract in controversy upon the

completion of the right of White to acquire title to the land as public land.

With this modification, your decision is affirmed.

**HOMESTEAD ENTRY—HEIRS OF SUCCESSFUL CONTESTANT—RESIDENCE.**

**BECKER v. BJERKE.**

The heirs of a successful contestant against a homestead entry, who make entry in the exercise of the preference right under the contest, stand in the place of the deceased contestant, with the same rights and privileges and burdened with the same duties and obligations relative to compliance with law in the matters of residence and cultivation.

*McPeek v. Sullivan et al.*, 25 L. D., 281, overruled.

*Acting Secretary Woodruff to the Commissioner of the General Land Office, July 23, 1907.* (E. J. H.)  
(S. V. P.)

The land involved in this case is the SE.  $\frac{1}{4}$  of Sec. 33, T. 121 N., R. 59 W., Watertown, South Dakota, land district, and the same is before the Department upon the appeal of J. P. Becker from your office decision of February 8, 1907, dismissing his contest against the homestead entry of Emil K. Bjerke, made for said land on June 11, 1903, as the heir of a successful contestant of a former entry, who died pending said contest.

The contest of Becker against the existing entry of Bjerke was filed February 13, 1906, alleging, substantially, that claimant had never resided upon or improved the land, but had wholly abandoned the same.

As a result of the hearing had in the case the local officers found that claimant had failed to construct a habitable house on the land and maintain residence therein, which he was not excused from doing by reason of having made the entry as the sole heir of his deceased daughter, who was a successful contestant against a prior entry; that he did not cultivate or improve the land, the only use made thereof by him being for a pasture. It was accordingly recommended that the entry be canceled, from which an appeal was taken.

As to the question of residence, your office decision found that under departmental ruling in the case of *McPeek v. Sullivan et al.* (25 L. D., 281), it was not necessary for claimant to reside on the land, it having been held in said case, that—

under a homestead entry made by the heirs of a successful contestant in accordance with the act of July 26, 1892 (27 Stat., 270), actual residence on the land is not required if cultivation thereof is shown for the required period.

Regarding the matter of cultivation, it was found that no portion of the tract had been cultivated, but that the same was a part of an

enclosed pasture of eight hundred to one thousand acres, belonging to claimant; that while "it was conceded that the land as a whole was best adapted for the 'mixed' purpose of raising grain and stock-raising," from the facts presented, it was, taken as a whole, "chiefly valuable for grazing purposes," and had been used as such. It was held that under the circumstances disclosed the requirements of the law had been substantially complied with by grazing the land and the contest was dismissed, from which the appeal under consideration was taken.

So far as the question of residence is concerned, it is not believed that the law received a proper construction in the case above cited, but rather the purpose of said act is better interpreted in the case of *Biggs v. Fisher* (33 L. D., 465), where it was said, on page 468 of the opinion:

It was the intention of Congress, as clearly appears from the language used in the act, and from the proceedings had in Congress with reference thereto, to place the heirs in the same position upon the successful termination of the contest that the contestant himself would have occupied if the contest had so terminated in his lifetime, the only qualification required of the heirs being, as expressly stated in the act, that they be citizens of the United States.

If the contestant had lived and made his entry under his preferred right, he would have had to comply with the homestead law the same as other entrymen, and his heirs therefore under said act succeed to his privilege, but burdened with the same obligations so far as compliance with the law is concerned. The case of *McPeck v. Sullivan* is accordingly overruled.

But if the heirs were excused from residence, under the authority cited, yet it is not found by the Department that compliance with the law in the matter of cultivation is shown. It appears from the testimony that there is no tillage, well, or other improvements on the land, except a fence built on one side to inclose it in a large pasture, in which claimant keeps some two hundred head of animals, and no effort has been made to cultivate or improve the same except that claimant, at one time, built a small house thereon which was blown down and allowed to remain in that condition. The testimony as to the character of the land is to some extent contradictory, but it is shown that the soil is good and that about sixty acres could be successfully cropped if the stone were removed therefrom, and without their removal crops could be raised in patches of probably not to exceed an acre each. There was no definite showing as to the quantity of stone requiring such removal, or the cost thereof, which it would seem to have been incumbent upon claimant to make, in order to be excused from actual tillage of the land.

The testimony shows that the land is best adapted to the mixed purpose of grain and stock-raising. Under such conditions it is

not considered that proof of grazing should be accepted as the equivalent of improvement and cultivation.

The decision of your office is accordingly reversed and the entry held for cancellation.

**FOREST RESERVE—LIEU SELECTION—DESERT LAND ENTRY—CREDIT  
FOR COMPLIANCE WITH LAW.**

JOHN W. LESLIE.

The provision of the act of June 4, 1897, allowing credit upon the selected land for compliance with law upon the land relinquished as base, is applicable to desert-land entries.

*Acting Secretary Woodruff to the Commissioner of the General  
(S. V. P.) Land Office, July 23, 1907. (J. R. W.)*

John W. Leslie appealed from your decisions of November 14, 1906, and February 11, 1907, rejecting his selection under the act of June 4, 1897 (30 Stat., 36), for the N.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 5, T. 14 N., R. 12 E., M. M., in lieu of lots 1, 2, SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , and SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 6, T. 14 N., R. 11 E., M. M., in a forest reserve, Lewistown, Montana.

December 12, 1903, after submitting final proof upon the land last above described, Leslie relinquished it to the United States and selected the land here in question in lieu thereof. November 14, 1906, you accepted the final proof on the land relinquished as base for the selection here involved, but required him—

to show that he has a right to water sufficient to irrigate the land selected and now embraced in D. L. E. 3070, and has placed ditches thereon and has reclaimed the same as required by the desert land laws.

Leslie filed a motion for review, and February 11, 1907, you adhered to that decision, and held that:

As patent for the land embraced in his said entry No. 3070 cannot under the desert land laws issue until it has been shown that the land has been reclaimed as provided in said laws, the said requirements of November 14, 1906, can not be abrogated, and the motion for review is therefore denied.

This is an exchange under the act of June 4, 1897, based upon a desert-land entry perfected on part of the entryman and unperfected only on part of the United States in that the final proof submitted had not been finally accepted by your office, nor patent issued. The unperfected condition of the claim was due wholly to necessary time for administrative action. Patent was due him, equitable title was complete, and had patent issued it would have relation to the date of submission of final proof, when his compliance with the law was complete. In such cases the act of 1897 provides for "credit being

given for the time spent on the relinquished claims," which in spirit and intent of Congress is that as to the new tract, so far as anything required by the law has been done, all that has been done shall be regarded as done upon the land taken in exchange. Otherwise exchange could not be made and patent would first have to go out on the original entry. This would tend to defeat the policy of the act by which the United States was seeking to repossess itself of full title, free of private right, to lands situate as the base tracts were at time of this exchange.

While the words of the act crediting "time spent on the relinquished claim" are not applicable to desert-land entries, yet the act provides:

That in cases in which a tract covered by an unperfected claim . . . . 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; . . . . 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 case of unperfected claims the requirements of the laws respecting settlement, residence, improvement, *and so forth* are complied with on the new claims, credit being allowed for *the time spent* on the relinquished claims.

The act is incapable of literal construction, for, under the homestead or any other settlement act, there is always coupled with residence other requirements for cultivation, improvement, and the like. If nothing is to be credited but the "time spent" (*i. e.* residence), then, upon exchange of an unperfected homestead, the claimant exchanging would have to cultivate and improve the land taken for five years, as required on the original claim, being credited only with "time spent" or period of actual residence. Such literal construction—sticking merely *in cortice*—would go far to defeat the object of the act.

Congress recognized that the specific things mentioned did not include all "the requirements of the laws respecting" unperfected claims, for it added to "residence" and "improvement" the comprehensive term "and so forth," which is the same as saying all other things required by law in the particular case of exchange of unperfected claims. The object was to eliminate private holdings by exchange for other lands and as one of the means to that end to permit the holder of an unperfected claim to take in lieu of it other land with credit as to such land for not only the time of residence, but, also, improvement and cultivation in homestead cases and payment, reclamation, cultivation, or any other required thing that had been done on the relinquished claim—comprehended under the general term "and so forth." All that had been done on the relinquished land was, in view of the law, to be regarded as done on the land for which it was exchanged. The Department so held in respect

to settlement, improvement, residence, and cultivation in the case of Frank F. McCain (34 L. D., 126). The same rule is applicable here, as to reclamation, water right, and ditches, as is applicable to residence, settlement, cultivation and improvement in homestead cases.

Your decision is reversed.

**HOMESTEAD ENTRIES WITHIN FOREST RESERVES—ACT OF JUNE 11,  
1906.**

**REGULATIONS.**

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., July 23, 1907.*

REGISTERS AND RECEIVERS,

*United States Land Offices.*

SIRS: Your attention is called to the act of June 11, 1906 (34 Stat., 233), copy of which is hereto attached as Appendix A. This act authorizes homestead entries for lands within National forests, and you are instructed thereunder as follows:

1. Both surveyed and unsurveyed lands within National forests which are chiefly valuable for agriculture and not needed for public use may, from time to time, be examined, classified, and listed under the supervision of the Secretary of Agriculture, and lists thereof will be filed by him with the Secretary of the Interior, who will then declare the listed lands subject to settlement and entry.

2. Any person desiring to enter any unlisted lands of this character should present an application for their examination, classification, and listing to "The Forester, Washington, D. C.," in the manner prescribed by regulations issued by the Agricultural Department. (The present regulations are attached as Appendix B.)

3. When any lands have been declared subject to settlement and entry under this act, a list of such lands, together with a copy of the notice of restoration thereof to entry and authority for publication of such notice, will be transmitted to the register and receiver for the district within which the lands are located. Upon receipt thereof the register will designate a newspaper published within the county in which the land is situated and transmit to the publishers thereof the letter of authority and copy of notice of restoration, said notice to be published in the designated newspaper once each week for four successive weeks. You will also post in your office a copy of said notice, the same to remain posted for a period of sixty days immediately preceding the date when the lands are to be subject to entry. If no paper is published within the county, publication should be made in a newspaper published nearest the land.

4. The cost of publishing the notice mentioned in the preceding paragraph will not be paid by the receiver, but the publisher's vouchers therefor, in duplicate, should be forwarded to the chief clerk, Department of the Interior, Washington, D. C., by the publisher, accompanied by a duly executed proof of publication. The register will require the publisher to promptly furnish him with a copy of the issue of the paper in which such notice first appears, will compare the published notice with that furnished by this office, and in case of discrepancy or error cause the publisher to correct the printed notice, and thereafter publish the corrected notice for the full period of four weeks.

5. In addition to the publication and posting above provided for, you will, on the day the list is filed in your office, mail a copy of the notice to any person known by you to be claiming a preferred right of entry as a settler on any of the lands described therein, and also at the same time mail a copy of the notice to the person on whose application the lands embraced in the list were examined and listed, and advise each of them of his preferred right to make entry prior to the expiration of sixty days from the date upon which the list is filed.

6. Any person qualified to make a homestead entry who, prior to January 1, 1906, occupied and in good faith claimed any lands listed under this act for agricultural purposes, and who has not abandoned the same, and the person upon whose application such land was listed, has, each in the order named, the preferred right to enter the lands so settled upon or listed at any time within sixty days from the filing of the list in your office. Should an application be made by such settler during the sixty-day period you will, upon his showing by affidavit the fact of such settlement and continued occupancy, allow the entry. If an application is made during the same period by the party upon whose request the lands were listed, you will retain said application on file in your office until the expiration of the sixty-day period, or until an entry has been made by a claimant having the superior preference right. If no application by a bona fide settler prior to January 1, 1906, is filed within the sixty-day period, you will allow the application of the party upon whose request the lands were listed. If entry by a person claiming a settler's preference right is allowed, other applications should be rejected without waiting the expiration of the preferred-right period. Of the applicants for listing, only the one upon whose request a tract is listed secures any preference right. Other applicants for the listing of the same tract acquire no right by virtue of such applications.

7. The fact that a settler named in the preceding paragraph has already exercised or lost his homestead right will not prevent him from making entry of the lands settled upon if he is otherwise quali-

fied to make entry, but he can not obtain patent until he has complied with all of the requirements of the homestead law as to residence and cultivation, and paid \$2.50 per acre for the land entered by him.

8. When an entry embraces unsurveyed lands, or embraces an irregular fractional part of a subdivision of a surveyed section, the entryman must cause such unsurveyed lands or such fractional parts to be surveyed at his own expense by a reliable and competent surveyor, to be designated by the United States surveyor-general, at some time before he applies to make final proof; but when any platted subdivision of a surveyed section is embraced in his entry he will not be required to resurvey such technical legal subdivision.

9. Applications for survey must be made by the homestead claimants or their duly authorized attorneys to the United States surveyor-general of the State wherein the land is situated. The applications must describe the claim to be surveyed by metes and bounds following the description contained in the listing and entry. The claimant may designate the surveyor he desires to do the work, who will, in the absence of objection, be authorized so to do by the United States surveyor-general. Surveys will be numbered by the United States surveyor-general consecutively when the orders for survey are issued, beginning with No. 37, thus: "H. E. S. No. —."

The surveys must be actually made on the ground by the surveyor designated by the United States surveyor-general, must be in strict conformity with or be embraced within the area described in the listing and entry, and the field notes and preliminary plat promptly returned to the surveyor-general.

10. The corners of each claim must be numbered consecutively beginning with No. 1; the corner and survey numbers must be neatly chiseled or scribed on the side (facing the claim) of the stone, post, or rock in place marking the corner. The corners may consist of a stone not less than 24 inches long set 12 inches in the ground, a post not less than 3 feet long by 4 inches square set 18 inches in the ground, or a rock in place. Corner No. 1 of each claim must be connected by course and distance with an established corner of the public surveys, or, if there be no corner within a reasonable distance, with a United States location monument, which may be established by the surveyor at some prominent point in the vicinity, and may consist of a stone not less than 30 by 20 by 6 inches set 15 inches in the ground or a post 8 feet long 6 inches square set 3 feet in the ground. The letters U. S. L. M. and number of the monument should be chiseled or cut upon the side of the monument and a detailed description thereof furnished the surveyor-general by the surveyor. Such bearings from the corners of the claims and U. S. L. monuments should be taken to near-by prominent objects as will serve to identify the locus of the claim. Upon the return of the field notes of survey, which must be

verified by the affidavit of the surveyor, executed before any officer qualified to administer oaths and having a seal, and the preliminary plat, the surveyor-general will cause same to be examined, and, if found regular, approve the same and cause to be prepared three sets of field notes and four plats of the claim, deliver to the claimant one plat to be posted on the claim, transmit two plats and two sets of field notes to the register and receiver of the local land office, one set to be forwarded to this Office with the final proof of claimant and one plat and field notes to be retained in the office of the surveyor-general. Action upon applications for survey and upon the surveys when returned must be promptly had. Surveys of homestead claims heretofore made may be accepted and approved by surveyors-general if in substantial conformance to the requirements herein set forth.

11. The commutation provisions of the homestead laws do not apply to entries made under this act, but all entrymen must make final proof of residence and cultivation within the time, in the manner, and under the notice prescribed by the general provisions of the homestead laws, except that all entrymen who are required by the preceding paragraph to have their lands, or any portion of them, surveyed must within five years from the date of their settlement present to the register and receiver their application to make final proof on all of the lands embraced in their entries, with a certified copy of the plat and field notes of their survey attached thereto.

12. In all cases where a survey of any portion of the lands embraced in an entry made under this act is required the register will, in addition to publishing and posting the usual final-proof notices, keep a copy of the final-proof notice with a copy of the field notes and the plat of such survey attached posted in his office during the period of publication, and the entryman must keep a copy of the final-proof notice and a copy of the plat of his survey prominently posted on the lands platted during the entire period of publication of notice of intention to submit final proof, and at the same time his final proof is offered he must file an affidavit showing the date on which the copies of the notice and plat were posted on the land and that they remained so posted during such period, giving dates.

13. This act does not apply to any lands situated in the counties of Inyo, Tulare, Kern, San Luis Obispo, Santa Barbara, Ventura, Los Angeles, San Bernardino, Orange, Riverside, and San Diego, in the State of California, and entries made for lands in the Black Hills Forest Reserve can only be made under the terms and upon the conditions prescribed in sections 3 and 4 of this act, as amended by the act of February 8, 1907 (34 Stat., 883).

14. This act does not authorize any settlements within forest reserves except upon lands which have been listed, and then only in the

manner mentioned above, and all persons who attempt to make any unauthorized settlement within such reserves will be considered trespassers and treated accordingly.

Very respectfully,

FRED DENNETT,  
*Acting Commissioner.*

Approved, July 23, 1907:

GEORGE W. WOODRUFF,  
*Acting Secretary.*

#### APPENDIX A.

AN ACT To provide for the entry of agricultural lands within forest reserves.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Secretary of Agriculture may in his discretion, and he is hereby authorized, upon application or otherwise, to examine and ascertain as to the location and extent of land within permanent or temporary forest reserves, except the following counties in the State of California, Inyo, Tulare, Kern, San Luis Obispo, Santa Barbara, Ventura, Los Angeles, San Bernardino, Orange, Riverside, and San Diego; which are chiefly valuable for agriculture, and which, in his opinion, may be occupied for agricultural purposes without injury to the forest reserves, and which are not needed for public purposes, and may list and describe the same by metes and bounds, or otherwise, and file the lists and descriptions with the Secretary of the Interior, with the request that the said lands be opened to entry in accordance with the provisions of the homestead laws and this act.

Upon the filing of any such list or description the Secretary of the Interior shall declare the said lands open to homestead settlement and entry in tracts not exceeding one hundred and sixty acres in area and not exceeding one mile in length, at the expiration of sixty days from the filing of the list in the land office of the district within which the lands are located, during which period the said list or description shall be prominently posted in the land office and advertised for a period of not less than four weeks in one newspaper of general circulation published in the county in which the lands are situated: *Provided*, That any settler actually occupying and in good faith claiming such lands for agricultural purposes prior to January first, nineteen hundred and six, and who shall not have abandoned the same, and the person, if qualified to make a homestead entry upon whose application the land proposed to be entered was examined and listed, shall, each in the order named, have a preference right of settlement and entry: *Provided further*, That any entryman desiring to obtain patent to any lands described by metes and bounds entered by him under the provisions of this act shall, within five years of the date of making settlement, file, with the required proof of residence and cultivation, a plat and field notes of the lands entered, made by or under the direction of the United States surveyor-general, showing accurately the boundaries of such lands, which shall be distinctly marked by monuments on the ground, and by posting a copy of such plat, together with a notice of the time and place of offering proof, in a conspicuous place on the land embraced in such plat during the period prescribed by law for the publication of his notice of intention to offer proof, and that a copy of such plat and field notes shall also be kept posted in the office of the register of the land office for the land district in which such lands are situated for a like period; and further, that any agricul-

tural lands within forest reserves may, at the discretion of the Secretary, be surveyed by metes and bounds, and that no lands entered under the provisions of this Act shall be patented under the commutation provisions of the homestead laws, but settlers, upon final proof, shall have credit for the period of their actual residence upon the lands covered by their entries.

SEC. 2. That settlers upon lands chiefly valuable for agriculture within forest reserves on January first, nineteen hundred and six, who have already exercised or lost their homestead privilege, but are otherwise competent to enter lands under the homestead laws, are hereby granted an additional homestead right of entry for the purposes of this act only, and such settlers must otherwise comply with the provisions of the homestead law, and in addition thereto must pay two dollars and fifty cents per acre for lands entered under the provisions of this section, such payment to be made at the time of making final proof on such lands.

SEC. 3. That all entries under this act in the Black Hills Forest Reserve shall be subject to the quartz or lode mining laws of the United States, and the laws and regulations permitting the location, appropriation, and use of the waters within the said forest reserves for mining, irrigation, and other purposes; and no titles acquired to agricultural lands in said Black Hills Forest Reserve under this act shall vest in the patentee any riparian rights to any stream or streams of flowing water within said reserve; and that such limitation of title shall be expressed in the patents for the lands covered by such entries.

SEC. 4. That no homestead settlements or entries shall be allowed in that portion of the Black Hills Forest Reserve in Lawrence and Pennington counties in South Dakota except to persons occupying lands therein prior to January first, nineteen hundred and six, and the provisions of this act shall apply to the said counties in said reserve only so far as is necessary to give and perfect title of such settlers or occupants to lands chiefly valuable for agriculture therein occupied or claimed by them prior to the said date, and all homestead entries under this act in said counties in said reserve shall be described by metes and bounds survey.

SEC. 5. That nothing herein contained shall be held to authorize any future settlement on any lands within forest reserves until such lands have been open to settlement as provided in this act, or to in any way impair the legal rights of any bona fide homestead settler who has or shall establish residence upon public lands prior to their inclusion within a forest reserve.

Approved, June 11, 1906.—(34 Stat., 233.)

AN ACT Excepting certain lands in Pennington County, South Dakota, from the operation of the provisions of section four of an Act approved June eleventh, nineteen hundred and six, entitled "An Act to provide for the entry of agricultural lands within forest reserves."

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the following described townships in the Black Hills Forest Reserve, in Pennington County, South Dakota, to wit: Townships one north, one east; two north, one east; one north, two east; two north, two east; one south, one east; two south, one east; one south, two east; and two south, two east, Black Hills meridian, are hereby excepted from the operation of the provisions of section four of an Act entitled "An Act to provide for the entry of agricultural lands within forest reserves," approved June eleventh, nineteen hundred and six. The lands within the said townships to remain subject to all other provisions of said Act.

Approved, February 8, 1907.

## APPENDIX B.

## REGULATIONS GOVERNING APPLICATIONS UNDER THE ACT OF JUNE 11, 1906.

U. S. DEPARTMENT OF AGRICULTURE,  
FOREST SERVICE.

1. Applications must be made upon this form,<sup>a</sup> signed by the applicant, and mailed to the Forester, Washington, D. C.
2. Applicants will secure preference in the order of the receipt of their applications, unless the lands were occupied by bona fide settlers prior to January 1, 1906, in which case the settlers have the preference.
3. The fact that an applicant has settled upon the land will not influence the decision with respect to its agricultural character. Settlement after January 1, 1906, and in advance of the opening by the Secretary of the Interior, is not authorized by the act, confers no rights, and will be considered trespass.
4. If for any reason an application is rejected or withdrawn, application may be made for another tract. Applicants entitled to a preference right under the act will be permitted to occupy the land applied for by them upon making application to the Forest supervisor.
5. Settlement and entry under the act are within the jurisdiction of the Secretary of the Interior, who will determine the preference rights of applicants.

**MINING CLAIM—APPLICATION FOR PATENT—OWNERSHIP.****LACKAWANNA PLACER CLAIM.**

Section 2325 of the Revised Statutes contemplates that applicants for mineral patent under its provisions shall at the date of the filing of the application have the full possessory right or title to the claim for which patent is sought.

John C. Teller, 26 L. D., 484, and Samuel H. Auerbach *et al.*, 29 L. D., 208, overruled.

*Acting Secretary Woodruff to the Commissioner of the General Land*  
(S. V. P.) *Office, July 24, 1907.* (G. N. B.—F. H. B.)

This is an appeal from your office decision of June 21, 1905.

September 24, 1902, J. H. Shockley filed application for patent to the Reservoir, Slide Rockless, and Tram lode mining claims, and the Lackawanna placer mining claim, all included in survey No. 15,314, Durango, Colorado, land district. Notice was published and posted and no adverse claim was filed. A protest was filed, however, which was finally disposed of by departmental decision of September 14, 1904 (33 L. D., 238).

January 16, 1905, Shockley made entry for the claims applied for. Upon examination of the record, your office directed the local officers to notify Shockley that he would be allowed sixty days from notice

<sup>a</sup> Form referred to furnished by Forest Service.

within which to show cause why the entry should not be canceled to the extent of the placer claim, for the stated reason that it appears by the abstract of title that he was not the sole owner of that claim at the date he filed his application for patent; and it was stated that on his failure to show full title in himself at that date, and in the absence of appeal, the entry would be canceled accordingly without further notice.

It is shown by the record that the Lackawanna placer claim was located August 22, 1901, by J. H. Shockley and John Morton, and the abstract of title, which is brought down to February 3, 1903, shows that Morton conveyed his interest in the claim to Shockley by deed dated January 16, 1903.

In the case considered by the Department September 14, 1904, *supra*, it was contended by the appellant that inasmuch as the lode claims were owned by Shockley and that at the time the application for patent was filed the placer claim was owned jointly by Shockley and Morton, patent for the placer claim could not issue to the former alone. Respecting this contention the Department then said:

It is sufficient to say, in answer, that it is shown by a further abstract of title that, January 16, 1903, Morton conveyed all his interest in the placer claim to Shockley; and, apart from other objection, entry may therefore be made by and patent issue to the latter. (John C. Teller, '26 L. D., 484.)

Apart from other considerations, it may be said that your office decision is based upon an erroneous theory. It is stated therein, after reciting the facts respecting Shockley's title to the placer claim, that—

It therefore appears that Shockley was not the owner of the entire interest in the Lackawanna claim at the date of application for patent, and in view of paragraph 71 of the mining regulations, transfers made subsequent to application for patent will not be considered; therefore, the conveyance to Shockley subsequent to application for patent can not be recognized.

The material portion of paragraph 71 of the mining regulations (31 L. D., 474, 486) is as follows:

Transfers made subsequent to the filing of the application for patent will not be considered, but entry will be allowed and patent issued in all cases in the name of the applicant for patent, the title conveyed by the patent, of course, in each instance inuring to the transferee of such applicant where a transfer has been made pending the application for patent.

The paragraph, which is a rule in the interest of administration, has no relation whatever to the situation presented in the case under consideration. It applies only to a transfer of a mining claim *by* the applicant for patent, after his application has been filed, as its terms and provisions plainly disclose; not to conveyances *to* the applicant, which are intended to secure to him a continuous and complete chain of title.

Your office also cites the case of *Sherer v. Koennecker*, decided by the Department December 30, 1904 (unreported), as holding that the applicant for patent must be the owner of the entire interest in the claim at the date of the application for patent. That case, too, is not in point, although somewhat allied in principle. What it holds is that your office is without authority to strike from an entry the name of a joint applicant, who, as shown by the record, has an interest in the claim but has failed to prove his qualifications otherwise, and allow the entry to stand in the names of his co-applicants, who do not claim a complete interest, "thus apparently vesting the full equitable, as a foundation for the legal, title in those having but a portion of the possessory right or interest." Upon that point the case of *Thomas et al. v. Elling* (25 L. D., 495, 497) was cited.

In the former departmental decision the entry as to the Lackawanna placer, and so far as the present question is concerned, was sustained upon authority of the case of *John C. Teller* (26 L. D., 484), cited and followed in the case of *Samuel H. Auerbach et al.* (29 L. D., 208), in which it is held that a mineral entry allowed on insufficient showing of title in the applicant may be allowed to stand where such applicant obtains by proper conveyances a complete chain of title, and makes showing thereof before the Department which is satisfactory as between him and the Government.

However, upon further consideration, compelled by the varying phases of the question presented in subsequent cases, the Department is of the opinion that the *Teller* and *Auerbach* cases do not correctly interpret the law, and they are not wholly consistent with the principles entering into later departmental decisions.

Authority to file an application for mineral patent is found only in section 2325 of the Revised Statutes, and is by its provisions extended only to the person, association, or corporation, qualified to locate a mining claim, who has or have claimed and located a piece of land for such purposes and complied with the terms of the mining laws with respect to it; the section giving like recognition, by necessary implication, to grantees to apply for patent. It is self-evident that under the terms of the statute, by the requisite compliance with the provisions relating to the location, the applicant or applicants must have acquired the full possessory right or title to come within the authority given by the section. No other is recognized by the statute. See paragraphs 41 and 42 of the mining regulations (31 L. D., 474, 481).

Substantial reason for a strict enforcement of those provisions of section 2325, aside from the plain terms employed, appears when the rights of possible adverse claimants are considered. Any such claimant might well hesitate to file an adverse claim as against an appli-

cation for patent by one without possessory right or title to the mining claim therein embraced and incur the expense of litigation in the effort to secure a judgment which he must in advance regard as at best of doubtful force and effect as against the real owner. If the adverse claimant were so to proceed and prevail in the adverse suit, the owner could disclose his title, disavow the patent proceedings, and prevent an entry upon the judgment roll. On the other hand, if the adverse claimant were to forbear thus to interpose because of the applicant's want of title and the latter could rightfully make entry upon conveyance from the real owner subsequent to the expiration of the period of publication of notice of the application, as validating the patent proceedings, the adverse claimant would be effectually cut off from asserting his rights in the manner provided by the law. And this, notwithstanding there could be no room for an assumption of the absence of adverse claims, because none has been filed, except upon the prosecution of such patent proceedings as are authorized by and are in accordance with the law, in behalf of which and of the applicant or applicants thereunder the statutory assumption could operate.

Where, too, as in this case, the applicant for patent has at the time but a partial interest in the claim involved, yet applies in his own and sole behalf and seeks to perfect his right to entry and patent by subsequently securing the outstanding interest, the proceedings are essentially defective, the difference being principally one of degree. In brief, as to an interest in the claim not held or represented by the applicant for patent in such a case, legal patent proceedings have not been prosecuted and no rights can be predicted thereon.

It seems unnecessary to extend the discussion further than to say that, whilst upon this point the Department heretofore cited the Teller decision in dismissing the tardy protest against Shockley's application for patent, thus apparently sanctioning its application in other than *ex parte* cases, it must now be held that in so far as the Teller and Auerbach cases are at variance with the views above expressed they can not be followed in any case hereafter arising and they are to that extent overruled.

Here, however, since the departmental decision first above mentioned, and in accordance with the view then taken, Shockley made his entry. That case closed with the denial of a motion for review (33 L. D., 358) and no further protest has been filed. Under these circumstances it is deemed just that the entry be sustained and passed to patent in the absence of objection not herein or heretofore considered; and it is so ordered.

The decision of your office is modified accordingly.

NORTHERN PACIFIC GRANT—CLASSIFICATION—ACT OF FEBRUARY 26,  
1895.

## BEVERIDGE ET AL. v. NORTHERN PACIFIC RY. CO.

An approved classification of lands under the provisions of the act of February 26, 1895, will not be inquired into upon a protest filed subsequently to the time allowed in the act for the filing of protests and which contains no competent allegation that there was such irregularity in the classification as to vitiate it.

*Acting Secretary Wilson to the Commissioner of the General Land*  
(S. V. P.) *Office, July 26, 1907.* (F. H. B.)

Your office submits, under date of July 19, 1907, a protest by George D. Beveridge and John J. Conroy, filed May 13, 1907, against the approved non-mineral classification, under the act of February 26, 1895 (28 Stat., 683), of lots 1 and 2 of Sec. 21, T. 3 N., R. 7 W., Helena, Montana, land district. The non-mineral classification was reported by the commissioners in December, 1897, and approved by the Secretary of the Interior December 21, 1906.

Protestants, it appears, are also applicants for patent to the Hercules, Ajax, and Achilles lode mining claims, surveys Nos. 8318, 8319, and 8320, situate in the above-described tracts.

In view of the allegations (in the protest and accompanying affidavits) of the known mineral character of these lands at the date of the classification, and the fact that there were then upon the lands and adjacent thereto a number of valid mining claims, and that the remaining portions of the section have been classified with approval, or adjudged, as mineral, your office recommends "that a hearing be ordered to determine whether the land was known at the time of the classification to be mineral in character as alleged."

For that purpose and upon the present record, alone, the Department can not concur in the recommendation. The act of 1895, *supra*, provides that an approved classification, in the absence of a protest within the time thereby fixed, "shall be considered final except in case of fraud." Whilst it is alleged that veins of quartz outcrop on the surface and that the ground contains at least five or six well-defined leads which had been observed and known as far back as 1893, some of which can be traced by several holes which were sunk along the strike of each prior to 1897, etc., it equally appears from the protest and the affidavits which accompany it that no demonstration of their substantial mineral value, if any, or exploitation of any consequence, had preceded the classification (if since made), from which actual or constructive fraud in the classification could be concluded. There is not in the protest or accompanying affidavits any competent allegation that the commissioners reached their

result by any such irregularity as to vitiate it. For all that is shown, however erroneous the classification, there is nothing to indicate more than mistaken judgment; certainly not to establish a "case of fraud" in the classification.

To order a hearing upon this showing, to determine the known character of the tracts in question at the date of the classification, would be to deny that classification the weight contemplated by the statute, whereunder its finality may be impeached upon the ground of fraud alone.

Protestants also allege, but only "upon their information and belief," that the commissioners did not make a personal examination, and took no evidence to overcome the *prima facie* mineral character of the lands, and the statements are unsupported. The concluding averment, that the commissioners' report as to these tracts "is false and fraudulent," is a conclusion merely.

The Department withholds its concurrence in your recommendation; and the protest and accompanying affidavits are returned for the files of your office.

FOREST RESERVE—LIEU SELECTION—ASSIGNMENT—CONTESTANT.

LINHART *v.* SANTA FE PACIFIC R. R. CO. ET AL.

A successful contestant in the exercise of his preference right may secure through the owner of lands within a forest reserve who relinquishes the same under the exchange provisions of the act of June 4, 1897, a selection of the lands covered by the contested entry, and all rights under such selection will inure to the contestant.

*Acting Secretary Woodruff to the Commissioner of the General Land*  
(S. V. P.) *Office, July 26, 1907.* (E. F. B.)

This appeal is filed by the Santa Fe Pacific Railroad Company, for the use of Anton E. Hagen, from the decision of your office of March 14, 1906, rejecting its application to select the SE.  $\frac{1}{4}$ , Sec. 5, T. 163 N., R. 88 W., Minot, North Dakota, under authority of the act of June 4, 1897 (30 Stat., 36), in lieu of land in the San Francisco Mountains forest reserve, Arizona.

The land applied for was formerly embraced in the homestead entry of Roy L. Caldwell, which was canceled April 7, 1905, as the result of a contest by Anton E. Hagen, charging abandonment, and Hagen was awarded a preference right of entry.

It does not appear from the record when Hagen was notified of the cancellation of Caldwell's entry, and the Department is not advised as to the date when the right to make entry by the successful contestant expired, but on May 15, 1905, one month and eight days after

the date of the decision of your office cancelling the entry of Caldwell, the Santa Fe Pacific Railroad Company, by David R. Pierce, attorney in fact, applied to select the land in question in lieu of land belonging to said company lying within the San Francisco Mountains forest reserve which it had by deed relinquished to the United States. Its application was rejected by the local officers, and, pending its appeal therefrom, John Linhart, on June 12, 1905, applied to make homestead entry of the land, alleging settlement July 10, 1904, whereupon a hearing was ordered to determine the rights of the respective applicants.

From the testimony taken at the hearing the local officers found that John Linhart established his residence on the land July 10, 1904, built a frame house and lived in it three or four months, leaving it in November, but working in the neighborhood; that he visited the place frequently during the winter and returned to the land some time in May. They held that it was immaterial whether Linhart was actually present on the land at the date the company tendered its application, and that Linhart had the prior right by reason of his settlement.

Your office affirmed their finding, and held that the only issue in the case is whether there was such occupation of the land May 15, 1905, when the company presented its application, and, finding that there was such occupation of the land by Linhart, you rejected the application and allowed Linhart to enter the land.

A material question is whether the application by the company was for the sole use and benefit of Hagen by reason of his purchase from the company of the right to the land selected by it in lieu of the land relinquished in the forest reserve under authority of the act of June 4, 1897, and, if so, whether Hagen in such manner applied to enter the land within the statutory period allowed to a successful contestant.

It is stated in your decision "that Hagen, who had a preference right to enter the land by reason of his successful contest against Caldwell, attempted to exercise such right by purchasing the so-called 'scrip,' consisting of a deed of relinquishment by the Santa Fe Pacific Railroad Company of 160 acres of land in a forest reserve;" but it is also stated that "as Hagen failed to exercise his preference right, he has no standing in the controversy between Linhart and the Santa Fe Pacific Railroad Company," citing as authority the case of *Schelling v. Fuller* (32 L. D., 466).

The meaning of this is not clearly comprehended. If it is to be understood from your statement that the application of the company was tendered within the statutory period allowed to Hagen as a successful contestant to enter the land, but that the application of the

company, although made for his use, was not the exercise by him of the preference right, your decision is not supported by the authority cited and is error.

In the case cited, Fuller was the successful contestant entitled to make entry. Instead of entering the land for himself, he applied to enter it for another as a forest lieu selection, it being found that he made no application in his own behalf, but impliedly waived his right and presented the application of another.

It is not denied that Hagen purchased of the company the right to the land that might be selected in lieu of the land relinquished, and that as between Hagen and the company such right could be enforced in his favor as soon as the company perfected its selection and secured title to the land. Under his purchase, all right, title and interest that the company might secure in the land selected would by such purchase vest the equitable title exclusively in him free from any right or control by the company.

While the Department has held that the right to select public land in lieu of lands within a forest reserve relinquished to the United States under the exchange provisions of the act of June 4, 1897, is not assignable (*Albert L. Bishop et al.*, 33 L. D., 139), it rests upon the theory that the law contemplates that the selection of the lieu land shall be made by or in behalf of the owner of the lands relinquished, and that the United States is not required to recognize the right of selection by any one except the owner of the relinquished tract—the language of the statute being that “the owner” may relinquish and “may select.” *John K. McCornack* (32 L. D., 578).

The purpose was to require that the transaction of exchange shall be between the United States and the owner of the land, and that the title to the selected land shall in every case rest in the owner of the relinquished land, so that no complication may arise by reason of floating rights acquired by assignment in advance of selection. But it does not follow that the owner of the relinquished land might not by deed of assignment convey to another the rights secured by the act of June 4, 1897, and growing out of his relinquishment, so as to vest in such assignee the equitable title to the land that the owner of the relinquished land may secure from the government.

The right secured by the act is a property right which the company may convey and Hagen by his purchase could secure; but the exchange of lands can only be made by or in the name of the company as the owner of the relinquished land. It therefore follows that the selection by the company was for the sole use and benefit of Hagen, and was to all intents and purposes an exercise by him of his preference right of entry.

While the entry of Caldwell remained intact and of record, no right could be secured by another in virtue of settlement or otherwise. When it was canceled, it became subject to entry by the successful contestant for a period of thirty days from notice of cancellation of the entry.

It is not disclosed by the record when Hagen received notice of the cancellation of Caldwell's entry; but from the statement in your decision, and from the contention of appellant, and nothing being shown to the contrary, it would appear that Hagen sought to exercise his preference right of entry through the agency of the company as the only means by which he could acquire title to the selected land, and it will therefore be assumed that the statutory period had not expired when the company's application was tendered.

It does not clearly appear that Linhart made such settlement upon the land after the cancellation of the entry and prior to May 15, 1905, as would defeat the company's selection, but no decision upon that question is here made, in view of the holding as to the exercise by Hagen of his preference right of entry.

Your decision is reversed.

#### DESERT LAND ENTRY—ENLARGEMENT OF ORIGINAL ENTRY.

##### INSTRUCTIONS.

The enlargement of desert land entries made for less than the maximum area that may be entered by one person will be allowed only in cases where the entryman could not, at the date of his entry as originally made, because of the existence of entries or filings covering the adjacent lands, embrace in his entry the full quantity allowed by law, but immediately took appropriate steps to clear the record as to a particular tract of such adjacent land, with the view to subsequently including such tract in his own entry, and clearly indicated in his application to make the original entry that such was his intention.

*Acting Secretary Woodruff to the Commissioner of the General Land*  
(S. V. P.) *Office, July 26, 1907.* (E. P.)

The Department is in receipt of your letter of the 10th instant, wherein you state that, in view of the provision of the desert-land law that "no person shall be allowed to enter more than one tract" thereunder, and the provisions of the law respecting the making of second homestead entries, as construed by the instructions of June 11, 1907 (35 L. D., 590), it is the understanding of your office that—

amendments of homestead and desert entries can not be allowed to include other and additional land adjoining, which was at date of original entry

vacant, or which may thereafter become vacant unless the entryman shall have at date of original entry in some manner expressed an intention not to exhaust his right, but on the contrary to include the land sought by way of amendment as soon as it should be able to clear the records of existing entries and that in the absence of such expressed intention to subsequently enlarge the entry such an entryman by entering less than the maximum area elects to take such in satisfaction of his homestead or desert right and can not be allowed in absence of legislation to make second entry, amendment, or enlargement. In view, however, of the decisions cited in 21 L. D., 265, 32 L. D., 176, and 33 L. D., 110, it is respectfully requested that this office be instructed in the matter.

By section 2 of the act of April 28, 1904 (33 Stat., 527), it is provided:

That any homestead settler who has heretofore entered, or may hereafter enter, less than one-quarter section of land may enter other and additional land lying contiguous to the original entry which shall not, with the land first entered and occupied, exceed in the aggregate one hundred and sixty acres, without proof of residence upon and cultivation of the additional entry; and if final proof of settlement and cultivation has been made for the original entry when the additional entry is made, then the patent shall issue without further proof: *Provided*, That this section shall not apply to or for the benefit of any person who does not own and occupy the lands covered by the original entry: *And provided*, That if the original entry shall fail for any reason prior to patent, or should appear to be illegal or fraudulent, the additional entry shall not be permitted, or if having been initiated, shall be canceled.

Said section provides a means whereby a homestead entry may be enlarged in cases where the original entry did not embrace all the land that the entryman was entitled to take, without regard to his intentions at the time of making his original entry. Hence special instructions with respect to the action that should be taken upon applications to enlarge a homestead entry, so as to embrace additional land lying contiguous to that covered thereby, would seem to be unnecessary.

As to desert-land entries for less than the maximum amount allowed to be entered by one person, the Department is of opinion that good and sufficient reason exists for restricting their enlargement to cases where the entryman could not, at the date of the entry as originally made, because of the existence of entries or filings covering adjacent lands, embrace in his entry the full quantity allowed by law, but immediately took appropriate steps to clear the record as to a particular tract of such adjacent land, with the view to subsequently including such tract in his own entry, and clearly indicated in his application to make the original entry that that was his intention. Your office is therefore instructed to allow the enlargement of desert-land entries under no other circumstances.

ABOLD *v.* MEER.

Petition for rehearing in this case (decision in which was rendered by the Department May 9, 1907, 35 L. D., 560, and motion for review denied June 28, 1907, 35 L. D., 640) denied by Acting Secretary Wilson, August 5, 1907.

ADDITIONAL HOMESTEAD ENTRIES—ACTS OF APRIL 28, 1904, AND  
MARCH 2, 1889.

## CIRCULAR.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., July 27, 1907.*

REGISTERS AND RECEIVERS,  
*United States Land Offices.*

GENTLEMEN: (1) Section 2 of the act of April 28, 1904 [33 Stat., 527], is substantially a reenactment of section 5 of the act of March 2, 1889 (25 Stat., 854), only modified so as to apply to entries for less than 160 acres each, made after the date of the act (April 28, 1904), as well as those made before, and provides for an additional entry of land which shall be contiguous to the land embraced in the original entry, for which the final proof of residence and cultivation made on the original entry shall be sufficient, but of which no party shall have the benefit who does not, on the date of his application therefor, own and reside upon the land covered by his original entry, and which shall not be permitted, or if permitted shall be canceled, if the original should fail for any reason prior to patent or should appear to be illegal or fraudulent.

(2) Applicants for additional entries under this section will be required to produce evidence that they own and reside upon the land embraced in their original entries, which shall be described by legal subdivisions and by reference to the number and date of the original entry, the evidence to consist of their own affidavits corroborated by the affidavits of two disinterested witnesses, executed before any officer authorized to administer oaths in such cases in the county, parish, or land district in which the land applied for is situated, under section 2294, United States Revised Statutes, as amended by the act of March 4, 1904 (33 Stat., 59). These affidavits and the homestead application and statements required to be made in connection therewith may be upon form No. 4-018.

(3) Section 3 of the act of April 28, 1904, forbids the acquisition of title to lands entered under that act through commutation under the provisions of section 2301 of the Revised Statutes, and it follows that additional entries can not be made under section 2 of that act by

persons who have, prior to their applications to make such additional entries, commuted their original entries; nor can title be acquired to lands embraced in such additional entries by the commutation of the original entries after the additional entries have been allowed. Any person who commutes his original entry after he has made an additional entry will forfeit his right to acquire title under his additional entry.

(4) Section 6 of the act of March 2, 1889 (25 Stat., 854), permits the entry, by a person otherwise qualified, who prior to the date of his application for additional entry has made homestead entry, submitted final proof thereon, and received receiver's final receipt, for a quantity of land less than 160 acres, of so much additional land, either contiguous or noncontiguous to the land originally entered by him, as shall not with it exceed a total of 160 acres.

(5) Applicants for additional homestead entries under this section must file applications to enter on the proper homestead form so modified as to describe, by number, section, township, and range, the original entry and give the date of issuance of receiver's final receipt thereupon. They are not required to show that they are still the owners or occupants of the land originally entered.

(6) Upon allowance of the additional entry, they will be required within the period prescribed by the homestead laws and regulations to establish residence upon the land entered and to reside upon and cultivate the land for the period required by the homestead laws, and within the period prescribed by statute, to submit proof of such residence and cultivation as in other homestead cases.

Very respectfully,

FRED DENNETT,  
*Acting Commissioner.*

Approved, July 27, 1907:

JESSE E. WILSON,  
*Acting Secretary.*

[PUBLIC—No. 208.]

AN ACT providing for second and additional homestead entries, and for other purposes.

\* \* \* \* \*

SEC. 2. That any homestead settler who has heretofore entered, or may hereafter enter, less than one-quarter section of land may enter other and additional land lying contiguous to the original entry which shall not, with the land first entered and occupied, exceed in the aggregate one hundred and sixty acres, without proof of residence upon and cultivation of the additional entry; and if final proof of settlement and cultivation has been made for the original entry when the additional entry is made, then the patent shall issue without further proof: *Provided*, That this section shall not apply to or for the benefit of any person who does not own and occupy the lands covered by the original entry:

And provided, That if the original entry should fail for any reason prior to patent, or should appear to be illegal or fraudulent, the additional entry shall not be permitted, or, if having been initiated, shall be canceled.

SEC. 3. That commutation under the provisions of section twenty-three hundred and one of the Revised Statutes shall not be allowed of an entry made under this Act.

Approved, April 28, 1904.

AN ACT to withdraw certain public lands from private entry, and for other purposes.

\* \* \* \* \*

SEC. 6. 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: 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: Provided also, That this section shall not be construed as affecting any rights as to location of soldiers' certificates heretofore issued under section two thousand three hundred and six of the Revised Statutes.

\* \* \* \* \*

Approved, March 2, 1889. (25 Stat., 854.)

(4-018.)

APPLICATION AND AFFIDAVIT.

ADDITIONAL HOMESTEAD.

(Act of April 28, 1904.)

Application No. \_\_\_\_\_ Land Office at \_\_\_\_\_

I, \_\_\_\_\_, of \_\_\_\_\_ do hereby apply to enter under section 2 of the act of April 28, 1904 (33 Stat., 527), the \_\_\_\_\_ of Section \_\_\_\_\_ Township \_\_\_\_\_, Range \_\_\_\_\_, containing \_\_\_\_\_ acres, as additional to my homestead entry No. \_\_\_\_\_, made \_\_\_\_\_, at \_\_\_\_\_ Land Office for the \_\_\_\_\_ Section \_\_\_\_\_, Township \_\_\_\_\_, Range \_\_\_\_\_.

I do solemnly swear that I am the owner of and am residing upon the land included in my original entry above described, and that this application is made for my exclusive benefit as an addition to my original homestead entry, and not directly or indirectly for the use or benefit of any other person or persons whomsoever, and that I have not heretofore made an entry under the homestead laws other than that above described except \_\_\_\_\_; that I have not since August 30, 1890,

acquired title to, nor am I now claiming by an entry made under any of the nonmineral public land laws, an amount of land which, together with the land now applied for, will exceed in the aggregate 320 acres; that I am well acquainted with the character of the land herein applied for and each and every legal subdivision thereof, having passed over the same; that my personal knowledge of the land is such as to enable me to testify understandingly with regard thereto; that there is not to my knowledge within the limits thereof any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, or copper, or any deposit of coal, cement, gravel, or other valuable mineral deposit; that the land contains no salt springs or deposits of salt in any form sufficient to render it valuable therefor; that no portion of said land is claimed for mining purposes under the local customs or rules of miners or otherwise; that no portion of the land is worked for minerals during any part of the year by any person or persons, and that my application is not made for the purpose of fraudulently obtaining title to mineral lands; that the land is not occupied and improved by any Indian, and is unoccupied and unappropriated by any person claiming the same under the public land laws other than myself.

Sworn to and subscribed before me this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

We do solemnly swear that we are acquainted with the above-named applicant and know that he is the owner of and residing upon the land embraced in his original entry above described.

Sworn to and subscribed before me this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

Land Office at \_\_\_\_\_, 19\_\_\_\_.

I, \_\_\_\_\_ Register of the Land Office, do hereby certify that the above application is for surveyed land of the class which the applicant is legally entitled to enter under the act of April 28, 1904, and that there is no prior, valid, adverse right to the same.

Register.

**SALE OF LOTS IN HUNTLEY, OSBORN, BALLANTINE, WORDEN, CARTERSVILLE, POMPEYS PILLAR, ANITA, AND BULL MOUNTAIN TOWN SITES, MONTANA.**

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
Washington, D. C., August 8, 1907.

REGISTER AND RECEIVER,  
Billings, Montana.

GENTLEMEN: Beginning at your office on Tuesday, September 3, 1907, and continuing thereafter from day to day between the hours

of 9 o'clock in the forenoon and 4 o'clock in the afternoon, as long as may be necessary for the purpose, you will offer for sale, under the acts of April 16 and June 27, 1906 (34 Stat., 116 and 519), at public auction to the highest bidder for cash at not less than its appraised value, specified in the appraisalment thereof (to be hereafter sent you prior to said date of sale), each of the lots and tracts delineated on the copies of the approved plats of the several town sites in the Huntley irrigation project of the ceded Crow Indian lands, Montana, as follows:

Huntley, all lots in blocks 5, 6, 7, 8, 53, 54, 55, 69, 70, 81, and 82, and the lots in the west half of block 114, and the lots in the east half of block 115, except lots 7, 8, and 9, in block 54, reserved for school purposes.

Osborn, all lots in blocks 16, 17, 18, 19, 34, 35, 39, 40, 41, and 55.

Ballantine, all lots in blocks 1, 2, 5, 7, 8, 9, and 10, except lots 1 to 8, inclusive, in block 8, reserved for town purposes.

Worden, all lots in blocks 20, 21, 24, 25, 27, 29, and 30.

Cartersville, all lots in blocks 4, 5, 9, and 15, and lots 1 to 6, inclusive, in block 16, and lots 10, 11, and 12, in block 17.

Pompeys Pillar, all lots in blocks 15, 16, 20, and 21, except lot 12 in block 21, reserved for a park.

Anita, all lots in blocks 3, 5, 15, 16, 21, 22, and 23.

Bull Mountain, all lots in blocks 7, 9, 12, 13, 14, 17, 18, and 19.

The sale will begin with the lots in the Huntley town site, and be followed by the sales of lots in the other town sites in the order above named.

1. *Purchase price—When paid.*—If the purchase price of any lot sold at public auction be not paid in cash to the Receiver before the close of the office on the day the bid for such lot has been accepted, the right thereafter to make such payment will be deemed forfeited, and the lot shall be again offered for sale at public auction on the following day in the prescribed manner, or if the sale of the lots in the town site in which it is located has been closed, then such lot shall be considered as offered and unsold; but no bid thereafter by the defaulting bidder, for the same or any other lot, shall be considered or accepted.

2. *Combination among bidders.*—If you should at any time become satisfied that there is a combination among bidders for lots at public sale which effectually suppresses competition or prevents the sale of lots at their reasonable value, or in case of any disturbance which interrupts the orderly progress of the same, you are authorized to suspend the sale for the time being and until the same can proceed in a fair and orderly manner.

3. *Unsold lots subject to private sale.*—If any lot offered for sale at public auction under these instructions be not sold when so offered, it

will thereafter become and remain subject to private sale by you at any time for cash at the appraised value of such lot, unless you are hereafter instructed to the contrary.

4. *Receipts and certificates.*—When any lot has been sold under these instructions, either at public auction or at private sale, and the purchase price has been fully paid, the Receiver should issue his receipt in duplicate and deliver one copy thereof to the purchaser and retain and forward the other copy in due course to this office; and the Register must issue his certificate under each of such sales. A form of receipt and certificate (a modification of Forms 4-131 and 4-189) has been prepared, and a supply thereof will be sent you when printed.

A separate series of receipts and certificates must be issued for lots sold in each of the town sites named, and they must be numbered consecutively, beginning with No. 1 in each town site, and will be known as “----- (name of town site) town lot series.” The receipt and certificate relating to the same lot must each bear the same serial number and each contain the same date and lot description, and the name of the town site in which the lot described is situated must be plainly written on the back of such receipt and certificate, opposite the serial number thereof.

5. *Disposition of moneys.*—All moneys arising from the sale of lots in said town sites shall be deposited in your designated depository to the credit of the Treasurer of the United States, four dollars per acre thereof on account of the Crow Indian Fund, and the excess over four dollars per acre on account of the Reclamation Fund, except as to the receipts derived from the sale of the lots in blocks numbered 53, 54, 55, 69, 70, 81, and 82 in Huntley town site, which receipts shall all be deposited on account of the Reclamation Fund, title to said blocks having been relinquished to the United States by a railroad company, and said Indians having no interest in said blocks. The certificates of deposit should specify the particular town site from which the amount arises. Special care should be taken in making said deposits, in order that no error may be made therein. I herewith submit a copy of a decision of the Department, dated July 12, 1907, directing the disposition of the proceeds of said sales in the manner above required.

You will prepare and transmit to this office, for each town site, separate monthly and quarterly accounts and abstracts of lots sold, specifying in your accounts the particular fund credited in each instance with the proceeds of said sales as above required.

6. *Compensation of Register and Receiver.*—The Register and Receiver will be entitled to the commission and fee provided in the second and eighth paragraphs, respectively, of section 2238, U. S. Rev. Stats. Said commission and fee are not payable by the Receiver acting as special disbursing agent out of the regular appropriations under which advances are made to him, but each officer must transmit to

this office his own claim therefor, which, if approved, will be paid by the Treasury Department out of the Reclamation Fund, under section 3 of the act approved June 27, 1906 (34 Stat., 519).

Very respectfully,

FRED DENNETT,  
*Acting Commissioner.*

Approved, August 8, 1907:

JESSE E. WILSON,  
*Acting Secretary.*

**OPENING OF LANDS IN CEDED PORTION OF LOWER BRULE INDIAN  
RESERVATION, SOUTH DAKOTA.**

BY THE PRESIDENT OF THE UNITED STATES.

A PROCLAMATION.

Whereas the act of Congress approved April 21, 1906 (34 Stat., 124), provided that all of the west half of townships one hundred and six, one hundred and seven, one hundred and eight, one hundred and nine, and one hundred and ten north, range seventy-seven west of the fifth principal meridian, and fractional townships one hundred and six, one hundred and seven, one hundred and eight, one hundred and nine, and one hundred and ten north, range seventy-eight west of the fifth principal meridian, and fractional township one hundred and ten north, range seventy-nine west, fifth principal meridian, except sections sixteen and thirty-six in each of said townships and such parts of said lands as are held under allotments to Indians, shall be disposed of under the general provisions of the homestead laws of the United States, and shall be opened to settlement and entry at not less than their appraised value by proclamation of the President, which proclamation shall prescribe the manner in which these lands shall be settled upon, occupied and entered by persons entitled to make entry thereof; and no person shall be permitted to settle upon, occupy, or enter any of said lands, except as prescribed in such proclamation, until after the expiration of sixty days from the time when the same are opened to settlement and entry.

And whereas all of the lands subject to settlement, entry and sale under said act have been duly appraised as appears from a schedule thereof hereto attached,

Now, therefore, I, Theodore Roosevelt, President of the United States, by virtue of the power and authority in me vested by said act of Congress, do hereby prescribe and proclaim that all of said lands subject to sale and disposal under said act will be opened to

settlement, entry and disposition under the general provisions of the homestead laws, and of the said act of April 21, 1906, in the manner hereinafter prescribed and not otherwise.

Any qualified person desiring to make entry of any of these lands shall execute in person within the limits of the Pierre, South Dakota, land district an affidavit showing his qualifications to enter and means of identifying him (forms of such affidavits to be furnished by the officers of the land department): The affidavit must be presented in a sealed envelope, in person or by ordinary and not registered mail, at the district land office located at Pierre, South Dakota, during office hours between 9 o'clock a. m. on October 7, 1907, and 4.30 o'clock p. m. on October 12, 1907. Thereafter at 9 a. m. on October 14, 1907, there shall be taken or drawn impartially from the envelopes so filed, such number as may be necessary to carry into effect the provisions of the Proclamation, and the order of drawing such envelopes shall determine the order in which applicants shall be permitted to make entry of these lands between October 20, 1907, and December 20, 1907.

Those successful as a result of the drawing must present formal application to enter within the time fixed and assigned for making such application; show present qualifications; make the required payments under the act of April 21, 1906, and otherwise comply with the law.

Any person filing more than one affidavit, or in other than his true name, shall be denied any privilege he might otherwise have secured under this drawing, except that any honorably discharged soldier or sailor entitled to the benefits of section 2304 of the Revised Statutes of the United States, as amended by the act of March 1, 1901 (31 Stat., 847), may be represented by an agent of his own selection for the purpose of executing the affidavit herein required, due authority therefor being shown, but no person will be permitted to act as agent for more than one such soldier or sailor.

Envelopes showing on the outside distinctive marks of any character shall be eliminated from the drawing.

The plan herein provided for governing the manner of opening these lands shall have operation and control the order in which all entries of the lands are allowed until December 20, 1907, upon which date any portion of the lands then remaining undisposed of will be subject to settlement, occupation, and entry under the provisions of the homestead law and the act of April 21, 1906, in like manner as if no special preliminary plan had been provided for.

All persons are especially admonished from attempting to settle upon, occupy, or improve any of these lands prior to December 20, 1907; except those making entry in accordance with the terms of this proclamation.

The Secretary of the Interior shall make and publish such rules and regulations as may be necessary and proper to carry into full force and effect the manner of settlement, occupation, and entry, as herein provided for:

In witness whereof I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the city of Washington this 12th day of August, in the year of our Lord one thousand nine hundred and seven and of the Independence of the United States the one hundred and thirty-second.

THEODORE ROOSEVELT.

By the President:

ALVEY A. ADEE,

*Acting Secretary of State.*

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**OPENING OF LANDS IN CEDED PORTION OF LOWER BRULE INDIAN RESERVATION, SOUTH DAKOTA.**

**REGULATIONS.**

DEPARTMENT OF THE INTERIOR,

*Washington, D. C., August 13, 1907.*

The COMMISSIONER OF THE GENERAL LAND OFFICE.

SIR: Pursuant to the proclamation of the President dated August 12, 1907, prescribing the manner in which the lands in the ceded portion of the Lower Brulé Indian Reservation shall be opened to settlement, occupation, and entry under the provisions of the act of April 21, 1906 (34 Stat., 124), and the general provisions of the homestead laws, and for the purpose of insuring the expeditious and orderly disposal of these lands, and to prevent conflicting claims and contests, and speculative entries, the following rules and regulations are issued to govern the opening of said lands:

**Affidavit of Applicants.**

1. Any person qualified and desiring to make entry of any of these lands may, either through the mails or otherwise, but not by registered mail, present to the register and receiver of the land office located at Pierre, South Dakota, a sealed envelope containing his personal affidavit, showing his qualifications to make entry under the homestead laws, and means of identification, and the name of the post-office to which he desires the notice of his successful drawing mailed.

2. The affidavits required in the preceding paragraph must be on forms similar to those attached hereto, and must be sworn to within the Pierre, South Dakota, land district before some officer authorized

to administer oaths in that district, *and must not be sworn to outside of that district.*

3. No person is authorized to present more than one affidavit of the character mentioned above in his own behalf, nor in any other than his true name, or on behalf of any person except as herein provided, and if more than one affidavit is presented by any person in violation hereof he will be deemed to have waived and forfeited the right to have either or any of his affidavits considered, and they will not be considered, but any honorably-discharged soldier or sailor entitled to the benefits of section 2304 of the Revised Statutes of the United States, as amended by the act of March 1; 1901 (31 Stat., 847), may be represented by an agent of his own selection for the purpose of executing and presenting the affidavit above provided for, due authority therefor, upon a form provided by the Commissioner of the General Land Office, being inclosed in the envelope with the affidavit. No person will, however, be permitted to act as agent for more than one such soldier or sailor.

#### **Method and Time of Presenting Affidavits.**

4. No affidavit will be received or considered if it is presented to or reaches the land office before 9 o'clock a. m. on Monday, October 7, 1907, or after 4.30 o'clock p. m. on Saturday, October 12, 1907, nor will any affidavit be considered which is sworn to outside of the Pierre, South Dakota, land district.

All envelopes containing affidavits should be plainly addressed to the "Register and Receiver, Pierre, South Dakota," and have indorsed upon the face near the left end the words "Lower Brulé lands." No affidavit will be considered which is not received in an envelope so indorsed or which is received by *registered* mail, or received in an envelope which bears any mark that in any way indicates the person who executed the affidavit. No envelope should contain more than one affidavit, or contain any other paper than the affidavit mentioned, except the authority to represent a soldier or sailor, as provided for in paragraph 3, when filed by an agent. Proof of naturalization, and of military service and other proof required, as in case of second homestead entry, will be exacted before entry is actually allowed, but should not accompany affidavit required above.

The blank forms of affidavits and the envelopes referred to above may be obtained by any prospective entryman upon application made either in person or by mail to the "Register and Receiver, Pierre, South Dakota," or to the "General Land Office, Washington, D. C."

#### **Method of Receiving, Holding, Opening, and Listing.**

5. The register and receiver of the Pierre, South Dakota, land office will provide themselves with a strong box or boxes, securely closed, fastened and sealed in such manner that they can not be

opened and closed again without leaving evidence thereof. These boxes must be so constructed that the envelopes referred to may be deposited therein, but can not be extracted therefrom before the time hereinafter fixed for their opening without detection.

6. As soon as any envelope, properly indorsed as herein provided, has been received it will be numbered and deposited in one of the boxes, which will be guarded by representatives of the Government until they are publicly opened, as hereinafter provided.

7. Beginning on Monday, October 14, 1907, at 9 o'clock a. m., the register and receiver of the Pierre, South Dakota, land office will, under the supervision and direction of such person or persons as the Secretary of the Interior may designate, publicly open the box or boxes and thoroughly mix all the envelopes deposited therein, and after they have been so mixed the envelopes will be drawn one at a time until two thousand of them, containing affidavits correct in form and execution, and no more have been drawn; and as fast as they are drawn the envelopes will be publicly opened in the order in which they were drawn, and a distinctive serial number, beginning with number 1, will be placed on the back of each affidavit contained in such envelopes, corresponding with the order in which such envelopes were drawn. All affidavits so drawn which are correct in form and execution will then be numbered consecutively on the face thereof, in the order in which they were drawn, and the numbers thus given will control the order in which the qualified persons named therein will be permitted to make entry. All affidavits contained in envelopes opened as above provided which are not correct in form and execution will be stamped "Rejected—Improperly executed" and filed in the order in which they were opened.

8. As soon as an affidavit, correct in form and execution, has been drawn and numbered as prescribed above, the name and address of the person who executed it and the number endorsed on the face thereof will be publicly announced and recorded in a book to be known as "The List of Authorized Applicants for Lower Brulé Lands," and copies of such list with an explanatory note attached, showing the date on which each applicant will be permitted to make application to enter, will be posted at the land office at Pierre, South Dakota, and furnished the press for publication as a matter of news.

9. All envelopes in excess of those drawn and numbered as above directed will be opened and scrutinized for the purpose of determining whether any of the successful persons have presented more than one affidavit; and if it is discovered that any person has presented more than one affidavit, or otherwise than as provided for herein, his name will not be retained upon the list of authorized applicants and he will be denied the privilege of entry he might otherwise have received under this drawing.

**Notices to Successful Applicants.**

10. Notice will be promptly mailed to each person whose name appears on the list of authorized applicants informing him of the number assigned to him, and each of the first four hundred persons on such list will be informed by such notice of the date upon which he must apply to make entry at the Pierre land office. These notices will be mailed to the address given by each applicant in his affidavit. Each person who deposits an envelope should, however, in his own behalf, employ such means as will insure his obtaining prompt and accurate information through newspaper reports of the successful applicants or otherwise as to the day on which he must appear at the Pierre land office to make entry, as the notices might possibly miscarry in the mails. When any successful applicant changes his post-office address before he receives notice he should at once notify the register and receiver at Pierre, South Dakota, of the change, and also request the postmaster of the office named in his affidavit to forward his mail to his new address.

**Method of Making Entry.**

11. Persons who have been assigned numbers in the manner hereinbefore prescribed may present their applications to make entry as follows:

Commencing on Monday, October 21, 1907, the applications of those persons who have been assigned Nos. 1 to 50, inclusive, must be presented in person or (in the case of soldiers and sailors) in the manner permitted by section 2309 of the Revised Statutes, at the land office at Pierre, South Dakota, and will be considered in their numerical order during that day, and the applications of those to whom have been assigned Nos. 51 to 100, inclusive, must be presented and will be considered in their numerical order during the next day, and so on from day to day, Sundays excepted, until the first four hundred successful applicants have in this manner and order been afforded opportunity to make entry. If any applicant fails to appear and present his application for entry when the number assigned to him by the drawing is reached, his right to enter will be passed until after the other applicants assigned for that day have been disposed of, when he will be given another opportunity to make entry, failing in which he will be deemed to have abandoned his right to make entry prior to December 20, 1907. In order to afford others upon the successful list above four hundred an opportunity, when there is a failure to make entry at the time assigned, it is directed that on October 21 notice issue to such number of the consecutive persons on the list herein provided for (beginning with No. 401, as shall equal those failing to make entry on that day), to appear and make entry on Monday, November 4, and on October 22

advise others in numerical order equal to the failures occurring on that day to appear and make entry on November 5, and so on each day succeeding, Sundays and holidays excepted, until all lands are entered or the list of authorized applicants is exhausted.

12. At the time of appearing to make entry each applicant must furnish such evidence as may be required to identify himself as being the person who executed the affidavit upon which his number was assigned, and he must by affidavit show his qualifications to make homestead entry. If he files a soldier's declaratory statement either by agent or in person, he must furnish evidence of his military service and honorable discharge. All foreign-born persons must furnish proper evidence that they have either filed their declarations of intention to become citizens, or that they have been fully naturalized; and all persons applying to make second entries must furnish the number and date of their former homestead entry, and a description of the land first entered, and also present an affidavit corroborated by the oath of two other persons showing facts which entitle them to make a second entry. This affidavit must conform to the general regulations governing applications for second entries.

#### **Payments Required.**

13. All persons who enter these lands will be required to pay the usual fees and commissions collected under the homestead laws where the price of the land is one dollar and twenty-five cents per acre, and in addition thereto the appraised value of the lands entered by them as follows: Each entryman will at the date of his entry be required to pay in cash the usual fees and commissions, and one-fifth of the appraised value of the lands entered by him, and the balance of the purchase price in five equal annual installments, to be paid in one, two, three, four, and five years, respectively, from and after the date of the entry; but in cases where entries are commuted under section 2301 of the Revised Statutes of the United States the entryman must pay all the deferred and unpaid installments of the purchase price at the time he makes proof of residence and cultivation.

14. In case any entryman fails to make the annual payments, or any of them, promptly when due, all rights in and to the land covered by his entry shall cease, and any payments theretofore made shall be forfeited and the entry be canceled.

15. All of the lands affected by this proclamation which have not been entered as herein provided prior to December 20, 1907, will, on that date, but not before, become subject to settlement and entry by any qualified homesteader under the general provisions of the homestead laws and of the said act of April 21, 1906, at the price specified in the schedule hereto attached; but all persons are especially admonished that under said act of Congress it is provided that

no person shall be permitted to settle upon, occupy, or enter any of said lands except in the manner prescribed in this proclamation until after the expiration of sixty days from the time when the same are opened to settlement and entry—or, in other words, until after December 19, 1907.

16. The usual nonmineral and nonsaline affidavits will not be required with applications to enter made prior to December 20, 1907, but evidence of the nonmineral and nonsaline character of lands entered prior to that date must be furnished by the entryman before their final proofs are accepted.

Proceedings on Contests and Rejected Applications.

17. When the register and receiver of the Pierre, South Dakota, land office for any reason reject the application of any person claiming right to make entry under any number assigned to him under these regulations, they will at once advise him of such rejection and of his right of appeal, and further action thereon shall be controlled by the following rules, and not otherwise:

(a) Applications either to file soldiers' declaratory statement or to make homestead entry of these lands must on presentation in accordance with these regulations be at once accepted or rejected, but the local officers may, in their discretion, permit amendment of defective applications during the day only on which they are presented. If properly amended on the same day, entry may be permitted, after the numbers for the day have been exhausted, in their numerical order.

(b) No appeal to the General Land Office will be allowed or considered unless taken within one day (Sundays excepted) after the rejection of the application.

(c) After the rejection of an application, whether an appeal be taken or not, the land will continue to be subject to entry as before, excepting that any subsequent applicant for the same land must be informed of the prior rejected application and that his application, if allowed, will be subject to the disposition of the prior application upon appeal, if any be taken, from the rejection thereof, which fact must be noted upon the receipt issued him and upon the application allowed.

(d) Where an appeal is taken the papers will be immediately forwarded to the General Land Office, where they will be at once carefully examined and forwarded to the Secretary of the Interior with appropriate recommendation, when the matter will be promptly decided and closed.

(e) Applications filed prior to December 20, 1907, to contest entries allowed for these lands will also be immediately forwarded to the General Land Office, where they will be at once carefully

examined and forwarded to the Secretary of the Interior with proper recommendations, when the matter will be promptly decided.

(f) These regulations will supersede during the period between October 20, 1907, and December 20, 1907, any rule of practice or other regulation governing the disposition of applications with which they may be in conflict, in so far as they relate to the lands affected by these regulations, and will apply to all appeals taken from the action of the local officers during that period affecting any of these lands.

Very respectfully,

JESSE E. WILSON,  
*Acting Secretary.*

AFFIDAVIT OF APPLICANT.

I, \_\_\_\_\_, of \_\_\_\_\_ post-office, do solemnly swear that I am \_\_\_\_\_ years of age,<sup>a</sup> \_\_\_\_\_ feet and \_\_\_\_\_ inches in height, and weigh \_\_\_\_\_ pounds; that I am a citizen of the United States, or have declared my intention to become such; that I am not the owner of more than 160 acres of land, and have not heretofore made any entry or acquired any title to public lands which disqualifies me from making homestead entry; that I *honestly desire to enter Lower Brulé lands for my own personal use as a home and for settlement and cultivation*, and not for speculation or in the interest of some other person; that I have not presented and will not present any other affidavit of this kind.

Subscribed and sworn to before me this \_\_\_\_\_ day of October, 1907, within the Pierre land district, South Dakota.

This affidavit can not be sworn to outside of the Pierre, South Dakota, land district.

AFFIDAVIT OF SOLDIER'S AGENT.

I, \_\_\_\_\_, of \_\_\_\_\_ post-office, do solemnly swear that I am \_\_\_\_\_ years of age, \_\_\_\_\_ feet and \_\_\_\_\_ inches in height, and weigh \_\_\_\_\_ pounds; that I am the duly appointed agent of \_\_\_\_\_, of \_\_\_\_\_ post-office, who desires to make entry of Lower Brulé lands, under the President's proclamation of August 12, 1907, and section 2304, Revised Statutes of the United States, as amended by the act of March 1, 1901; that I have not presented and will not present an affidavit of this character for any other person.

Subscribed and sworn to before me within the Pierre, South Dakota, land district this \_\_\_\_\_ day of \_\_\_\_\_, 1907.

This affidavit must be sworn to within the Pierre, South Dakota, land district, and not elsewhere.

<sup>a</sup> If applicant is a minor and intends to make entry as a head of a family, he should so state.

## SOLDIERS AND SAILOR'S AFFIDAVIT.

I, \_\_\_\_\_, of \_\_\_\_\_ post-office, do solemnly swear that I am qualified to make a homestead entry and entitled to the benefits of section 2304, Revised Statutes of the United States, as amended by the act of March 1, 1901; that I hereby appoint \_\_\_\_\_ my agent and attorney in fact to present the affidavit required by the President's proclamation, dated August 12, 1907, and to thereafter file a declaratory statement for me under section 2309, Revised Statutes of the United States; that I make his affidavit *in good faith for the sole purpose of securing public lands for a home for myself, and for the purposes of settlement and cultivation*, and not for speculation; that I have not presented and will not personally present an affidavit under said proclamation nor authorize any other person than the one named above to present such an affidavit for me.

Subscribed and sworn to before me \_\_\_\_\_, 1907.

This affidavit may be sworn to before any officer having a seal in any part of the United States.

[Schedule omitted.]

**EMPLOYEE OF GENERAL LAND OFFICE—MINERAL SURVEYOR—SECTION 452, R. S.**

SEYMOUR K. BRADFORD.

A United States mineral surveyor is within the purview of section 452 of the Revised Statutes, which prohibits officers, clerks, and employees in the General Land Office from directly or indirectly purchasing or becoming interested in the purchase of any of the public lands, and is therefore prohibited from making a mineral location, upon penalty of forfeiture of his official position.

*Acting Secretary Wilson to the Commissioner of the General Land*  
(S. V. P.) *Office, August 13, 1907.* (E. B. C.)

This is an appeal by Seymour K. Bradford from your office decision of April 22, 1907, revoking his appointment as an United States mineral surveyor for the district of Nevada, because of violation of section 452 of the Revised Statutes. With the appeal was filed Bradford's resignation as a mineral surveyor for the district mentioned, dated March 22, 1907, and addressed to the United States surveyor-general at Reno, Nevada.

May 29, 1906, Special Agent Frank J. Parke reported that Mr. Bradford was one of the locators of the Clay Bank placer claims, situated about 12 miles from Tonopah, Nevada, and as such locator and as attorney-in-fact for the other locators, conveyed said claims to the Tonopah Water Company on April 20, 1903. Accompanying the report is a full statement by Bradford, under oath, dated May 11, 1906, explaining his action in the matter.

October 31, 1906, your office directed that the mineral surveyor be granted sixty days in which to show cause why his appointment should not be revoked and it was stated that if the mineral surveyor made answer, the surveyor-general should consider the same and make report and recommendation to your office.

November 22, 1906, the mineral surveyor made answer to the effect that in most of the location notices posted his name was used without his knowledge; that when he held an appointment in the 80's mineral surveyors were allowed to locate mining claims; that from the sample field notes furnished him it is to be inferred that such locations are permitted; that no circular or instructions were given him advising him to the contrary; that the Clay Bank placer claims were located for common clay, which is not subject to location under the mining laws, and are on nonmineral, desert land and are null and void and that consequently there was no violation of the provision of section 452 of the Revised Statutes on his part; that his official bond expired in August, 1906, and he is no longer a mineral surveyor; that he, as a mineral surveyor, was not an employee in the General Land Office and therefore not within the purview of section 452 of the Revised Statutes.

December 1, 1906, the surveyor-general reported that the four-year period of the mineral surveyor's bond had expired on August 16, 1906; that he had not applied for reappointment; and that all orders for official surveys issued to him had been duly returned and recommended that the surveyor's name be dropped from the roll of mineral surveyors for that district.

April 22, 1907, your office held that the action of the mineral surveyor was a violation of the statute and declared his appointment revoked.

The mineral surveyor has appealed and specifies error in the decision of your office as follows: In holding that a sufficient reason has been shown for revoking his appointment; in holding that a mineral surveyor might not participate in a mining location, he being a citizen of the United States and within the purview of section 2319, Revised Statutes; in holding, in effect, that a mineral surveyor is an employee of the Government within the prohibition of section 452, Revised Statutes; and in refusing to consider and accept his resignation as a mineral surveyor, the same having been tendered in good faith.

The resignation referred to was not before your office for consideration and action but was filed with, and accompanied, the appeal taken herein. The mere fact that such resignation has been tendered here will not be permitted to affect the decision upon the merits in this proceeding.

Section 452 of the Revised Statutes is as follows:

The officers, clerks, and employes in the General Land-Office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public land; and any person who violates this section shall forthwith be removed from his office.

In this connection, see circulars of September 15, 1890 (11 L. D., 348), and May 12, 1906 (34 L. D., 605).

The Department has repeatedly decided that an United States mineral surveyor is within the inhibition contained in said section 452. *Floyd et al. v. Montgomery et al.* (26 L. D., 122); *Frank A. Maxwell* (29 L. D., 76), and *Alfred Baltzell et al.* (29 L. D., 333). The first case cited expressly overrules the prior departmental decisions in conflict therewith. The supreme court of Utah in a recent decision (April 4, 1903), has said:

We think that the section in question (452, *supra*), includes mineral surveyors, and prohibits them, as held by the Land Department, from entering any of the public lands while they are such deputies, and also from directly or indirectly acquiring any interest in the purchase from the Government of the same. \* \* \* His location . . . was therefore void.

*Lavagnino v. Uhlig et al.* (26 Utah, 1; 71 Pac., 1046, 1049).

That case was carried to the Supreme Court of the United States, but the court refrained from expressing any opinion upon that phase of the case. (198 U. S., 443, 452.) In reference to the official status of a mineral surveyor the Department has used the following language:

He is, therefore, an officer of the land department, and as such is strictly under the highest obligations to perform his duties in accordance with instructions. Being such officer, his reports and acts must be accepted as *prima facie* true. . . . His connection with the survey is only that of an officer of the Department, and any further acts, especially in connection with securing a patent, are in direct violation of his duties and his instructions.

*Gowdy et al. v. Kismet Gold Mining Co.* (24 L. D., 191, 193). See also, II *Lindley on Mines*, sec. 661.

The only reported departmental decision of recent date upon this question is the case of *W. H. Leffingwell*, on review (30 L. D., 139), involving an entry made December 31, 1897, by *Leffingwell*, the official survey of which had been executed by him. The departmental decision directed that the entry be passed to patent, and is, in part, as follows:

Without at the present time considering the correctness of the conclusion arrived at in the case of *Floyd et al. v. Montgomery et al.* (26 L. D., 122, 136), and similar cases, in so far as it was therein held that the prohibitive provisions of said section embrace a deputy mineral surveyor, it is sufficient to say that the facts in this case, as disclosed by the record, are materially different from those stated in the cases referred to.

Independently of the statute it would be within the power of the land department in making regulations for the survey of mining claims to provide against the survey thereof by one interested in the claim, the reason therefor being manifest. In the case under consideration Leffingwell had no interest, real or contingent, in the claims involved at the date of the survey thereof by him, or at the date of the application for patent thereto, and under these circumstances it is not believed that he is within the spirit of the statute or circular above quoted.

This case is to be distinguished from the decisions referred to, in that the entry was passed to patent upon the particular facts and equities presented, those evils which the statute was designed to correct being entirely absent. It also appears that the purchase and entry of the claims was made by Leffingwell as transferee of the applicant for patent, a proceeding at that time permitted and recognized by your office, but which is not now allowable under the provisions of paragraph 71 of the mining regulations, which provisions were first formulated and approved in the mining circular of July 26, 1901 (31 L. D., 453, 486). Leffingwell's entry was treated and disposed of as a special and peculiar case. The Department did not modify or overrule the prior decisions cited therein. Indeed, in disposing of the case, it was expressly stated not to be necessary to consider such prior decisions. These cases still stand as authoritative and controlling.

Under the authorities a mineral surveyor is within the purview of said section 452, and consequently is prohibited from making a mineral location, upon penalty of the forfeiture of his official position. It may be that Bradford acted without actual intention to violate the statute, but ignorance of the law excuses no one. That the locations made may be defeated or proved to be voidable does not clear him. He, while a mineral surveyor, was directly and beneficially interested, as a co-locator, in the Clay Bank placer claims in violation of the statute and of necessity the penalty, to wit, his removal from office, must follow. The appointment of Seymour K. Bradford as an United States mineral surveyor must be revoked. The decision of your office is accordingly affirmed.

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**HOMESTEAD ENTRY—RELINQUISHMENT—ACT OF APRIL 28, 1904.**

**ANDREW W. ALCORN.**

Where on account of irregularity of the surveys one makes improvements on land intended to be taken as a homestead but not included in the entry as made, he may properly sell such improvements, and by such sale his right to make another entry under the act of April 28, 1904, is not prejudiced though followed by relinquishment of the lands actually embraced in his entry but never intended to be taken.

*Acting Secretary Woodruff to the Commissioner of the General Land*  
 (S. V. P.) *Office, August 16, 1907.* (J. R. W.)

Andrew W. Alcorn appealed from your decision of March 6, 1907, adhering to that of October 25, 1906, rejecting his application for homestead entry of the E.  $\frac{1}{2}$  NW.  $\frac{1}{4}$  and lots 1 and 2, Sec. 18, T. 16 N., R. 23 W., I. M., Guthrie, Oklahoma.

January 21, 1892, Alcorn made entry for the SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 13, T. 7 N., R. 3 E., I. M., forty acres, Oklahoma series, which was canceled on relinquishment February 25, 1903. August 9, 1893, he made entry for the S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$  and lot 2, Sec. 2, T. 16 N., R. 24 W., I. M., 119.83 acres, Kingfisher series. December 12, 1901, you allowed him to amend this entry to be for lots 2, 3, and S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$  of said Sec. 2, which amendment was to be simultaneous with one by Robert Alcorn of his entry also made August 9, 1893, which included said lot 3. January 23, 1902, he withdrew such application, relinquished the entry, and March 14, 1902, you closed the case.

February 3, 1906, he made this application to enter the E.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , lots 1 and 2, Sec. 18, T. 16 N., R. 23 W., and therewith filed affidavit, corroborated, that prior to entry of 1893 he examined the land, relying upon aid of a practical surveyor for the description; that then no government field-notes were in that county (Day), and, as he was informed, none were at the local office. There was a jog in the township line and no surveyor could inform himself of it, which caused an error in description of the land entered, in that he intended to enter the land included in and described as lot 3 and S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , Sec. 2; that the SW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$  had running water and valuable timber; but the SW.  $\frac{1}{4}$  of NE.  $\frac{1}{4}$  is valueless; that he established residence on lot 3 in the spring of 1893, made extensive enumerated improvements, worth over \$1,000, not removable; that when he found they were not on the entered land he sold them to C. W. Donnell for \$1,000, less than their cost; when he learned the mistake lot 3 was covered by another entry; and about a year after applying to amend he was convinced he could not do so, and relinquished, but made entry for sole purpose of a home.

Your office records show that Robert Alcorn's entry, above mentioned, was amended to exclude lot 3, and that Andrew W. Alcorn, not amending his entry to include lot 3 as permitted, relinquished January 23, 1902, and the same day Columbus W. Donnell made entry for lots 2 and 3, Sec. 2. You held that:

The record does not sustain the allegations made by the applicant . . . he appears to have exhausted his homestead right and his application is denied.

It is no doubt true that before filing relinquishment of the 1893 entry in the local office, Alcorn knew the amendment was allowed, for the amendment of the two Alcorn entries had to be simultaneous,

so that Andrew might obtain lot 3 included in Robert's entry, on which Andrew's house and chief improvements lay. The local office, January 25, 1902, reported that your letter allowing the amendments was served by registered mail on each applicant, January 16, and was acted upon January 18, by Robert. Presumably, Andrew was also informed at that time, either by receipt of the notice or by Robert, whose lot 3 Andrew was to take. Andrew's relinquishment is dated January 21, and was filed in the local office, and Donnell's entry was made January 23, 1902.

The record does not show when the applications to amend were made or how long they pended before favorable action of December 12, 1901. It seems to have pended considerable time. The affidavits show the current report was that amendments would not be allowed to correct errors in descriptions caused by non-continuity of section lines south and north from the fourth standard parallel. Andrew lost hope of amendment of his entry to cover the tract whereon his improvements were. That tract was in Robert's entry. He sold those improvements to Donnell, who took chances of obtaining right to enter the tract in case Robert was permitted to amend, or, if he was not permitted to amend, would lose or have to remove them. The affidavits are clear and sufficient to the point that Andrew's sale of improvements was in September, 1901, before allowance of amendments. The price was necessarily for the improvements, not for relinquishment of an entry, for Robert held entry of the tract and Andrew could not sell or relinquish it.

Where by irregularity of the surveys one makes improvements on land not covered by his entry, he may properly sell them and by such sale his right under the act of April 28, 1904 (33 Stat., 527), is not prejudiced though followed by relinquishment to the United States of the lands entered, but never intended to be included or taken.

Your decision is reversed, and if no other objection appear, the application will be allowed.

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**MINING CLAIM—PURPOSES FOR WHICH LOCATION IS MADE.**

**GRAND CANYON RY. CO. *v.* CAMERON.**

The government is a party in interest in every case involving the disposal of the public lands, and when such lands are sought to be acquired under any of the public-land laws, it is not only within the power but it is the duty of the land department to see that the lands are disposed of according to law, and not in violation or evasion of the law.

Lands belonging to the United States can not be lawfully located, or title thereto by patent legally acquired, under the mining laws, for purposes or uses foreign to those of mining or the development of minerals; and should it

be shown in case of an application for mineral patent that the claims applied for were not located in good faith for mining purposes, but for the purpose of securing control of a trail upon lands belonging to the United States, susceptible of such control by reason of the surrounding physical conditions, so as to place the claimant in a position to charge for the privilege of using the trail, and thereby to prevent the free and unrestricted use thereof by the public, such claims would be fraudulent from their inception and patents thereto could not be obtained under the mining laws.

*Acting Secretary Woodruff to the Commissioner of the General Land*  
(S. V. P.) *Office, August 21, 1907.* (A. B. P.)

This is an appeal by Ralph H. Cameron from your office decision of January 22, 1907, whereby two applications for mineral patent (Nos. 714 and 715) filed by Cameron May 24, 1905, and based upon surveys Nos. 2014 A and B and 2016 A and B, respectively, Prescott, Arizona—one embracing the alleged Magician lode claim and Alder mill site, and the other, the alleged Wizard lode claim and Willow mill site—were held for rejection.

The proceedings were without adverse claim under the statute against either application, but on July 25, 1905, the Grand Canyon Railway Company filed protests against both. Except as to formal matters, the allegations of the protests are the same in each case. Stated partly in substance and in part literally, they are, in so far as deemed material, as follows:

1. That the protestant company is, and since August 10, 1901, has been, a corporation, maintaining and operating a railroad for the carriage of freight and passengers from the town of Williams, in the Territory of Arizona, to a point on the rim of the Grand Canyon of the Colorado River in said Territory, near what is known as the Bright Angel Trail.

2. That at the time of the location of his said lode claims, Cameron had made no discovery of any valuable deposit of mineral within the limits of either claim, and has not since made any such discovery; and that the lands so located do not contain valuable deposits of mineral of any kind so far as known.

3. That the notices of the applications for patent are defective, and were not posted on the several claims as required by law.

4. That the expenditures in improvements upon the claims are insufficient for patent purposes.

5. That Cameron is seeking "by means of fraud, deceit, and misrepresentation" to acquire patents for the lands embraced in said claims, in that such lands are not valuable for minerals, and the claims were not located for mining purposes but for the purpose of "controlling so far as possible the use of a portion of the Bright Angel Trail leading from near the terminus of the line of railroad of the

protestant down the walls of the Grand Canyon of the Colorado River to said river, and thereby placing himself in a position either to prevent the public from using said portion of said trail or pay to said Cameron such sums of money as he shall see fit to exact for the privilege of using said trail."

6. That the boundaries of the Magician location "were so fixed upon the face of the earth as to include that portion of said trail known as the Devil's Corkscrew, which, because of the topography of the ground traversed by it, is located upon the only practicable and feasible route for a trail from the terminus of the protestant's line of railroad to the Colorado River, and that, so far as can be determined from an inspection of the surface of the ground and the small amount of excavation therein, the course of said alleged mining claim was determined by the course of said portion of said trail rather than by the course of any lode or mineral bearing vein."

7. That the lands embraced in the so-called Alder and Willow mill sites are not and never have been used or occupied for mining or milling purposes, and that said Cameron is seeking to acquire patents to said mill sites "by means of fraud, misrepresentation, and deceit," and as a part of a scheme devised by him "for acquiring control of said Bright Angel Trail and the waters flowing in what is known as Indian Garden Creek."

8. That in carrying out said scheme Cameron "made pretended locations of mining claims and mill sites along and across said trail from its head on the rim, near the terminus of the line of railroad of the protestant, to its foot, at the Colorado River, all in the Grand Canyon of the Colorado River, so located as to include the greatest possible portion of said trail;" that the mining claims and mill sites here in question were located in pursuance of said scheme; "that the Grand Canyon of the Colorado River is one of the great natural wonders of the world, is visited by large numbers of people from all parts of the world, practically all of whom travel over the line of railroad of the protestant and the most of whom make the trip over said trail down to said river;" and that said trail and alleged mining claims and mill sites are within the Grand Canyon Forest Reserve.

9. That these protests are made for the purpose of preventing the consummation of what protestant verily believes to be a fraudulent scheme to obtain patents for lands within a forest reserve regardless of their value for mining uses, and to secure control of the waters flowing in what are known as Indian Garden and Pipe Creeks; and also for the purpose of securing to the public, and particularly to all persons who travel upon the protestant company's line of railroad with the intention of visiting the Grand Canyon of the Colorado River, "the right freely and unrestrictedly to travel upon and over said trail down into said canyon."

At a hearing ordered by the local officers upon the protests testimony was submitted by both parties. To avoid a second examination of the witnesses, the allegations of the protests being in most part the same, it was stipulated, in effect, that testimony once taken should be considered, as far as applicable, in both cases. Apparently because of such stipulation, the cases have been since considered together, as though consolidated into one case.

Before the testimony was commenced counsel for the protestant company (hereinafter called the company) submitted several motions in writing having for their ultimate object the dismissal of the applications for patent on various and sundry stated technical grounds; which motions were severally overruled.

In the course of the examination of one Martin Buggeln, the first witness called on behalf of the company, he was asked to tell what he knew about certain mining locations claimed by Cameron at the rim of the Grand Canyon near the terminus of the company's line of railroad. The question was objected to by counsel for Cameron, as relating to an immaterial matter, and the objection was sustained by the local officers. Counsel for the company thereupon submitted the following offer of proof:

We wish to make proof by the witness Buggeln, and by other witnesses, that Ralph H. Cameron did not locate the mineral claim in proceeding, No. 714, for mining purposes or with the intention of holding it and working it for any mineral or minerals contained therein, or for the purposes of acquiring the millsite in connection with said mining claim, but that said mining claim and millsite were taken as part of a connected system and scheme arranged by the said Cameron beginning at the head of Bright Angel Trail at the rim of the Grand Canyon on mineral claims located by him and known as Cape Horn Lode mining claim and the Golden Eagle mining claim, to which are joined and connected following down the trail other mineral locations made by said Cameron, including the mineral claim and millsite embraced in this proceeding, said millsite being the Alder millsite and situated at the point on said Bright Angel Trail known as Indian Gardens and covering a part of the water flowing there from natural springs and in the Indian Garden Creek. The mineral claim in this proceeding is located on said Bright Angel Trail at a point impassable, except over said trail through a place known as the Devil's Corkscrew. That at the foot of and along said trail, and for the purpose of controlling passage thereover, the applicant has made a mineral filing on said Wizard Mining claim, in connection with which he has located the Willow Millsite, adjoining the Alder Millsite above described and covering additional water-grounds and water-course in said Indian Gardens.

In support of this offer we wish to show a scheme or system on the part of the applicant to take the premises described for other than mineral or millsite purposes; the protestant further offers to show that said Cameron since 1902 has been conducting on the rim of the Grand Canyon on the said Golden Eagle Mining Claim and the Cape Horn mining claim a hotel and livery business for the entertainment of guests and travelers to the Grand Canyon for the purpose of seeing that work of nature, and that he has upon said two mining claims a hotel building constructed of logs and boards two stories high, also stable build-

ings and corrals and about twelve solidly constructed house tents, having stone foundations, wooden frames and tent coverings, in which large numbers of tourists and travelers have been since 1902 and down to the present time housed for hire by said Cameron and piloted by vehicles and on horseback by said Cameron and employees to the different points in the said Canyon and along the rim thereof; that starting from said two mining claims at the rim of said Canyon is a trail, which the said Cameron claims to be a tollroad, the entrance to which is upon said mineral claims, and that part of the hotel and livery business of said Cameron, conducted on said Golden Eagle and Cape Horn Mining claims is to conduct tourists down said trail into the Canyon and to collect tolls for passage over said trail as well as moneys for livery service and service of guides for tourists.

Protestant further offers to show that on the Alder Millsite and Willow Mill-site before described as at the Indian Gardens said applicant has since 1902 maintained house tents and hotel accommodations for tourists into said Canyon, and that he is now and has for a long time been furnishing tourists with all things necessary for their accommodation, including intoxicating liquors, upon said millsites; that on said millsites he has a partially stone and mortar building designed as a hotel together with about eight or nine house tents, constructed after the manner of those described on the rim of the canyon with stable room and corrals for the saddle animals needed in showing guests throughout the canyon.

This offer of evidence was objected to by counsel for Cameron, and the objection was sustained. The result was to confine the testimony to much narrower limits than contemplated by the protests, and effectually to preclude the introduction of any evidence to support the charge of fraud and bad faith on the part of Cameron in the location and assertion of the claims in question.

After the witnesses present had been examined, as far as permitted, there was a motion by the company, supported by two affidavits, the statements of which are not disputed, for a postponement of the hearing to a date to be fixed by the local officers on account of the absence of a material witness—one Lester Jackson; but the motion was denied.

Upon such evidence as they allowed to be introduced the local officers found that the company had "totally failed to prove the allegations" of its protests. The company thereupon appealed.

By the decision of January 22, 1907, your office, after sustaining the action of the local officers in all other respects, held the applications for patent for rejection on the grounds (1) that the lands covered by the lode claims were not shown to contain mineral deposits of sufficient extent and value to render them subject to entry under the mining laws, and (2) that the mill sites were not shown to have been used or occupied for mining or milling purposes.

The Department is of opinion that in sustaining the action below upon the question of the sufficiency of the notices of the applications for patent, and upon the motions of the company to dismiss said applications, your office decision is right, and in these respects said decision is affirmed.

The refusal of the local officers to allow the introduction of the offered evidence on the question of fraud and bad faith in the assertion of the claims embraced in the applications for patent, however, and the affirmance of that action by your office, the Department can not accept as justified by the law. If it be true as in substance charged in the protests that the claims were not located in good faith for mining purposes, and that patents therefor are sought for the purpose of securing control of a trail upon lands belonging to the United States, leading from the rim of the Grand Canyon of the Colorado River down into the Canyon and to said river, known as the Bright Angel Trail, so as to place the applicant in a position to charge visitors to the Canyon—alleged to be one of the great natural wonders of the world—for the privilege of using said trail, and thereby to prevent the free and unrestricted use thereof by the public, or persons desiring to visit the Canyon, said claims were fraudulent in their inception, are equally so still, and patents therefor can not be obtained under the mining laws.

That lands belonging to the United States can not be lawfully located, or title thereto by patent legally acquired, under the mining laws for purposes or uses foreign to those of mining or the development of minerals, as attempted in this case if the charges of the protests be true, is a proposition the soundness of which is beyond question. It was never contemplated or intended that public lands might be possessed and held and title thereto acquired under the mining laws for purposes or uses not essential to mining, or mining operations.

In connection with their ruling against the admissibility of evidence offered by the company to show that Cameron's claims were located and held for other than mining purposes, it was stated by one of the local officers, and apparently concurred in by the other, as follows: "It does not make any difference what he uses or wants them for. I do not see how you can go into that question." It is proper here to observe that such statement does not correctly represent the law. The Department knows of no reason why the purposes for which lands claimed under the mining laws, and charged to be fraudulently so claimed, are used or intended to be used, may not be inquired into, in a proper case, the same as in the case of a charge of fraud or bad faith against a claimant under any other of the public land laws. The principle applies alike in all cases arising under any of such laws.

The Government is a party in interest in every case involving the disposal of the public lands, and when such lands are sought to be acquired under any of the public land laws it is not only within the power but it is the duty of the land department to see that the lands are disposed of according to law, and not in violation or evasion of

the law. As was held by the Supreme Court in the case of *Knight v. United States Land Association* (142 U. S., 161, 176-181), the Secretary of the Interior, as the head of the Land Department, "is the guardian of the people of the United States over the public lands," and his oath of office obliges him to see that the law is carried out, that the public lands are not disposed of to parties not entitled to them, that justice is done to all claimants, and that the rights of the people of the United States are preserved. See also *McDaid v. Oklahoma* (150 U. S., 209; 215-216).

In this case the stated evidence which the company offered to produce through the witness Buggeln and other witnesses was clearly admissible under the protests as bearing upon the question of Cameron's good faith in the assertion of the claims embraced in his applications for patent, and the action of the local officers refusing to allow such evidence was error. The decision of your office affirming that action was likewise error, and to that extent said decision is hereby reversed.

Because of such error the Department is deprived of evidence material to the questions involved, and consequently the state of the record is not such as to warrant a final disposition of the case at this time. It is to be observed in this connection that the lands covered by the mining claims in question are situated within a national forest.

The record is accordingly returned to your office to be by you returned to the local officers with directions that they reopen the hearing and admit the evidence formerly offered by the company, and refused by them. They will also admit any and all evidence that may be offered by either party, or by the Government, in relation to Cameron's purpose, past, present, or future, as touching the claims here in question, or any other claims located or claimed by him embracing portions of or lying near to the said Bright Angel Trail, including evidence intended to show the uses to which any or all of such claims have been applied. Any further evidence that may be offered by either party, or by the Government, bearing upon any of the other questions raised by the record and not herein finally passed upon will likewise be admitted.

The local officers will proceed with the rehearing, after not less than twenty days notice to both parties, with as much expedition as their other official duties and a proper regard for the convenience of the parties will allow. When the taking of testimony shall be completed they will forthwith forward the entire record to your office to be by you transmitted to this Department, with such recommendations as you may desire to make, if any. The whole matter will then be considered and disposed of here, where such briefs or arguments

as counsel for either party may wish to submit may be filed. All questions other than those expressly decided are held open until that time; and the decision of your office, on the points as to which the same is not herein either affirmed or reversed, is modified accordingly.

**TIMBER CUTTING--PERMITS TO CUT TIMBER BY AGENT FROM NON-MINERAL PUBLIC LANDS.**

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., August 21, 1907.

*Chiefs of Field Divisions, General Land Office.*

SIRS: Hereafter applications for permit to cut timber by agent from the non-mineral public lands under the act of March 3, 1891 (26 Stat., 1093), as extended by the act of February 13, 1893 (27 Stat., 444), and the act of March 3, 1901 (31 Stat., 1436), will be filed directly with you instead of with the register and receiver as heretofore. On receipt of such an application you will at once have the same taken up and made special for investigation as follows:

(1) Examine the records of the proper local land office to see if the lands described in the petition are vacant public lands.

(2) Ascertain by field examination or otherwise that the applicants are *bona fide* residents of the State and that they urgently need the amounts of timber set opposite their respective names for the purposes indicated in the act.

(a) That the petitioners are not in position to go upon the public domain and cut and get out said timber for themselves.

(b) That the agent who is to procure the timber for them is in every way reliable and that the price agreed upon is only a charge for the necessary time, labor and legitimate expense in getting it out, plus a fair price per thousand feet for sawing logs into lumber, and that he does not make any charge for the timber itself.

(c) That the removal of the timber will not interfere with, lessen or damage the water supply or injuriously affect any public interest and that said timber is for the actual use of the petitioners and is not to be sold, nor bartered; also give county and State where timber is to be used.

(d) That the land is non-mineral in character.

(e) Whether or not there are private dealers who will supply timber or lumber to the petitioners; and if so, at what rate.

(f) If after your investigation is completed you find that the petitioners, or any of them, are entitled to the free use of timber under

the terms of law, you will grant said petition with the amounts of timber required, placing your initials after the name of each petitioner whose permit is granted. You will not initial the names of any petitioners who, in your opinion, are not entitled to the use of timber and in your report you will state the reasons for rejecting the petition as to them.

Very respectfully,

FRED DENNETT,  
*Acting Commissioner.*

Approved, August 21, 1907:

G. W. WOODRUFF,  
*Acting Secretary.*

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RANEY *v.* BURNETT.

Motion for review of departmental decision of July 2, 1907, 36 L. D., 2, denied by Acting Secretary Woodruff, August 23, 1907.

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APPLICATIONS TO COMMUTE—RESIDENCE PENDING SUBMISSION OF PROOF.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE,  
*Washington, D. C., August 31, 1907.*

REGISTER AND RECEIVER, MINOT, NORTH DAKOTA.

GENTLEMEN: Referring to your communication of August 16, 1907, calling attention to the fact that a large number of applications to make commutation proof have been filed in your office but that owing to the press of business in your office the hearing of said proofs can not be had before April next, and that under existing rulings claimants are required to remain continuously upon their claims up to the time of submission of final proof, which in the class of cases mentioned will result in great hardship to those who have resided upon, cultivated and improved their claims for the statutory period and who are constrained by necessity to leave the claims for the purpose of earning money for their support or for the further improvement of their claims, you are instructed as follows:

*First.* Where applicants file in your office their applications to make final commutation proof accompanying same by their affidavits setting forth briefly the facts as to their period of residence upon the claim, amount of cultivation and improvements, and why they desire to leave the same, the absence of such claimants from their

land from and after the filing of the application and until date fixed by you for submission of final proof, will not prevent the applicants from making such proof on the day fixed by you.

*Second.* If upon submission of such proof it fails to show residence, cultivation and improvement, as required by law, up to date of filing in your office the application to submit final proof and the affidavit above mentioned, claimants will not be allowed to claim the period of absence as constructive residence upon their lands but said period will be treated as are leaves of absence under the act of March 2, 1889 (25 Stat., 854), and should the proof submitted be rejected because of insufficient compliance with law prior to date of application to submit final proof, claimants will be required to show, when submitting new proof, residence, cultivation and improvement for the statutory period, not counting the interval of absence under these instructions.

Very respectfully,

FRED DENNETT,  
*Acting Commissioner.*

Approved:

GEORGE W. WOODRUFF,  
*Acting Secretary.*

#### INDIAN LANDS—STATE SELECTION—GRANT FOR PUBLIC BUILDINGS.

##### ALLISON *v.* STATE OF MONTANA.

Lands formerly within the Gros Ventre, Piegan, Blood, Blackfeet, and River Crow Indian reservation in Montana and opened to entry under section 3 of the act of May 1, 1888, are subject to selection by the State on account of the grant for public buildings made by the act of February 22, 1889.

*Acting Secretary Woodruff to the Commissioner of the General Land*  
(S. V. P.) *Office, September 5, 1907.* (F. W. C.)

The Department has considered the appeal by Alfred E. Allison from your office decisions of February 24 and August 18, 1906, affirming the action of the local officers in rejecting his homestead application covering the NE.  $\frac{1}{4}$  of Sec. 12, T. 33 N., R. 6 W., Greatfalls land district, Montana, for conflict with the claim of the State of Montana under a selection made of said land in part satisfaction of its grant for public buildings.

August 28, 1898, the Governor of the State of Montana made application under the act of August 18, 1894 (28 Stat., 372), for the withdrawal and survey of township 33 north, range 6 west, outside of the east boundary of the Blackfoot Indian reservation, and by your office letter "E" of September 7, 1898, withdrawal was ordered as of the date of August 31, 1898.

Due publication of notice of the State's application for survey was made in the "Helena Herald," the publication running from September 17 to October 27, 1898. The survey of the township was made June 9 and 10, 1900, and the plat thereof was filed April 10, 1902.

June 5, 1902, within the sixty days preference right of selection granted the State by the act of 1894, the State filed its list of selections embracing the tract here in question, the selection being on account of the grant made by the act of February 22, 1889 (25 Stat., 676), for public buildings.

February 21, 1893, the local officers rejected Allison's homestead application for conflict with the prior selection by the State, from which action he appealed to your office but failed to make service of his appeal upon the State. Notwithstanding this defect, as he alleged settlement antedating the State's application for survey and continuous residence upon the land, with valuable improvements, your office, in letter of January 11, 1905, addressed to the local officers, directed that the State be allowed sixty days to show cause why its selection as to the tract embraced in Allison's application should not be canceled or to apply for a hearing to determine their respective rights in the premises.

A hearing was thereafter held and upon the record made the local officers rendered decision in favor of the State, holding, in effect, that the pretended settlement claim of Allison was not sufficient to defeat the right of the State under its selection, from which Allison appealed to your office and the record is very carefully reviewed in your office decision of February 24, 1906, wherein the decision of the local officers was affirmed and the rejection of Allison's application sustained. A motion for review was denied in your office decision of August, 1906, and the case has been further prosecuted by appeal to this Department.

It may be here stated that on May 17, 1902, prior to the selection of the land by the State, this tract with others was temporarily withdrawn on account of the St. Mary's Canal irrigation project. Since the case has been pending before the Department on appeal investigation was directed to ascertain the needs of the irrigation service respecting this tract, resulting in the recommendation by the Director of the Reclamation Service that this tract be restored, which recommendation received departmental approval June 25, 1907, so that no further consideration of any question respecting the needs of the irrigation service affecting this tract need be considered.

With regard to the alleged settlement claim of Allison antedating the application of the Governor for the survey of the township in question, the concurring decisions of your office and the local officers respecting the quality of that claim is affirmed after a very careful

examination of the record, which fully supports the finding made and the conclusions arrived at.

It has been suggested in the progress of this case that the tract of land in question being among those restored to the public domain for disposal under the act of May 1, 1888 (25 Stat., 113, 133), the same is not subject to the selection by the State of Montana, independently of any claim of Allison thereto, because of that portion of section 3 of said act wherein it is provided that these lands—

are a part of the public domain of the United States and are open to the operation of the laws regulating homestead entry, except section 2301 of the Revised Statutes, and to entry under the town site laws and the laws governing the disposal of coal lands, desert lands, and mineral lands; but are not open to entry under any other laws regulating the sale or disposal of the public domain.

This matter has before been the subject of departmental consideration in connection with clear list No. 1, Greatfalls, Montana, school land indemnity, in respect to which it was said in departmental decision of July 5, 1906 (L. and R. Press Copybook No. 579) :

With regard to the question as to whether the lands formerly within the Gros Ventre and other Indian reservations, restored to the public domain for disposition in the manner provided by the act of May 1, 1888, *supra*, are subject to indemnity school land selection, when viewed in the light of the fact that the enabling act was not passed until February 22, 1889 (25 Stat., 676), by the 19th section of which it was provided "that all lands granted in quantity or as indemnity by this act shall be selected under the direction of the Secretary of the Interior from the surveyed, unreserved, and unappropriated public domain of the United States within the limits of the respective states entitled thereto," and the provisions of the act of February 28, 1891 (26 Stat., 796), governing generally the selection of school land indemnity, the provisions of the act of March 3, 1893 (27 Stat., 592), and the act of August 18, 1894 (28 Stat., 373), it is the opinion of this Department that such lands are not reserved or appropriated as against selection by the State in satisfaction of its grants in quantity or as indemnity. This, it is learned, is in harmony with the repeated rulings by your office and in no wise conflicts with the holding in the case of State of Utah (30 L. D., 301), for the reason that the lands there in question were subject to disposal under the provisions of the act of July 5, 1884 (23 Stat., 103), and August 23, 1894 (28 Stat., 491), which had provided for an appraisal of the lands before subjecting them to a particular form of entry described in said acts, and required that in the entry they should be paid for at the appraised price, thus, in a sense, appropriating the land.

This fully disposes of the objection made to the State's selection and after a most careful review of the entire case the decisions of your office are affirmed and Allison's application will stand rejected.

## ACCOUNTS—RECEIPTS—VOUCHERS—DISBURSING OFFICERS.

## CIRCULAR.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
Washington, D. C., September 7, 1907.

*Disbursing Officers of the General Land Office.*

GENTLEMEN: In compliance with circular of July 29, 1907, the Comptroller of the Treasury, you are advised that after September 30, 1907, the practice of requiring public creditors to receipt for moneys in advance of actual payment will be discontinued, except where receipts are required either by law or by contract.

Instead of taking a receipt in advance of payment, you will take a bill (signed and certified by the creditor—see Forms 4-665a and 4-665b), the bill or voucher being certified as to correctness by the officer by whom the articles are received or under whose supervision the services are rendered. When paid by check, the check number, date, amount, name of depository, etc., should be noted on the voucher. You will then forward it with your accounts, instead of the receipts now in use.

The vouchers and accounts, after receiving the examination of this office, will be forwarded to the Auditor for the Interior Department, who will compare the vouchers with the checks issued in payment therefor, which will be forwarded to him by your depository. A monthly statement will be furnished you by your depository, showing number and amount of your paid checks, from which you can prepare your statement of balances after comparison with your check stubs.

Disbursing agents will be held to a strict compliance with the terms of circular of July 29, 1907, a careful study of which is imperative.

*Directions for the Use of New Forms 4-665a, 4-665b, and 4-665c.*

See that all blank spaces are filled in, except those for signature of approving officer, which will be omitted.

Place the voucher number on the check, and the check number on the voucher, to facilitate the assemblage of the checks and vouchers by the Auditor.

See that the voucher has the name, title, and address of the disbursing officer on it.

Voucher numbers should be consecutive and continuous during the period for which the account is rendered.

Form 4-665a, "voucher for personal services," is to be used for payment of services of persons employed at a given rate for a given time. In payment of registers and receivers the usual statement, Form 4-637, showing fees and commissions earned will be furnished, with

vouchers relating to said statement attached showing, under head of remarks, on each voucher, "for salary only," or "for salary and fees and commissions," as the case may be. Do not use the receipt at the top of said statement. Receivers will use 4-665*a* as a voucher for their own salary, fees, and commissions. Form 4-665*a* will also be used instead of forms—

4-639, "receiver's voucher for services of clerks."

4-639*b*, "receiver's voucher, when immediate performance is required by the public exigency."

4-665*a*, surveyors-general voucher for services of himself and clerks.

4-665*c*, surveyors-general voucher for services of clerks payable from special deposits.

Form 4-665*b*, "voucher for purchases and services other than personal," is to be used for all purchases, and for services rendered by persons not regular employees of this bureau but paid from an appropriation by check. Form 4-665*b* will also be used instead of forms—

4-641, "receiver's voucher for purchase."

4-641*c*, "receiver's voucher for exigency purchases," by the insertion of the appropriate number and initial.

4-665*d*, "receiver's voucher where testimony is taken by deposition," by insertion of the officer's bill in its appropriate place.

4-640, "receiver's voucher for payment of witnesses," by insertion of witnesses' bill and the certificate of the special agent that "above account is correct and witness appeared by my authority."

4-665*b*, "surveyors-general voucher for purchase."

4-665*e*, "surveyors-general voucher for exigency purchases," by insertion of the proper number or initial.

Form 4-665*c*, "receipt for cash payment," should be used, in connection with the other two forms, when cash payment is made instead of payment by check. It is intended to take the place of the check number, date, etc., at the bottom of vouchers, and should be attached to said vouchers when used in that way.

Form 4-665*c* can also be used instead of 4-641*a*, "receipt for unearned fees and unofficial moneys," when payment is made in cash; when payment of unearned fee and other trust funds is made by check, no voucher is necessary, but receivers will insert in their quarterly abstract, Form 4-103*a*, the number and date of the check by which payment is made.

Form 4-639*a*, and 4-640*a*, "for use of receivers in payment of contest clerks," will be retained. Surveyors-general will use the forms now in use for the payment of their departmental printing and stationery bills, by adding thereto the number of check, date, amount, and name of depositary.

Agents and others not bonded can use the receipts now in use, as the circular applies only to disbursements made from public funds with which a disbursing agent is charged.

Special agents and other field employees will continue to use Form 4-152 for their monthly accounts, omitting to sign the receipt, but if a disbursing agent who is also a field employee pays himself by check, he should give the check number, date, amount, etc., at the bottom of the form instead of the receipt.

Disbursing officers will exercise judgment and care in using the three new forms. It is to their advantage to do so, as in case of error the settlement of accounts will be delayed or the amount in error will be disallowed, in either event causing trouble, loss of time and, perhaps, of money.

Disbursing officers will destroy all voucher forms now on hand made obsolete by this circular, after the receipt of the three new forms, a supply of which, estimated to last six months, will be sent them from the Secretary's office.

Acknowledge receipt of this circular.

Very respectfully,

R. A. BALLINGER,  
*Commissioner.*

Approved September 7, 1907.

JESSE E. WILSON,  
*Acting Secretary of the Interior.*

CONTESTANT—PREFERENCE RIGHT—ACT OF MAY 14, 1880.

TAYLOR ET AL. *v.* GRAVES.

The preference right of entry accorded a successful contestant by the act of May 14, 1880, is in the nature of a reward to an informer and is not earned until the entry is canceled as the result of the information furnished.

The preference right of entry is not earned by a collusive informer who does not act in good faith but assumes the position of an informer for the purpose of protecting the entry from *bona fide* attack until the entryman can sell a relinquishment.

The preference right of entry of a successful contestant is not a right in the land which he may transfer to another, but is purely personal to the informer and not assignable.

The preference right of entry, in a case where the senior contestant withdraws his contest, will, as between two junior contestants, be awarded to the junior-junior contestant who successfully prosecutes his contest, where the senior-junior contestant was afforded an opportunity to prosecute his contest but failed to do so.

*Acting Secretary Woodruff to the Commissioner of the General Land*  
(S. V. P.) *Office, September 7, 1907.* (J. R. W.)

Isaac D. Taylor and George F. Marston each appealed from your decision of September 15, 1906, awarding to Charles M. Graves

preference right to enter the NE.  $\frac{1}{4}$ , Sec. 29, T. 21 N., R. 22 W., I. M., Woodward, Oklahoma.

July 30, 1903, Michael C. Sawyer filed a contest affidavit charging abandonment by his daughter Bessie of her then existing entry.

August 1 and September 27, 1903, respectively, Isaac D. Taylor and Charles M. Graves filed contest affidavits making the same charge and that the first contest was collusive, applying to intervene therein. October 26, 1903, before action on the junior contests, Michael Sawyer, after due notice, submitted testimony, and February 14, 1904, before decision of the local office in his case, dismissed and filed waiver of preference right. At the same time relinquishment of the entry was filed and Marston applied for entry.

March 19, 1904, Graves applied for entry, filing affidavit claiming right superior to Taylor and Marston. The local office held a hearing. Taylor appealed from that order, submitted no testimony, and claimed that on his then senior contest he was entitled to notice of preference on the presumption that the relinquishment was result of his contest. The local office found on evidence adduced by Graves that Marston purchased Bessie's relinquishment and caused its filing, the price being not payable until Marston got an entry, and that the relinquishment was not result of any contest; that Bessie married prior to Graves's contest, and abandoned her entry to reside with her husband, who had an existing entry; that the senior contest was collusive to protect Bessie's entry. Upon such facts the local office recommended that Graves's entry be allowed. Marston and Taylor each appealed to your office. Your decision held that the order for hearing, being interlocutory, was not appealable; that as the evidence showing the senior contest was collusive, to protect the entry after abandonment, was adduced by Graves, who prosecuted while Taylor failed to do so, the preference right was due to Graves and not to Taylor; that Marston's application, though first in time after cancellation of the entry, was subject to the preference right of the successful contestant. The action of the local office was affirmed.

Marston shows that Michael C. Sawyer earned a preference right in his contest by submitting proof of Bessie Sawyer's abandonment, and from that argues:

Does it make any difference to the government what is done with the preference right after it has been earned if the earning is free from fraud?

The error here lies in the condition annexed—"if the earning is free from fraud." The local office finding negatived that condition, and on the contrary found that the contest was collusive, for protection of the abandoned entry from any real hostile attack, and to preserve it until a relinquishment could be sold—that is, merely to protect the entry with view to sale of a relinquishment of it. Its purpose was to defeat the object aimed at by the act of May 14, 1880 (21

Stat., 140), and not to promote it. It is well settled that the preference right is in the nature of a reward to an informer and not earned until the entry is canceled on such information. *Strader v. Goodhue* (31 L. D., 137, 138); *McCraney v. Hayes's Heirs* (33 L. D., 21, 24-5); *Stevenson v. Scharry* (34 L. D., 675, 678). It is from this principle obvious that a reward is not earned by a collusive informer who does not act in good faith, but assumes position of an informer for protecting the entry from *bona fide* attack until the entryman can sell a relinquishment. *Graham v. Ferguson* (19 L. D., 426).

Another fallacy inheres in Marston's position, viz: that the preference right, earned in good faith, is a right in the land which he may assign and transfer to another. On the contrary, the preference right is purely personal to the informer, not assignable. *Tillinghast v. Van Houten* (15 L. D., 394). Any entry or application made during the preference period is made with notice of the preference right and subject to determination and award of it.

Taylor's appeal contends that on dismissal of Sawyer's contest his own became senior, and that the relinquishment must be presumed to be caused by it. Presumably it was caused by the senior contest, dismissed at the same time it was filed. Both Taylor and Graves had initiated junior contests alleging fraud and collusion in the senior one, which charge, if proved, would defeat the senior contestant of his reward and give the *bona fide* informant the reward for cancelation of the entry. Proof both of abandonment by the entryman and of collusion of the senior contestant were necessary to give a junior contestant the preference right, which, on face of the record, was presumably due to the senior contestant. Both junior contestants were given opportunity. Taylor failed to avail himself of it, electing to stand on a supposed presumption, which did not in fact arise, but was rebuttable if it had existed. Graves availed himself of the opportunity, proved both the charge of abandonment and that of collusion, and earned the preference right. The course of the local office and your decision were both without error. Your decision is affirmed.

**HOMESTEAD ENTRY—DISQUALIFICATION—OWNERSHIP OF LAND—  
CONTRACT OF PURCHASE.**

**MATHISON v. COLQUHOUN.**

The disqualification imposed under the homestead law on one who is the proprietor of more than 160 acres of land, does not extend to one who at the time of making entry holds lands under a contract of purchase, where at the time the contract was entered into and at the date the entry was allowed the contractor was not the owner of, had no interest in, or power over the title to the lands he assumed to sell; and the fact that he subsequently becomes the owner thereof can in no wise affect the qualifications of the entryman at the date the entry was made.

*Acting Secretary Wilson to the Commissioner of the General Land*  
(S. V. P.) *Office, September 12, 1907.* (J. R. W.)

Kenneth M. Colquhoun appealed from your decision of February 26, 1907, canceling his homestead entry for the SE.  $\frac{1}{4}$ , Sec. 20, T. 143 N., R. 80 W., Bismarck, North Dakota.

May 3, 1902, Colquhoun made entry, against which Mathison filed contest affidavit October 28, 1905, alleging that Colquhoun was at time of his entry proprietor of more than one hundred and sixty acres and disqualified to make entry.

April 10, 1906, the parties appeared before the local office and stipulated some of the facts. The entryman testified in his own behalf. The local office found the charge proven and recommended cancellation of the entry. You affirmed that decision.

It is admitted by stipulation filed that Colquhoun at time of his entry held under one W. D. Washburn four land contracts—all in substantially the same form—each in substance that Colquhoun agreed to purchase of Washburn one hundred and sixty acres in the same township as his homestead, paying \$192 in hand and to pay the balance with 6% interest in three annual payments, or sooner at Colquhoun's option, time being made the essence; that the possessory right remained in Washburn; that Colquhoun's possession till full payment was merely that of tenant, and on any default all payments made were forfeited as rent. On full performance by Colquhoun Washburn agreed to convey the land to him by deed with warranty of title.

Abstracts of title to the lands so sold show it was not in Washburn, but passed by patent of the United States to the Northern Pacific Railroad Company, which before that time mortgaged its grant to secure payment of its bonds. Foreclosure was brought for default of the mortgage, and such proceedings were had that title by deeds of the special master and receivers and railroad company passed to the Northern Pacific Railroad Company, September 22, 1899, which mortgaged them to secure payment of \$130,000,000 bonded debt. December 2, 1902, the railway company conveyed the land to Washburn, and February 18, 1903, the mortgage last mentioned was released. Washburn, November 26, 1902, assumed by warranty deed to convey it to Colquhoun, so that Washburn's title by force of the covenant of warranty inured to Colquhoun, who, December 2, 1902, became owner, subject to the Mercantile Trust Company mortgage afterward released, and now has title free of such lien.

There is nothing in the record showing that Washburn at time of making his contract had any right or interest in the land he assumed to sell. It is true that the Department holds that one purchasing land under a contract giving him right to acquire title, acquisition of which depends only on his own performance or default, is owner

of such land and proprietor of it within the meaning and intent of section 2289 of the Revised Statutes. It was so held in *Smith v. Longpre* (32 L. D., 226). But in that case Longpre held his contract of purchase from the holder of legal title, acquisition of which depended solely on himself. The Union Pacific Railway Company, having itself legal title, contracted to convey to him upon payment of the purchase price. The right to a title could be lost or defeated only by Longpre's own default. He could enforce it by an action of specific performance if his vendor refused to convey after performance or tender by himself. The same was true in *Boyce v. Burnett* (16 L. D., 562).

This was not Colquhoun's situation. So far as anything in the record discloses, his vendor, Washburn, was complete stranger to the title, with no interest in it or power of disposal of it. A contract like that of Washburn's implies a representation that he has and is able to convey perfect title unincumbered. In *Washington et al. v. Ogden* (1 Black, 450, 456), a contract of sale agreeing merely "to deliver a deed of the property" was sued upon by the vendor without averment that he held and was able to convey a title. Plaintiff was defeated on demurrer to his complaint, and the court held:

It is true the words of the covenant are "that he will make a deed" to his vendees. . . . But the meaning of these words in the contract requires that the deed shall convey the land. . . . The legal effect of a covenant to sell is, that the land shall be conveyed by a deed from one who has a good title or full power to convey a good title.

The proof not only fails to show that Washburn had title or power to convey good title, but affirmatively shows he had no title or any power to convey a good title. The fact that Washburn bestirred himself and obtained title so that he made his warranty good does not cure the defect in the evidence or make Colquhoun in equity or law owner or proprietor of the land he contracted to purchase of Washburn at the time that he made his entry. The obtaining of title by Washburn in December, 1902, and February 18, 1903, can not by relation make Colquhoun owner or proprietor of that land May 3, 1902, the date of his entry, so as to work forfeiture of the entry and improvements. Of the doctrine of relation the court in *Johnston v. Jones* (1 Black, 209, 221) held:

It is a legal fiction, invented to promote the ends of justice. It is a general rule that it shall do no wrong to strangers. It is applied with vigor between the original parties, when justice so requires; but it is never allowed to defeat the collateral rights of third persons lawfully acquired.

Again, in *Gibson v. Chouteau* (13 Wall., 92, 101):

The doctrine of relation is a fiction of law adopted by the courts solely for the purposes of justice and is only applied for the security and protection of persons who stand in some privity with the party that initiated proceedings for the land, and acquired the equitable claim or right to the title.

Again, in *Hussman v. Durham* (165 U. S., 144, 148) :

In order to protect a title or to attain the ends of justice, the courts will, under the doctrine of relation, which is a fiction of law, hold that a title began at the date of an entry or location upon the public lands. But this doctrine can not be invoked to burden the holder of a title.

Again, in *Bear Lake Irrigation Company v. Garland* (164 U. S., 1, 23) :

This doctrine of relation . . . is a fiction only. It is indulged in for the purpose of thereby cutting off intervening adverse claims of third parties against the right or title set up and acquired by the first possessor. It will not be indulged in for the purpose of thereby effecting an injustice.

Nothing in the record shows that Washburn at date of his contract was owner of the land he assumed to sell, or had power over the title and could convey title to it. It follows that by purchase from Washburn, stranger to the title, Colquhoun did not in legal or equitable aspect become owner or proprietor of it. This bearing of the evidence seems to have escaped notice.

Nor was Colquhoun estopped, as suggested by your decision, to question the title of Washburn, who assumed to sell to him. He could have defended suit by Washburn against him for the purchase price, as the purchaser successfully did in *Washington et al. v. Ogden, supra*. As to his adversary, Mathison, there was no obligation of conscience to close his mouth against speaking the truth as to the condition of title to the Washburn lands at time of his entry. He owed contestant no duty that prevented his showing Washburn's lack of title. One is not owner of lands purchased of another who has no title nor any power to convey title. *Mantle v. McQueeney* (14 L. D., 313, 314).

Your decision is reversed and the contest dismissed.

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**TOWNSITE—PRE-REQUISITE URBAN OCCUPANCY—SECTION 2387, R. S.**

**TOWNSITE OF CEMENT.**

Section 2387 of the Revised Statutes provides for townsite entry thereunder only of land upon which there is actual urban settlement, occupancy and use, and does not contemplate that promoters of prospective towns may, with speculative intent, in advance of urban settlement and use, enter upon and partition open and unsettled public lands, with a view to establishing a town thereon.

*Acting Secretary Wilson to the Commissioner of the General Land*  
(S. V. P.) *Office, September 16, 1907.* (J. R. W.)

Albert Gerrer and eighteen others appealed from your decision of May 15, 1907, canceling entry of the townsite of Cement for lot 1,

S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , and NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , 239.89 acres, Sec. 3, T. 5 N., R. 9 W., I. M., Elreno, Oklahoma.

February 24, 1902, the probate judge of Caddo county, Oklahoma, made on information and belief a declaratory statement, sworn before the receiver of the local office, that townsite settlement and improvement existed on the SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$  and NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , then covered by an entry relinquished as to this land March 1, 1902; that it had been surveyed and platted "according to the settlements, occupations and uses of the inhabitants thereof," and that he "has been requested by the parties in interest to enter said lands" under section 2387 of the U. S. Revised Statutes. March 3, 1902, he made before the receiver a like statement as to the other lands, above described, theretofore embraced in an entry that day canceled. Both declarations were based upon an undated, unverified petition purporting to be signed by fifty-eight "inhabitants and occupants of the town of Cement situated on parts of Sec. 3," &c., representing that "said town has more than one hundred and fifty inhabitants and occupants and is rapidly increasing in number." It does not purport to express the wish of a majority of the town inhabitants or lot occupants.

April 15, 1902, after notice given, proof of which is informal and defective, the judge submitted townsite proof at the local office and received final cash receipt. The three proof witnesses were, the probate judge, Frank E. Rickey, of Elreno, and L. G. Hamilton, who gave his residence as Cement, though your decision found that he did not in fact reside there. February 10, 1905, you suspended the entry upon report of a special agent of its fraudulent character.

August 7, 1905, the President of the Board of Trustees of the Town of Cement, on behalf of the occupants and residents, filed a corroborated contest affidavit alleging the entry was made under false and fraudulent representations and for private speculation by F. E. Rickey, E. E. Blake, C. O. Blake, L. G. Hamilton, and others; also the same day Boley F. Key filed a contest against the entry, with application for homestead of the S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$  and NE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 3, included in the townsite entry, charging that the NE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$  was never occupied since the entry, and had been conveyed as an entirety; that the S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$  had but nine occupants, with shanties and dug-outs, was otherwise vacant and unimproved, and was conveyed by blocks to persons who never had settlement or improvement thereon.

December 13, 1906, after dilatory proceedings immaterial here, and a hearing, the local office found the entry was made for speculation of townsite promoters, recommended its cancellation, and that the town authorities be permitted to make entry for benefit of the occupants and inhabitants. You affirmed that action.

The numerous assignments of error are aimed rather at your conclusions upon the facts clearly shown by the testimony, than error

of fact. The evidence shows that some time before the entry the Acme Cement-Plaster Company, under management of L. G. Hamilton, got control of a deposit of mineral suitable for manufacture of cement-plaster, near the present town. Hamilton conceived the scheme of establishing a town and associated F. E. Rickey, C. O. Blake and E. E. Blake with him for that purpose. The Blakes were practicing lawyers at Elreno and Rickey a real estate man and promoter at Apache. Before selecting a site they met at Chickasha, adopted a plan and made agreement with C. G. Jones, then building a railroad through the region, whereby they would convey to him half the lots in the future townsite and he build a depot and switchyard at the point they agreed upon. They also agreed to deed the plaster company a fourth of the lots selected by it, it agreeing to build there a mill. They then selected the land involved as suitable to their purpose, paid William F. Wade \$250 to relinquish his homestead entry as to the SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$  and NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , and agreed to deed him twenty-five lots in the town. They also obtained Woodall's relinquishment of homestead entry for the other lands involved. They then selected and invited about fifteen others, met and camped Saturday evening, March 1, 1902, in the timber near the land to avoid publicity. An engineer located the land corners, and after dark all left their hiding, surveyed the land by moonlight into lots, blocks, streets, and alleys, and proceeded to fence the lots and blocks with posts and wire, placing stones on many of what they considered the more valuable lots. This building of a fence town continued till practically all the town was fenced into blocks. Most of the Saturday campers left Sunday for their homes otherwheres and never returned. Rickey, Hamilton, and two or three others only remained, occupying the tent moved from the camp in the woods to the "town." Rickey testified:

I remained in charge of this work employing men to put up fences, haul stone and continued to wire these blocks for some time after. No one seemed to be interested in my work, no one asked for location, no one took them [lots] . . . . After we wired the business portion of the town we announced we would have an opening, told parties, our friends, that by coming in and paying a sum we considered equal to the cost we would go to and have been to, they could have lots.

Others, termed by him "jumpers," were prevented from taking lots for the reason, given by him, that:

If we [promoters] were not able to direct the occupation of lots on that town . . . . we would fail. . . . . Had the townsite been thrown wide open and had . . . . it been circulated widely and a large number of people went in there and occupied that land the town would have been a failure.

He says invited parties were told to keep the matter "quiet as possible" "because we [promoters] wanted to control as much of that property as we could." The promoters alone "knew anything of the

proposition," and this secrecy they deemed necessary to their plan. He admits the invited parties were not required to pay assessment or expense incident to the town founding. He remained there to prevent those not the promoters' friends from getting lots and to dispose of lots only to such persons as would pay the price fixed. Their object and conduct of the whole matter was to make profit on their investment.

Rickey and Hamilton usurped at once to act as commissioners, to make partial award of lots to supposed occupants, but none were awarded by them or their successors to any but these promoters or their assigns. No lots or blocks were reserved for public purposes as required by act of May 2, 1890 (26 Stat., 81, Sec. 22), nor was paragraph 4, instructions of June 12, 1903 (32 L. D., 156), complied with. No record exists in the probate judge's office of appointment of townsite commissioners, though lists of lots and blocks purporting to show award to persons named were filed by the usurping commissioners. No assessment of sums to be paid for expense of entry, survey, plat, &c., was shown. Soon after the probate judge conveyed all the lots (1965) to forty-eight persons, promoters, or their assigns, 1860 of them being deeded to three persons. One of the promoters testified that according to their original arrangement half the lots were to go to Jones, on account of the depot, a fourth to Hamilton for the cement company, and one-fourth to the three promoters—C. O. Blake, E. E. Blake, and F. E. Rickey; and the deeds later recorded show that plan was carried out.

Section 2387 of the Revised Statutes provides:

Whenever any portion of the public lands have been or may be settled upon as a townsite . . . it is lawful . . . to enter . . . the land so settled and occupied in trust for the several use and benefit of the occupants thereof, according to their respective interests.

Actual urban settlement, occupancy, and use are the clearly stated statutory prerequisites to a townsite entry. Those not existing, the entry is unauthorized and in fraud of the law. *Oakes v. West Reno* (26 L. D., 213, 216); *Caldwell v. Gold Bar Mining Company* (24 L. D., 258, 262-3). Promoters of prospective towns have no right to obtain or cause such entry and agreement in advance of urban settlement and use, to partition land to be so entered, without regard to occupancy and use is essentially fraudulent. The case here presents an avowed pre-existing speculative and fraudulent scheme, in pursuance of which unsettled open land is partitioned and fenced by transient speculative visitors to exclusion of actual urban occupancy and use by real settlers and urban population—these visitors at once dispersing to their homes leaving a conservator to watch their fence "town," unless their fixed price be paid for privilege to settle.

Your decision is affirmed. Should the municipal authorities of the town that has now come into existence seek entry of the land, nothing herein prevents their doing so.

As to contestant Key: If there is actual urban use of the land he seeks to enter, that fact excludes it from homestead entry; otherwise, if no other objection appears, entry under the homestead law may be made.

**STATE SELECTION—SCHOOL LAND—PREFERENCE RIGHT.**

**HOMESTEAD AND TIMBER LAND CLAIMANTS v. STATE OF WASHINGTON.**

Applications to purchase under the timber and stone act presented within sixty days from the date of the filing of the township plat may be accepted and held subject to the exercise by the State of its preference right of selection accorded by the act of March 3, 1893, but no further action should be taken during that period with a view to the allowance of such applications.

The act of February 28, 1891, amending sections 2275 and 2276, R. S., is a general act establishing a uniform rule with respect to the adjustment of school-land grants to the several States and affording each an equal right of indemnity, and supersedes, so far as in conflict, all other laws bearing upon the same subject.

By virtue of the provisions of the act of February 28, 1891, the State of Washington is entitled to receive, on account of its grant in aid of common schools, the lands appropriated in accordance with the provisions of the act of February 26, 1859, in lieu of sections 16 or 36 where such sections were fractional or wanting from any natural cause whatever, and to make selection or location of the lands appropriated on account of the grant in aid of common schools from any unappropriated, surveyed public lands, not mineral in character, within the limits of the State.

The act of March 3, 1893, was intended to preserve the grant in aid of common schools so far as according a preferred right of selection on account thereof, and selections made on account of that grant in furtherance of the provisions of the act of February 28, 1891, are within the contemplation of the act of 1893, without regard to whether the act of 1891 be held to supplement the school grant, as defined in the act of 1889, provide for an exchange of lands, or merely enlarge the limits within which selections may be made in satisfaction thereof.

*Acting Secretary Woodruff to the Commissioner of the General Land Office, September 20, 1907.* (F. W. C.)

The Department has considered the records forwarded with your office letters of March 15 and May 31, 1907, upon appeals filed by the State of Washington, and numerous individual claimants to lands in township 25 north, range 12 west, and township 25 north, range 13 west, Seattle land district, Washington, from your office decision of December 17, 1906.

The subdivisional survey of township 25 north, range 12 west, was made between July 13 and September 2, 1903, and the subdivisional

survey of township 25 north, range 13 west, was made between October 3 and November 2, 1903. The surveys of both townships were approved December 29, 1904, and the plats of survey of said townships were officially filed July 13, 1905, when the lands in said townships became subject to entry, selection, or other disposition under the land laws.

The act of March 3, 1893 (27 Stat., 592), grants to the State of Washington, and other named States—

a preference right over any person or corporation to select lands subject to entry by said States granted to said States by the act of Congress approved February twenty-second, eighteen hundred and eighty-nine, for a period of sixty days after lands have been surveyed and duly declared to be subject to selection and entry under the general laws of the United States: *And provided further*, That such preference right shall not accrue against *bona fide* homestead or preemption settlers on any of said lands at the date of filing of the plat of survey of any township in any local land office of said States.

September 9, 1905, and within sixty days after the filing of the plats of survey, the State of Washington filed school indemnity lists of selections numbered 23 and 24, embracing nearly all the lands in said townships. Prior to the filing of said lists of selections a large number of homesteads was filed in the local land office, based upon settlements alleged to have been made prior to the filing of the township plats of survey, which entries were duly accepted by the local officers and permitted to go of record. A larger number of applications to purchase under the timber and stone act was filed, embracing lands in these townships, upon which the local officers issued notice for publication preliminary to the submission of proof and the allowance of purchase to be made of the lands.

When the State's lists were received at the local land office certain objections thereto were noted in the matter of form and the Commissioner of Public Lands of the State advised thereof. Such matters were sought to be corrected or explained in the answer of that officer filed September 28, 1905. In considering these matters your said office decision of December 17, 1906, states that:

The said lists 23 and 24 were in form similar to all previous lists filed by the State in your office, and the objections urged thereto by the register's letter of September 28 [14], 1905, were evidently ill-considered and have resulted in unnecessary confusion and complications. The lists, so far as the rights of the State thereunder are concerned, will be considered as filed September 9, 1905.

Without taking up the separate claims filed for lands in these townships, it is sufficient to say that your said office decision in disposing of these claims respected and held intact as against the State's selections homestead entries allowed prior to the filing of the State's lists where the same were based upon settlement antedating the filing of the township plats of survey, directed hearings upon such homestead

applications as were filed after the filing of the State's lists where the application was based upon a settlement antedating the filing of the township plat, and rejected all applications to purchase under the timber and stone act, whether presented before or after the filing of the State's lists of selections. Since the case has been pending before the Department counsel representing applicants under the timber and stone act was accorded oral hearing.

Without detailing the formal objections to the State's list as filed, it is sufficient to say that they were not of such character as to avoid the selection and that as filed the selection was such an assertion of claim through the form of selection as protected the State in its preference right granted by the act of 1893. In the further consideration of the case it will be divided into two classes: first, respecting the claims of homesteaders, and second, applications to purchase under the timber and stone act.

#### HOMESTEAD ENTRIES.

In the course of procedure governing the receipt of claims for lands during the preferred right of selection granted the several States by the act of 1893, circular of May 10, 1893 (16 L. D., 462), provided as follows:

During said period of sixty days no person, not claiming in virtue of settlement existing at the date of the filing of the plats, nor corporation, will be allowed to enter the lands subject to selection by the respective States. . . .

The *bona fide* claims of homestead and preemption settlers existing at the date of filing the plats being protected by the law, their claims may be made of record during said period of sixty days in the absence of State selections of record of the lands claimed by them, upon *ex parte* showings of the applicants by affidavit of each applicant that he or she had made *bona fide* settlement prior to the time that the plats had been filed. . . .

In the event that a person makes application during said period for land already selected by the State, alleging settlement thereon existing at the date of the filing of the plat of the township, it will become your duty to order a hearing under practice rules to determine the respective rights of the parties. (James *et al.* v. Nolan, 5 L. D., 526; Baxter v. Crilly, 12 L. D., 684.)

And since the States have a general preference right to select within said period, you will take the same course, in the event that they present lists of selections, and urge their acceptance as to tracts already covered by the actual entries of alleged settlers.

The States in such instances will be required to attack the entries by affidavit of their authorized agents, duly corroborated, denying the existence of *bona fide* settlement on the part of the entry men prior to filing of the plat in each case or alleging that the settlers were not legally qualified to make settlement.

The second paragraph of the regulations just quoted clearly authorizes the allowance of homestead entries presented during the period of sixty days following the filing of the township plat of survey, upon the *ex parte* showing of the applicant alleging settlement prior to the filing of the township plat. It is this feature of the case alone

that is covered by the State's appeal from your said office decision. The contention on the part of the State is that the filing of its list within the period of sixty days following the filing of the township plat, is sufficient to put in contest entries previously allowed without requiring of the State the filing of specific affidavits attacking the claim of settlement as alleged or questioning the qualifications of the applicant in each instance. It is urged in the present case that as the number of tracts involved is large, to limit the State to the time accorded by the statute would not permit of the making of such examination as would enable it to file counter-showing in all the cases it might desire to object to.

About the time the State's appeal was filed there was also filed what purports to be an order approved by the Board of State Land Commissioners, for the relinquishment of all claim under its selection as to the land embraced in but six (being but a very small part) of the entries in question, the order being described as based upon the report of certain named State land inspectors respecting the character of settlement and improvements made and maintained upon these lands. The nature of said report respecting any of the other homestead entries in question, if such were made, is not with the papers nor does it accompany the relinquishment, and no other showing has been filed on behalf of the State in anywise questioning the *bona fides* of any of the homestead claims involved.

When it is remembered that these lands were surveyed in the summer and fall of 1903, after which time they were capable of identification in the field; that the official plats were not filed until July, 1905; that the lands were undoubtedly cruised and examined by the agents of the State before the lists of selection were filed, or should have been so examined if objection was intended to be made to any of the claims being asserted thereto by reason of settlement or occupancy; and that the State is chargeable with notice of the circular of 1893, no good reason appears why further time should be accorded the State to object to the sufficiency, in any particular, of these homestead claims, and your office decision, in so far as it respected and approved of the allowance of said homestead claims, is hereby accordingly affirmed and the selections to that extent rejected. Respecting those homestead applications presented after the filing of the State's lists based upon settlement antedating the filing of the township plat of survey, no further consideration need be given them at this time, the decision appealed from having provided for a hearing, of which the State will be duly advised.

#### TIMBER AND STONE APPLICANTS.

The first paragraph of the circular of May 10, 1893, above quoted, clearly inhibits the allowance of an application to purchase under the

timber and stone act presented during the sixty days preference right of selection granted the State, and the local officers, while they might have accepted such applications, holding them in suspension for consideration upon the expiration of such period, where no selection was made, were clearly in error in issuing notice for publication or otherwise recognizing such applications during that period.

On behalf of the timber and stone claimants it is insisted, however, that the State's selection can not be respected and accorded precedence over prior applications to the extent that the same rests upon the act of February 28, 1891 (26 Stat., 796), for the reason that the preference right granted by the act of 1893 is made only in furtherance of the grants made to the several named States by the act of February 22, 1889 (25 Stat., 676), commonly known as the Enabling Act, specifically that section 10 of the act of 1889, making the grant in aid of common schools, limits the indemnity selections to legal subdivisions of not less than one-quarter section "and as contiguous as may be to the section in lieu of which the same is taken;" that the selections contained in these lists are all outside of any fair requirement of contiguity, consequently must rest for their validity upon the provision of the act of February 28, 1891, *supra*, and that as the act of 1889 makes no provision for indemnity where a school section is fractional or for any reason wanting, to that extent the selection rests upon the grant of 1891; and further. to that extent is a new grant under a later act.

The act of March 2, 1853 (10 Stat., 172), establishing the territorial government of Washington, "reserved for the purpose of being applied to the common schools in the territory" sections 16 and 36, and in all cases where said sections "or either or any of them" shall be occupied prior to the survey thereof, the county commissioners for the counties where the land was situated were authorized to locate other lands to an equal amount in lieu of sections so occupied.

By the act of February 26, 1859 (11 Stat., 385), other lands were—appropriated to compensate deficiencies for school purposes where said sections 16 or 36 are fractional in quantity or where one or both are wanting by reason of the township being fractional or from any natural cause whatever: *Provided*, That the lands by this section appropriated shall be selected and appropriated in accordance with the principles of adjustment and the provisions of the act of Congress of May twentieth, 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."

This was a general act applicable to all the States and Territories. It has been uniformly so administered and many tracts had been reserved through selection made by the territorial authorities in lieu of fractional townships, prior to the passage of the Enabling Act of 1889.

It may be here noted that by the terms of the act of 1826 selections were to be made "out of any unappropriated public land within the land district where the township for which any tract is selected, may be situated." The provision in the Enabling Act making the grant to the new States in support of common schools, is found in the tenth section and provides as follows:

That upon the admission of each of said States into the Union, sections numbered sixteen and thirty-six in every township of said proposed States, and where such sections or any part thereof have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one-quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said States for the support of common schools—such indemnity lands to be selected within said States in such manner as the legislature may provide, with the approval of the Secretary of the Interior.

It will be noted that said section makes no specific provision indemnifying the State for losses by reason of fractional townships or where a section 16 or 36 is wanting from any natural cause whatever; further, that the indemnity selections are required to be made in legal subdivisions of not less than one-quarter section and as contiguous as may be to the section in lieu of which the same is taken. The question as to the effect of this omission upon the reservation provided for in the act of 1859 in lieu of fractional townships or where section 16 or 36 was for any cause wanting, was considered by this Department prior to the passage of the act of February 28, 1891, and it was held that such omission did not restrict or nullify that provision in the act of 1859. *L. H. Wheeler* (11 L. D., 381); *Levi Jerome et al.* (12 L. D., 165). It may be, therefore, as held by your office decision, that had the act of 1891 never been passed, the State of Washington, by virtue of its admission, would have taken title to lands appropriated by the act of February 26, 1859. Be this as it may, the act of February 28, 1891, *supra*, amending sections 2275 and 2276 of the Revised Statutes, incorporated anew the same provision respecting indemnity school land selections and was passed for the purpose of establishing a uniform rule with respect to the adjustment of the school land grant in the several States and of affording to each an equal right of indemnity. It was a general adjustment act and superseded, so far as in conflict, all other laws bearing upon that subject.

Section 2275 of the Revised Statutes, as amended by said act, provides:

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 16 or 36 are fractional in quantity or where one or both are wanting by reason of the township being fractional or from any natural cause whatever.

Section 2276 of the Revised Statutes, as amended by said act, provides:

That the lands appropriated by the preceding section shall be selected from any unappropriated, surveyed public lands, not mineral in character, within the State or Territory where such losses or deficiencies of school sections occur.

It results that the effect of the act of 1891 upon the school grant to the State of Washington was to make clear that the new State was to receive on account of its grant in aid of common schools, those lands appropriated in accordance with the provisions of the act of 1859, in lieu of sections 16 or 36 where such sections were fractional or wanting from any natural cause whatever, and to authorize the selection or location of those lands appropriated on account of the grant in aid of common schools, from any unappropriated, surveyed public lands, not mineral in character, within the limits of the State.

Other provisions made by the act of 1891 respecting the adjustment of the school grant apply equally to the State of Washington and are involved herein, notably, the provision making immediately available to the State the grant so far as the lands fell within any Indian, military or other reservation, without awaiting the extinguishment or termination of such reservation, through the selection of other lands in lieu thereof.

The act of 1893 was clearly intended to preserve the grant in aid of common schools so far as according a preferred right of selection on account thereof, for that grant was made to the new State by the act of 1889, and selections made on account of that grant in furtherance of the provisions of the act of 1891, are within the contemplation of the act of 1893, without regard to the question as to whether the act of 1891 be held to supplement the school grant, as defined in the act of 1889, provide for an exchange of lands, or merely enlarge the limits within which selections may be made in satisfaction thereof. A different question would be presented had the adjustment act been passed after the act of 1893.

The selections in question are in strict conformity with the act of 1891 and the objections advanced to their validity by the timber and stone claimants are hereby overruled. In so far, therefore, as your office decision respecting these selections accorded them precedence over the timber and stone applications proffered during the sixty-day period following the official filing of the township plat, the same is also accordingly hereby affirmed.

Objection to recognition of the State's selection was filed by the Board of County Commissioners of Jefferson County upon the ground that the county is in debt and in need of revenue which would immediately accrue from taxes on these lands were they disposed of under the timber and stone act, while if they pass to the State they may

not be available for taxation for many years. Your office rightly overruled this protest, from which action no appeal appears to have been taken. A further protest as to a large portion of the lands was noted on behalf of the Washington and Wisconsin Land Company and the Pacific Land and Oil Company, corporations incorporated under the laws of Washington, who claim certain interests by reason of the location of a portion of the lands because of supposed oil deposits and the expenditure of more than \$20,000 in the development thereof. Respecting this protest your office decision states that in view of the allegation contained therein it will be made the basis for a hearing hereafter to be ordered, and in view thereof no opinion is expressed respecting the validity of the selections in question further than that they are entitled to the protection accorded by the act of 1893, by way of preference over the prior claims asserted to the land by reason of the timber and stone applications before referred to.

Upon the whole the decision of your office was in all respects correct and is hereby affirmed.

**HOMESTEAD ENTRY—ADDITIONAL—SECTION 6, ACT OF MARCH 2, 1889.**

**GRAHAM v. HARTMAN.**

Section 2289 of the Revised Statutes, according the right to make homestead entry for not exceeding 160 acres of land, contemplates but one entry under its provisions, and there is no authority for the exercise of this right piecemeal.

The right of additional entry accorded by section 6 of the act of March 2, 1889, is limited to persons "entitled, under the provisions of the homestead law, to enter a homestead;" hence one who is the owner of more than 160 acres of land is not entitled to make entry under said section.

*Acting Secretary Woodruff to the Commissioner of the General Land*  
(F. W. C.)                      *Office, September 24, 1907.*                      (G. A. W.)

Albert S. Hartman has appealed from your office decision of May 4, 1907, affirming the action of the local officers and holding for cancellation his homestead entry No. 34513, for the NW.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 20, T. 156 N., R. 70 W., Devils Lake, North Dakota, land district, upon the contest of Richard Graham.

February 6, 1906, Hartman made homestead entry for the 40-acre tract above mentioned. July 25, 1906, Graham filed affidavit of contest against said entry, charging that Hartman was not a qualified entryman, for the reason that at the time he made the entry in question he was the owner of 280 acres of land in Benson County, North Dakota.

At the hearing before the local officers, the following statement of facts was agreed upon by stipulation between counsel for contestant and contestee:

That at the time Albert S. Hartman made H. E. 34513, on February 6, 1906, . . . he was the owner of two hundred and eighty acres of land.

It appears from the record that 120 acres of Hartman's land represented public land of the United States upon which he had made entry, under the general homestead law, in March, 1899, submitting final proof April 2, 1904, while the remaining 160 acres was held by title derived elsewhere.

The local officers found defendant not qualified to make the additional entry in question, and their action was affirmed by your office. Defendant has appealed to this Department.

Counsel for Hartman, in his brief, contends that:

Defendant's entry papers . . . do not refer to the act of 1889, or to any other act of Congress except section 2289 of the United States Revised Statutes. The entry was made under such section, just as the original entry was made, and accordingly the two should be taken and considered together as one appropriation of public lands.

There is no authority for the making of a second or additional entry under section 2289 of the Revised Statutes upon the same terms and conditions, and those only, as the first entry was made. One is not permitted to exercise his right to 160 acres of public land piecemeal, and have the aggregate considered and treated as one appropriation of the public lands. Were this the case, there would have been no occasion for the enactment of legislation permitting additional entries.

On its face, Hartman's application appears to be under section 2289 of the Revised Statutes, but, as above stated, there is no authority for the allowance of his entry under that section. The only authority, if any, under which Hartman is qualified to make additional entry, is section 6 of the act of March 2, 1889 (25 Stat., 854). Is he qualified under that section? Said section, omitting portions in no wise material to the consideration of this case, reads as follows:

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.

It will be observed that the privilege granted by this section is limited to "every person entitled, under the provisions of the home-

stead laws, to enter a homestead." Section 2289 of the Revised Statutes as amended by the fifth section of the act of March 3, 1891 (26 Stat., 1095), prescribing the qualifications of entryman, contains the following:

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.

These statutes stand *in pari materia*, and the provisions of both must be met by an applicant to make additional entry under section 6 of the act of March 2, 1889. (See case of Sarah J. Walpole, 29 L. D., 647.)

That one can change his status, so that, although once qualified to make entry under the homestead laws, he may become disqualified, has repeatedly been held by the Department. See Sarah J. Walpole, *supra*; Smith *v.* Longpre, 32 L. D., 226; Arthur J. Abbott, 34 L. D., 502.

By the acquisition of 160 acres of land in addition to his original homestead of 120 acres, Hartman has, by his own act, placed himself in a position where he can not obtain title to an additional 40 acres of public land under section 6 of the act of March 2, 1889.

Your office decision is affirmed.

#### REPAYMENT—DESERT LAND ENTRY—CONFLICT WITH RAILROAD GRANT.

ROBERT H. ROBINSON.

Notwithstanding an entry may have been erroneously allowed because of conflict with the grant to the Northern Pacific Railway Company, yet if susceptible to confirmation, at the election of the entryman, under the provisions of the act of July 1, 1898, as extended by the act of May 17, 1906, and he fails to exercise his election and the entry is canceled, repayment of the purchase money paid for the land is not authorized.

*Acting Secretary Woodruff to the Commissioner of the General Land*  
(F. W. C.) *Office, September 24, 1907.* (C. J. G.)

An appeal has been filed by Robert H. Robinson from the decision of your office of July 12, 1907, denying application for repayment of the purchase money paid by him on desert-land entry for the SE.  $\frac{1}{4}$  of Sec. 35, T. 4 N., R. 24 E., The Dalles, Oregon.

The entry was made February 19, 1903, and canceled February 2, 1907. Repayment is claimed on the ground that said entry was in conflict with the grant to the Northern Pacific Railroad Company, and therefore an entry erroneously allowed and that could not have been confirmed within the purview of the repayment act of June 16, 1880 (21 Stat., 287).

The act of July 1, 1898 (30 Stat., 597, 620), provided that where, prior to January 1, 1898, any part of an odd-numbered section, in either the granted or indemnity limits of the grant to the Northern Pacific Railroad Company, to which the right of the grantee 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 refused to transfer his entry as in the act provided, the railroad grantee, upon a proper relinquishment, should be entitled to select an equal quantity of land in lieu of that relinquished. Thereafter the tract so relinquished was to be treated as if no railroad right thereto had ever attached, and the person claiming said tract in good faith as aforesaid was to be permitted to prove his title according to law as if no railroad grant had ever been made.

The entry in question was not made prior to January 1, 1898, but the provisions of the act of July 1, 1898, *supra*, were, by the act of May 17, 1906 (34 Stat., 197), extended to include any *bona fide* settlement or entry made subsequently to January 1, 1898, and prior to May 31, 1905, "where the same has not since been abandoned." As this entry was not canceled until February 2, 1907, it was included in the act of May 17, 1906. Your office states that the entryman was afforded opportunity to exercise his election under said act, but that he failed to take any action whatever. It is alleged in the appeal that he had practically abandoned the land prior to the act of May 17, 1906. There is nothing in the record, however, to substantiate this claim.

From the facts disclosed in this case it is concluded that notwithstanding the entry may have been erroneously allowed as being in conflict with the grant to the railroad company, it was nevertheless one that could have been confirmed under legislation passed at a time when the entry was still intact. The matter of confirmation was, so far as the land department is concerned, placed entirely within the control of the entryman, said department standing ready to sustain his election to retain the land upon a proper showing. The facts, so far as shown, do not present a case where repayment is authorized.

The decision of your office herein is affirmed.

## MINING CLAIM—EXPENDITURE—COMMON IMPROVEMENTS.

## MOUNTAIN CHIEF No. 8 AND MOUNTAIN CHIEF No. 9 LODE MINING CLAIMS.

The owner of a group of contiguous mining claims and of an improvement constructed for their common development and effective to that end, and of sufficient value for patent purposes as to the entire group, may, instead of embracing all the claims in one application for patent, apply for and obtain patent to a portion of such claims, based upon their due share or interest in the common improvement; and a subsequent break in the common ownership by a sale or other disposition of one or more of the patented claims, or of any interest therein, would constitute no bar to later patent proceedings for the remaining claims of the group based upon their due share or interest in the same common improvement.

There is no authority of law for the apportionment of an improvement made for the development of two or more mining claims held in common so as to apply arbitrary fractional portions thereof, for patent purposes, exclusively to the use of individual claims or sets of claims of the group.

Cases of Copper Glance Lode, 29 L. D., 542, and James Carretto and Other Lode Claims, 35 L. D., 361, cited and followed.

*Acting Secretary Woodruff to the Commissioner of the General Land (F. W. C.) Office, September 28, 1907. (A. B. P.)*

This is an appeal by James K. Shaw and George Hirsch from your office decision of January 23, 1907, holding for cancellation their entry, made December 29, 1905, for the Mountain Chief No. 8 and the Mountain Chief No. 9 lode mining claims, survey No. 5406, Salt Lake City, Utah, on the ground of insufficient showing in the matter of improvements for the benefit of the claims.

The certificate of the surveyor-general taken in connection with the report of the mineral surveyor who surveyed the claims shows that the improvements relied on to support the entry consist of the last 167.4 feet of a tunnel, commencing 754.3 feet from the mouth thereof; the stated portion being valued at \$1,600. With respect to this tunnel the mineral surveyor states as follows:

This tunnel is in course of construction for the development of this claim and Surs. Nos. 4131, 4132, 4133, 4134, 4135, and 5405, Joseph, Zephyr, Mountain Chief No. 2, Mountain Chief No. 5, Mountain Chief No. 6, and Mountain Chief No. 7 lodes, respectively; also for Lot No. 476, Rosa lode, all adjoining claims belonging to these claimants and forming a compact piece of mining ground.

The first, second, third, fourth, and fifth 60 ft. of this tunnel have been applied to Surs. Nos. 4131, 4132, 4133, 4134, and 4135, Joseph, Zephyr, Mountain Chief No. 2, Mountain Chief No. 5, and Mountain Chief No. 6 lodes, respectively, all owned by these claimants.

The 83 ft. of this tunnel commencing 671.3 ft. from mouth have been applied to Sur. No. 5405, Mountain Chief No. 7 lode, owned by these claimants. The remainder of the tunnel is yet unapplied upon any claim.

This is the same tunnel designated in the records of said previous Surs. Nos. 4131, 4132, 4133, 4134, and 4135 as the "Rosa tunnel."

By informal inquiry at your office it is learned that the Rosa claim was patented August 17, 1893, upon alleged improvements valued at \$860, consisting of a shaft and drift; that the Mountain Chief, the Joseph, the Zephyr, the Mountain Chief No. 2, the Mountain Chief No. 5 and the Mountain Chief No. 6 were patented, all in one proceeding, August 2, 1901, upon a showing of improvements stated to consist of a tunnel on the Mountain Chief valued at \$1000, and of 60 feet of the Rosa tunnel as to each of the claims except the Mountain Chief, valued in each instance at \$600, aggregating for the five claims 300 feet of said tunnel valued at \$3,000; and that the Mountain Chief No. 7 was patented June 30, 1906, the stated improvements being 83 feet of the said tunnel, commencing 671.3 feet from the mouth thereof, valued at \$800.

A calculation based on the above figures and those given in the mineral surveyor's report shows that the Rosa tunnel is 921.7 feet in length; that 383 feet thereof have been applied in the other patent proceedings mentioned; and that aside from the 167.4 feet relied on to support the present proceedings, there remain 371.3 feet, represented as "unapplied upon any claim."

It appears that the Rosa tunnel runs in a southerly direction and is situated entirely within the Rosa claim; that the Rosa, the Mountain Chief No. 6 and the Mountain Chief No. 7 lie side by side to the north of the other claims mentioned; and that the Mountain Chief No. 8 and the Mountain Chief No. 9, embraced in the entry here in question, lie in south-easterly and southerly directions, respectively, from the Rosa claim and from the said tunnel, being separated from the tunnel by the Zephyr and Mountain Chief claims.

The two claims here in question were located, respectively, as follows: the Mountain Chief No. 8, November 8, 1902, and the Mountain Chief No. 9, December 13, 1902, many years after the patent to the Rosa claim, and more than a year after the patent to the Mountain Chief, Joseph, and other claims. It is shown that the 167.4 feet of the tunnel here relied on were constructed after December 13, 1902.

The decision of your office is based upon the fact, admittedly shown by the record, that the patented Joseph, one of the group of contiguous claims (including those here in question) for the benefit of which the Rosa tunnel appears to have been constructed as a common improvement, was not owned in full title by the entrymen at the time their application for patent was filed.

In the opinion of the Department, this fact of itself furnishes no warrant for the cancellation of the entry. The patented claims of the group are no longer within the jurisdiction of the land department, and there is nothing in the law, nor does there seem to be any reason, to require that common ownership as to such claims and the

remaining or unpatented claims of the group shall continue until patent for such remaining claims shall be also obtained, or applied for. There is no reason why an owner of a group of contiguous mining claims and of an improvement constructed for their common development and effective to that end, and of sufficient value for patent purposes as to the entire group, may not, instead of embracing all the claims in one application for patent, apply for and obtain patent to a portion of such claims, based upon their due share or interest in the common improvement (Zephyr and other Lode Mining Claims, 30 L. D., 510); and a subsequent break in the common ownership by a sale or other disposition of one or more of the patented claims, or of any interest therein, would furnish no bar to later patent proceedings for the remaining claims of the group based upon their due share or interest in the same common improvement. If the right to a patent for the entire group be in fact earned by the construction of a common improvement of a character and value effective and sufficient for that purpose, it can make no difference that patent for all the claims is not applied for at one time, or that a part may be patented and disposed of before patent to the remainder is applied for.

But from the above history it appears that a physical segment or section of the Rosa tunnel, valued at \$1,600, is attempted to be applied as an improvement for the benefit of the two claims embraced in the entry here in question, only, notwithstanding the fact that the tunnel is alleged, and appears, to have been constructed for the development of all the claims of the group.

There is no authority of law for such procedure. The statute makes no provision for the apportionment of an improvement made for the development of two or more mining claims held in common so as to apply arbitrary fractional portions thereof, for patent purposes, exclusively to the use of individual claims or sets of claims of the group. This was in substance held in the case of Copper Glance Lode (29 L. D., 542, 550), where the subject of improvements for the benefit of mining claims held in common was discussed at length.

In the more recent case of James Carretto and other Lode Claims (35 L. D., 361, 364-365), the Department again considered the subject, and there said:

Where several contiguous mining claims are held in common and expenditures are made upon an improvement which is intended to aid in the development of the claims so held, and which is of such character as to redound to the benefit of all, such a general improvement is properly called a common improvement. In legal contemplation these terms import a single, distinct entity, not subject to physical subdivision or apportionment in its application to the claims intended to be benefited by it. The entire body of claims held in common, the group as it is ordinarily denominated, not the individual claims separately considered, is the beneficiary on the one hand, while on the other the common

improvement in its entirety is the means or agency effecting the common development or the community benefit. Such benefit accrues and attaches to, and becomes available for, the claims as a body, not individually, by the very reason of the construction of the common improvement and as soon as the construction takes place. The physical act of sinking a shaft, or driving a tunnel, which is a common improvement, makes this so; not the certificate of the surveyor-general to that effect.

Where two or more persons own property in common each owner has only an undivided interest therein, represented by no physical or tangible part of the property itself, but extending and attaching to the whole thereof. By a simple computation the value of such interest, based upon the value of the entire property, is easily ascertained. Likewise each claim of a group developed by a common improvement has an undivided, but nevertheless a beneficial and ascertainable, interest in the common development work. By a calculation, based upon the number of claims in the group and upon the value of the common improvement, it is readily ascertained whether the equivalent of the required expenditure in labor and improvements for the benefit of each claim is represented in the common improvement, and whether more or less, and also what credit is available to such claims as are embraced in any particular patent proceeding.

Then after stating the unequal apportionment attempted to be made in that case of an alleged common improvement (a shaft valued at \$4,600), the Department further said:

Such a method of arbitrarily adjusting the credit to be derived from a common working shaft, merely as the exigencies of the case seem to require, is destructive of the essential idea inherent in the term, a common improvement. To undertake to set apart or apportion a physical segment or section, or an arbitrary fractional part, of a common improvement and accredit the value thereof to a particular claim is in violation of the theory of a common benefit accruing from a common improvement. The scheme here invoked for adjusting the monetary worth of the benefit derived from a common improvement is, on its face, unreasonable and leads to a result but little short of absurd. The Department is of opinion that it is unwarranted and unauthorized by, and contrary to, the law.

Judged in the light of the principles thus stated the entry here in question is clearly subject to the objection that a physical segment or fractional portion of an improvement constructed for the common development of a group of mining claims may not be arbitrarily applied, for patent purposes, to any particular claim or claims of the group. The portion of the Rosa tunnel here relied on is just as much common to the other claims of the group as is any and every other portion of said tunnel. The tunnel as a common improvement is to be treated in its entirety, not in separate sections or parts; and so treating it the 167.4 feet cannot be set apart and apportioned as is here sought to be done.

This same erroneous method of apportionment seems to have been employed with respect to said tunnel in the earlier patent proceedings aforesaid, but it may be fairly assumed from the record of those proceedings that the value of the tunnel as a whole was at that time

sufficient, for patent purposes, to embrace all the claims covered by such proceedings. It would seem therefore, that, based upon the tunnel as far as then completed, the patents heretofore issued were fully earned, in so far as concerns the matter of improvements, and that the error consisted only in the attempted apportionment of the tunnel to the several claims instead of applying the same as a whole to the group of claims: an error of form rather than of substance.

Such is not the situation, however, with respect to the two claims embraced in the entry here in question. As already stated, these claims were not located until November 8 and December 13, 1902, respectively, and, so far as the record shows, not until after the tunnel had been completed up to the point of the beginning of the last 167.4 feet thereof. To the extent that the tunnel was constructed prior to the location of these claims it cannot be said that the work of construction was in any sense intended for their benefit. And the said 167.4 feet of the tunnel being simply the extension of an improvement common to all the claims of the group, as well those already patented as those for which patent is here sought, the share or interest in the stated cost or value of such extension to which these two claims are entitled, is far less than the required expenditure for patent purposes of \$500 for each claim.

The doctrine of the cited cases is based upon sound principle, and for this reason, as well as for purely administrative considerations, should be strictly enforced in the absence of controlling equitable conditions to the contrary. If applied here the entry in question would have to be canceled, and the question arises, therefore, whether the facts are such as to justify sustaining the entry on equitable grounds.

It is claimed that by the action of your office in the aforesaid prior patent proceedings, in allowing the Rosa tunnel to be cut into sections or fractional parts, and thus applied for patent purposes, the entrymen were misled into the belief that such method of apportionment was lawful, and justified their present application for patent upon the basis stated; and the record of such prior patent proceedings would seem to warrant the claim thus made. The good faith of the entrymen not having been questioned at any time, as far as the record shows, the Department is of opinion that the defect in the entry is not only not due to any attempt on their part to evade the law, but is one for which they are not wholly, or even primarily, responsible, the error being one into which it is entirely reasonable to suppose they were misled as claimed by the previous action of your office.

The Rosa tunnel as a whole, including the 371.3 feet reported as "unapplied on any claim," as aforesaid, would seem to be of sufficient value to have embraced for patent purposes the entire group of ten claims, if all had been located prior to its construction, and were it here so shown by satisfactory evidence, and also that there are no

other claims depending for patent upon such "unapplied" portion, and that the tunnel in its entirety, excepting the portion here relied on, shall be regarded as having been applied and exhausted for patent purposes in behalf of the eight claims covered by the former proceedings, such showing would, in the opinion of the Department, entitle the entrymen to every possible equitable consideration and, in view thereof, to have their entry upheld on the basis presented notwithstanding the stated defect therein.

Without intending to establish a precedent for cases to arise in the future, which must be adjudged upon their own facts, you will allow the entrymen a reasonable time within which to make the showing suggested, which if made you will act upon in the light of the considerations here stated, and if found satisfactory, the entry will be passed to patent if in all other respects regular. If such showing be not made as required the entry will be canceled. The decision of your office is modified to conform to the views herein expressed.

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**INDIAN LANDS—TURTLE MOUNTAIN RESERVATION—ACT OF APRIL 21,  
1904.**

INSTRUCTIONS.

The act of April 21, 1904, does not limit the time within which members of the Turtle Mountain band of Chippewa Indians who may be unable to secure land upon their ceded reservation may take a homestead from any vacant public land belonging to the United States, as provided in said act, and the Department has no authority to fix a date after which children born into the band shall not be entitled to such right.

*Acting Secretary Woodruff to the Commissioner of Indian Affairs,*  
(F. W. C.) *September 30, 1907.* (J. R. W.)

The Department is in receipt of your letter of September 17, 1907, stating that your office is in receipt of a request from the superintendent in charge of Fort Totten School, North Dakota, asking instructions:

whether children born since the date of the completion of the work in the field are entitled to allotments under the provisions of the act of April 21, 1904 (33 Stat., 189, 194-5).

Your office states the question is:

When the right to receive selections under the act of April 21, 1904, terminated—whether at the date of the approval of the act, the date of the completion of the work in the field, or the date of the approval of the schedule of allotments by the Secretary of the Interior? The office is inclined to the view that the latter date determines, and that all children born prior to that date would be entitled to allotments on the reservation or on the public domain; and that children born since that date are not entitled.

Article 3 of the agreement between the United States and the Turtle Mountain Band of Chippewa Indians, embodied in the act, provided for allotment of the reservation lands to the members of the band in severalty as homesteads, after which the reservation lands not allotted were "to be opened to settlement as other public lands." This was, in substance, a cession by the Indians of the reservation to the United States, subject, however, to a right of the Indians to take homesteads from the ceded lands so far as they saw fit to select from those lands.

Article 6 then provides that:

All members of the Turtle Mountain band of Chippewa Indians who may be unable to secure land upon the reservation above ceded may take homestead from any vacant land belonging to the United States without charge.

In the natural import of the language this is a grant to all members of the Turtle Mountain Band of Chippewa Indians, so long as such band remains as a recognized tribe or band, of the right to take a homestead from any vacant public lands of the United States, if for any reason, as for instance by opening the reservation to settlement and disposal of it, they are "unable to secure land upon the reservation" so ceded, and this is without charge or fees to be paid therefor.

The act fixes no date after which children born into the band shall not have such right, nor any date when the tribal or band organization shall cease, nor any date prior to which the right so granted shall be exercised. The Department has no power to legislate. You will accordingly so instruct the superintendent.

#### DESERT-LAND ENTRY—ANNUAL PROOF—WORK AND IMPROVEMENTS.

##### BRADLEY *v.* VASOLD.

A contest charging a desert-land entryman with failure to make the requisite annual expenditure, thus putting in issue the truth of the yearly proof offered by the entryman, may be brought prior to the expiration of the time allowed for the submission of final proof.

In determining whether a desert-land entryman has complied with the requirement of the statute relative to annual expenditure, the reasonable value of the work done or improvements placed upon the land is the criterion, and not the amount alleged by the entryman to have been expended therefor.

*Acting Secretary Woodruff to the Commissioner of the General Land*  
(F. W. C.) *Office, September 30, 1907.* (C. J. G.)

A motion for review having been filed and entertained in the above-entitled case, involving Vasold's desert-land entry for the SW.  $\frac{1}{4}$  of Sec. 12, T. 3 N., R. 4 W., Boise, Idaho, and in which departmental decision was rendered May 27, 1907, the matter is again here for consideration with evidence of service, briefs in behalf of the parties, etc.

This entry was made November 11, 1903, against which affidavit of contest by Bradley was filed April 28, 1905, charging that—

said Ernest Vasold has failed to comply with the law after entry; that there is no work done on said entry; that \$160.00 worth of work, towards the reclamation of said land, has not been done, as required by law.

The local officers after stating that the charge in the contest affidavit challenged Vasold's first annual proof in the matter of the required annual expenditure of \$1.00 per acre, which if substantiated subjected his entry to cancellation, and after analysis of the testimony, recommended dismissal of the contest. Their action was affirmed by your office, wherein it was said:

The question is not what the work ought to have cost, or whether a certain number of dollars might or might not have been saved, but whether the expenditures were honestly made at reasonable prices, for the work done or labor performed, and this the contestee has satisfactorily shown, by detailing his actual expenditures as claimed by him, etc.

It is stated in briefs filed in opposition to the motion for review that—

the sole issue to which proof must be directed is, whether or not contestee has expended the amount required by law in the improvement of the one hundred and sixty acres of land, to wit \$160.00, which he has entered under the Desert Land Law of the United States.

The desert-land act of March 3, 1877 (19 Stat., 377), as amended by the act of March 3, 1891 (26 Stat., 1095), in section 5 thereof, not only prescribes the amount of money that shall be expended thereunder, that is, at least \$3.00 per acre of whole tract, but also the purpose for which the expenditure shall be made, namely, the irrigation, reclamation, and cultivation of the land, as well as the manner in which it shall be reclaimed, that is, by means of main canals and branch ditches, and in permanent improvements upon the land, and in the purchase of water-rights for irrigation of the same. The act further provides that within one year after entry the entryman shall expend not less than \$1.00 per acre "for the purposes aforesaid;" and shall file during each year proof that the "full sum" of \$1.00 per acre has been expended "in such necessary improvements" during such year, and the "manner in which expended."

A contest charging a desert-land entryman with failure to make the requisite annual expenditure, thus putting in issue the truth of the yearly proof offered by the entryman, may be brought prior to the expiration of the time allowed for the submission of final proof. *Julian v. Harding* (31 L. D., 10). It was said in the case of *Wilkinson v. Stillwell* (35 L. D., 92), that—

the statutory requirement as to yearly expenditure is as explicit and mandatory as are any of the other requirements imposed by the desert land act, and

the Department, in the face of a contest brought upon that ground, is without authority to waive its observance, even though it should be convinced of the intent of the claimant to in the future fully comply with the law.

The fact of the requirement of first annual proof shows that the actions of entrymen for that year are to be judged in the same light as when they come to submit final proof. The undoubted object of the law was thus to forestall the segregation of lands for long periods if claimants are not in good faith complying with said law. It appears that your office found basis for giving contestee credit for the amount claimed to have been expended by him, or in other words, found that what was done on the land actually cost the amount claimed to have been expended by him, but your office failed to specifically find that \$180, or even \$160 *worth* of work had been actually done on the land. This latter is evidently what was contemplated in the desert-land act. The statement from the briefs above quoted embodies a misleading principle. The main question involved in this case is not so much what the work alleged to have been done by contestee may have cost him, or the time consumed in its performance, or the number of men employed, as whether the work actually done on the land for the first year, in line with the purposes of the act, was fairly and reasonably worth as much as \$1.00 per acre. The rule laid down in mining cases is applicable here. There it is held that "a mere expenditure is not sufficient. The work must tend to develop the claim and be of the reasonable value claimed." *Lindley on Mines*, Vol. 2, 1186. Quotations are made in the same volume, pages 1186 and 1187, from decisions of the supreme courts of Montana and Colorado, as follows:

In determining the amount of work done upon a claim, or improvements placed thereon for the purpose of representation, the test is as to the reasonable value of said work or improvements—not what was paid for it or what the contract price was, but it depends entirely upon whether or not the said work or improvements were reasonably worth the said sum of one hundred dollars.

The amount paid is not conclusive that work of that value has been done, but the actual value is the true test whether or not the law has been complied with, etc.

The effect of a rule that would accept mere proof of expenditure as compliance with the desert-land law would be far reaching and open the door to fraud and collusion. A case could arise where the entryman might show that he paid out not less than \$1.00 per acre as first annual expenditure, and that in good faith, and still have nothing or very little on the land to show for such expenditure. *Rigdon v. Adams* (34 L. D., 279). It is needless to say this could not be accepted as compliance with requirements of law.

From a careful re-examination of the entire record in this case, however, the Department is convinced that contestant has failed to show that the labor expended and the results attained on this land

during the first year of the entry are not fairly and reasonably equivalent or commensurate in value with the expenditures alleged to have been made, or at least of not less than \$1.00 per acre as required by law. The record leaves no doubt that the testimony of contestant and witnesses is not based upon a thorough examination of the work they found done on the land, or a thorough knowledge of *all* the work that had been performed. The former decision will therefore be adhered to, the motion for review being hereby denied.

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ALABAMA LANDS—RECLASSIFICATION—ACT OF MARCH 27, 1906.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
Washington, D. C., August 17, 1907.

*Register and Receiver, Montgomery, Alabama.*

GENTLEMEN: 1. Pursuant to the act of March 27, 1906 (34 Stat., 88), the Secretary of the Interior has reclassified such of the public lands in Alabama as were reported prior to March 3, 1883, as containing coal and iron, except certain tracts which were erroneously omitted from the list of lands to be reclassified. There are transmitted herewith schedule "A", consisting of a list of those tracts of lands so reported which are now classified as agricultural lands and which are unappropriated, except by pending homestead entries, and schedule "B", consisting of a list of the lands which are now classed as mineral lands, and which are unappropriated except by pending homestead entries. It is provided in said act of March 27, 1906, that all lands which may, under such reclassification, be classed as agricultural shall become subject to homestead entry. Accordingly, November 11, 1907, has been set as the date when the agricultural lands will be open to entry. All qualified persons who shall have made *bona fide* settlement upon any of said lands prior to the date of opening to entry, with the purpose of making homestead entry of the same, will have a preference right of entry for three months from the date of opening.

2. As to the lands in schedule "B", their status is not affected in any manner by the passage of the act of March 27, 1906, nor by the present reclassification. Until said lands shall have been offered for sale, they will not be subject to entry of any kind.

3. You will, on application, advise all inquirers as to the effect of this reclassification on the status of any particular tract of land.

4. In both schedules "A" and "B" appear lists of lands which are embraced in pending entries. Where lands in schedule "A"

are embraced in such entries, the suspension of the same on account of the report of the character of the land is relieved. The entries embraced in schedule "B" which were suspended prior to the act of March 27, 1906, will remain suspended pending further action. Since the list for reclassification was prepared certain other entries have been made, the parties alleging settlement prior to March 3, 1883. These cases will be separately considered and disposed of according to their merits. You will at once advise entrymen of the effect of the reclassification on their entries.

The final entry of Nancy E. Sides, which includes lands in both schedules, will be the subject of a separate letter.

5. You will make the proper notations on your records showing the status of the lands included in the two lists.

The schedule of agricultural lands is being printed and a supply will be sent you for general distribution. The newspapers should be given full information hereof to publish as a matter of news.

There were three tracts erroneously omitted from the list of lands, and which were not reclassified. A supplemental report will be made on these lands and when their character is determined, you will be advised.

Very respectfully,

FRED DENNETT,  
*Acting Commissioner.*

Approved:

G. W. WOODRUFF, *Acting Secretary.*  
[Schedule omitted.]

ISOLATED TRACTS—SECTION 2455, R. S., AS AMENDED BY ACT OF JUNE 27, 1906.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C.; September 5, 1907.*

*Registers and Receivers, United States Land Offices.*

SIRS: These instructions are supplemental to those contained in circular approved May 16, 1907 [35 L. D., 581], and will govern applications for the sale of isolated tracts of public lands outside that territory in the State of Nebraska covered by the act of March 2, 1907 (34 Stat., 1224).

1. The affidavits of applicants to have isolated tracts ordered into market, and of their corroborating witnesses, must, in all cases, be executed before the register or receiver of the land office of the district in which the tracts described in the applications are situated.

2. The local officers will question each applicant and his witnesses as to whether the applicant owns land adjoining the tracts sought, and, if so, to what use he intends to put the isolated tracts should he purchase same; if he owns no adjoining lands, whether he intends to reside upon or cultivate the isolated tracts, or for what purpose he desires to obtain the same; whether he has been requested by any one to apply for the ordering of the lands into market, and, if so, by whom; whether he is acting as agent for any person or persons, or acting directly or indirectly for or on behalf of any person other than himself in making the application; whether he intends to appear at the sale, if ordered, and bid for the lands; whether he has any agreement or understanding, expressed or implied, with any other person or persons, whereby he is to bid or purchase the lands for them or in their behalf, or to absent himself from the sale or refrain from bidding, to the end that they, or any of them, may acquire title to the lands.

These interrogations and the answers thereto must be reduced to writing and signed and sworn to before the register or receiver.

3. Local officers will, wherever possible, make additional inquiries as to the good faith of the applicant and his purpose in having the lands ordered into market, and include a statement of all facts ascertained by them in their report submitted under paragraph 3 of circular of May 16, 1907.

4. No sale will be authorized upon the application of a person who has purchased under section 2455, Revised Statutes, or the amendments thereto, any lands the area of which when added to the area applied for shall exceed approximately 160 acres.

5. No sale will be authorized for more than approximately 160 acres embraced in one application.

6. All applications for the sale of isolated tracts presented to local officers after the date of these instructions, and not executed in accordance herewith, will be promptly rejected by them and applicants advised of the reason for such action.

Very respectfully,

R. A. BALLINGER, *Commissioner.*

Approved, September 5, 1907.

G. W. WOODRUFF,

*Acting Secretary.*

## MANNER OF PROCEEDING UPON SPECIAL AGENTS' REPORTS.

## INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
Washington, D. C., September 30, 1907.

*To Special Agents and Registers and Receivers,*

*United States Land Offices:*

The following rules are prescribed for the government of proceedings had upon the reports of special agents of this office. All existing instructions in conflict herewith are superseded.

1. The purpose hereof is to secure speedy action upon claims to the public lands, and to allow claimant, entryman, or other claimant of record, opportunity to file a denial of the charges against the entry or claim, and to be heard thereon if he so desires.

2. Upon receipt of the special agent's report this office will consider the same and determine therefrom whether the charges, if true, would warrant the rejection or cancellation of the entry or claim.

3. Should the charges, if not disputed, justify the rejection or cancellation of the entry or claim the local officers will be duly notified thereof and directed to issue notice of such charges in the manner and form hereinafter provided for, which notice must be served upon the entryman and other parties in interest shown to be entitled to notice.

4. The notice must be written or printed and must state fully the charges as contained in the letter of this office, the number of the entry or claim, subdivision of land involved, name of entryman or claimant or other known parties in interest.

5. The notice must also state that the charges will be accepted as true, (a) unless the entryman or claimant files in the local office within thirty days from receipt of notice a written denial, under oath, of said charges, with an application for a hearing, (b) or if he fails to appear at any hearing that may be ordered in the case.

6. Notice of the charges may be personally served upon the proper party by the local officers at their office, but if this can not be done they will deliver the notice to the special agent for service under the Rules of Practice. If the special agent can not secure personal service, notice may be served, upon sufficient showing by the special agent, or other qualified person, by publication. The register will require such publication to be made under the Rules of Practice.

7. If a hearing is asked for, the local officers will consider the same and confer with the special agent relative thereto and fix a date for the hearing, due notice of which must be given entryman or claimant. The above notice may be served by registered mail.

8. The chief of field division will duly submit, upon the form provided therefor, to this office, an estimate of the probable expense required on behalf of the Government. He will also cause to be served subpoenas upon the Government witnesses and take such other steps as are necessary to prepare the case for prosecution.

9. The special agent must appear with his witnesses on the date and at the place fixed for said hearing, unless he has reason to believe that no appearance for the defense will be made, in which event no appearance on behalf of the Government will be required. The special agent must, therefore, keep advised as to whether the defendant intends to appear at the hearing. The chief of field division may, when present, conduct the hearing on behalf of the Government.

10. If the entryman or claimant fails to deny the charges under oath and apply for a hearing, or fails to appear at the hearing ordered, without showing good cause therefor, such failure will be taken as an admission of the truth of the charges contained in the special agent's report and will obviate any necessity for the Government's submitting evidence in support thereof.

11. Upon the day set for the hearing and the day to which it may be continued the testimony of witnesses for either party may be submitted, and both parties, if present, may examine and cross-examine the witnesses, under the rules, the Government to assume the burden of proving the special agent's charges.

12. If the entryman or claimant fails to apply for a hearing or to appear at a hearing applied for, as provided in paragraph 10, or if a hearing is had, as provided in paragraph 11, the local officers will render their decision upon the record, giving due notice thereof in the usual manner.

13. Appeals or briefs must be filed under the rules and served upon the special agent in charge of hearing. The special agent will not file any appeal or brief unless directed to do so by this office, or the chief of field division.

14. The above proceedings will be governed by the Rules of Practice. All notices served on claimants or entrymen must likewise be served upon transferees or mortgagees, as provided in Rule 8½ of Practice.

15. At the conclusion of the hearing the chief of field division will pay all proper charges for the Government's case, upon proper vouchers when required; and he will *at once* make return thereon to this office, showing the amount of authorization expended.

Very respectfully,

R. A. BALLINGER, *Commissioner.*

Approved:

G. W. WOODRUFF, *Acting Secretary.*



obtained two allotment patents, or that any error occurred in description of the land.

The question attempted to be raised by Fullbright is not whether there is authority to cancel a trust patent, but whether any trust patent in fact ever existed. If no trust declaration was ever in fact effectively made, then title to the land remained public.

A trust patent is merely a declaration that the United States will hold the land described to be conveyed, at a future time upon the happening of certain conditions, to the allottee or his heirs. In *United States v. Rickert* (188 U. S., 432, 436) the court held:

The "patents" . . . were, as the statute plainly imports, nothing more than instruments or memoranda in writing, designed to show that for a period of twenty-five years the United States would hold the land allotted, in trust for the sole use and benefit of the allottee, or in case of his death, of his heirs, and subsequently, at the expiration of that period . . . convey the fee, discharged of the trust.

For the creation of a trust three elements must exist, three parties are necessarily contemplated—the founder who creates it, the trustee to hold, and the beneficiary to take. In the present instance the first two elements existed, the United States acting in both capacities, being both founder and trustee. It is charged that the third necessary element did not exist. If that be true, then the attempted declaration of trust lacked an essential element to the creation of a trust, and the title to the land remained in the founder unaffected by the attempted impress of a trust upon the estate.

That the Department might be advised in the matter, inquiry was made, August 23, 1907, of the Indian Office, which, September 12, 1907, reported that the records of that office show that the annuity roll was receipted August 1, 1901, by Mur-ro-hov-it. Opposite the names of himself and his wife Har-ray the entry was made that they were murdered August 7, 1901. The agent, however, reported that Har-ray and her husband Mur-ro-hov-it—

were murdered on the night of August 5, 1901, by parties unknown, and it was impossible to know which died first. Har-ray left no issue, and as the result of several investigations during the last five years, Quannah Parker, chief of the Comanches, and Black Wolf, Coathy and Che-yeck-ye—all Comanches—certified, in leasing Har-ray's allotment, that To-wis-chy, Comanche allottee No. 2263, was the sole heir, his mother and the mother of Har-ray being sisters. Mur-ro-hov-it left issue, at present living, who would have been heirs of Har-ray if Mur-ro-hov-it had survived his wife, whose heir he would have been, but, as it could not be determined who died first, it was thought neither was heir to the other. This case will be investigated further at next per capita payment.

It thus appears that in fact To-wis-chy is by the United States recognized as heir to Har-ray and has been permitted to lease Har-ray's allotment. The question attempted to be raised by Fullbright does

not arise in the case. Har-ray in her lifetime selected her allotment and that selection was approved. The United States by her selection undertook to issue to her and her heirs the declaration of trust called a trust patent, and the effect and force of the declaration, like ordinary patents conveying title, must relate to and be regarded as effective from the date of initiation of the proceeding. The delay incident to actual issue and date of the trust patent until after her death did not annul her right, which descended to her heirs. The United States recognized To-wis-chy as her heir. The trust patent had effect and inured to his benefit, though she was dead at its date.

Your decision refusing the hearing applied for and that of the Department affirming it were based on the ground that no authority existed for cancellation of the trust patent. This was not responsive to the application, which asked a hearing to show that the trust patent was never effective for want of any beneficiary. The record of the Indian Office shows there was a beneficiary whom the government recognizes. The question of succession—who was the heir to Har-ray—is one between the government and the Indian, to which Fullbright is a stranger as he alleges no relation to or interest in the land prior to date of the trust patent or allotment to Har-ray. He will not be allowed to intrude into it and raise a question between the government and the person it recognizes as heir to Har-ray because of a claim of settlement on the land after the allotment made to her. The action taken was correct, though based on untenable ground. Being now advised of the fact that Har-ray left an heir recognized by the government as entitled to her succession, Fullbright's application is denied.

LISTS OF LANDS FOR TAXATION PURPOSES—ACT OF MARCH 3, 1883.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
Washington, D. C., October 8, 1907.

*Registers and Receivers, United States Land Offices.*

GENTLEMEN: The act of March 3, 1883 (22 Stat., 484), provides that upon application by the proper State or Territorial authorities registers and receivers shall—

furnish for the purpose of taxation a list of all lands sold in their respective districts, together with the names of the purchasers, and shall be allowed to receive compensation for same not to exceed ten cents per entry.

It is believed that it is within the purview of said act for you to furnish, upon like application, and for the compensation therein stated, lists of canceled final entries so that the lands may be relieved

from improper taxation. Therefore, when application is made therefor by proper authority, you will furnish lists of canceled final entries and the sums received therefor shall not be considered or taken into account in determining the maximum of your compensation.

Very respectfully,

R. A. BALLINGER,  
*Commissioner.*

Approved:

JAMES RUDOLPH GARFIELD,  
*Secretary.*

PATTEN ET AL. *v.* CONGLOMERATE MINING CO.

Motion for review of departmental decision of June 24, 1907, 35 L. D., 617, denied by Secretary Garfield, October 8, 1907.

PRIVATE CLAIM—SURVEY—JURISDICTION OF LAND DEPARTMENT.

HUGH STEPHENSON OF BRAZITO GRANT.

Confirmation by Congress of a private land grant according to a survey made under the order of a court for the purpose of determining the respective rights of the parties to the controversy then pending before the court as between themselves, does not deprive the land department of authority to make a survey thereof, according to the boundaries of the grant as confirmed, with a view to segregating the grant from the public domain and establishing and marking the boundaries by official survey.

The land department has jurisdiction to approve the official survey of a private land grant confirmed by Congress, notwithstanding the grant as surveyed conflicts with the survey of another grant which has been approved in pursuance of a decree of confirmation and upon which patent has issued.

*Acting Secretary Ryan to the Commissioner of the General Land*  
(G.W.W.) *Office, October 10, 1907.* (E.F.B.)

This appeal is filed by the Mesilla Valley Realty Company, owners of the Santo Tomas de Yturbe Colony grant, from the decision of your office of October 3, 1905, approving a survey of the Hugh Stephenson grant, and also from your decision of November 15, 1906, requiring appellant to show cause why a patent should not be issued upon the Hugh Stephenson grant for lands in conflict with the patent issued upon the Santo Tomas de Yturbe grant under a decree of confirmation by the Court of Private Land Claims.

The Hugh Stephenson grant, otherwise known as the Brazito grant, was confirmed by the act of Congress of June 21, 1860 (12 Stat., 71), being claim No. 6 in the list or schedule of claims examined

and approved by the Surveyor-General of New Mexico and transmitted for the action of Congress with his letter of January 12, 1858.

An official survey of that grant was made in 1893 by Leonard M. Brown, deputy surveyor, which was approved by your office October 3, 1905, as being in conformity with the act of confirmation and in compliance with the special instructions of the Surveyor-General. You propose to issue a patent for that grant in conformity with said survey.

The Santo Tomas de Yturvide Colony grant was confirmed by decree of the Court of Private Land Claims rendered September 1, 1900, according to certain boundaries therein defined, the eastern boundary being the western boundary of the Hugh Stephenson grant. A survey of the grant was made under that decree which fixed its eastern boundary by closing upon the western boundary of the Stephenson grant as surveyed by Brown in 1893. A protest was filed by the confirmees against the approval of that survey, alleging that the eastern boundary of the grant should be located two miles further east, following the bed of the Rio Grande river as it ran in 1854, and that the western boundary of the Hugh Stephenson grant as surveyed by Brown did not so follow the bed of the river.

The court sustained said protest and found that the line surveyed as the east boundary of the grant did not follow the east bank of the Rio Grande River as it flowed in 1854, and was not the true east boundary. A survey was made to conform to the decree of the court establishing the east boundary of said grant, about two miles east of the west boundary of the Hugh Stephenson grant as fixed by the Brown survey in 1893, thus overlapping and conflicting with the survey of the Hugh Stephenson grant to the extent of about 5000 acres.

The court approved said survey June 26, 1903, and thereupon a patent was issued to the confirmees of said grant May 5, 1905, which was subsequently cancelled because of an error in description, and a corrected patent for the land covered by said survey and in accordance therewith was issued October 17, 1905.

October 3, prior to the issuance of the corrected patent, you approved the survey of the Stephenson grant made by Brown in 1893.

Appellant protested against the approval of said survey and the issuance of a patent thereon for the reason that your office can not exercise jurisdiction for any purpose as to the lands embraced in said survey that are covered by the patent issued in conformity with the decree of the court.

It has assigned four grounds of error which may be stated as follows:

First. In not holding that no survey of the Stephenson grant was necessary, or required, in order to determine its boundaries, it having

been confirmed "as recommended by the Surveyor-General of New Mexico," which was according to the field notes and plat of a survey made by Stephenson Archer in 1854.

Second. In exercising jurisdiction by the approval of a survey of the lands in conflict after the approval of the final survey of the Santo Tomas grant made in pursuance of the decree of confirmation.

Third. In finding and holding that the survey of the western boundary of the Hugh Stephenson grant as made by Brown in 1893 followed the bed of the Rio Grande River as it ran in 1854 and as surveyed by Stephenson Archer in that year.

Fourth. In assuming authority to issue a patent for lands embraced in a prior patent while such patent remains outstanding and has not been judicially avoided or annulled.

At the time the claimants of the Hugh Stephenson grant presented their petition to the Surveyor-General of New Mexico for confirmation of the grant, its boundaries had been ascertained by a survey made by Stephenson Archer under an order issued by the United States District Court for the Territory of New Mexico, in a controversy then pending before said court between the different claimants of the grant. The survey was approved by the court. The field notes of survey read as follows:

Beginning at a stake set on the banks of the Rio Grande, at the mouth of an acequia, known as the Bracito acequia; thence down the Rio Grande with its meanders to a stake set on the banks of said river, three leagues from which a cottonwood, fourteen inches in diameter, north 31 degrees, east 21 varas; thence east 100 varas, to a lake known as the Trujillo lake, 7,500 varas, to a range of sand hills at a stake, the southeast corner of said tract; thence with said range of sand hills in a northerly direction 21,520 varas, to a stake, the northeast corner of said tract; thence west 3,800 varas to the place of beginning, containing 20,195 acres.

In the petition to the Surveyor-General for confirmation of the grant it was stated that "the boundaries of said land are duly ascertained by actual survey, and the amount of land in acres estimated." The Surveyor-General appears to have accepted the Archer survey as a description of the boundaries of the grant, and a copy of the plat thereof was sent by him to Congress with his letter recommending the grant for confirmation. (See Report No. 321, House of Representatives—36th Congress, 1st Session.)

It is insisted by appellant that the grant was confirmed as recommended by the Surveyor-General, which was according to the boundaries designated by the field notes of the Archer survey. That is conceded, but it does not follow that your office had no authority to have a survey made of the grant according to the boundaries indicated by the Archer survey, or that it was not your duty to have

the grant segregated from the public domain and to have the boundaries established and marked by an official survey made under the direction of the executive department of the Government.

The survey made by Archer was only for the purpose of determining the respective rights of the parties to the controversy then pending before the court as between themselves. The court had no authority to have a survey made for any other purpose. It is true the grant was confirmed according to the boundaries designated by that survey, but as stated by the court in *Stoneroad v. Stoneroad* (158 U. S., 240, 247)—

the confirmatory act of 1860, by necessary implication, contemplated that the confirmed grant should be thereafter surveyed, and that such survey was essential for the purpose of definitely segregating the land, to which the right was confirmed, from the public domain, and thus formally fixing the extent of the rights of the owners of the grant.

The grant in controversy in the case cited was embraced in the same list with the Hugh Stephenson or Brazito grant, and was confirmed by the same act. The Surveyor-General in recommending the former grant for confirmation stated that—

the boundaries set forth in the granting decree are natural points, well known to all the community, and in the absence of a survey, which was not required in the grant, are amply sufficient to designate such portions of land as were intended to be severed from the public domain.

In both grants the boundaries were distinctly indicated. In one by natural monuments or points well known to all the community; in the other by monuments and lines indicated by the field notes of a survey, probably more definite than the other, but not by the official survey contemplated by the act of confirmation. The survey served only to indicate the extent and limit of the confirmation. In both cases the official survey was necessary to accurately fix and mark the boundary lines before the issuance of a patent.

It is not to be presumed that Congress intended, by confirming a grant which had never been surveyed, and had, therefore, never been distinctly separated from the public domain, to exempt it from the survey essential to its accurate segregation and delimitation, especially when this survey was fully provided for by the general law, in accordance with the uniform public policy of the government in dealing with questions of this character. The general rule being to exact a survey, the grant here under consideration could only be exempted from this requirement by an express statement in the act of Congress indicating an intention to depart from the rule in the particular instance. No such intention is anywhere expressed in the confirmatory act. Indeed the idea that the act, whilst confirming the title, did not contemplate a survey, for the purpose of marking its limits, amounts to the contention that the public domain itself should remain in part forever unsurveyed and undetermined, since a separation of the private claim from the public domain was essential to the ascertainment of what remained of the latter. (*Ibid.*, p. 250.)

Your office has not only authority, but it is your duty, to have a survey made of this grant. Such survey must, however, retrace and establish the lines designated by the Archer survey as the boundaries of the grant, it having been confirmed according to the lines indicated thereby.

The material question is whether your office could exercise jurisdiction for any purpose over the lands in conflict after the Santo Tomas grant had been confirmed by the Court of Private Land Claims, and an approved survey of that claim had been made under the direction of the court embracing the lands in conflict.

Assuming for the sake of argument that the Brown survey followed the boundaries delineated upon the plat of the Archer survey and indicated by the field notes thereof, the Department would have no hesitancy in holding that it should be approved by your office, even though your approval be made after the issuance of the patent upon the Santo Tomas grant, as such approval is the official recognition by the Government of the extent of the grant confirmed by the act of June 21, 1860. "To hold otherwise would be to conclude that Congress had confirmed the claim and yet deprived the claimant of all definite means of ascertaining the extent of his possessions under the confirmed title." *Stoneroad v. Stoneroad* (158 U. S., 240, 247).

If the boundaries of the Stephenson grant as ascertained by the Archer survey of 1854 were correctly traced by the survey of 1893, the Court of Private Land Claims could not by its decree fixing the boundaries of the Santo Tomas grant, affect in anywise the title of the claimants under the Stephenson grant to the land in conflict, or remove from your office jurisdiction to perform every act contemplated by the statute necessary to fix and mark with accuracy the boundaries of the grant, and to furnish to claimants definite means of ascertaining the extent of their possessions under the confirmed title.

It is urged by appellant that the 7th section of the act of March 3, 1891 (26 Stat., 854), that created the Court of Private Land Claims, conferred upon that court "full power and authority to hear and determine all questions arising in cases before it, relative to the title to the land, . . . the extent, location and boundaries thereof, . . . and by final decree to settle and determine the validity of the title and the boundaries of the grant or claim presented for adjudication." But the powers so conferred were subject to and controlled by section 13 of the act, the fourth paragraph of which declares that "no claim shall be allowed for any land, the right to which has hitherto been lawfully acted upon and decided by Congress or under its authority."

In *United States v. Baca* (184 U. S., 653) it was held that the Court of Private Land Claims had no jurisdiction to pass upon the

merits of a claim to any land, the right to which had been lawfully acted upon and decided by Congress.

Referring to the fourth provision of section 13 of the act it said (page 639) :

The manifest intent of Congress appears to have been that with any land, of the right to which Congress in the exercise of its lawful discretion had itself assumed the decision, the Court of Private Land Claims should have nothing to do.

The court had no right to adjudicate upon the respective merits of the two titles as to the land in conflict. *United States v. Conway* (175 U. S., 60, 69) :

The duty of the court under section 8 "to hear, try and determine the validity of the same [the grant] and the right of the claimant thereto, its extent, location and boundaries," is discharged by determining the extent and validity of the grant as between the United States and the grantee, and it is not incumbent upon the Court of Private Land Claims to determine the priority of right as between him and another grantee.

The owners of the Hugh Stephenson grant are not therefore precluded by the survey and patenting of the Santo Tomas grant from having its boundaries ascertained and marked under the direction of the proper tribunal. As to the lands in conflict, the adverse claimants may in the proper forum litigate as between themselves which of the two is entitled to the land, and it is only by the judgment of such tribunal that the question becomes *res adjudicata*. (Ibid.; see also *United States v. Baca*, 184 U. S., 653, 660.)

But it does not follow that because it is the duty of your office to ascertain the boundaries of the grant and to approve the survey thereof, a patent should issue upon that survey, although it was provided by the act of March 3, 1869 (15 Stat., 342), that the Commissioner of the General Land Office shall without unreasonable delay issue patents for lands in said Territory which had theretofore been confirmed by acts of Congress and surveyed and where plats of such survey have been filed in his office.

It may be stated as a general proposition that where one patent has issued for lands a second patent for the same land should not issue so long as the first patent remains outstanding.

A patent assumes that a patentor has certain rights to convey and that if those rights have already been conveyed with the knowledge of the grantor, a second patent carries with it a suspicion of want of good faith. (*United States v. Conway*, 175 U. S., 60, 68.)

As documentary evidence a patent would be of service in proving title and the extent of confirmation, but it would not add to the validity or completeness of any title confirmed by Congress where the boundaries of the tract confirmed have been clearly defined and can be identified. *Langdeau v. Hanes* (21 Wall., 521); *Ryan v. Carter*

(93 U. S., 78); *Morrow v. Whitney* (95 U. S., 551); *Whitney v. Morrow* (112 U. S., 693).

In the case last cited (page 695) the Court said:

If there were any difference in the grade of the two conveyances of the Government,—that by direct legislative act, and by officers acting under the provisions of the statute,—it would seem that there should be greater weight and dignity attached to the legislative grant as proceeding more immediately from the source of title than the patent. . . . Still, if the law be complied with, the title passes as completely in the one case as in the other.

There appears to be no question as to the extent of confirmation of the Hugh Stephenson grant. It was confirmed according to the boundaries defined by the Archer survey as recommended by the Surveyor-General. The only point of difference is whether the locus of the western boundary as it was surveyed by Archer has been correctly retraced and fixed by the Brown survey. That question is to be determined by your office subject to supervision and control by the Department.

Upon the oral hearing of this case before the Assistant Attorney-General several affidavits were filed by counsel for the owners of the Santo Tomas grant tending to show that the western boundary of the Brazito grant as surveyed by Brown does not follow the line described by the Archer field notes, and disregards well-established monuments. These affidavits were received with the understanding that, if it was necessary to consider them, an opportunity would be afforded counsel for the Brazito claimants to file counter affidavits.

It has not been deemed necessary to consider these affidavits from the fact so many discrepancies between the Archer and the Brown surveys are disclosed by a *prima facie* examination of the field notes and plats of the respective surveys as to make it doubtful whether Brown followed the lines of the Archer survey throughout.

It may be that the physical conditions along the west line as surveyed by Archer were not described with sufficient accuracy to indicate with reasonable precision the course of the river as it ran in 1854, and he may have considered that the west boundary was sufficiently established without actual measurement. The discrepancy as to distance throughout the entire survey is such as to make it impossible to reconcile the two surveys with each other.

The west boundary by the Archer survey followed the meanders of the river on the east bank for a distance of three leagues—less than eight miles. The Brown survey of this boundary, which purports to follow the Archer line, makes the distance 15 miles and 3 chains; the east boundary is given by Archer as 11 miles and 16 chains; by Brown's survey it is 8 miles and 75 chains. Archer's south boundary has a distance of 7,500 varas, equal to 312.50 chains; Brown's survey of that boundary gives it as 235.61 chains; the north

boundary by the Archer survey is 3,800 varas, equal to 158.33½ chains; by Brown's survey the length of this line is 119.50 chains.

Such discrepancy is too great to be attributed to mere error in chaining, and makes the two surveys irreconcilable. Furthermore, it does not appear from the report of the Special Examiner that he made a satisfactory examination of this line. His only reference to the west boundary in his general report is that "the west boundary of this grant as established by Turley's survey practically follows the field notes of the Leonard M. Brown survey and *probably* follows the old channel of the Rio Grande in 1854."

Archer did not follow the channel of the river. He commenced "on the banks of the Rio Grande" at the Brazito acequia and followed down the river "with its meanders." It does not appear that he deviated from the left bank of the river at any place. A considerable part of Brown's survey of the west line is west of the river.

It may be that by a further investigation of the surveys these discrepancies can be reconciled, and that such investigation will develop whether Brown did or did not follow the meander of the river as it flowed in 1854 and as indicated by the Archer survey.

You will therefore cause an early investigation to be had by the Surveyor-General of New Mexico as to whether the lines of the Archer survey were retraced by Brown. At such hearing all parties in interest, especially the respective claimants of the Santo Tomas and the Brazito grants, will be given opportunity to be present and submit such evidence as they may desire in support of their respective contentions. You will also direct a competent examiner of surveys to report to the Surveyor-General to aid in such work and the retracing of such lines as may be deemed necessary.

In the meantime all action upon the Brown survey will be suspended.

#### FINAL PROOF—COMMUTATION—RESIDENCE AND CULTIVATION.

##### CIRCULAR.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
Washington, D. C., October 18, 1907.

*Registers and Receivers, United States Land Offices.*

GENTLEMEN: The following rules will govern your action upon homestead commutation proofs hereafter submitted, namely:

1. Commutation proof offered under a homestead entry made on or after November 1, 1907, will be rejected unless it be shown thereby that the entryman has, in good faith, actually resided upon and cultivated the land embraced in such entry for the full period of at least fourteen months.

2. Where such commutation proof is offered under an entry made prior to November 1, 1907, if it be satisfactorily shown thereby that the entryman had, in good faith, established actual residence on the land within six months from the date of his entry, he may be credited with constructive residence from date of entry; provided it be also shown that such residence was, in good faith, maintained for such period as, when added to the period of constructive residence herein recognized, equals the full period of fourteen months' residence required by the homestead laws.

3. In no case can commutation proof be accepted when it fails to show that the required residence and cultivation continued to the date on which application for notice of intention to make such proof was filed.

Very respectfully,

R. A. BALLINGER,  
*Commissioner.*

Approved:

JAMES RUDOLPH GARFIELD,  
*Secretary.*

FEES OF SURVEYORS-GENERAL—CERTIFIED COPIES OF PLATS AND RECORDS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., October 19, 1907.*

*United States Surveyors-General.*

SIRS: The circular of this office dated April 15, 1907 [35 L. D., 514], revoking office circular dated October 13, 1886 (5 L. D., 190), relative to the furnishing to applicants exemplified copies of your plats or any other records in your office, is hereby amended to read as follows:

Hereafter when application is made for exemplified copies of your plats or any other records in your office, you will first furnish the applicant with a memorandum of the exact cost thereof at the rates established by law for registers and receivers for like services, and require him to pay or remit the amount to you in your official capacity as Surveyor-General, and upon receipt of the amount you will then cause the copies to be prepared during office hours and furnish them to the applicant. All such moneys must be promptly receipted for.

At the end of each week you are directed to deposit the aggregate amount received by you to the credit of the Treasurer of the United States, on account of "Receipts for Furnishing Copies of Records," and forward the duplicate certificates of deposit to this office.

In rendering to this office your consolidated account current for each quarter of the fiscal year, form No. 4-661 a, you are directed to credit the United States therein with the aggregate amount received by you during the period for which the account is rendered, and debit the United States with the deposits made by you to the credit of the Treasurer of the United States during the said period. The said credits and debits should appear in one of the blank columns provided in the account current.

You are also directed to furnish with the said account current an abstract showing in detail all the moneys received by you during the period covered thereby, giving date of the payment, name of the payee, and the amount received in each case.

The provisions of this circular are to take effect immediately upon your receipt thereof, which you will acknowledge at once.

Very respectfully,

R. A. BALLINGER, *Commissioner*.

Approved:

JAMES RUDOLPH GARFIELD,

*Secretary.*

#### COAL LAND—PREFERENCE RIGHT.

CHARLES S. MORRISON.

A preference right of entry under the coal-land laws arises when a mine or mines of coal upon the public lands are opened and improved by a qualified person or persons in actual possession thereof; and from the time such a mine is opened and improvements thereon are commenced, the possession concurring, the period of sixty days prescribed by the statute, within which the preference right may be exercised or may be prolonged by filing a declaratory statement, begins to run.

Unless the declaratory statement is filed within the sixty-days period, in accordance with the statute and in which respect its provisions are mandatory, the preference right lapses and leaves nothing to be secured by a declaratory statement thereafter filed, notwithstanding no rights in others have intervened.

In the absence of an intercepting purchase by or preference right in another applicant or claimant, or the withdrawal of the land from entry, after the lapse of the delinquent claimant's preference right, he may yet purchase, unless disqualified on some other ground, as any other qualified applicant might do.

*Secretary Garfield to the Commissioner of the General Land Office,*  
(G. W. W.)                      *October 21, 1907.*                      (F. H. B.)

Appeal from your office decision of May 2, 1907, affirming the action of the local officers in rejecting the application of the appellant, Charles S. Morrison, to purchase, as coal land, the SW.  $\frac{1}{4}$  of Sec. 31, T. 5 N., R. 88 W., 6th P. M., Glenwood Springs, Colorado.

July 12, 1906, appellant filed his sworn declaratory statement for the tract, in which he alleged possession from and after May 5, 1906, and that he had caused to be located and opened a valuable mine of coal on the land.

December 14, 1906, appellant filed an application to purchase the tract, claiming a preference right, which was rejected by the local officers on the stated ground that the land had been withdrawn from entry of any kind by executive order, citing your telegraphic advice of July 27, 1906, to that effect.

Upon appeal, and by the decision above mentioned, your office pointed out that the declaratory statement had been filed more than sixty days after the date of the possession and improvements alleged therein and sustained the rejection of appellant's application to purchase, saying in that connection:

While the Government might under regulations then in force, in the absence of adverse rights, ordinarily waive the requirements that the coal declaratory statement must be filed within sixty days from the beginning of possession and improvements, it is not believed that it should be done under the circumstances in this case, at least so long as the lands remain withdrawn. The acceptance of the coal declaratory statement after the expiration of the period mentioned, is a mere matter of favor extended by the Government and not a right which the applicant can insist upon under the statute.

The pending appeal to the Department rests principally upon the contention embodied in appellant's specifications of error and extended in his brief, that, as it may be substantially stated, the provisions of the coal-land laws prescribing the time within which a coal declaratory statement is to be filed are directory merely, not mandatory, and that in the absence of intervening adverse rights the declaratory statement may lawfully be filed after the expiration of that period in any case, and without loss of any rights theretofore existing in the declarant. Upon this contention appellant relies to bring his case within the purview of the amendatory executive order of January 15, 1907 (35 L. D., 395), as follows:

Nothing in any withdrawal of lands from coal entry heretofore made shall impair any right acquired in good faith under the coal-land laws and existent at the date of such withdrawal.

The provisions of the coal-land laws, embodied in sections 2347 to 2352, inclusive, of the Revised Statutes, in so far as they are material to an understanding and disposition of the present case, are as follows:

SEC. 2347. Every person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified as above, shall, upon application to the register of the proper land office, have the right to enter, by legal subdivisions, any quantity of vacant coal lands of the United States not otherwise appropriated or reserved by competent authority not exceeding one hundred and sixty acres to such individual person, or three hundred and twenty acres

to such association, upon payment to the receiver of not less than ten dollars per acre for such lands where the same shall be situated more than fifteen miles from any completed railroad, and not less than twenty dollars per acre for such lands as shall be within fifteen miles of such road.

SEC. 2348. [In part] Any person or association of persons severally qualified, as above provided, who have opened and improved, or shall hereafter open and improve, any coal mine or mines upon the public lands, and shall be in actual possession of the same, shall be entitled to a preference right of entry, under the preceding section, of the mines so opened and improved.

SEC. 2349. [In part] All claims under the preceding section must be presented to the register of the proper land district within sixty days after the date of actual possession and the commencement of improvements on the land, by the filing of a declaratory statement therefor.

SEC. 2350. [In part] The three preceding sections shall be held to authorize only one entry by the same person or association of persons; . . . and upon failure to file the proper notice, or to pay for the land within the required period, the same shall be subject to entry by any other qualified applicant.

By compliance, then, with the provisions of section 2348 a person or association, as the case may be, acquires "a preference right of entry, under the preceding section, of the mines so opened and improved." This preference right of entry, "under the preceding section" (2347), is "the right to enter, by legal subdivisions," the area of vacant public coal lands thereby authorized, "upon payment to the receiver" of the purchase price. The term "preference" is a familiar one under the public-land laws and means *exclusive*. A right thus secured, therefore, is to the exclusion of all other persons; and it is evident without argument that the duration and extent of a right of that character should be strictly governed by the statute. The exclusive right can be enlarged or diminished by Congress alone.

It is provided by the law, however, that this preference right, once secured conformably to section 2348, may be preserved and continued for one year beyond its duration otherwise, by the filing of a declaratory statement "within sixty days after the date of actual possession and the commencement of improvements on the land" (Sec. 2349). The continuation of the preference right beyond the sixty-days period depending upon that condition, unless the declaratory statement is so filed in accordance with the statute the preference right lapses and is at an end; and, having so lapsed, leaves nothing to be secured by a declaratory statement. As was said in *McKibben v. Gable* (34 L. D., 178, 181):

The office of the declaratory statement is to preserve the right, not to create it. If the right does not exist, the declaratory statement has no office to perform, and is without force or effect for any purpose.

Under the provisions of the law the preference right of entry arises only when a duly qualified person or persons open and improve a mine or mines of coal upon the public lands and are in actual possession of the same. Apart from the matter of qualification under

the statute, three elements must concur in point of time to give rise to the preference right, viz., the opening of a mine of coal, its improvement as such, and actual possession. From the date the mine is opened upon the coal and improvements thereon are commenced, the possession concurring, the period of sixty days within which a declaratory statement may be filed in accordance with section 2349 begins to run. Within that period the preference right may be exercised, or may be preserved and continued by filing a declaratory statement.

The language of section 2349 is that the declaratory statement must be filed "within sixty days after the date of actual possession and the commencement of improvements on the land." This does not mean, however, as it might perhaps be literally taken to mean, within sixty days from the date on which one enters into possession of a tract and commences the prosecution of work which will result in the opening of a mine upon the coal. The related provisions of all sections of the statute are to be read and construed together. The clause deals with the presentation of "claims under the preceding section" (*i. e.* of preference rights under section 2348), and accordingly must refer to the origin and existence of those rights.

Section 2350 specifically provides that "upon failure to file the proper notice [declaratory statement], or to pay for the land within the required period, the same shall be subject to entry by any other qualified applicant." In either event there no longer remains a "preference right." In that clause of the section, therefore, if no other consideration were present, is found a full answer to appellant's contention that the provisions as to the time within which the declaratory statement is to be filed are merely directory. A number of extracts from judicial opinions and text books, quoted in the brief of counsel, express the general principle that limitations of time within which acts may be performed under a statute are ordinarily mandatory only when followed by words negating a right to perform them at a later time. The clause in question unequivocally declares the extinguishment of the "preference right," which it is the office of the declaratory statement merely to prolong, if that statement is not filed within the time specified by the statute. Thereafter the land involved "shall be subject to entry by any other qualified applicant," as to whom the exclusion is removed, and than whom the former preference-right claimant then stands upon no better footing.

It is not deemed necessary to extend the discussion upon this point further than to say that the several authorities cited in the brief, which have been examined, do not sustain appellant's contention in this behalf.

Upon the foregoing considerations the Department must express its disapproval of the views contained in your office decision and above quoted. The land department is without authority to waive the statutory requirement as to the time within which the declaratory statement must be filed, and if it is in fact filed after that time in any case it is without effect. Such an ineffectual declaratory statement should not be accepted if the facts are clearly shown.

In this connection, it would appear from the brief of counsel for the appellant, they are under the misapprehension that, under the provisions of the present coal-land regulations (35 L. D., 667), upon the lapse of a preference right, either by failure to file a declaratory statement in season or to purchase within the prescribed period, the claimant is in every instance cut off altogether from the privilege of purchasing the land. This is not the case. The delinquent claimant merely risks an intercepting purchase or preference right or the withdrawal of the land from entry, after the lapse of his preference right. In the absence of these barriers he may yet purchase, if not disqualified on some other ground, notwithstanding the expiration of his preference or exclusive right, as any other qualified applicant might do. *Lehmer v. Carroll et al.* (on review, 34 L. D., 447).

The form of the declaratory statement used in this case is exceedingly unsatisfactory and supplies but meager information concerning the initiation of the preference right, if any was in fact acquired. As the averments therein must be taken, however, it would appear that appellant presented the declaratory statement too late; and several months prior to his application to purchase, the land was withdrawn from such entry by executive order. At the time of the withdrawal, therefore, appellant was not invested with a preference right of entry, nor had he an application to purchase pending. He did not possess "any right acquired in good faith under the coal-land laws and existent at the date of such withdrawal."

The judgment of your office is affirmed.

COLUMBIA INDIAN RESERVATION LANDS—SOLDIERS' ADDITIONAL  
APPLICATIONS—ACT OF FEBRUARY 25, 1907.

ROBERT L. WRIGHT.

Under the provision of the act of February 25, 1907, that all lands in the former Columbia Indian reservation embraced in applications to make entry under section 2306 of the Revised Statutes, "which were presented before the lands covered by such applications were withdrawn under the reclamation act, are hereby declared to be subject to such entries," the point to which action had been proceeded with under departmental regulations respecting any such application at the time of the passage of the act is not material, the only limitation being that the application should have been presented before the lands covered thereby were withdrawn under the reclamation act.

*Secretary Garfield to the Commissioner of the General Land Office,*  
(G. W. W.) *October 21, 1907.* (F. W. C.)

June 19, 1905, Robert L. Wright filed in the local land office at Waterville, Washington, applications as assignee of W. A. Springer, administrator of the estate of Mary Ann Barnwell, widow of Clayborne A. Barnwell and of William H. Blair, to enter, under the provisions of section 2306 of the Revised Statutes, the E.  $\frac{1}{2}$  of NW.  $\frac{1}{4}$ , NE.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$ , and lot 2, Sec. 25, T. 34 N., R. 26 E., which land was a part of the old Columbia Indian reservation surrendered for disposal under the act of July 4, 1884 (23 Stat., 80), under which act disposals were limited to "actual settlers under the homestead law only." It was because of this limitation that Wright's applications were rejected, which rejection was sustained by your office decision of May 16, 1906, and affirmed in departmental decision of October 12, 1906, not reported. It may be here stated that on August 24, 1905, subsequent to the proffer of Wright's application, this land was withdrawn under the reclamation act of June 17, 1902 (32 Stat., 388), first form.

At the time Wright's appeal was under consideration by this Department attention was called to the fact that certain legislation was pending in Congress having as its object the relief of claimants to the lands within this reservation, and in referring thereto it was said in departmental decision of October 12, 1906, that—

It is further urged that action on this and similar cases should be suspended to await action of the Congress on a bill, pending before it at date of this appeal, to legalize entries and locations of this kind. Such action would be manifestly improper, as the case must be decided under the law as it now exists.

The bill referred to became a law February 25, 1907 (34 Stat., 934), and as passed is as follows:

That all lands in the former Columbia Indian reservation, in the State of Washington, which are embraced in entries heretofore allowed under section twenty-three hundred and six of the Revised Statutes of the United States, or which are embraced in any application to make entry under said section twenty-three hundred and six, which were presented before the lands covered by such application were withdrawn under the reclamation act, are hereby declared to be subject to such entries, and applications and entries shall be allowed and patents shall be issued thereunder in the same manner and upon the same conditions under which entries are allowed and patents are issued under said section twenty-three hundred and six for other public lands of the United States, and all patents heretofore issued under such entries are hereby confirmed.

Following the passage of this act Wright petitioned the reinstatement of his application which petition was denied in your office decision of May 17, 1907, and upon appeal, in departmental decision of September 6, 1907 (not reported).

In a letter of September 27, 1907, addressed to this Department, Hon. W. L. Jones, who introduced the bill hereinbefore referred to, called attention to Wright's applications, stating therein that it was his understanding that said applications came within the express meaning of said bill and requested favorable action thereon; whereupon, in letter of the 9th instant, you were directed to return the record made upon said applications for further consideration.

In the previous decision of this Department denying relief to Wright under the act of February 25, 1907, consideration does not appear to have been given to the fact that this act is remedial in character; that Wright's applications fall within the express language of the act; and that to deny him relief necessitates importing words of limitation into the statute. The plain letter of the statute is that all lands in the former Indian reservation which are embraced in entries heretofore allowed under section 2306 of the Revised Statutes, or—

which are embraced in any application to make entry under said section twenty-three hundred and six, which were presented before the lands covered by such application were withdrawn under the reclamation act, are hereby declared to be subject to such entries and applications and entry shall be allowed and patent shall be issued thereunder in the same manner and upon the same conditions under which entries are allowed and patents are issued under said section twenty-three hundred and six for other public lands of the United States.

It will be seen that there is only one limitation upon applications embracing lands within the former reserves, namely, "which were presented before the lands covered by such applications were withdrawn under the reclamation act." Wright's applications cover land within this reservation just as much today as they did when originally presented. They could not have been properly allowed when first presented, neither could they now, but for this legislation. The point to which action had been proceeded with under departmental regulations respecting such applications, at the time of the passage of the act, is not material unless there be imported into the statute the word "pending," or other word or words of like import; further, no good reason suggests itself for so limiting the scope or effect of the relief intended to be extended by the statute; that is, for extending the relief to one whose application had not received departmental consideration at the date of the passage of said act, and denying relief where the application had been considered by the Department theretofore.

After a most careful reconsideration, the departmental decision of September 6, last, in this matter, is hereby recalled and set aside, and unless other and sufficient reason appears for denying Wright's petition for the reinstatement of his applications, the same will be granted, and the local officers instructed to receive the same upon payment of the required fees and making the usual showing respecting like applications for other public lands.



entryman's name or anything about him. He then knew, or soon thereafter knew, that contestant was a minor and for that reason was disqualified to make entry. Learning that the former entry had been canceled, as aforesaid, and that the defendant had entered the land, he filed his contest containing the allegations of disqualification.

Being under legal age, and therefore under the necessity of showing that he was "the head of a family," claimant, at the instigation of his father and attorney, hit upon the scheme of getting his little brother Glenn, age 9 years, formally adopted as a member of his family, and in this scheme he had the cooperation and good offices of the judge of the probate court of Beaver County, Oklahoma, who formally issued a decree of such adoption. Claimant's father and mother appeared in court "and voluntarily consented to the adoption of said child by the said Robert L. Drake."

That the sole purpose of the adoption was to qualify the defendant to enter the land is made plain by the testimony of defendant's father, as well as defendant himself, as shown by the following questions and answers:

Q. You told him (the probate judge) substantially what I have stated, he (claimant) had won the contest out here and you had been advised that in order to file on it, he being a minor, he would have to adopt someone? That was all understood between you and the probate judge and your attorney, was it?—A. Yes, that was substantially the understanding, I believe.

The following question was propounded to the claimant:

Q. You were advised, were you not, and it was talked over between you and your father and your attorney, that being a minor you could not file on this land and that the only way out of it was to adopt someone or get married?—A. Why I guess that is all the way I could file.

Claimant's parents were both in good health. The father's age was 45 years. He owned a farm of 160 acres, situated near the land in question. He was also engaged in merchandising, doing a good business, and was postmaster at Dombey.

Claimant, at least up to date of the adoption of his little brother, had always lived with his parents and was supported by them. He then had no home and owned no property and was in no condition "to rear said child and furnish suitable nurture and education," as gravely enjoined by the court.

Besides being an acknowledged scheme to subvert the plain provisions of law, the decree of adoption, as shown by your office in citations from the Oklahoma statutes, was null and void. No provisions are made in said statutes authorizing a minor to adopt a child and the probate judge had no power to issue the decree of adoption.

As observed, contestant settled on the land in June, 1905, and thereafter resided there improving and cultivating the same. He then knew that the entryman herein, a minor, had filed a contest and knew,

presumably, that until that contest was settled he could not bring to trial one brought by himself. He waited to see the outcome of defendant's contest, not believing the latter would be qualified, as he was not, to make entry of the land at the expiration of the thirty days' preference right.

Claimant knew that plaintiff was living on the land and was claiming the right thereto by reason of settlement. Under the circumstances, contestant was not guilty of laches in failing to bring the contest herein at an earlier date.

As held by your office, contestant's right of entry, based upon his settlement, attached immediately on the expiration of the period of claimant's preference right. Claimant did exercise that supposed right by entering the land, but being then a minor he was disqualified, and as above seen his fraudulent attempt to show that he was the head of a family utterly failed.

The action appealed from is affirmed.

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RECLAMATION ACT—INDIAN ALLOTMENT—CONTRACT TO SELL DURING TRUST PERIOD.

LUCY HAWK SHIVELY.

Under the provision of the act of June 21, 1906, authorizing the sale of allotted Indian lands within reclamation projects during the trust period, a contract by an Indian allottee to convey to the United States a strip over his allotted lands, as a right of way for a canal under a reclamation project, executed during such period, may properly be approved by the Secretary of the Interior.

*Assistant Secretary Wilson to the Commissioner of the General Land Office, October 25, 1907.* (G. W. W.) (J. R. W.)

The Department is in receipt of your letter of October 17, 1907, transmitting the proposed contract of Lucy Hawk Shively, a Crow Indian allottee, to grant to the United States a strip of land through her allotted lands lying in section five, township two north, range twenty-nine east, Montana meridian, Yellowstone county, Montana, as right of way for a canal in a reclamation project, under the act of June 17, 1902 (32 Stat., 388).

April 20, 1905, the lands were allotted to her, and July 14, 1906, a trust patent issued to her therefor under section 5 of the act of February 8, 1887 (24 Stat., 388), to hold the land in trust for her sole use and benefit for twenty-five years, and then convey it by patent to her or her heirs, free of any charge or incumbrance. The section provides that any conveyance by her in the meantime, or contract touching the same, shall be absolutely void.

July 9, 1907, the Director of the Reclamation Service transmitted the contract to your office for approval. July 22, 1907, you declined approval of the contract for want of power, though the price is adequate, made reference to the act of March 3, 1901 (31 Stat., 1058, 1084), giving authority to condemn Indian allotted lands, and suggested that proceedings in eminent domain are the only practicable way to acquire the land. After correspondence between the Reclamation Service and the Indian Office, the matter is referred to the Department.

By act of June 21, 1906 (34 Stat., 325, 327), Indian allotted lands within a reclamation project may be sold and conveyed by the Indian during the trust period by approval of the Secretary of the Interior, and the act of March 1, 1907 (34 Stat., 1015, 1018), contains a like provision not limited to lands within a reclamation project. A power to sell includes power both to bargain or contract to convey, and a power to consummate that contract by actual conveyance. In view of the Department the power to contract to sell and convey is but part of and is included in a power to sell and convey, and the transaction may be done in parts at different times or at one time as may be convenient or expedient under the circumstances of the case. It appearing from the correspondence that you deem the price adequate, and the Reclamation Service having ascertained the land is necessary to be acquired, it is deemed ample power exists, and that delay for proceedings of eminent domain is unnecessary. The contract is therefore approved and has been transmitted to the Reclamation Service.

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**FEES—SCHOOL-LAND SELECTIONS—RE-ARRANGEMENT OF LISTS.**

**STATE OF COLORADO.**

Where re-arrangement of lists of school-land selections is made necessary by reason of change in departmental rulings, such re-arranged lists should, for the purpose of determining the fees due thereon, be considered as amendatory and not as original selections.

*Assistant Secretary Wilson to the Commissioner of the General Land*  
(G. W. W.) *Office, October 25, 1907.* (F. W. C.)

The Department has considered the appeal of the State of Colorado from your office decision of May 11, 1907, requiring further payment of fees on account of certain school land indemnity selections made within the Pueblo land district. The facts respecting the selections in question appear to be as follows:

October 30, 1905, there was filed what was known as indemnity school list No. 39, embracing 68,652.73 acres of selected lands. On

account of such selection fees were collected at the rate of \$2.00, one for each officer; for each 160 acres selected, aggregating \$860. When this list was examined by your office May 7, 1906, exception was taken to many of the base tracts because less than a legal subdivision, and further proof was required respecting non-incumbrance of the base lands designated in said list. July 13, 1906, the local officers reported that there had been filed in their office on June 19, 1906, a reselection of the lands embraced in said list No. 39, the evident purpose of the State being to file a list conformable to what was supposed to be the requirements of your office. August 3, 1906, you advised the local officers that such a list could not be accepted because the original selection had not been canceled; and, further, it would not comply with rule 1 of the regulations of January 10, 1906 (34 L. D., 365), by which it was required that selections in any one list must not, in the aggregate, exceed 160 acres, and the local officers were instructed to advise the State that if it desired to select the lands embraced in said list No. 39, the original list would thereupon be canceled and after the cancellation was noted upon the local office records new selections might be accepted, provided they conform to rules one and three of the last-mentioned regulations, and no other objections appear. Thereafter the State's list No. 39 was canceled and new lists were filed December 17, 1906, embracing the same lands included in said list No. 39, bearing numbers from 178 to 609, inclusive. The local officers evidently treated this new arrangement, to conform with the changed rulings, as a mere re-arrangement of the original list No. 39, in a measure amendatory thereof, and in assessing the fees due them on account of said selections credited the State with \$860, originally paid, the re-arrangement necessitating a further charge of \$74, which the State paid.

Your office decision of May 10, 1907, appealed from, holds that—

It was error not to have treated these lists [the lists from 178 to 609 inclusive] as you would have treated an original selection and have required the proper payment of fees in each case.

Under this arrangement there would be forfeited \$836 paid on account of the original list No. 39, and the school fund would, to that extent, be depleted.

After a careful consideration of the entire matter it is the opinion of this Department that the view entertained by the local officers was the correct one, and that for the purpose of determining the fees due on account of the re-arranged lists, made necessary by the change of rulings, they should be considered, in a measure, as amendatory and not as original selections and your office decision must be, and is, accordingly hereby reversed and the matter remanded for further consideration of the State's selection.

## RECLAMATION ACT—"SECOND FORM" WITHDRAWALS—COAL LAND.

ALBERT M. CRAFTS.

Withdrawals pursuant to the act of June 17, 1902, under the "second form," do not affect coal lands.

*Assistant Secretary Wilson to the Commissioner of the General Land*  
(G. W. W.) *Office, October 26, 1907.* (F. H. B.)

Albert M. Crafts has appealed from your office decision of December 12, 1906, which affirmed the rejection by the local officers at Douglas, Wyoming, of his coal declaratory statement, offered June 18, 1906, for the SW.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of Sec. 9, T. 33 N., R. 73 W., 6th P. M.

Crafts has also appealed from your office decision of February 12, 1907, involving another declaratory statement offered for filing by him, January 30, 1907, for the above described tract and the NW.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  of Sec. 16, in said township 33.

With respect to the first appeal the record shows that the local officers refused to accept the declaratory statement involved, and indorsed thereon the following: "Rejected by reason of land being withdrawn for reclamation." In the decision of your office affirming the action of the local officers it is stated that—

Said township 33 N., Range 73 W., was withdrawn under the reclamation act of June 17, 1902, by Department order of February 11, 1903. It was further withdrawn from entry, filing, or selection under the public-land laws by Department order of July 26, 1906, because it is believed to contain workable coal.

Section 2 of the act of June 17, 1902 (32 Stat., 388), authorizes and directs the Secretary of the Interior to make examinations and surveys for, and to locate and construct, irrigation works for the storage, diversion, and development of waters, including artesian wells. Section 3 provides as follows:

That the Secretary of the Interior shall, before giving the public notice provided for in section four of this act, withdraw from public entry the lands required for any irrigation works contemplated under the provisions of this act, and shall restore to public entry any of the lands so withdrawn when, in his judgment, such lands are not required for the purposes of this act; and the Secretary of the Interior is hereby authorized, at or immediately prior to the time of beginning the surveys for any contemplated irrigation works, to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from said works: *Provided*, That all lands entered and entries made under the homestead laws within areas so withdrawn during such withdrawal shall be subject to all the provisions, limitations, charges, terms, and conditions of this act; that said surveys shall be prosecuted diligently to completion, and upon the completion thereof, and of the necessary maps, plans, and estimates of cost, the Secretary of the Interior shall determine whether or not said project is practicable and advisable, and if determined to be impracticable or unadvisable he shall thereupon restore said lands to entry:

that public lands which it is proposed to irrigate by means of any contemplated works shall be subject to entry only under the provisions of the homestead laws in tracts of not less than forty nor more than one hundred and sixty acres, and shall be subject to the limitations, charges, terms, and conditions herein provided: *Provided*, That the commutation provisions of the homestead laws shall not apply to entries made under this act.

In the circular of instructions to registers and receivers, approved June 6, 1905 (33 L. D., 607), relative to withdrawals under the act, it is said:

There are two classes of withdrawals authorized by that act: one commonly known as "withdrawals under the first form," which embraces lands that may possibly be needed in the construction and maintenance of irrigation works, and the other commonly known as "withdrawals under the second form," which embraces lands not supposed to be needed in the actual construction and maintenance of irrigation works, but which may possibly be irrigated from such works.

The tracts are within the limits of a withdrawal under the "second form," made February 11, 1903, and the first question to be considered is whether such a withdrawal includes coal lands. If not, the effect of the withdrawal of July 26, 1906, as coal land, is to be considered.

Lands chiefly valuable for deposits of coal are mineral lands (*Mullan v. United States*, 118 U. S., 271; *T. P. Crowder*, 30 L. D., 92; *Brown v. Northern Pacific Railway Company*, 31 L. D., 29), and it is a familiar policy which has consistently withheld all classes of lands of that character from disposition otherwise than as specifically provided. The subjects of this policy are considered in *Pacific Coast Marble Company v. Northern Pacific Railroad Company et al.* (25 L. D., 233). By sections 2347 to 2352, inclusive, of the Revised Statutes, specific and full provision is made for the disposition of coal lands, and only in accordance with those sections may these lands be disposed of unless Congress has otherwise declared. Congress has not so declared in the act of 1902, *supra*, and that act expressly provides that the lands withdrawn thereunder as susceptible of irrigation shall be subject to entry under the provisions of the homestead laws only. Not only does it not expressly appear therefrom, but indeed it can not even be gathered by intendment, that Congress meant to subject coal lands within the areas of such withdrawals to homestead entry; and manifestly it could not have been the intent and purpose that lands should be withdrawn for future irrigation which could not be disposed of in accordance with the provisions of the act. Upon these considerations it must be held that withdrawals pursuant to the act of 1902, under the "second form," do not affect coal lands.

This is in accordance with principles heretofore announced by the Department. In the case covered by the instructions of October

6, 1906 (35 L. D., 216), the Mountain Meadow Placer Company, which had located a number of placer mining claims on lands embraced within the limits of a withdrawal under the second form, applied to the Director of the Geological Survey for permission to explore the lands embraced in its locations for oil, and the matter was referred to the Department for an opinion, whether the lands were open to exploration for mineral. The conclusion of the Department was that—

lands valuable for the mineral deposits contained therein, although embraced within the limits of a withdrawal of lands susceptible of irrigation from any contemplated works, are not affected by such withdrawal, and are not taken out of the operation of the mining laws.

If the tracts here in question are in fact coal lands they are subject to disposition under the coal land laws, notwithstanding they were embraced within the geographical limits of a withdrawal under the act of June 17, 1902; and in that event the effect of the executive order of July 26, 1906, is to be considered.

By that order the lands in said township 33, in which the tract is situate, were withdrawn from "entry, filing, or selection under the public-land laws." Later the order was several times amended or modified, and January 15, 1907 (35 L. D., 395), a further executive order was issued which declares as follows:

Nothing in any withdrawal of land from coal entry heretofore made shall impair any right acquired in good faith under the coal-land laws and existent at the date of such withdrawal.

The declaratory statement offered by Crafts January 30, 1907, and involved in the second appeal above noted, is accompanied by his corroborated affidavit in which he states, in substance, that he came into possession of the tracts described in the statement May 4, 1906; that between that day and June 18, 1906, he opened and improved a mine of coal thereon; that he expended \$60 in labor and improvements on the mine; that June 18, 1906, he offered to file in the Douglas, Wyoming, land office his declaratory statement for said land; that the local officers refused to receive the statement; that he had opened and improved a mine of coal on the land within sixty days prior to such refusal, and that—

being informed that the development of a coal mine on the public domain under the conditions and facts as stated aforesaid admit the entryman now to have his declaratory statement accepted and entered at said U. S. land office, he makes this his affidavit.

The local officers received this second declaratory statement, marked it "filed," and forwarded the papers to your office with the notation that—

As the land applied for has been withdrawn from coal entry we are not satisfied the affidavit is in accordance with circular letter "E" of January 21, 1907.

In the later decision appealed from, your office, while the rejection of the first declaratory statement was pending on appeal to the Department, found the tracts to be embraced within the executive order of July 26, 1906, and held the affidavit to be defective in that—

it does not set forth specifically the conditions under which the claim was made, and the different steps taken to perfect the same, nor does it show the date when the mine was opened upon the land by the claimant, and when the improvements mentioned were begun and when completed, as contemplated by the circular of instructions of January 21, 1907.

Following the objections thus expressed, your office held that the claimant would be allowed sixty days from receipt of notice within which to submit his affidavit, or that of his duly authorized agent, setting forth specifically the conditions related by him, in default whereof and of appeal the declaratory statement would be rejected without further notice.

The circular of January 21, 1907 (35 L. D., 395), provided, amongst other things, that—

Any person seeking to perfect a right alleged to have been existent at the date of the withdrawal must, in addition to the showing now required by the regulations, submit his affidavit or that of his duly authorized agent setting forth specifically the conditions under which the claim was made and the different steps taken to perfect the same.

If the facts were, as indicated in his affidavit, that Crafts had acquired in good faith a preference right of entry which overlapped the withdrawal, it is within the purview of the amendatory order of January 15, 1907, *supra*. As held by your office, however, his affidavit did not supply the information required by the circular of January 21, 1907; and was prepared and filed so soon after the circular as to have been, doubtless, without knowledge of it. In the absence of other objection, however, and agreeably to the present circulars of April 24th and May 20th, 1907 (35 L. D., 681 and 683), he should be allowed seasonably to perfect such right in the premises as he may have, if all be found regular.

The decisions of your office are modified accordingly.

## PUBLIC LAND—UNLAWFUL OCCUPANCY—ACT OF FEBRUARY 25, 1885.

CIRCULAR.<sup>a</sup>

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,

Washington, D. C., January 18, 1907.

*Registers and Receivers and Special Agents of the General Land Office:*

The following instructions are issued under the act of February 25, 1885 (23 Stats., 321), entitled "An act to prevent unlawful occupancy of the public lands."

These instructions will supersede any instructions in conflict therewith, and must be faithfully followed in all matters to which they relate. These instructions must be given the widest publicity and must be faithfully and rigidly enforced. Any unlawful inclosure or obstruction existing after April 1, 1907, must be summarily destroyed in the manner provided for by the act.

1. The law declares any inclosure of public lands made or maintained by any party, association, or corporation who "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," to be unlawful and prohibits the maintenance or erection thereof.

2. It provides that it shall be the duty of the district attorney of the United States for the proper district on affidavit filed with him by any citizen of the United States that such unlawful inclosure is being made or maintained, showing the description of the lands inclosed with reasonable certainty so that the inclosure may be identified, to institute a civil suit in the proper United States district or circuit court or territorial district court in the name of the United States and against the parties named or described who shall be in charge of or controlling the inclosure complained of.

3. The execution of this law devolves primarily upon the officers of the Department of Justice, but as it is the purpose to free the public lands from unlawful inclosures and obstructions and to open the same to bona fide settlement, it is deemed incumbent upon the officers of the land department to furnish the officers of the Department of Justice with the evidence necessary to a successful prosecution of the law.

4. All charges or complaints against unlawful inclosures or obstructions upon the public lands must be carefully considered and investigated. The names and address of the party or parties making

<sup>a</sup> Omitted from Volume 35.

or maintaining such inclosure or obstruction should be obtained by the special agent, who will keep a record thereof.

5. It shall be the duty of the special agent on receipt of any charge or complaint or upon information being acquired by him from any source that an unlawful inclosure is being maintained by any person or persons, association or corporation, to at once proceed to secure sufficient data, including a description of the lands inclosed, with reasonable certainty not necessarily by metes and bounds nor by governmental subdivisions of surveyed land, but only so that the inclosure may be identified and the person or persons guilty of the violation, as nearly as may be, and by description if the name can not on reasonable inquiry be ascertained, and to at once submit such case with the data thus obtained to the United States attorney for prosecution.

6. It shall be the duty of the special agent to be alert and vigilant to detect the existence of unlawful inclosures in his district, and to proceed in accordance therewith as hereinabove directed, and that he is not to construe his duties as requiring that before proceeding in the matter of an unlawful inclosure there must first be filed with him a formal complaint by some person or persons acquainted with the facts, but it shall be his duty, as hereinabove stated, to take the initiative himself.

7. If an inclosure is upon surveyed land a reference to the section, township, and range should be made; if upon unsurveyed land it may be described in any manner that will disclose with reasonable certainty the location thereof. A survey of the land is not necessary to sustain proceedings under the law, but cases may arise in which a survey may be desirable, in which event application therefor must be first submitted to this office.

8. If after investigation it is found that an unlawful inclosure is being maintained the special agent will make report in duplicate on Form 4-495, one of which will be forwarded to this office and the other to the United States attorney for the district in which the land is situated, accompanied by the requisite affidavit.

9. The special agent must make the affidavit required by law if no other person can be found to make the same, and a copy thereof must be submitted with the report to this office. The affidavit must state all material facts relating to the unlawful inclosure.

10. If after investigation no unlawful inclosure is found to exist, a statement to that effect to this office, giving the names and address of the parties charged therewith and the description of the land alleged to be unlawfully inclosed, will be sufficient.

11. In any report submitted to this office it must be shown whether there are any fraudulent entries upon the lands alleged to be

unlawfully inclosed; and if so, they must be reported to this office upon the provided Form 4-480.

12. The question, what constitutes a claim or color of title, is one especially for the courts to determine, but special agents are expected to report every case coming to their attention in which the claim or color of title included in such inclosure is not clearly established and defended.

13. The law provides that no person by force, threats, intimidation, or by any fencing or inclosing or any other unlawful means shall prevent or obstruct any person from peaceably entering upon or establishing a settlement or residence upon 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.

14. Any fence or other obstruction upon any portion of public land, whether entirely inclosing public land or only partially so, must be reported to this office upon the form herein provided for.

15. Special agents will consult with the United States attorneys with regard to any case in which the question of the legality of the inclosure is raised.

16. When a case is submitted to the United States attorney for prosecution, the special agent will take no further action therein except by direction of this office or at the request of the United States attorney.

17. The special agent must keep the office advised of all proceedings in court in relation to any cases involving unlawful inclosures, and is required to render the United States attorney all possible assistance therein.

18. No statement or showing by the parties in interest will obviate the necessity for a final and personal investigation by the special agent to ascertain whether the unlawful inclosure has been wholly removed, and the result of such investigation must be reported to this office.

Very respectfully, W. A. RICHARDS, *Commissioner*.

Approved:

E. A. HITCHCOCK, *Secretary*.

#### MINING CLAIM—MILLSITE—ADVERSE PROCEEDINGS.

#### HELENA ETC. Co. v. DAILEY.

Sections 2325 and 2326 of the Revised Statutes do not require adverse proceedings in court by a millsite claimant in order to protect his rights as against an applicant for patent to a mining claim; but by protest in the land department he can litigate all material matters relating to the ownership and validity of his claim as against the mineral applicant.

*Acting Secretary Woodruff to the Commissioner of the General Land*  
(S. V. P.) *Office, August 27, 1907.* (E. B. C.)

This is an appeal from your office decision of December 20, 1906, dismissing the protest of the Helena and Livingston Smelting and Reduction Company against the entry (No. 4429) made June 6, 1904, by William W. Dailey, for the Bell Flower lode mining claim, survey No. 7146, Helena, Montana, land district.

The record shows that approximately the western three-fourths of the Bell Flower claim, except a small triangular tract adjoining the middle portion of the westerly end line, overlaps portions of six prior millsite surveys, three of which are excluded from the entry while the conflict area of the remaining three, namely, surveys Nos. 729, 730 and 732, is entered. Two of the excluded claims, the Custer millsite, survey No. 1072, and the Smelting Works millsite, survey No. 731, are patented and so intersect the Bell Flower survey as to leave its claimed area in three cornering, non-contiguous tracts.

June 20, 1904, the president of the company mentioned filed a protest, alleging substantially that the company is the owner of all the ground embraced in surveys Nos. 729, 730 and 732 and has valuable improvements thereon costing \$18,000, which were made by the company and its grantors; that the company and its predecessors have held, used, occupied and possessed such premises for 25 years or more, a period longer than that prescribed by the statute of limitations for the State of Montana, and for that period prior to the attachment of any adverse claim; that no vein or lode or rock in place of any value has been discovered within the millsite claims and that none are or have been known to exist therein; that the plat and notice upon the Bell Flower claim are inconsistent and not notice such as to advise an adverse claimant, and also misleading, in that the plat filed and posted excludes the areas embraced in the millsites, while the notice for publication claims such areas.

April 14, 1905, your office directed that a hearing be had "to determine the existence or non-existence of a valuable lode or vein of rock in place within the millsites claimed by the protestant company," and stated that the allegations in the protest as to other matters, even if true, constituted no sufficient reason for the suspension of the entry.

Hearing was had at which both parties submitted evidence. The local officers found in favor of the entryman as to survey No. 729 and in favor of the company as to surveys Nos. 730 and 732, on the ground, substantially, that the evidence did not establish the discovery or existence of any vein or lode within those two millsites. Both parties appealed. December 20, 1906, your office decided that the protest should be dismissed for the reason, substantially, that a

valuable vein or lode was shown to exist throughout the length of the claim, and it was stated that it was immaterial whether the vein or lode actually passed through the limits of surveys 730 and 732, as the entryman, on the showing made, was entitled to surface ground for the entire width of his claim.

The company has appealed and specifies that it was error to hold that a vein or lode of any value had been discovered within, or extended through, the millsites in controversy, when such holding is based only upon theory, belief or the opinion of witnesses; to hold that, even if it was not shown that the Bell Flower vein or lode extended through the millsites, the entryman was nevertheless entitled to the surface ground of such millsites; and not to have held, from the showing as to the continued possession and ownership for more than 25 years, that the company was entitled to patent under section 2332, Revised Statutes.

In his argument counsel for the company contends that your office erroneously disregarded all the allegations of the protest but one, and urges that, as the plat and field notes of the survey exclude the millsites involved and no amended survey claiming such area was made, there was no legal and sufficient notice and that the allowance of the application and entry embracing such millsites was a surprise and was error on the part of the local officers.

Counsel in his brief charges, on information and belief, that certain of the testimony submitted on behalf of the entryman is wholly false, and also makes certain criticisms of your office decision. The entryman's attorney has presented a motion "to strike from the files" the argument to support the appeal because of its "contemptuous nature." The charge as to the stated falsity of the testimony on behalf of the entryman finds no support from anything appearing in the record. The argument referred to, which discusses both the facts and the law, is before the Department and will be considered in connection with the other papers in the case. The motion to strike from the files is denied.

Upon the record presented, the first question arising is what effect, if any, upon the company's rights resulted from its not having adversed Dailey's application for patent. No adverse claim was filed. Did the assumption of the statute, that the applicant is entitled to patent and that no adverse claim exists (Sec. 2325, Rev. Stat.), operate as against the company?

The section cited sets forth the manner in which "a patent for any land claimed and located for valuable deposits may be obtained," and states that "if no adverse claim" is filed it shall be assumed that none exists and that thereafter no objections shall be heard, except it be shown that the applicant has failed to comply with the law. Section 2337 provides that *non-mineral* land not contiguous

to the vein or lode, used or occupied for mining or milling purposes, may be patented along with such vein or lode, "subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes," and further that the owner of a quartz-mill or reduction-works may also receive patent for his millsite, "as provided in this section."

A millsite is an adjunct to a mine, and while it is a claim for obtaining patent to which provision is made in the mining laws, it must be upon non-mineral land and is not in the ordinary sense a mining claim.

The courts in several instances have entertained adverse suits involving millsite conflicts with mining locations. *Shafer v. Constans* (3 Mont., 369); *Durgan v. Redding* (103 Fed., 914); and *Cleary v. Skiffich et al.* (65 Pac., 59).

The earlier departmental decisions also held that a millsite claim was a proper subject for adverse proceedings. *Warren Mill Site v. Copper Prince* (1 L. D., 555) and *Bay State Gold Mining Co. v. Trevillion* (10 L. D., 194).

In a more recent case, where a millsite claimant had filed an adverse claim against a lode application, the land having been prior thereto finally adjudicated to be mineral land, the Department said (*Snyder v. Waller*, 25 L. D., 7, 8):

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 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. (*Alice Placer Mine*, 4 L. D., 314; *Powell v. Ferguson*, 23 L. D., 173.)

When the character of the land is involved to the extent that the determination of the 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. It follows that there is nothing for the court to determine under the adverse suit that would aid the Department in deciding to whom the patent should issue.

In no reported case, so far as the Department is advised, has the Supreme Court of the United States passed upon this precise question, but the scope and application of sections 2325 and 2326 have been repeatedly considered by that court, which has used the following language referring thereto (*Creede & Co. v. Uinta & Co.*, 196 U. S., 337, 357, 359):

Reading these two sections together it is apparent that they provide for a judicial determination of a controversy between two parties contesting for the possession of "land claimed and located for valuable deposits:" in other words, the decision of a conflict between two mining claims, a decision which will enable the Land Department without further investigation, to issue a patent for the land. A tunnel is not a mining claim, although it has sometimes been inaccurately called one. . . .

Without further review of the conflicting authorities, it would seem that whatever may be the propriety or advantage of an adverse suit, one can not be adjudged necessary when Congress has not specifically required it. . . . Adverse proceedings are called for only when one mineral claimant contests the right of another mineral claimant.

See also *Iron Silver Mining Co. v. Campbell* (135 U. S., 286); *Richmond Mining Co. v. Rose* (114 U. S., 576).

Referring to section 2326, the Supreme Court of Wyoming, in the recent case of *Wright et al. v. Town of Hartville* (81 Pac., 549, 650), held as follows:

It will be observed that this statute provides a method by which a court of competent jurisdiction is to determine the right of possession between two or more mining claimants, and not to determine the character of the lands involved as to whether they are mineral or non-mineral. This statute only gives the court jurisdiction of suits when the parties are all mining claimants and when the land embraced in the claim is unpatented government land. It follows, therefore, that the court would not have jurisdiction in a suit in support of an adverse claim, where the parties were all mining claimants, and a patent had already been issued to one of the claimants; or where one of the parties is a mining claimant and the other a townsite claimant, whether patent had been issued or not; or stating the proposition more generally, where one of the parties is an applicant for a patent to mineral land and the other party claims the same or any part of the land embraced in the mining claim under any of the laws providing for the disposal of non-mineral lands. In other words, the court has jurisdiction only where the suit is between adverse mining claimants to the same unpatented mineral land.

The Supreme Court of Idaho has also expressed substantially the same views regarding the statute. See case of *Le Fevre et al. v. Amonson et al.* (81 Pac., 71).

In the case of *Ryan v. Granite Hill Mining and Development Company* (29 L. D., 522, 524) the Department held as follows:

The mining laws do not authorize or provide for adverse proceedings against an applicant for patent to mineral lands by one claiming the same, or any part thereof, under laws providing for the disposal of nonmineral lands. The provisions of sections 2325 and 2326 relative to adverse claims contemplate proceedings to determine only the right of possession as between claimants of the same unpatented mineral lands; and not to decide controversies respecting the character of public lands, that is, whether they are mineral or nonmineral lands. . . . No authority of law exists for transferring the proceedings from the land department to the courts for the decision of that question, and hence the decision of a court thereon can not bind or conclude the land department nor relieve it from the duty of making its own decision in the premises.

From the very decided weight of authority on the subject, and in view of the better reasoning of the more recent adjudications referred to, the Department is of opinion that sections 2325 and 2326 do not require adverse proceedings in court by a millsite claimant in order to protect his rights as against an applicant for a patent to a mining claim. It follows that by protest in the land department

the millsite claimant can litigate all material matters relating to the ownership and validity of the millsite claim as against such mineral applicant.

The protest herein contains allegations as to the company's claimed prior and better right to the land in dispute, and as to valuable improvements thereon, and also as to an alleged defect in the entryman's notice and plat as posted. These matters were held by your office to be immaterial. In this your office erred. Not being required to adverse, the company has the right to show, as it may be able, before the land department, not only the facts as to the known character of the land in dispute at the time of the entry thereof by the mineral applicant, which is the fundamental question, but also the facts relating to the company's alleged priority or rights with respect to the disputed millsites and relating to its claim to valuable improvements upon the same, as such matter will tend to disclose the use or occupancy of the millsite claims for mining or milling purposes in connection with the lode claims owned by it, or the construction and ownership of quartz-mills or reduction-works thereon, as the case may be, and thus to establish its compliance with the requirements of the statute.

The notice and plat as posted should correspond and not be contradictory or essentially misleading, for the posted plat is a necessary element in the patent proceedings and a vital part of the notice required by the statute. In the opinion of the Department the allegation of the protest as to defective notice is sufficient to demand an investigation in order that the facts may be fully ascertained.

The evidence submitted in the record has been examined. It does not definitely appear therefrom what the facts and conditions were at the time the mineral entry was allowed. There is testimony that work was continued in two drifts, which have penetrated a short distance into the ground within the Bell Flower location, for six months after the entry. The sufficiency of the entry must be determined as of the date upon which it was made. Subsequent developments can not serve to strengthen it, if defective, or defeat it, if valid. In order to properly determine the questions arising upon the record here presented, further and more definite testimony is required.

The fundamental questions, upon which the land department should be fully advised as to the facts, are those relating to the notice and plat as posted upon the claim and the actual character of the land in each of the disputed millsites at the date the entry was allowed. As subordinate to these but none the less material, evidence as to the company's possession, use, occupation, and improvement of the millsite claims may be submitted and also as to the necessity which may have existed for the group of contiguous millsites, or more than one millsite, within the principle announced in the case of the

Alaska Copper Company (32 L. D., 128) and the Hard Cash and Other Millsite Claims (34 L. D., 325).

The showing in the record as to the statutory \$500 expenditure upon or for the benefit of the Bell Flower claim is not sufficient under the doctrine announced in the case of the James Carretto and Other Lode Claims (35 L. D., 361). As this question may become the subject of further protest, counsel for the company, in his brief, having questioned the extent of the entryman's improvements, and is a matter upon which the land department should be fully informed, it is deemed advisable to direct that the hearing, hereinafter ordered, should embrace the subject of the entryman's improvements as the same were constructed and existing at the completion of the sixty-day period of publication of notice, to wit, May 29, 1904.

For the foregoing reasons the decision of your office and the conclusions of the local officers are vacated and set aside and the case remanded with directions that a further hearing be had, at which the parties will be cited to appear and submit evidence, along the lines above indicated, touching the allegations of the protest and the matter of the entryman's improvements. Thereupon the case will be readjudicated.

The papers are herewith returned for further proceedings in accordance with the views herein expressed.

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**PASTURE RESERVE LANDS—COMMUTATION OF HOMESTEADS FOR TOWNSITE PURPOSES.**

**WICHITA FALLS AND NORTHWESTERN RAILWAY CO.**

The provision in the act of May 2, 1890, for the commutation of homestead entries for townsite purposes, has no application to the pasture reserve lands opened for disposal by the act of June 5, 1906.

*Acting Secretary Wilson to J. A. Kemp, Wichita Falls, Texas, September 10, 1907.* (S. V. P.) (F. W. C.)

The Department is in receipt of your letter of August 20, last, petitioning the aid of this Department to the end that such favorable decision may be accorded as will permit the commutation of a certain number of homestead entries located along and adjoining the line of the Wichita Falls and Northwestern railway through the Big Pasture, recently opened and disposed of under the provisions of the acts of March 20, 1906 (34 Stat., 80), and June 5, 1906 (34 Stat., 213).

This land formed a part of that ceded by the Kiowa, Comanche and Apache Indians under the treaty ratified by act of June 6, 1900 (31 Stat., 672). That act made provision for the sale of certain

of the ceded lands but the lands in question were, by article 3 of the treaty, reserved from disposition. The only provision of law authorizing commutation of homestead entries for townsite purposes is found in section 22 of the act of May 2, 1890 (26 Stat., 81). This Department held that said provision did not apply to the lands opened for disposal by the act of June 6, 1900, *supra*, being a part of the lands ceded by the Kiowa, Comanche and Apache Indians, but by the act of March 11, 1902 (32 Stat., 63), said commutation provision was "made applicable to the lands in the territory of Oklahoma ceded by . . . Comanche, Kiowa, and Apache tribes of Indians under the agreement . . . June 6, 1900."

With respect to the pasture lands reserved from the opening in 1900, the act of March 20, 1906, *supra*, authorized the Secretary of the Interior "to set aside and reserve from allotment or leasing such of the common grazing lands of said tribes as shall be necessary for the establishment of townsites," and the act of June 5, 1906, *supra*, provided that the unreserved and unallotted portions of the pasture lands should be "disposed of upon sealed bids or at public auction at the discretion of the Secretary of the Interior, to the highest bidder, under the provisions of the homestead laws of the United States." Under the authorization above referred to, found in the act of March 20, 1906, *supra*, this Department on July 18, 1906, designated the commission to select townsites within the pasture reserve. August 20, 1906, that commission reported its selections, which were submitted with favorable recommendation by the Commissioner of Indian Affairs, and the report received departmental approval September 12, 1906. Thereafter the selected tracts were duly platted and have in a large measure been disposed of. Partial payments have been made by the purchasers but the major part of the consideration yet remains unpaid.

In your letter under consideration it is represented that you and your associates began survey of a line of road through the pasture reserve about September 16, 1906, which, it will be seen, was after the selection and approval of the townsites to be located within said reserve. As located, and said to be under construction and nearly constructed, the nearest townsite is more than two miles from the line of said road. The natural result of the commutation of homesteads adjoining the line of your road would be the partial destruction, if not the entire abandonment, of one or more of the townsites selected, as before stated.

It is not believed that the provision for commutation of homesteads found in the act of May 2, 1890, *supra*, nor the extended application thereof made by the act of March 11, 1902, *supra*, has any application to these pasture lands. This view is strengthened by the fact that the act of March 20, 1906, made specific provision for the selection of such

townsites as might be deemed necessary, and the further fact that the act of June 5, 1906, merely provides for the opening of the remainder of the pasture lands under the provisions of the homestead law, no reference being made to either the townsite law or to any provision for the commutation of homesteads for townsite purposes. Further, at the last session of Congress, H. R. 24989, entitled "An act to provide for the commutation for townsite purposes of homestead entries in certain portions of Oklahoma," embracing particularly the pasture and wood reserve lands in the Kiowa, Comanche and Apache Indian reservation, failed to become a law because of the President's veto.

In this connection it may be said that a number of persons occupying a portion of the right of way of your road for purposes of business and trade, assuming to form a townsite under the name of Kell, in opposition to the government townsite of Eschiti, a short distance away, were recently enjoined upon the petition of the United States; a motion to dissolve the temporary injunction was overruled August 12, last, and the case set for final hearing September 18, next.

While the Department appreciates the difficulty and inconvenience to the community and the railroad in the orderly handling of business, from the fact that there are no towns immediately adjoining the line of the road, it may be said that with the exercise of reasonable diligence and ordinary prudence the railroad company might have learned of the exact location of the government townsites, if it was ignorant of their location as stated in your letter, and have so located its line of road as to relieve the situation; but be this as it may, the Department is unable to afford any relief under existing law, and it is doubtful whether favorable recommendation would be given to legislation proposing to correct the difficulty by permitting the establishment of new towns along the line of the road, in view of the equities of those who have invested their money within the towns heretofore established under the government's selection, and of the possibility of default upon deferred payments due the Indians on account of sales made of lots within these towns.

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**LEAVE OF ABSENCE—"UNAVOIDABLE CASUALTY"—SEC. 3, ACT OF MARCH 2, 1889.**

**FRANK WATERFIELD.**

The fact that crops can not be produced without irrigation and that there is no present means of supplying the necessary water for irrigation purposes, does not constitute an "unavoidable casualty" within the meaning of section 3 of the act of March 2, 1889, and does not therefore furnish sufficient ground for the granting of a leave of absence.

*Acting Secretary Pierce to the Commissioner of the General Land*  
(G. W. W.) *Office, November 1, 1907.* (C. E. W.)

This is the appeal of Frank Waterfield from your decision of July 16, 1907, affirming the action of local officers in rejecting his application for leave of absence from his homestead entry, No. 3457, for NE.  $\frac{1}{4}$ , Sec. 13, T. 10 N., R. 51 W., Sterling, Colorado.

Appellant made entry on this tract July 13, 1906, and established his residence thereon January 2, 1907, constructing a small frame house for himself and family. On January 25, 1907, he applied for one year's leave of absence, alleging that the land is "located above all ditches and will not of itself with the present amount of rainfall produce in sufficient quantity to provide sustenance" for himself, his family, or his cattle. But, he avers:

There is a proposed irrigation district now being organized for the purpose of making a reservoir which will be above this tract, and which reservoir will perhaps be under headway and construction sufficient so that water can be obtained for irrigation therefrom during the season of 1908; that it is absolutely necessary for this applicant to leave said tract to obtain a livelihood for himself and go away therefrom for the purpose of working during the present season.

The local officers held, and you affirmed their decision, that the grounds set forth do not bring the application within the purview of section 3 of the act of March 2, 1889 (25 Stat., 854). On appeal, reference is made to this statute, coupled with the contention:

The showing made by appellant herein is that through no fault of his, he will be unable to support himself and family on this land until it will produce crops from irrigation. It is unavoidable as far as he is concerned and heretofore numbers of persons have obtained leaves of absence in this State upon a similar showing as this appellant is informed and verily believes.

The law is clear and explicit: leave of absence may be granted where a settler is unable to secure a support for himself and those dependent upon him, "by reason of a total or partial destruction or failure of crops, sickness, or other unavoidable casualty." No discretion in the grant of leave of absence is left to officers of the land office: the terms of the statute mark the limitation, and applications, either as to ground or preliminary requirements, must fall within its purview. Phoebe N. Buckman (35 L. D., 253).

In this case no total or partial failure of crops is alleged; predicted, merely. No averment of sickness is made. Clearly, if at all, the basis of the application must be some "unavoidable casualty:" and this, he states, is his inability to obtain a livelihood for lack of irrigation. But inability to earn a living on the land is not a "casualty" within the meaning of the act. Adele C. Leonard (22 L. D., 716). Nor is failure to secure water in the less artificial way

than irrigation, even, such a "casualty." John Riley (20 L. D., 21); Harry C. Seward (11 L. D., 631).

Indeed no element of "unavoidable casualty" is to be predicated of a condition which appellant was bound to foresee at the time of entry. The necessity for irrigation and the absence of a reservoir should have been as apparent in July, 1906, as it was six months later. There is much more of the element of casualty in a situation arising from inability to find water upon the land where through drilling or digging it might reasonably have been expected than in the case which appellant presents for consideration. Need of irrigation, coupled with a present impossibility of securing it, then, is not a "casualty" within the meaning of section 3 of the act of March 2, 1889. Your action is affirmed.

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BEVERIDGE ET AL. *v.* NORTHERN PACIFIC RY. CO.

Motion for review of departmental decision of July 26, 1907, 36 L. D., 40, denied by Acting Secretary Pierce, November 1, 1907.

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SECOND HOMESTEAD ENTRY—ACT OF APRIL 28, 1904.

FINSANS ERHARDT.

Since the passage of the act of April 28, 1904, the Secretary of the Interior has no discretionary power to allow second homestead entries, but his power in this respect is defined and limited by the provisions of that act.

*Acting Secretary Pierce to the Commissioner of the General Land Office, November 1, 1907.* (G. W. W.) (J. E. W.)

The Department has given careful consideration to the appeal filed on behalf of Finsans Erhardt from your office decision of July 18, 1907, denying his application to make second homestead entry for the E.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 17, and NW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 20, T. 22 N., R. 15 E., B. H. M., Rapid City land district, South Dakota, in lieu of his entry No. 4059, made May 19, 1906, for the SE.  $\frac{1}{4}$ , Sec. 35, T. 129 N., R. 93 W., 5th P. M., Dickinson land district, North Dakota, which was canceled upon relinquishment May 9, 1907.

The entryman based his application for second entry upon his inability to obtain water on the land originally applied for after repeated diligent efforts, and you state as the reason for rejecting his said application that the relief afforded by the act of April 28, 1904 (33 Stat., 527), is limited to those who made homestead entries and lost, forfeited or abandoned the same before the date of said act, and

under conditions therein named, citing departmental instructions of June 11, 1907 (35 L. D., 590).

The appeal and accompanying brief present with clearness a strong and apparently an unusually meritorious case.

Counsel admits that the act of April 28, 1904, *supra*, covers only entries made prior to the passage thereof, but contends that under the general law it lies within the discretion of the Secretary of the Interior to permit second entries in certain cases. He states as follows:

This is well set forth in the general circular of the Interior Department (p. 19) which was promulgated and published after the act of 1904 went into effect. Therein it was found and held thus: "In some cases where obstacles which could not have been overcome and which rendered it impracticable to cultivate the land are discovered subsequent to entry (such as the impossibility of obtaining water by digging wells or otherwise) or where subsequent to entry and through no fault of the homesteader, the land becomes useless for agricultural purposes, the entry may, in the discretion of the Commissioner of the General Land Office be canceled and a second entry be allowed; but in the event of a new entry, the party will be required to show the same compliance with law in connection therewith as though he had not made the previous entry and must pay the proper fees and commissions upon the same."

We submit that the present case comes squarely within this rule and should be adjudicated in line therewith.

The general circular referred to was promulgated and published January 25, 1904, and not after the act of April 28, 1904, *supra*, went into effect, as stated by the attorney in the brief accompanying the appeal.

Department instructions of June 11, 1907, referred to in your said decision, state explicitly that unless applications to make second entry come within the purview of one of the acts of Congress therein set forth, this Department is without authority to allow such applications in the absence of other legislation on the subject. In other words, these instructions show that, contrary to the contention of the attorney in the case at bar, it is the opinion of the Department that the Secretary of the Interior does not have the discretionary power which was exercised prior to the passage of the act of April 28, 1904, and which it is sought to have applied for the relief of claimant in this case.

In view of the foregoing, your decision complained of is affirmed.

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**REPAYMENT—RAILROAD GRANT—ADJUSTMENT—ACT OF JULY 1, 1898.**

**MONROE MORROW.**

An entry allowed for lands within the overlap of the forfeited main line and constructed branch line of the Northern Pacific railway, *via* the valley of the Columbia river to Portland, Oregon, held by the Supreme Court of the

United States to have passed to the company under its grant, was improperly allowed and could not have been confirmed, because of conflict with the grant, and where made subsequent to the act of July 1, 1898, and abandoned prior to the act of May 17, 1906, extending the provisions of that act, the conflicting claims of the company and the entryman are not subject to adjustment under said acts, and the entryman is entitled to repayment of the fees, commissions and excess paid by him upon said entry.

*Acting Secretary Pierce to the Commissioner of the General Land*  
(G. W. W.) *Office, November 1, 1907.* (C. J. G.)

September 24, 1907, there was returned to your office for further consideration the case of Monroe Morrow, appealed from the decision of your office of July 2, 1907, denying application for repayment of the fee, commissions and excess paid by him on homestead entry for the NW.  $\frac{1}{4}$  of Sec. 31, T. 2 N., R. 26 E., The Dalles, Oregon.

October 2, 1907, your office resubmitted the case, adhering to its former decision in the premises.

The land involved is within the limits of the grant made by the act of July 2, 1864 (13 Stat., 365), to the Northern Pacific Railroad Company, main line, as fixed by map of general route filed August 13, 1870, *via* the valley of the Columbia to Portland, Oregon, which portion of the grant was forfeited for non-construction by the act of September 29, 1890 (26 Stat., 496). The land is also within the limits of the grant for the constructed branch line of said railroad and was embraced in a selection made by the company May 2, 1885, on account of such constructed branch line. Within this resulting overlap the Department originally held that the grant made on account of the constructed branch line was of only a moiety of the lands (11 L. D., 625), and the company was required to elect which of the alternate odd sections it would take in satisfaction of such moiety. Under the election this tract remained to the United States as part of the moiety appertaining to the unconstructed main line, the railroad selection was canceled and the land opened to general disposition in 1892.

By the act of July 1, 1898 (30 Stat., 597, 620), it was provided that where, prior to January 1, 1898, any part of an odd-numbered section, in either the granted or indemnity limits of the grant to the Northern Pacific Railroad Company, to which the right of the grantee 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 refused to transfer his entry, as in the act provided, the railroad grantee, upon a proper relinquishment, should be entitled to select an equal quantity of land in lieu of that relinquished.

Thereafter, to wit, April 25, 1905, in view of the decision in *United States v. Northern Pacific Railroad Company* (193 U. S., 1), the holding with respect to the rights of said company within the overlap hereinbefore described was changed, and the rights of the company to the full extent of the grant on account of the constructed branch line was respected, resulting in subjecting the claims of those allowed in the interim to enter these lands to the superior right of the railroad company. It was to protect this class that the act of May 17, 1906 (34 Stat., 197), extending the foregoing provisions of the act of 1898, was passed. The act of 1906 extended the provisions of the act of 1898 to any settlement or entry made subsequently to January 1, 1898, and prior to May 31, 1906—

in accordance with the erroneous decision of the land department respecting the withdrawal on general route of the Northern Pacific railroad between Wallula, Washington, and Portland, Oregon, where the same has not since been abandoned.

It follows that entries allowed for these railroad lands were improperly allowed and could not have been confirmed, because in conflict with the railroad grant, except for the act of 1906. The fact that some cases may inadvertently have been allowed to go to patent during the time the lands were erroneously held to be subject to entry does not alter the situation in the matter of those cases where entries were made and abandoned during the period of conflict. The entry in this case, although made October 25, 1902, subsequently to the date January 1, 1898, was abandoned, and canceled May 8, 1905, before the act of 1906 was passed. In cases where entries were not abandoned prior to said act confirmation was made possible thereby at the election of entrymen. But in this case the entry during its existence remained in conflict with said grant and could not legally have been confirmed. This is clearly demonstrated by the passage of the act of 1906, deemed necessary to protect those who were improperly allowed to make entry of these lands, the same being in conflict and not subject to confirmation until the relief afforded by said act. This case differs from that class where the lands are legally subject to entry under the land laws and in which case a conflict existing at the date of entry may not necessarily be fatal to subsequent confirmation thereof upon removal of the conflict, and where abandonment or relinquishment might be regarded as entirely voluntary. The only theory upon which it could be maintained that this entry was susceptible of confirmation is that the entryman had no knowledge of the conflict with the grant to the railroad company, that under the erroneous ruling of the land department his belief must have been that his entry could be confirmed, that his relinquishment was therefore entirely voluntary, due to an intention to abandon the land and not to any knowledge of the conflict, and that as matters

turned out if he had complied with the homestead law for the statutory period his entry might have been confirmed. It is not believed that confirmation possible only under such circumstances is the confirmation contemplated by the repayment statute, so as to preclude repayment. As the entry was always in conflict with the railroad grant such a view would not accord with the plain language of that statute.

The decision of your office is hereby reversed, and if there be no other objection, repayment will be allowed herein as applied for.

SURVEY—APPROVAL—SUPERVISION OF LAND DEPARTMENT.

EDWARD J. HILL.

A survey approved by the surveyor-general under the provisions of the act of April 29, 1816, is subject to the supervision of the land department, and if declared invalid by that department is of no effect.

*Acting Secretary Pierce to the Commissioner of the General Land*  
(G. W. W.) *Office, November 6, 1907.* (E. F. B.)

Edward J. Hill has filed an application for the correction of what is alleged to be an error of James Whitecomb, as Commissioner of the General Land Office, in cancelling certain entries in township 39 north, range 14 east, Illinois. The application is for the restoration of said entries and for the issuance of patents for the lands embraced therein, which he alleges has been wrongfully withheld.

The material facts appearing from the petition are that on February 9, 1836, Elias T. Langham, surveyor of public lands in Illinois and Missouri, issued instructions to Edward B. Talcot, deputy surveyor, authorizing him to survey an island in Lake Michigan in T. 39 N., R. 14 W., upon the application of a Mr. Walker, who alleged that he was a settler on said land entitled to preemption and that he desired to make proof upon his preemption claim and obtain title to the land.

That the said Edward B. Talcot, pursuant to the said instructions, surveyed said island in February, 1836, and said survey was approved by said Elias T. Langham, who transmitted the plat thereof to the register of the land office at Chicago, Illinois, as required by the laws then in force; that the said register, on May 31, 1836, allowed Mark Noble, Sr., to purchase and pay for one of the lots so surveyed, and on the same day allowed Mark Noble, Jr., to purchase and pay for another of the lots so surveyed, and on the same day the register issued and delivered to each of said purchasers a certificate of purchase in due form, stating that upon presentation of said cer-

tificate to the Commissioner of the General Land Office the purchaser shall be entitled to a patent for the land therein described.

That when Commissioner Whitcomb received a certified copy of said survey in February, 1837, and of the plat thereof, he advised the Surveyor-General by letter of May 5, 1837, that said survey was disapproved, and the local officers were directed to cancel the entries as shown by the letter of the Commissioner of April 4, 1838, of which the following is a copy:

4 APRIL, 1838.

REGISTER AND RECEIVER, *Chicago, Illinois.*

GENTLEMEN: The entries of floats of Mark Noble, Senior, and Mark Noble, Junior, per certificates 3804 and 3805, of tracts described in those certificates, respectively, as additions to fractional sections 10 and 15 of T. 39 N., R. 14 East, are considered as nullities and the said certificates cancelled. This office has no official knowledge of any such public land, and has never authorized any survey of the same, it being as represented, an accretion, or sand-bar formed since the original survey in 1821.

Thereupon the said Commissioner caused to be written upon the plat of said survey the following:

The additional survey was disapproved by the Commissioner of the General Land Office in letter to the Sur. Gen'l dated May 5, 1837, and the register and receiver were instructed to cancel the entry and refund the money for the lands by letter from the G. L. Office dated April 4, 1838.

It is alleged in the petition that the Department has since that day continuously held that said survey was, by the acts of the said James Whitcomb, Commissioner as aforesaid, canceled, vacated and set aside, and has withheld the issuance of patents contrary to the tenor and effect of said certificates; that applicant is the owner of said lands by mesne conveyances from said original purchasers.

The contention is that the approval of the survey by the Surveyor-General of Illinois and Missouri, as he was authorized to do under the act of April 29, 1816 (3 Stat., 325), was final and conclusive and not subject to supervision by the Commissioner of the General Land Office, citing *Tubbs v. Wilhoit* (138 U. S., 134) and other cases in support of his contention; that the duty of the Department in issuing a patent thereon was merely ministerial.

The ruling of the court to which reference is made is to the effect that prior to April 17, 1879, the Commissioner's approval of a public-land survey and plat was not required before filing the same in the local office; that there is nothing in the act of May 1, 1796, providing for the survey of lands in the territory northwest of the Ohio River, or in the subsequent acts, which requires the approval of the Commissioner of the General Land Office before said survey becomes final and the plats authoritative. That expression had reference to the time when a *proper* survey became effective so as to authorize the disposal of lands under it, if no action had been

taken upon it by the Commissioner of the General Land Office. Since April 17, 1879, the practice has been to require the specific approval of all surveys before the land is subject to entry. This change was not by statutory direction but by virtue of the supervisory authority.

There is nothing in the expression of the court to indicate that it was intended to hold that the Commissioner did not then as now have authority to determine whether a survey should or should not be approved. On the contrary, the court said:

There can be no doubt but that under the act of July 4, 1836, re-organizing the general land office, the Commissioner has general supervision over all surveys, and that authority is exercised whenever error or fraud is alleged on the part of the Surveyor General.

It is contended, however, that the power of supervision over the public land surveys was conferred upon the Commissioner by the act of July 4, 1836, and that the survey of the lands in question was made and approved by "the surveyor of the public lands in the territories of Illinois and Missouri, appointed under the act of April 29, 1816, *supra*, under which he was empowered to perform all acts in relation to such surveys, and to transmit the plats thereof to the registers of the land offices." That the final receipt having issued for the purchase of lands made in conformity with said survey, the power of supervision given by the act of 1836, could not retroact so as to authorize him to divest by his act the equitable title vested in the purchasers prior to the passage of the act of 1836, and that the United States holds the legal title to such lands in trust for the purchaser.

This contention is upon the assumption that the power of supervision by the Commissioner did not exist prior to 1836.

That contention is not sustained by the decisions of the Supreme Court, but on the contrary, the expressions of the court are to the effect that the power of supervision has always been vested in the executive authority having control and direction of the disposal of the public lands.

The General Land Office was established by the act of April 25, 1812, which provided for the appointment of a Commissioner thereof—

whose duty it shall be, under the direction of the head of the Department, to superintend, execute and perform, all such acts and things, touching or respecting the public lands of the United States, and other lands patented or granted by the United States, as have heretofore been directed by law to be done or performed in the office of the Secretary of State, of the Secretary and Register of the Treasury, and of the Secretary of War; or which shall hereafter by law be assigned to the said office.

In *Magwire v. Tyler* (1 Black, 195, 201) the court said: "That the General Land Office has, from its first establishment in 1812,

exercised control over surveys generally, is not open to discussion at this day." In that case the controlling question was whether the Secretary of the Interior was authorized to reject the survey of a confirmed Spanish grant which had been approved by the Surveyor-General.

There was no express authority conferred upon the Secretary of the Treasury by the act of March 3, 1807, to supervise the action of the Surveyor-General in approving the survey. It provided that when the survey and certificate were returned to the recorder of land title, a patent certificate should issue which, being transmitted to the Secretary of the Treasury, entitled the claimant to a patent. The authority to reject or approve the survey could only have been exercised under the general power of supervision over all matters pertaining to the disposal of the public lands and to the survey of private land grants that had been exercised by the proper executive officer prior to and since the organization of the General Land Office. In *Snyder v. Sickles* (98 U. S., 203, 210) the court said:

Assume that the power of such supervision and appeal was vested in the Secretary of the Treasury prior to the passage of that act (April 25, 1812) and it would follow beyond controversy that the same power is now possessed by the Secretary of the Interior.

Then, speaking as to the suggestion that the act reorganizing the land office left the Secretary of the Treasury no such power, the court observes that duties of that kind were rightfully performed by the Secretary of the Treasury prior to that act which did not make any substantial change in that regard, as the President still acted as before, in matters belonging to the departments, through their respective heads, which in legal contemplation and practical effect gave to the Secretary of the Treasury the same supervision over the doings of the Commissioner as under the prior act establishing the land office. See also 3 Op. Atty. Gen'l, 137.

The act of May 8, 1822 (3 Stat., 707), supplementary to the act of March 3, 1819 (3 Stat., 528), gave to the register and receiver authority to decide on conflicting claims confirmed by said acts and to declare how it should be located. No right of appeal from their decision was provided by the act, nor was power of supervision given to the Commissioner or the head of the Department having control over such matters. In *Cousin v. Blanc's Executors* (19 How., 202), the question was whether the courts of justice had jurisdiction to review and reverse the decision of the local officers. The court held that they did not, but added: "The power of revision is vested in the Commissioner of the General Land Office," and when the survey was executed according to the order of the register and receiver, "the United States Government was bound by it until it was set aside at the General Land Office."



possibility for all to have presented applications simultaneously; that entryman acted honestly, in perfect good faith, in harmony with law, instructions, rules, and regulations, and that entryman should not be put to expense of a hearing.

April 12, 1905, you sustained Munn's appeal, and directed the entrymen to show cause against cancelation of the entries as to the land in conflict. They filed returns to the rule, and also appealed to the Department from such order. Smith's affidavit charged that Munn was disqualified by being proprietor of more than one hundred and sixty acres—viz: three hundred and forty-one acres of land. You held the order to show cause not appealable, because merely interlocutory, and February 6, 1906, ordered a hearing, which was held April 20–21, at the local office. All parties participated in person and with counsel. December 3, 1906, the local office found that all parties had acted in good faith; that Munn was owner of but one hundred and forty acres, and that he made settlement on the land at the hour of opening, prior to the time of application by the adverse claimant-entrymen; and recommended that the entries be canceled so far as in conflict with Munn's settlement claim, and that his application for entry be allowed. Reviewing the testimony you held that Munn was "owner of at least 166.9 acres of land September 6, 1904;" that his homestead application was not tendered in good faith. As to the relative rights of settlers and applicants not alleging settlement you held that:

It would be unjust and inequitable . . . to allow plaintiff to shift and avoid the burdens of complying with departmental rules and regulations by an alleged settlement on the land in dispute to the detriment of these two homesteaders, who in perfect good faith fully met and complied with all the rules and regulations governing the opening of these lands to the public . . . The act of March 30, 1904, *supra*, provides that the lands . . . "shall be subject to entry . . . at a time and in accordance with regulations to be prescribed by the Secretary of the Interior." . . . The act in question gave ample authority to make and enforce such regulations relative to opening of these lands as the Department saw fit to make.

You reversed the action of the local office on two grounds: 1. That Munn was disqualified by reason of owning more than one hundred and sixty acres of land at the time of his settlement and application; 2. on the ground that by the regulations of June 30, 1904, *supra*, rights acquired by application at the land office are superior to rights acquired by settlement on the land at or prior to application at the local office, and asserted within time allowed by the act of May 14, 1880 (21 Stat., 140).

As to the latter question there can be no doubt. The instructions of June 30, 1904, *supra*, did not inhabit initiation of right by settlement. On the contrary, the land was "opened to *settlement* and entry." Either mode of appropriation was authorized. This was

in strict compliance with the act of June 6, 1900 (31 Stat., 672, 676), section 5 whereof, among other things, provides that after completion of the allotments "the residue of said ceded lands shall be opened to settlement by the proclamation of the President and shall be subject to disposal under the homestead . . . laws." The act of March 30, 1904, *supra*, made these lands "subject to entry under and in accordance with the provisions of section five" of the act above referred to. Munn was within the law, the instructions, and regulations in electing to initiate his right by settlement instead of by application presented at the land office. The assertion of prior right was in proper time, in due form, and the local office erred in denying him a hearing, which action you properly reversed. The actual settler is preferred over the land office applicant, if actual priority is not shown, and the initiation of rights is strictly simultaneous. *Dowman v. Moss* (176 U. S., 413, 417). Munn is entitled to the land, if he actually settled as alleged in good faith, was qualified, and has complied with the homestead law. This necessitates examination of the evidence to determine these questions, whereon your decision reversed the findings of the local office.

As to qualification, the only evidence is that of Munn himself, called out on cross-examination, whereby, with apparent candor, he admits ownership of some lands and denies ownership or interest in other lands respecting which he is questioned. His adversaries rested content with his statement of his land holdings and did not by copies of deeds of conveyance to him, or other written evidence, or even by offer of oral evidence, attempt to dispute his statement or prove he was holding, owning, or proprietor of more than he admitted—amounting only to one hundred and forty-eight acres. As to one tract of three hundred acres respecting which he was questioned he expressly denied having any interest whatever in it by way of partnership with his brothers or otherwise, and no attempt was made to show that he had.

As to settlement his testimony was clear and unequivocal, corroborated by his wife and Edwards, who say they were present, that he settled with his wife and child on the land at the very point of time that it became open, and that he brought over from an adjoining tract a house already built, which he has since improved and has ever since inhabited as his residence. Beyond these three witnesses there is no testimony as to the house being on the land that day or at that hour, but the entryman's witness, Perkey, saw it next day, the 7th; Smith, the entryman, saw it the 8th, and Bartholf saw it the 9th, and none claim or say that they saw the act of moving the house. The moving was at their first observation a thing already done, and so far as their evidence goes corroborates contestant's proof, not refuting it.

As to the establishing and maintaining of residence in the house on the land, the testimony on contestant's part is equally direct and positive that it was established at once and has been continuous; that Mrs. Munn has not slept elsewhere except one night; that they have cooked and eaten there all the time, save for a period of about six weeks between July 1 and some time in November, 1905, when the meals were cooked and eaten at the "Indian shack" on the adjoining forty acres, while Munn had men helping him put up hay, which was done because the men were working there, and this arrangement saved both their work time and rest time. Had they even slept there for such brief time, moved by such reason, it could not properly be held an abandonment, or breach of continuity of residence.

There has been little cultivation by Munn, no more than a small garden and plowing of a small tract not exceeding an acre, stated by Smith to be but about fifty by one hundred and forty feet but this was not Munn's fault, as Smith and Bartholf fenced him out of all the land. It is not for them to complain that, while they were excluding Munn from the land by fences, erected and maintained under color of subsisting entries, he did not use force to get access to his land and cultivate.

There is no satisfactory or direct evidence that any statement of Munn as to establishing and maintaining residence on the land in contest is untrue. Smith was at Munn's house, as he says, only twice. The first time, not definitely fixed in date, was apparently September 14, 1904, and the Munn's were there. In July, 1905, he looked into their window and they were not there. This was in the daytime and was while they were on the adjoining forty acres haying. Earle Thomas, witness against Munn, was then working for him in this haying season, and testified that the Munn's had no bedstead at the Indian shack, and that "Mrs. Munn would *get there* in the morning about seven o'clock," which implies that she did not stay there, but came from somewhere else. So far as this goes it tends to corroborate her statement that she came from the homestead claim, where, as she claims, she slept.

There is nothing in the record justifying reversal of the findings of the local office, which heard the testimony and saw the witnesses. The weight of testimony supports their finding. Your decision is reversed and the finding of the local office is affirmed. The entries will be canceled, to the extent of conflict with Munn's settlement and his application for entry will be allowed.

## HOMESTEAD ENTRY—RESIDENCE—SUMMER HOME.

GEORGE W. HARPST.

The homestead law contemplates that an entryman thereunder shall make the land his permanent home to the exclusion of a home elsewhere; and an entry of land merely for the purpose of making it a summer home, during three or four months of the year, while maintaining and occupying a home elsewhere the remainder of the time, is not within contemplation of the law.

*Secretary Garfield to the Commissioner of the General Land Office,*  
(G. W. W.) *November 14, 1907.* (E. F. B.)

George W. Harpst has appealed from the decision of your office of July 19, 1907, affirming the action of the local officers rejecting his final proof upon his homestead entry made October 24, 1901, for the SE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 7, SW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 8, NW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 17, and NE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 18, T. 4 N., R. 4 E., Eureka, California.

The proof was rejected for the reason that it does not show that claimant established and maintained a residence on the land to the exclusion of a home elsewhere.

The correctness of that finding does not appear to be questioned. On the contrary, claimant with unusual frankness states in his appeal that his purpose in entering the land was to secure a summer home for himself and family; that the land is of an elevation of 4500 to 5000 feet, subject to late and early frosts, covered with deep snow in winter and for those reasons is not fit for agricultural purposes other than grazing during the summer months. He does not claim that he made it his only home, or that he had any such intention at the time of his entry, but that "it was his intention to make the same the permanent home of himself and family during the summer months, and he has done so ever since entry."

His contention is that it is not the intentment of the homestead law to require the entryman to remain constantly on the land. While continuous presence upon the land after the establishment of actual residence is not essential in the continuity of such residence, the law does require that such residence shall be maintained to the exclusion of a home elsewhere.

The claimant has a stable and house and lot in Arcata, California, where he is engaged in the livery business. He has stock in the stable and the house is furnished. He does not deny that he has not lived continuously on the land, but says that his average residence on the place would be about three or four months in the year, and that when it is impracticable to live on the place he resides with his family in Arcata until the condition of the climate will permit of his returning to the land.

The only reasonable conclusion that can be deduced from his testimony is that his real home is in Arcata for about nine months of the year, and that the occupancy of the land for the summer months is a luxury he indulges under the impression, seemingly, that the donation by the Government to actual settlers and residents under the homestead law can be secured in such manner.

Your decision is affirmed.

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CHARLES O. DE LAND.

Motion for review of departmental decision of July 16, 1907, 36 L. D., 18, denied by Secretary Garfield, November 14, 1907.

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RESERVATION—SELECTION BY RAILROAD COMPANY—ACT OF AUGUST 5, 1892.

ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO.

So long as an order reserving lands stands unrevoked the lands are not subject to selection under the provisions of the act of August 5, 1892, notwithstanding the order of reservation was never noted upon the records of the local office, that the lands were never used for the purposes intended, and that the original scheme or purpose for which the reservation was made has been abandoned.

*Acting Secretary Pierce to the Commissioner of the General Land*  
(G. W. W.)                      *Office, November 15, 1907.*                      (F. W. C.)

The Department has considered the appeal of the St. Paul, Minneapolis and Manitoba Railway Company from your office decision of June 19, 1907, holding for cancellation its selection under the act of August 5, 1892 (27 Stat., 390), per list No. 69, of a certain unsurveyed tract designated in the selection as lot 1, Sec. 30, T. 24 N., R. 3 E., Seattle land district, Washington, being the easterly point of Blake Island, for the reason that the lands selected were, and had been for a long time prior to the filing of the selection in question in February, last, reserved for lighthouse purposes.

By the terms of the act of August 5, 1892, under which this selection is made, the company is limited to lands "not reserved and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection," etc. Your office decision reports that this tract was reserved for lighthouse purposes in accordance with order of the President dated March 26, 1869, in letter of March 29, 1869, addressed to the surveyor-general, the same being designated as "Tatugh Point Reservation," and that

no revocation of said order has ever been made. In conclusion your office decision states that—

No claim to this tract can be recognized until the Department of Commerce and Labor, which now has jurisdiction over such reservations, shall report that it is no longer needed for lighthouse purposes.

The appeal merely alleges error—

In holding that said tract was reserved for lighthouse purposes at the time of appellant's selection thereof, in this, that the so-called reservation was never noted upon the books of the district land office and to all intents and purposes had been abandoned many years before said selection.

A failure to properly note an order of reservation upon the records of the local land office does not take from the effect of the order directing the reservation, and even though it were admitted that the lands were never used for the purposes intended, and that the original scheme contemplated had been abandoned, yet, so long as the order reserving the lands stands unrevoked the tract is not subject to selection under the act of August 5, 1892. On the record before the Department the decision appealed from must be and is accordingly hereby affirmed. The company's selection will be canceled.

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CONTESTANT—HEIRS—ACT OF JULY 26, 1892.

HAGMAN *v.* KLAMMER.

Under the provisions of the act of July 26, 1892, the heirs of a deceased contestant are entitled to the same rights that contestant would have been entitled to if his death had not occurred, and where at the time of his death he was disqualified to make entry by reason of being an alien and not having declared his intention to become a citizen, no rights exist to which his heirs can succeed under said act.

*Acting Secretary Pierce to the Commissioner of the General Land*  
(G. W. W.)                      *Office, November 15, 1907.*                      (G. C. R.)

Fritz Hagman, through his guardian, C. A. Peterson, has appealed from your office decision of May 9, 1907, which required him to show that his father, Peter Hagman, was a qualified entryman at date of his death. This requirement was based upon the following state of facts:

The homestead entry of one Hans C. Erickson, made April 6, 1905, for the SW.  $\frac{1}{4}$  of section 1, T. 162 N., R. 93 W., Minot land district, North Dakota, was canceled on the contest of Peter Hagman, who died before notice of preference right reached him.

Hagman left surviving him as his only child, Fritz Hagman, for whom one C. A. Peterson was appointed guardian.

Within the time allowed, Peterson, as guardian, etc., applied to enter the land. The register and receiver rejected the application

because it was not shown that Peter Hagman was a qualified entryman at date of his death.

Notice of this rejection was sent by registered letter June 9, 1905, to "C. A. Peterson, guardian for Fritz Hagman, minor," at Minot, North Dakota. The letter was sent to the address given by the applicant in his homestead papers, being sworn to as the correct address in his nonmineral affidavit. The letter was returned to the local office unclaimed, presumably at the expiration of the thirty days noted on the envelope.

August 9, 1905, Charles A. Klammer made homestead entry for the land. He submitted commutation proof therefor November 27, 1906, final certificate issuing on same day.

March 5, 1906, Peterson, as guardian, etc., appealed from the rejection of his application to enter the land, stating that he did not learn that said adverse action had been taken until February 13, 1906. He sought to excuse his failure to file an earlier appeal on the ground that the notice of rejection was mailed to him at Minot, North Dakota, whereas in his application he had given his post-office address as Flaxen, North Dakota. As observed, he was mistaken in this statement.

Your office, November 14, 1906, sustained the appeal and Klammer was thereupon notified that he would be allowed sixty days in which to show cause why his entry should not be canceled and the application of the minor heir, Fritz Hagman, allowed.

Klammer answered the rule, alleging that Hagman was not a qualified entryman at date of filing contest, and asked for a hearing to prove it.

Your office in the decision appealed from vacated the order of November 14, 1906, sustaining Peterson's appeal, holding as aforesaid that it was incumbent upon him as guardian, etc., to show that Peter Hagman, the contestant, was a qualified entryman at the date of his death, and sixty days were allowed him to make such showing or to appeal, etc.

It is contended in the appeal which was taken from that order that as contestant's son, Fritz Hagman, is qualified to make entry (he has declared his intention to become a citizen), and since he has succeeded to the rights of his father under the contest, it is immaterial as to whether his father was qualified or not at date of his death.

It does not appear that contestant claimed any right to the land by reason of occupancy or prior settlement. He fought to a successful issue his contest, presumably upon the ground that the entryman had failed to comply with homestead law.

The right of a successful contestant is a personal one. This right may be waived, but its purchase by another confers no benefit. For-

merly the right did not descend to the heirs but completely abated on the death of the contestant. *Poisal v. Fitzgerald* (15 L. D., 19).

The second proviso to the act of July 26, 1892 (27 Stat., 270), amended in an important particular section 2 of the act of May 14, 1880 (21 Stat., 140), stating that—

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

If the father were in fact an alien, he was not on that account disqualified to initiate the contest (*Spitz v. Rodey*, 17 L. D., 503); but after its successful termination the results of his efforts would have been abortive unless he first showed his qualifications as an entryman.

Under the act of 1892, *supra*, the applicant had "the same rights" and no more than his father had when alive. It was therefore incumbent upon the applicant to affirmatively show or define those rights, and this involved a showing, not only that he was the sole heir of the successful contestant, but that the contestant, when he died, was qualified to make entry of the land.

Contestant appears to have been alien born. If he became a citizen of the United States, or had declared his intention to become such, the proof thereof was a matter of record and could have been readily obtained. The requirement appealed from was not therefore difficult to meet, and the failure to comply therewith is an intimation that the same could not have been met. He will, however, be allowed a reasonable time to meet said requirement.

The action appealed from is affirmed.

#### OKLAHOMA LANDS—GREER COUNTY—TIMBER-AND-STONE AND MINING LAWS.

##### LENERTZ *v.* MALLOY.

Lands in Greer County, Oklahoma, opened by the act of January 18, 1897, "to entry to actual settlers only, under the provisions of the homestead law," are not subject to disposal under the timber-and-stone act or the general mining laws.

*Acting Secretary Pierce to the Commissioner of the General Land*  
(G. W. W.)                      *Office, November 19, 1907.*                      (E. B. C.)

J. B. Lenertz has appealed from your office decision of March 5, 1907, which affirmed the action of the local officers in dismissing his protest against James E. Malloy's homestead entry (No. 11908,

Mangum series) made July 10, 1905, for the NE.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of section 22, T. 6 N., R. 21 W., Indian Meridian, in Greer County, now embraced in the Lawton, Oklahoma, land district.

Notice was given that the entryman would submit final proof in support of his claim on August 24, 1906, and on that day such proof was submitted. The same has been held in suspension to await the final disposition of the protest here involved.

August 8, 1906, Lenertz filed his verified protest, alleging, in substance, that the tract is exclusively and solely valuable for its deposit of granite and as a granite quarry; that the entryman is attempting to secure the same for quarry purposes and not for agriculture; and that the protestant "has recorded a placer mining claim for said tract under the statute of the United States for stone purposes."

The protest was "rejected" (dismissed) by the local officers "for the reason that the mineral laws of the United States did not apply to Greer County, Oklahoma." The pending appeal followed your affirmance of that action, as first above stated.

The appellant contends that your office erred, in that the protest is not founded upon the application of the mining laws to Greer County but upon the provisions of the timber-and-stone act as applicable to the public lands. Errors in other particulars are specified, but, in view of the conclusion herein reached, they are not material and need not be considered.

The lands in Greer County, Oklahoma, were opened and rendered subject to disposition by the act of January 18, 1897 (29 Stat., 490). The acts of June 23, 1897 (30 Stat., 105), and March 1, 1899 (30 Stat., 966), are amendatory thereof. Departmental regulations of February 25, 1897 (24 L. D., 184), and August 20, 1903 (32 L. D., 236), were issued thereunder. Section 2 of the act first mentioned, which contains the provisions applicable herein, is as follows:

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

This section is not modified or affected by either of the amendatory acts.

The Department, in the case of W. D. Harrigan (29 L. D., 153), commenting upon the act of June 20, 1890 (26 Stat., 169), which provided that certain withdrawn lands in Minnesota and Wisconsin should be restored to the public domain and "be subject to homestead entry, only," held that such language was entirely free from ambiguity, left no room for construction, and clearly indicated that it was the intention of Congress to make the land subject to entry under the homestead law only; and thereupon decided that the por-

tion of those lands therein involved was not subject to sale as an isolated tract nor to entry as timber or stone land. With equal cogency it may be said that the language of the section above quoted is not open to construction and means exactly what its terms import. It then follows that the land here involved is not subject to disposition in any other manner than that specified by the act; hence, is subject neither to the timber-and-stone act nor to the general mining laws.

This conclusion, however, finds support upon other grounds than the mere exclusive provisions of the Greer County act. By the act of May 2, 1890 (26 Stat., 81), which created the Territory of Oklahoma, Greer County was included within the geographical boundaries of the Territory, but was not politically a part thereof because of a dispute as to jurisdiction between the United States and the State of Texas. Section 18 of said act, after making certain provisions relating to the Public Land Strip, the Muscogee (or Creek) and the Seminole ceded lands, declares that—

Whenever any of the other lands within the Territory of Oklahoma, now occupied by any Indian tribe, 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, under the provisions of the homestead law.

Further pertinent provisions are:

Sec. 20. That the procedure in applications, entries, contests and adjudications in the Territory of Oklahoma shall be in form and manner prescribed under the homestead laws of the United States and the general principles and provisions of the homestead laws, except as modified by the provisions of this act and the acts of Congress approved March first and second, eighteen hundred and eighty-nine, heretofore mentioned, shall be applicable to all entries made in said Territory, but no patent shall be issued to any person who is not a citizen of the United States at the time of making final proof.

\* \* \* \* \*

Sec. 25. That inasmuch as there is a controversy between the United States and the State of Texas as to the ownership of what is known as Greer County, it is hereby expressly provided that this act shall not be construed to apply to said Greer County until the title to the same has been adjudicated and determined to be in the United States.

March 16, 1896, such an adjudication was made by the Supreme Court of the United States, in the case of *United States v. Texas* (162 U. S., 1). Further history regarding Greer County lands is found in the case of *Frank Johnson* (28 L. D., 537), to which reference is made.

Section 16 of the act of March 3, 1891 (26 Stat., 989, 1026), provides that certain ceded Indian lands in Oklahoma Territory, when opened to settlement, "shall be disposed of to actual settlers only, under the provisions of the homestead and townsite laws," and concludes as follows:

and *all the lands in Oklahoma* are hereby declared to be *agricultural lands*, and proof of their *non-mineral character* shall not be required as a condition precedent to final entry. [Italics borrowed.]

From the context it is apparent that the provisions quoted were general and intended to apply, as expressly stated, to all lands in Oklahoma, in which Greer County was then geographically included by act of Congress.

This definite legislative classification of Oklahoma lands as agricultural is consonant with the great body of legislation relating to the disposition of such lands. In addition to those already mentioned may be cited the acts of March 1, 1889 (25 Stat., 757, 759); March 2, 1889 (25 Stat., 980, 1004-5); February 13, 1891 (26 Stat., 749, 759); March 3, 1893 (27 Stat., 557, 563); same date (27 Stat., 612, 640, 642, 644). By those acts Congress provided, in general, that lands opened to settlement in Oklahoma should be disposed of under the homestead and townsite laws, with certain minor modifications specifically set forth in the various acts. Their exclusive import is emphasized by two express exceptions, whereby Congress has made the mining laws applicable to certain of the lands. The first is the act of March 2, 1895 (28 Stat., 876, 899), which in terms extended the mining laws to the lands ceded to the United States by the Wichita and affiliated bands of Indians under the agreement ratified by that act, and the second is the act of June 6, 1900 (31 Stat., 672, 680), which also in terms extended those laws to certain of the lands ceded by the Kiowa, Comanche, and Apache Indians under the agreement thereby ratified. As to the lands thus affected the usual non-mineral affidavit and proof are an essential part of a homestead-entry record, but are not necessary as to other lands in Oklahoma.

The general policy of Congress in disposing of Oklahoma lands as agricultural\* is further evidenced by the provisions of the enabling act of June 16, 1906 (34 Stat., 267), whereby lands granted to the future State of Oklahoma are clearly intended to vest in the State even where they "are valuable for minerals, which terms shall also include gas and oil." See section 8 thereof.

In certain specific cases the Department has held that the general mining laws were not, of their own force or otherwise, operative upon the following Oklahoma lands, namely: the reserved townsites of Lawton, Anadarko, and Hobart upon the Comanche, Kiowa and Apache ceded lands, Instructions (31 L. D., 154, 157); the school and other sections of the same lands reserved to the future State of Oklahoma, Instructions (32 L. D., 95), and Gypsite Placer Mining Claim (34 L. D., 54); school sections in the Cherokee Outlet, E. A. Shirley (35 L. D., 113); and lands in the Kiowa, Comanche

and Apache pasture reserve, opened under the act of June 5, 1906 (34 Stat., 213), Benjamin F. Robinson (35 L. D., 421).

Section 2318 of the Revised Statutes provides that "In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law." By the Greer County Act, Congress *expressly directed* and prescribed by law a certain method for the disposition of all the lands therein. This act, when considered in connection with the general policy pursued in disposing of all lands in Oklahoma as agricultural (with the exceptions above mentioned), must be held to preclude the operation or the applicability to Greer County lands of the provisions of the general mining laws and equally of the timber-and-stone law. The appellant could not, then, under the terms of either of those laws initiate or secure any rights in the premises which the land department could recognize.

The conclusions reached by your office and the local officers are correct, and Lenertz's protest was properly dismissed.

The decision appealed from is affirmed.

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BRADLEY *v.* VASOLD.

Petition for re-view of departmental decision of September 30, 1907, 36 L. D., 106, denied by Acting Secretary Pierce, November 19, 1907.

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LEAVE OF ABSENCE—RECLAMATION PROJECT.

EDWARD L. CRANE.

Homestead entrymen who by reason of the construction of irrigation works under the reclamation act are deprived of the annual overflow of waters upon which they largely depend for the production of crops, may be granted leaves of absence where from such cause they are unable to comply with the law.

*Acting Secretary Pierce to the Commissioner of the General Land*  
(G. W. W.)                      *Office, November 22, 1907.*                      (F. W. C.)

With your office letter of October 9, last, were forwarded the papers in the matter of the appeal of Edward L. Crane from your office decision of July 15, 1907, rejecting his application for leave of absence from his homestead entry made June 7, 1904, embracing lots 1 and 2, and the S.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$  of Sec. 3, T. 10 S., R. 24 W., Phoenix land district, Arizona.

Crane's application is made under section 3 of the act of March 2, 1889 (25 Stat., 854), and in support thereof he alleges that he has

made improvements upon the land of the value of \$1165, and that 45 acres were cultivated during the years 1903, 1904, 1905 and 1906. His application is for a period of six months from June 1, 1907, and thus describes the circumstances making it necessary to apply for leave of absence: That the crops grown upon this land had been secured by planting immediately after overflow from the Colorado river, and that by reason of the construction of a levee southward for several miles from Yuma the overflow water upon which the entryman relied has been entirely cut off, rendering total destruction of crops planted upon the land.

In denying this application you merely refer to departmental decision in the case of Jacob Fist (33 L. D., 257). The matter has been referred to the reclamation service and is made the subject of report by the Acting Director dated November 16, 1907, wherein he points out certain features distinguishing this case from that referred to and relied upon in your office decision. In said report he says:

The settlers on these lands who relied in raising crops on the wetting from the overflow, and who were temporarily deprived of such means of obtaining subsistence by the necessary action of the United States in constructing the levees would apparently come within the provisions of the act of March 2, 1889 (25 Stat., 854), and entitled to relief by reason of failure of crops due to the construction of such levees, which was to them for a time an "unavoidable casualty." By the construction of these dykes, the people occupying the Yuma bottom lands were cut off from the annual overflow, upon which they depended to a certain extent for irrigation and by which they had theretofore managed to obtain partial crops, affording at least some means of subsistence. These facts would apparently distinguish their cases from the Fist case, cited in the Commissioner's decision, and entitle them to the benefits of a leave of absence under the act of March 2, 1889.

Upon this presentation the decision of your office denying the application must be and is hereby reversed, and the application will be granted as applied for.

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**DESERT LAND ENTRY—WITHDRAWAL UNDER RECLAMATION ACT—ACT OF JUNE 27, 1906.**

**STAATS v. NORTHERN PACIFIC RY. CO.**

The provision of section 5 of the act of June 27, 1906, that the time during which a desert-land entryman is hindered, delayed, or prevented from making improvements or from reclaiming the land embraced in his entry by reason of the withdrawal of the land under the reclamation act shall not be computed in determining the time within which he is required to make improvements or reclaim the land, has no application where the entryman is in no wise hindered by such withdrawal from improving and reclaiming the land according to his original intention, and the only reason for not carrying out the original plan is that the proposed government scheme may offer a more efficient and economical means for the reclamation of the land.

*Acting Secretary Pierce to the Commissioner of the General Land*  
(G. W. W.) *Office, November 23, 1907.* (F. W. C.)

The Department has considered the appeal by Jennie Staats from your office decision of May 9, 1907, denying her petition filed under the provisions of section 5 of the act of June 27, 1906 (34 Stat., 519), to be excused from making further improvements upon the SE.  $\frac{1}{4}$  of Sec. 9, T. 8 N., R. 23 E., North Yakima land district, Washington, embraced within her desert land declaration filed April 5, 1905, for the period of one year from February 15, 1907.

Her application is based upon the ground that at the time of making said desert declaration it was her intention to reclaim the land covered thereby by means of artesian wells or by pumping water from such wells; that since making said declaration, to wit, in September, 1905, this land was embraced within a withdrawal made under the reclamation act of June 17, 1902 (32 Stat., 388); that the reclamation service announced its determination to furnish water for this and other lands, and that by reason thereof claimant abandoned her original plan, subscribing to the Sunnyside Water Users' Association, proposing to reclaim the land by means of the water from the government irrigation works.

Prior to filing this application claimant submitted annual proof, March 5, 1906, showing an expenditure of \$175, through clearing about 30 acres of the land and surveying a main irrigation canal and laterals upon this land. Since your office decision appealed from, to wit, on July 16, 1907, claimant submitted further proof showing expenditure of \$175, the cost of an engine for pumping and of labor in installing the same upon the land. From this latter proof it would seem that claimant had not entirely abandoned her original intention of depending upon the use of water from wells for the irrigation of the land.

The section of the act of June 27, 1906, under which the application under consideration was filed, provides that where any *bona fide* desert land entry has been or may be embraced within the exterior limits of a withdrawal under the reclamation act—

and the desert land entryman has been or may be directly or indirectly hindered, delayed, or prevented from making improvements or from reclaiming the land embraced in any such entry by reason of such land withdrawal or irrigation project, the time during which the desert land entryman has been or may be so hindered, delayed, or prevented from complying with the desert land law should not be computed in determining the time within which such entryman has been or may be required to make improvements or reclaim the land embraced within any such desert land entry.

In denying claimant's application it was said in the decision appealed from:

In this case it is not shown that claimant's intended plan of irrigating the land by means of artesian or other wells has in any way been hindered or delayed in any manner, nor can the contention of claimant that her voluntary subscription to stock in an irrigation company brings her within the purview of said act, be entertained.

It seems clear that the claimant has not been delayed or hindered by reason of the withdrawal of this land under the reclamation act, and while the intervening proposed government scheme may have offered what claimant considered a more efficient and economical means of reclaiming the land, yet it in no wise hindered her from developing a water supply as originally intended. It may be argued that the water developed under the original intention would be useless after water from the government irrigation works was available, but this would not bring the claimant within the class intended to be protected by the legislation invoked.

In this connection it may be said that aside from the development of water for use in irrigating the lands, there are many other improvements necessary in the preparation of the land for the reception and utilization of the water, and, for that reason, the application to be relieved from making further improvements upon the land might also be denied. In so far as claimant, should she change her original intention and await the furnishing of water through the government scheme, may be unable to make her proof within the period prescribed under the desert land act, it may be that relief might nevertheless be afforded her, and relative thereto attention is invited to departmental instructions of July 14, 1905 (34 L. D., 29); and the opinion of the Assistant Attorney-General for this Department dated January 6, 1906 (*ib.*, 351, 355).

Upon the showing now before the Department the rejection of her application to be relieved from making further improvements upon the land is affirmed.

A further feature of this case is worthy of some consideration although not involved in claimant's appeal. This land is within the primary limits of the constructed branch line of the Northern Pacific railroad, opposite the portion thereof definitely located June 29, 1883. Claimant's entry was allowed under a former erroneous decision of this Department treating this land as a part of the grant appertaining to the unconstructed branch line via the Valley of the Columbia River to a point at or near Portland, which grant was forfeited by act of September 29, 1890 (26 Stat., 496), June 12, 1905, and again on October 15, 1906, resident counsel for the Northern Pacific Railway Company requested the cancellation of this entry. Your office decision finds, however, that claimant is entitled to the benefits of the act of May 17, 1906 (34 Stat., 197), extending the

provisions of the act of July 1, 1898 (30 Stat., 597, 620), to settlements, entries or claims initiated upon lands having the status above described prior to May 31, 1905, and in your decision denying claimant's petition to be excused from making further improvements upon this land you allowed her 60 days within which to make her election under the act of 1898. This she does not appear to have done as far as appears from the record before the Department. Had she elected to transfer her claim to other lands the decision upon her present application would have been unnecessary. She should therefore be treated as having elected to retain the land and the matter of the conflict with the railroad company adjudicated accordingly.

MANNER OF PROCEEDING ON SPECIAL AGENTS' REPORTS.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,

*Washington, D. C., November 25, 1907.*

*To Special Agents and Registers and Receivers, United States Land Offices:*

GENTLEMEN: Paragraph 6 of instructions relative to the manner of proceeding upon Special Agents' reports, approved September 30, 1907 [36 L. D., 112], is hereby amended to read as follows:

6. Notice of the charges may in all cases be served personally upon the proper party by any officer or person, or by registered letter mailed to the last address of the party to be notified, as shown by the record, and to the post office nearest to the land. Proof of personal service shall be the written acknowledgment of the person served, or the affidavit of the person who served the notice attached thereto, stating the time, place and manner of service. Proof of service of notice by registered mail shall consist of the affidavit of the person who mailed the notices, attached to the post office receipts for the registered letters, the post-office registry return receipts, or the returned unclaimed registered letters.

The purpose and effect of the above amendment is to obviate the necessity of personal service, or of service by publication in government proceedings, and local officers are enjoined to exercise care in properly identifying and preserving the evidence of service in such cases, and in forwarding same to this office with the record.

Very respectfully,

R. A. BALLINGER, *Commissioner.*

Approved:

JAMES RUDOLPH GARFIELD, *Secretary.*

## TOWNSITE OF CEMENT.

Motion for review of departmental decision of September 16, 1907, 36 L. D., 85, denied by Acting Secretary Pierce, November 25, 1907.

## CONTEST—NOTICE—DEFECTIVE SERVICE.

MEEGAARD *v.* HARVEY.

Service of notice of a contest is fatally defective where the purported copy of the original notice served upon the entryman does not show the date of the hearing as fixed in the original notice.

*Acting Secretary Pierce to the Commissioner of the General Land (G. W. W.) Office, November 25, 1907. (E. F. B.)*

Anna Harvey has appealed from the decision of your office of May 24, 1907, holding for cancellation her homestead entry made April 21, 1903, for the SE.  $\frac{1}{4}$  of Sec. 34, T. 133 N., R. 75 W., Bismarek, North Dakota, upon the contest of M. G. Meegaard, filed July 2, 1906, charging failure to reside upon and cultivate the land as required by law.

The proof clearly shows that the entryman never resided on the land, and no error is alleged on the finding of the local officers and of your office upon that question.

The only ground of alleged error is in not holding that the local officers had no jurisdiction to hear and determine the case for the reason that the notice of the contest served upon her did not state the time and place fixed for the taking of the testimony, and in not sustaining her motion to dismiss the contest.

The original contest notice cited the parties to appear "at 10 o'clock a. m., on September 18, 1906, before P. G. Books, clerk of District Court, at Linton, North Dakota, and that final hearing will be held at 10 o'clock a. m., on September 25, 1906, before the Register and Receiver at the United States land office in Bismarek, North Dakota."

The return of the Sheriff of Emmons County, North Dakota, is that he served said notice "by delivering a true copy thereof to contestee on August 11, 1906, at Linton, Dakota."

The local officers refused claimant's motion to dismiss the contest because the return of the sheriff shows that a true copy of the original notice had been served upon her. Your office affirmed their ruling for the reason that the copy of the notice served on claimant was not exhibited to the local officers, so as to enable them to decide whether the copy of notice was defective, as alleged.

As the record failed to contain sufficient evidence to impeach the return of the officer who served the notice, there was no error in the

decision of your office sustaining the ruling of the local office. But in the appeal it is alleged that the copy of notice was exhibited to the local office, but was not filed, as it was the only evidence to prove the correctness of the averment. There is now filed with the appeal the copy of the notice served upon claimant, which does not give the date either for the taking of the testimony before the Clerk of the District Court or the hearing before the local officers, the blank space for the insertion of said date not having been filled in.

Under the rulings of the Department the service of notice is fatally defective where the purported copy of the original notice served upon the claimant does not show any date for the hearing, or does not show the true date. *Morgan v. Riley* (12 L. D., 44). The case must therefore be remanded to the local officers with directions to set aside the service with leave to contestant to proceed with his contest by a new summons, within such time as may be fixed by your office, following the ruling in *Milne v. Dowling* (4 L. D., 378).

Your decision is modified accordingly.

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WHITE *v.* SWISHER.

Motion for review of departmental decision of July 22, 1907, 36 L. D., 22, denied by Acting Secretary Pierce, November 25, 1907.

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HOMESTEAD—AMENDMENT—SECOND ENTRY—SECTION 2372, R. S.

PATRICK O'NEILL.

The provisions of section 2372 of the Revised Statutes, authorizing a cash entryman who by mistake in description made entry of a tract not intended to be entered "to change the entry and transfer the payment from the tract erroneously entered to that intended to be entered, if unsold, or, if sold, to any other tract liable to entry," have no application to homestead entries.

While the land department has applied the principle of section 2372 to homestead and other non-cash entries and permitted amendment to carry out the original intention of the entryman, it has never been extended to permit an entryman to change his entry from the tract actually entered to one not originally intended to be entered.

*Acting Secretary Pierce to the Commissioner of the General Land*  
(G. W. W.) *Office, November 25, 1907.* (E. P.)

Patrick O'Neill has appealed from your office decision of July 2, 1907, rejecting his application to make a second homestead entry of lots 1, 2 and 3, Sec. 2, T. 6 S., R. 30 E., Roswell land district, New Mexico.

It appears that on July 24, 1906, O'Neill made homestead entry of the SE.  $\frac{1}{4}$  of Sec. 25, T. 5 S., R. 30 E., in the land district aforesaid. His application to make a second entry, which was presented January 22, 1907, was based upon a corroborated showing to the effect that, through a mistake of description, the land actually entered by him, as aforesaid, was not the land that he had examined and thought he had entered, but a particularly worthless tract situated more than a mile from the tract that he intended to enter; and that the latter tract is covered by the homestead entry of another person, and therefore is not now subject to entry. Your office rejected the application on the ground that, O'Neill's original entry having been made subsequently to the approval of the act of April 28, 1904 (33 Stat., 527), the land department is without authority to permit him to make a second entry, citing instructions of June 11, 1907 (35 L. D., 590).

In his appeal O'Neill invokes the aid of section 2372 of the Revised Statutes, and contends that, in view of the facts disclosed herein, he is entitled, under the provisions of said section, to have his entry changed to the tract he now desires to enter.

That section provides that in certain circumstances and upon a compliance being made with certain rules, a purchaser, who, by a mistake of the true number of a tract intended to be entered, has made entry of a tract not intended to be entered—

is authorized to change the entry and transfer the payment from the tract erroneously entered to that intended to be entered, if unsold; but, if sold, to any other tract liable to entry.

It is manifest that this section, which was carried into the Revised Statutes from the act of May 24, 1824 (4 Stat., 31), is applicable only to cash entries of the public lands, and not, therefore, to a homestead entry. It is true that, applying the principle of the statute, the Department has permitted homestead and other non-cash entries to be changed by way of amendment, from one tract to another in certain cases where, by such change, the original intention of the entryman might be effectuated. But, so far as the Department is aware, that principle has never been applied, nor is it believed there is any authority for its application, to a case, like the one at bar, where an entryman is seeking, not to correct a mistake of description so as to make his homestead entry conform to his original intentions, but, rather, to receive compensation for the loss occasioned by such mistake, by being permitted to enter, in lieu of the tract actually entered, a tract different from the one he originally intended to enter. For the reasons stated, it must be held that the applicant is not entitled to have his entry changed from the tract covered thereby to the one he now desires to enter. His right to enter the tract in question, therefore, must be governed solely by the act of April 28, 1904, *supra*,

which is the last general law relating to second homestead entries. That act authorizes the making of such entries only in cases where the applicant's original entry was made prior to the date of its approval. O'Neill's original entry was made July 24, 1906, or long subsequent to the approval of the act. Hence it is clear that he does not come within the purview of the act. The decision appealed from is therefore affirmed.

**NORTHERN PACIFIC GRANT—ADJUSTMENT—SETTLEMENT OF UNSURVEYED LANDS—ACT OF JULY 1, 1898.**

**NORTHERN PACIFIC RY. CO. v. VIOLETTE.**

The provision in the act of July 1, 1898, respecting relinquishments by the railway company in favor of settlements made upon unsurveyed lands after January 1, 1898, is not mandatory upon the company, but merely extends a privilege to the company to select other lands for such as it may relinquish, upon such favorable terms as should reasonably induce the relinquishment, and thus protect settlements made at a time when it could not be reasonably ascertained whether they would fall upon odd- or even-numbered sections.

*Acting Secretary Pierce to the Commissioner of the General Land*  
(G. W. W.)                      *Office, November 26, 1907.*                      (F. W. C.)

June 9, 1905, this Department approved a list of lands preliminary to a request upon the Northern Pacific Railway Company for relinquishment under the act of July 1, 1898 (30 Stat., 597, 620), and among the tracts included in said list, which was known as Montana list No. 46, was lot 1, Sec. 15, T. 13 N., R. 18 W., within the primary limits of the Northern Pacific land grant and included in the individual claim of Frank K. Violette.

Upon being advised thereof and requested to relinquish the lands the company responded that the same had been sold to the Blackfoot Milling Company and that the company was endeavoring to secure a reconveyance with a view to making the relinquishment, as requested. Subsequently, the company filed a statement wherein it was claimed that the land embraced in the present claim should not have been included in the demand under the act of July 1, 1898, and should be eliminated from the list previously approved, and in support thereof argument was filed which your office submitted for departmental consideration.

The plat of the township in question was officially filed May 17, 1905, and thereafter Violette filed a homestead application for the lot in question, alleging settlement thereon with continuous residence since September, 1902. So far as disclosed by the record there was no pending controversy arising by settlement, entry, or claim under the land laws involving the tract in question, either January 1, 1898, or

upon July 1, 1898, the date of the passage of the act providing for adjustment of conflicting claims to lands within the limits of the Northern Pacific land grant, said latter act being 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 or 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 railroad 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.

In submitting this matter your office makes no review of the law; neither does it give consideration to the brief filed on behalf of the railway company; and upon the record now before the Department it must be assumed that this tract was placed upon the list under that part of the act of 1898 which provides:

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 be issued therefor.

It is urged upon behalf of the company that claims falling within the proviso above quoted are a class in themselves separate and dis-

inct from the general body of claims covered by the act of 1898; that the general provisions and obligations imposed upon the company with respect to relinquishment of lands included within the general body do not apply to this class; that lands included within said proviso are not to be listed with a view to demand upon the company for relinquishment, and that the filing of a relinquishment including such claims is not mandatory upon the company.

To a proper consideration of this matter it is necessary to first consider the general object and scope of the act of July 1, 1898. Bearing thereon I quote from the decision of the Supreme Court in the case of *Humbird v. Avery* (195 U. S., 480, 499), wherein it was said:

Obviously, the first inquiry should be as to the object and scope of the act of 1898. Upon that point we do not think any doubt can be entertained, if the words of the act be interpreted in the light of the situation, as it actually was at the date of its passage. Here were vast bodies of land, the right and title to which was in dispute between a railroad company holding a grant of public lands, and occupants and purchasers—both sides claiming under the United States. The disputes had arisen out of conflicting orders or rulings of the Land Department, and it became the duty of the Government to remove the difficulties which had come upon the parties in consequence of such orders. The settlement of those disputes was, therefore, as the Circuit Court said, a matter of public concern. If the disputes were not accommodated, the litigation in relation to the lands would become vexatious, extending over many years and causing great embarrassment. In the light of that situation Congress passed the act of 1898, which opened up a way for an adjustment upon principles that it deemed just and consistent with the rights of all concerned—the Government, the railroad grantee, and individual claimants. The railroad company evinced its approval of this action of the legislative department by a prompt acceptance of the act, in its entirety. By such unqualified acceptance the railroad company agreed that so far as it had any claim to the lands in dispute, whatever the act of Congress required to be done might be done.

There can be no question but that the main body of the act had reference to the adjustment of controversies pending at the date of the passage of the act where the individual claim had been initiated prior to January 1, 1898. Respecting such claims the act first extends to the individual claimant as against the grant, the right of election to transfer his claim in conflict with the grant to other lands or to retain the land claimed, and in the latter event for the listing of the land for relinquishment by the railway company who "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."

Upon the filing of such relinquishment the railway company is accorded a privilege to select other lands upon the limitations and

conditions therein prescribed, not material to the matter here under consideration.

It will be first noted with respect to the class covered by the proviso hereinbefore quoted, namely, settlers in pursuance of existing law upon odd numbered sections of unsurveyed public lands within the railroad grant to which the right of the railroad has attached, that the act is broadened, including settlements made after the passage of the act and at any time prior to the survey of the lands. With respect to such claims it is provided that—

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 patent shall issue therefor.

To these individual claimants the act does not extend the right of election and transfer of the claims to other lands, and it seems clear that they are not of the class required to be listed with a view to demanding relinquishment of the railway company. The contention of the company that to hold it bound to relinquish in favor of such settlers would amount to an open invitation to settle upon its unsurveyed lands with a guarantee of protection, with a resulting cloud upon the company's title and, perhaps, a bar to the disposal of its lands, is not without force, and after a most careful consideration of the entire act the Department is of opinion that the proviso above quoted merely extends a privilege to the company to select other lands for such as it may relinquish, upon such favorable terms as should reasonably induce the relinquishment, and thus protect settlement made at a time when it could not be reasonably told whether the settler would fall upon an odd numbered or even numbered section. In this respect the privilege is somewhat akin to that provided for in the act of June 22, 1874 (18 Stat., 194), only the inducement to relinquish is greater because the field of selection is greatly enlarged.

While it is true that settlement made within the limits of the grant upon unsurveyed lands is with notice that the odd numbered sections thereafter defined by the lines of the public survey have been granted, yet the government is desirous of disposing of such as by the lines of the public survey are returned as even numbered sections, and the settlement under the government invitation is entitled to protection as far as it is possible to extend it.

It follows from these considerations that the contention of the company must be sustained and that the provision respecting relinquishment in favor of settlements made upon unsurveyed lands after January 1, 1898, is not mandatory upon the company, but as the relief proposed is vital to the settler, it is hoped that the company may, as far as possible, make the provision available to bona fide

settlers, and, as it first proposed when invited to relinquish this tract by your office, that it endeavor to secure a reconveyance where it has sold the land shown to be included in such bona fide settlers' claims.

In your future action respecting adjustments under this act you will be guided by the construction of the law herein given.

LINHART *v.* SANTA FE PAPER CO.

Motion for review of departmental decision of July 26, 1907, 36 L. D., 41, denied by Acting Secretary Pierce, November 26, 1907.

DESERT LAND ENTRY—SURVEYED AND UNSURVEYED LAND—FINAL CERTIFICATE.

MICHAEL H. FALLON.

Desert land entries are treated as entireties, and where part of the land embraced in an entry is surveyed and part unsurveyed, final certificate should not issue for the surveyed portion only, but in such case, where proof is submitted as to the surveyed land, issuance of certificate should be suspended until the unsurveyed portion shall have been surveyed, when the entryman should be required to submit supplemental proof as to such portion, describing it by proper legal subdivisions and conforming it to the lines of the public survey.

*Acting Secretary Pierce to the Commissioner of the General Land (G. W. W.) Office, November 26, 1907. (E. O. P.)*

Michael H. Fallon has appealed to the Department from your office decision of July 18, 1907, holding for cancellation final certificate issued upon desert land made by him June 21, 1901, and afterwards, on October 8, 1905, amended to cover the W.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 7, T. 37 N., R. 26 W., NE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 12, T. 37 N., R. 27 W., M. M., Kalispell land district, Montana. Final proof was offered by Fallon July 26, 1905.

The cancellation of said final certificate as directed by your office was without prejudice to any of the rights of the claimant under his entry, and was based solely upon the ground that a portion of the land was unsurveyed.

Fallon on appeal here seeks to have this action modified to the extent that the final certificate be allowed to stand as to the surveyed portion of his entry.

The uniform practice of the Department has been to treat entries made under the public land laws as entireties. Assignments of portions of desert land entries are prohibited, though the assignment of the whole is authorized. Luther J. Prior (32 L. D., 608). Where

desert land entry is made of unsurveyed lands, proof must be submitted within the time specified by the act of March 3, 1877 (19 Stat., 377), as amended by the act of March 3, 1891 (26 Stat., 1095), but the issuance of final certificate thereon will be suspended until survey, when the entryman will be required to submit supplemental proof, describing the entry by the proper legal subdivisions and conforming it to the lines of the public survey. Until such supplemental proof is made final payment should not be accepted for the land. C. B. Mandenhall (11 L. D., 414); John W. Phillips (23 L. D., 410). Where a portion of the land only is unsurveyed the same practice should be followed. In no other way can the entry be maintained in its entirety, or the rule prohibiting the assignment of a portion of a desert land entry adhered to. The practice is well settled, and good administration demands that but one certificate should be issued upon a single entry, and the action of your office in following the procedure outlined in the general circular of January 25, 1904 (page 39), is hereby affirmed.

It is noticed in connection with the affidavit of Fallon made in connection with his final proof, that he has heretofore made entry under the agricultural public land laws of 200 acres of land. In the affidavit made by him at the time of making desert land entry he averred that he had never made entry of land sufficient in amount to aggregate, with that applied for, more than 320 acres. It would seem therefore, that a portion of the land, other than that embraced in the entry now under consideration, was made subsequent to the filing of said affidavit. The description given by the claimant of the land entered by him under the homestead and timber and stone laws is not specific enough to enable the Department to ascertain whether such entries, or either of them, were relinquished or perfected. If both were perfected claimant would not now be entitled to complete his present entry in a greater amount than 120 acres. Unless the records of the local office show what disposition was made of said entries, Fallon should be called upon at the time he submits supplemental proof conforming his present entry to the lines of the public survey, to furnish evidence that he did not perfect title under said entries to more than 160 acres of public land, and to show what disposition was actually made of said entries.

The papers are herewith returned and the final certificate erroneously issued on Fallon's desert land entry will be canceled as directed by your office.

## PRACTICE—DEPOSITIONS—OFFICER—RELATIONSHIP TO ATTORNEY.

HELLER *v.* HILLIUS.

The fact that a United States Commissioner is the father of the attorney for one of the parties to a contest does not disqualify him to take depositions in the case where he has no interest in the subject-matter of the suit.

*Acting Secretary Pierce to the Commissioner of the General Land*  
(G. W. W.)                      *Office, November 27, 1907.*                      (C. E. W.)

This is an appeal filed by John Hillius, contestee in the above entitled action, from your decision of March 25, 1907, reversing the decision of local officers, and holding for cancellation the homestead entry of said Hillius, No. 18387, for lots 1 and 2 and S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 4, T. 134 N., R. 68 W., Bismarck, North Dakota.

The evidence in this case was taken before a United States Commissioner, who, it is conceded, was the father of one of plaintiff's attorneys. Defendant protested against his authority to act, at and during the trial, but refused to enter into a stipulation to change the officer before whom the depositions were taken. Counsel for defendant appeared specially for the purpose of objecting to the commissioner's jurisdiction. He cross-examined the witnesses presented although introducing no testimony in behalf of the contestee. A continuance was granted to enable the latter to present evidence in defense of the charge made in the protest, but he chose not to avail himself of the opportunity.

Defendant now urges in his appeal that the depositions taken by said commissioner should not be admitted in evidence owing to the latter's disqualification and cites in support of his contention *Tillinghast v. Walton* (5 Ga., 335); *Crockett v. McLendon* (73 Ga., 85); *Glanton v. Griggs* (5 Ga., 424); *Nichols v. Harris* (Fed. Cas., No. 10243); *Dodd v. Northrop* (27 Conn., 216); *Bryant v. Ingraham* (16 Ala., 116); *Call v. Pike* (66 Me., 350); *McLean v. Adams* (45 Hun., 189); and *Bean v. Quimby* (5 N. H., 84).

An examination of the cited authorities shows that none sustains the proposition advanced by appellant. It is indubitably true that relationship by blood or affinity to a party litigant disqualifies the magistrate (*Bryant v. Ingraham*, *Call v. Pike*, and *Bean v. Quimby, supra*), and that a law partner of one of the counsel (*Nichols v. Harris*, *Dodd v. Northrop, supra*), or the attorney's clerk (*Tillinghast v. Walton, supra*), or student (*Glanton v. Griggs, supra*), or correspondent or agent (*McLean v. Adams, supra*), may not act as such a magistrate. But no published case, as far as the Department is advised, extends this disqualification through relationship or interest to a commissioner who is merely related to one of counsel, without having a particle of interest in the subject-



The view of the matter heretofore entertained by this Department, as evidenced by departmental letter of August 3, 1903, and the opinion of the Assistant Attorney-General for this Department dated January 16, 1904, was that the right to royalties under the lease continued until the lands were, under the legislation of Congress, actually restored to entry. The company has heretofore contended that the preferential right of selection of 100 mining claims in lieu of its lease, provided for in the act of May 27, 1902 (32 Stat., 245, 263), was a grant *in praesenti* and by operation of law terminated all rights under the lease.

After a further consideration of the matter the Department is at present inclined to the belief that neither the view heretofore entertained by it respecting this matter, nor that advanced by the Raven Mining Company, is the proper one, but rather that the rights under the lease were terminated upon the definite location of the ground by the Raven Mining Company in the form in which it has applied for the issue of patent under the locations made.

It will be remembered that the act of May 27, 1902, *supra*, granted to the Raven Mining Company in lieu of its lease the right to locate 100 mining claims of the character of mineral mentioned in its lease "up to thirty days before said lands are restored to the public domain." The act of March 3, 1905 (33 Stat., 1048, 1069), required of the Raven Mining Company that it should within sixty days from the passage of that act file in the office of the recorder of deeds of the county in which its claims are located a proper certificate of each location, and that it should also, within the same time, file with the office of the Secretary of the Interior said description and a map showing the locations made by it under the act of May 27, 1902.

In a letter from Mr. Leroy D. Thoman, dated the 15th instant, it is represented that the only claims from which elaterite was taken prior to the formal opening of these lands to entry, October 28, 1905, were the Potwin, 1, 2, and 3, and the Thoman. It is also represented that these four claims were surveyed and located June 3, 1903, and were duly recorded in the office of the recorder of deeds of Wasatch County, Utah, on the 12th of June, 1903; that the Potwin claims, 1, 2, and 3, were resurveyed and relocated February 28, 1905, and that the Thoman was resurveyed and relocated March 2, 1905.

There was no specific requirement for filing with the Department the description of the lands located under the act of 1902, until the passage of the act of March 3, 1905, *supra*. It seems clear, however, that until some formal notice was in a proper manner given so as to bind the company, it was within its power to locate and relocate its claims to the extent of the preferential right granted it. Under these circumstances the most reasonable deduction is that the date of the actual location of any given claim, in the form as filed in obedience to

the act of 1905, definitely fixed and attached the right of the company in and to the located ground, and where the same had been theretofore operated under the lease made with the Indians, rights theretofore existing under such lease were at that date terminated.

Whether the ground actually worked was located June 3, 1903, and duly recorded June 12, 1903, as claimed, and whether the locations then made were in the form as relocated in February and March, 1905, and on account of which the claims were recorded and filed in the Department as prescribed by the act of March 3, 1905, can not be told from the record now before the Department. It is therefore directed that you cause investigation to be made of these matters, and also as to the amount of mineral actually mined prior to the location of the lands in the manner herein defined, and the amounts of royalty due the Indians on account thereof. For your information I inclose herewith the letter from Mr. Thoman, dated the 15th instant, hereinbefore referred to. You will facilitate the inquiry and investigation herein directed, reporting the matter to the Department at your earliest convenience.

**COAL LAND REGULATIONS—AMENDMENT OF PARAGRAPH 18.**

CIRCULAR.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,

Washington, D. C., November 30, 1907.

*Registers and Receivers, United States Land Offices.*

SIRS: Paragraph 18 of the Coal-Land Regulations, approved April 12, 1907 [35 L. D., 665], is hereby amended by adding thereto the following requirement:

The claimant will be required within thirty days after the expiration of the period of newspaper publication, to furnish the proofs specified in said paragraph and tender the purchase price of the land. Should the specified proofs and purchase price be not furnished and tendered, within this time, the local land officers will thereupon reject the application, subject to appeal. Furthermore, in the exercise of a preference right to purchase, no part of the thirty-day period specified herein may extend beyond the year fixed by the statute.

R. A. BALLINGER, *Commissioner.*

Approved:

JAMES RUDOLPH GARFIELD, *Secretary.*

## PATENT—DESERT LAND ENTRY—ASSIGNEE.

## CARL HERMAN LEOPOLD.

Patent upon a desert land entry assigned subsequently to final proof will follow the final certificate and issue in the name of the entryman.

*Acting Secretary Pierce to the Commissioner of the General Land*  
(G. W. W.) *Office, November 30, 1907* (J. R. W.)

Carl Herman Leopold appealed from your decision of September 30, 1907, refusing to issue patent to him as grantee of Stephen B. Sealy, on Sealy's desert-land entry for the SE.  $\frac{1}{4}$  of SE.  $\frac{1}{4}$ , Sec. 31; S.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  of SE.  $\frac{1}{4}$ , Sec. 32, T. 1 N., R. 23 W.; lot 4, Sec. 5, and lots 1, 2, 3, Sec. 6, T. 1 S., R. 23 W., Tucson, Arizona.

After making final proof on his entry, at a date not shown by the record here, August 5, 1907, as claimed to be shown by purported copy of a deed claimed to have been executed on that day by Sealy, he is said to have conveyed the lands to Leopold, who desires patent to issue in his name. You held:

This office will not recognize an assignment made after final proof has been submitted and patent will issue in the name of the person who made the final proof. This office will not consider questions arising out of assignments after final proof. Such questions are solely between the parties interested.

The reasons for the request are by counsel stated that:

As certain affidavit from parties appearing as assignee of original entryman is required by your office, Mr. Leopold concluded that such an assignment would be recognized and sent you this affidavit, together with the deed of sale between Sealy and himself; and for the further reason that should patent issue to Sealy it would work a great hardship on Mr. Leopold, as there have arisen family difficulties between Mr. Sealy and his wife, and it is certain that, at this time, Mrs. Sealy will sign no paper transferring Mr. Leopold's property to him.

Patents are issued upon an entry, and by the courts are, for conservation of rights, regarded as operating by relation from that date. *United States v. Detroit Lumber Company* (200 U. S., 321, 332-3). In uniform practice of the land department the patent issues to and in name of him who made the final entry, to whom the final receipt issued showing he was entitled to patent. *David B. Dole* (3 L. D., 214, 216); *Henry W. Fuss* (5 L. D., 167, 169).

It is not the province of the land department to hear controversies of parties relative to rights in property, complete right to which one of them has acquired from the United States. The second reason above given by counsel for such action by the land department is in fact sufficient reason against it. If Mrs. Sealy, wife of the entryman, has, or claims, rights in the land entered, the civil courts are

the proper tribunal to decide such controversy, not the land department, nor should her claim of right be embarrassed by issue of patent to another than the entryman himself.

Your decision is affirmed.

LISTS OF LANDS FOR TAXATION PURPOSES—ACT OF MARCH 3, 1883.

INSTRUCTIONS.<sup>a</sup>

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., October 8, 1907.

*Registers and Receivers, United States Land Offices.*

GENTLEMEN: The act of March 3, 1883 (22 Stat., 484), provides that upon application by the proper State or Territorial authorities, registers and receivers shall—

furnish for the purpose of taxation a list of all lands sold in their respective districts, together with the names of the purchasers, and shall be allowed to receive compensation for same not to exceed ten cents per entry.

The act of August 4, 1886 (24 Stat., 239), and instructions approved April 22, 1898 (26 L. D., 657), as modified by circular approved May 20, 1905 (33 L. D., 627, 631), govern the disposition of such fees.

It is believed that it is within the spirit and intent of the act first cited for you to furnish, upon like application, and for the compensation therein stated, lists of canceled final entries, so that the lands may be relieved from improper taxation. Therefore, when application is made by the proper authorities, you will furnish such lists.

Very respectfully,

R. A. BALLINGER, *Commissioner.*

Approved:

JAMES RUDOLPH GARFIELD, *Secretary.*

RESIDENCE—LEAVE OF ABSENCE—AUTHORITY TO GRANT.

JOHN T. SORENSEN.

There is no authority of law for granting leave of absence to a homestead entryman who has never in good faith established residence upon his claim.

*Acting Secretary Pierce to the Commissioner of the General Land*  
(G. W. W.) *Office, December 3, 1907.* (J. R. W.)

John T. Sorensen appealed from your decision of July 26, 1907, denying his application for leave of absence for one year from his homestead entry for the W.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , and E  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , Sec. 11, T. 18 S., R. 1 E., S. L. M., Salt Lake City, Utah.

<sup>a</sup> These instructions supersede those of the same date published on pages 116-117 of this volume.



ton for himself and his three children, Theresa, Therma and Gerald Stratton; of Mrs. Rosa Loveland (nee Stratton) for herself and her two children, Chlora Loveland and Mrs. Mamie McCrary (nee Loveland) and her grandchild, Hattie McCrary; of Peter M. Revard, Mary J. R. Crump and Pauline M. R. Egbert (nee Crump).

Applications for enrollment as members of the Osage tribe of Indians were made to your office by these parties in 1904, and were forwarded to the Osage agent for investigation. The agent reported that said applications with accompanying evidence were submitted to the Osage council, which by unanimous vote rejected the same. He stated, however, that in the matter of Indian blood these parties were entitled to enrollment if Jane R. Miller (Raridon) of the Revard family, and Julia A. Hackleman (Stevens) of the Stratton family, who are borne on the rolls of the tribe, are so entitled. This was in December, 1904.

In March, 1905, your office reported in separate letters:

The present applicants are children of Louis Revard, probably a one-eighth blood Osage; and Augustine Philabre, a white woman, and would therefore be but one-sixteenth Osage Indian blood and the children of Mary J. R. Crump by a white husband would consequently be but one thirty-second Osage blood. As shown, these applicants were all born in California among the whites and now live there; they were practically whites, so far as Indian blood is concerned, and have been all their lives exercising the rights of citizens of the State of California and have never been identified in any way whatever with the interests of the Osage Nation, nor have they shown that it is their intention to cast their lot with the Osages.

While the Osages seem to have recognized some of the Revard family as entitled to enrollment, yet it has also objected to other members of seemingly the same family sharing with them; and after carefully considering all the evidence presented, the Office is of the opinion that the applicants have not established by indubitable proof a legal right to the enrollment sought.

In the case of Mrs. Julia Ann Stevens and her son, it is shown that they returned to the Osage country, though the mother is now living in the Cherokee Nation. It is also shown that Mrs. Stevens's sister—Rebecca Jane Vadney, deceased—who with her children were enrolled with the Osages, returned to the reservation and made their homes upon the same.

Inasmuch as the present applicants have never affiliated with the tribe; are to all intents and purposes white persons, members of a white community and not identified with the interests of the tribe, and have since their birth practically been citizens of the United States, the Office would very much hesitate to recommend their enrollment over the unanimous protest of the Osage tribe.

The views expressed by your office in the premises were approved by the Department in letters dated March and April, 1905, respectively, and the applications of these parties for enrollment were accordingly denied. A motion for review was filed, which was also denied in September, 1906, the previous action adverse to said parties being adhered to.

It appears that the papers in these cases were again sent by your office to the Osage agent in December, 1906. He reported under date

of June 22, 1907, that immediately upon receipt of said papers he notified the attorneys for the parties to furnish any additional evidence they might have; that the matter was placed before the Osage Business Council in January, 1907, which rejected the applications on the ground that no additional evidence had been furnished showing said parties to be entitled to enrollment; that further time was asked for by the attorneys, and granted, in which to file additional arguments and briefs which were submitted to the Principal Chief who did not wish to take further action in the matter, saying the action of the council in January, 1907, was final. The agent was of opinion that no sufficient evidence had been offered to warrant change in departmental action of September, 1906. Your office submitted the papers here under date of July 5, 1907, with recommendation that the applications of these people for enrollment be denied, on the ground that the additional evidence furnished is insufficient to establish their right to enrollment. Since then the record has been supplemented by oral argument.

An examination of the record clearly shows that no additional material evidence has been furnished in support of the applications of these parties. It is not claimed that they ever affiliated with the tribe or were ever in any way identified with its interests. In fact, it seems to be admitted that they will remove to the reservation only in the event of favorable action upon their applications. It is now urged in their behalf that under laws and decisions they did not forfeit their rights with the tribe by living apart therefrom, and that they were prevented from affiliating with the tribe and residing on the reservation under section 2134 of the Revised Statutes, which reads:

Every foreigner who shall go into the Indian country without a passport from the Department of the Interior, superintendent, agent, or sub-agent of Indian affairs, or officer of the United States commanding the nearest military post on the frontiers, or who shall remain intentionally therein after the expiration of such passport, shall be liable to a penalty of one thousand dollars. Every such passport shall express the object of such person, the time he is allowed to remain, and the route he is to travel.

It is contended that "every person not a member of the Osage tribe of Indians and enrolled as such is a 'foreigner' under the meaning of this section, and to get on the reservation and remain there, would prior to their enrollment subject them to the provisions of this act." The claim in this case is that these parties are of Osage blood and as such entitled to membership in the tribe. The foregoing section was originally enacted as section 6 of the act of June 30, 1834 (4 Stat., 730). It is held by the Attorney General (18 Op. Atty. Gen., 555), that the word "foreigner" used in said section embraces those who are born out of the United States, who are not naturalized, and who owe allegiance to any other Government than that of the United

States; in other words, an alien. It is pointed out that in the context, both in the Revised Statutes and in the act of 1834, when others besides foreigners are intended to be embraced, the language "any person other than an Indian" is used.

As to the other contention made, the laws and usages of a tribe have always been recognized as potent factors in determining membership therein. Thus in the case of William Banks (26 L. D., 71), referred to in briefs, it was held that the usage of an Indian tribe may be accepted to establish a claim of membership therein, on the part of a person who under the general rule would be held a citizen of the United States. The facts of that case as stated in the decision were:

William Banks, sr., a white man, was married to an Indian woman, a member of the Sac and Fox of Missouri tribe; that the applicant William Banks was born of this marriage about the year 1849; that his parents lived in Missouri just across the river from the reservation in Kansas, then occupied by this tribe; that his mother was recognized as a member of the tribe up to the time of her death, which occurred about 1852; that she visited the tribe to receive the annuities due her as such member, and that she took this child with her on some, if not all, of these visits, and received annuities for him as well as for herself; that after her death he was for a time in a school called the Highland Mission, established for the benefit of these Indians; that during the time he was there annuities were drawn by those in charge of said school on his account; that at some time during his childhood, just when not being shown, his father removed him from the school and after that continued to live among the whites until about the year 1895 when he went to the reservation for this tribe in Nebraska to secure allotments for himself and children. It is further stated in some of these affidavits that it was the custom of these Indians to consider all children born to any member of the tribe as members and to place their names upon the rolls for annuity payments without any action of the council or chiefs.

It was held in said case that Banks's tribal relations were completely severed so far as his own acts could accomplish that end; that all tribal property among the Indians is held as communal property; that under the general rule governing in the matter of community property one who withdraws from the community or association, thereby forfeits all his interest in the common property; and that Banks gave up all right to share in the tribal property unless relieved from the effect of the general rule by legislation. Reference was then made to certain acts of Congress and it was held, Banks's mother being a member by blood of the tribe and recognized as such at the time of her death, that he was entitled to the benefits conferred by said acts. It is shown that the applicants now under consideration were all born in California, now live there, and have all their lives exercised the rights of citizenship in that State. It was further held in the case of Banks, *supra*, that the case of his children presented a different question. "Their father had severed his tribal relations before their births and hence they can not claim to have been born members

of this tribe. Neither is it claimed that any one of them was ever considered or recognized as having membership therein." It was therefore held that they were not entitled to allotments. The rules announced in that case are squarely against the contentions made herein.

Upon consideration of the entire record in this case the Department approves the recommendation of your office that the applications of these people be rejected.

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**MINING CLAIM—PATENT PROCEEDINGS—POSTING OF NOTICE AND  
PLAT UPON THE CLAIM.**

**TOM MOORE CONSOLIDATED MINING CO. ET AL. v. NESMITH.**

The requirement under section 2325, Revised Statutes, that an applicant for mineral patent shall previously "post" a copy of the plat, together with a notice of his application, "in a conspicuous place on the land" involved, contemplates that both shall be prominently and openly displayed, in such position that they can, without being removed, be conveniently inspected and read by the public.

*Loneragan v. Shockley*, 33 L. D., 238, overruled in so far as in conflict.

*Acting Secretary Pierce to the Commissioner of the General Land*  
(G. W. W.)                      *Office, December 4, 1907.*                      (E. B. C.)

The Tom Moore Consolidated Mining Company and S. G. Martin, president of the company, have appealed from your office decisions of November 24, 1906, and (on motion for review) of July 5, 1907, which affirmed the finding and conclusions of the local officers and held that appellants' protest against the entry made by John W. Nesmith, February 24, 1905, for the Pine Bark lode mining claim, survey No. 17,262, Durango, Colorado, land district, must be dismissed because not sustained by the evidence adduced.

May 27, 1905, the appellants filed their verified protest, alleging, in substance, that the company is the owner and entitled to the possession of the Copper Boy and J. A. P. millsite claims and the Ibex lode mining claim by virtue of prior location and discovery, which locations cover the larger portion of the Pine Bark claim; that no discovery of mineral has been made upon the latter claim; that the improvements thereon are insufficient and were not constructed for mining purposes; and that the notice was defective in that the plat and notice were not posted upon the claim in accordance with the requirements of law.

Upon the protest a hearing was ordered and had, at which the parties appeared and submitted evidence. Thereupon the local officers found that the appellants had failed to establish the allega-

tions of their protest and recommended that the same be dismissed. From the affirmance thereof by your office, as first above stated, the pending appeal is taken.

Appellants contend that your office erred both as to the findings of facts and the conclusions drawn therefrom. Numerous specifications of error are set forth, but it is not deemed necessary to state them at length. Among other things, appellants challenge the sufficiency of the posting of the plat and notice upon the claim. As it is a jurisdictional matter and goes to the very foundation of the patent proceedings, this question will be examined first.

Witnesses on behalf of the appellants, with but one exception, were not upon the claim during the period of publication and posting. Their witness who did pass along the road over the claim within that period, going to and from his work, states that he saw no notice, but that he could and ought to have seen it if posted in a conspicuous or prominent place upon the premises.

By the evidence of the entryman's witnesses it is established that the plat was doubled up, then folded three times, and, together with the notice of the application, also folded, was inserted in a white or cream-colored oil-cloth envelope, such as is sometimes used for that purpose, with one end left open so that the papers could be readily withdrawn and replaced, and that the envelope was fastened up by means of four tacks to a dark-colored board extending horizontally along and immediately below the ground-sill at the south end of a building 33 feet long, north and south, by 22 feet wide, by  $6\frac{1}{2}$  feet in height to the eaves. The board and the eastern portion of the sill referred to extended over and across the top of a cut or trench some 8 or 9 feet in depth, over 8 feet in width at the top, and 3 or 4 feet wide at the bottom. This cut is about 28 feet in length, is in solid rock, and extends from the northern bank of the Las Animas river (which flows in a southeasterly direction through the southwestern portion of the Pine Bark claim) northerly about 10 feet to the south end of the building mentioned, at which point it is boarded up temporarily, thence onward to the breast thereof within the building. The envelope containing the plat and notice was fastened up immediately over the cut or trench at the top of the temporary boarding and next below the sill of the building. The south and west sides of the building are exposed and have six windows with tight shutters. In the west side there is also a door. The other two sides of the structure are close to the earth and rock of the mountain side, space having been excavated to make room for placing the building, so that the roof conforms substantially to the shape of the mountain in order that snow slides might pass over it. Parallel to the building along, and about 5 feet from, the west side

a public wagon road, some 15 feet in width, passes north and south and crosses the river, which is about 20 feet wide, upon a bridge. The ground between the south end of the building and the bridge is fairly level. The envelope could be seen from the bridge and the road in vicinity thereof, its position being  $1\frac{1}{2}$  to 2 feet below the level of the line of vision of a person standing upon the bridge. The envelope was so marked upon the outside as to indicate that it contained a "patent notice" for the Pine Bark claim, also giving the name of the applicant and the survey number. In order to inspect the notice and plat it was necessary for a person to step down into the cut, reach up and remove them from the envelope, and unfold them for examination.

The reason given for posting the notice in the above manner was to protect it from the elements and destructive animals and as well from mischievous boys or men who in passing might see and destroy it. The envelope was fastened up October 18, 1904, and was observed still in position during November and December following and as late as January 12, 1905. Application was filed November 17, 1904. Notice was first published November 25, 1904, and continued thereafter for the full period of 60 days.

Section 2325 of the Revised Statutes provides, among other things, that notice shall be concurrently given by three different methods, the manifest object of which is to afford wide publicity of the applicant's patent proceedings in order that possible adverse claimants may seasonably come in and litigate the validity of their claims, if they so desire. The statute directs that the copy of the plat and the notice of the application for a patent shall be posted "in a conspicuous place on the land."

The term conspicuous is defined in Webster's dictionary as "open to the view; obvious to the eye; easy to be seen; plainly visible; manifest; attracting the eye." One of its synonyms is "prominent."

An analogous requirement, but by a State railroad commission, that each railroad company affected should post in a conspicuous place, and keep conspicuously posted, in each of its stations a copy of its schedule of freight and passenger rates and of all rules and regulations prescribed by the commission for the government of the transportation of freight and passengers, etc., has been judicially construed to mean advertised in poster or placard form (publication in pamphlet form held not to satisfy the requirement), so attached to something in a conspicuous place in the station that they can, in the position in which they are placed or without being removed, be read conveniently by the public. *State v. Pensacola & Atlantic Railroad Co.* (27 Fla., 403; 9 So. Rep., 89). With greater force that construction should apply to the notice and plat required by the mining laws to be posted in a conspicuous place on the land involved,

with knowledge of which all those claiming adversely are to be charged and through which their rights may be saved or lost. Upon the full consideration to which the established facts of this case have led, the Department is of the opinion that that judicial interpretation correctly outlines the manner in which the notice and plat are intended by the mining laws to be displayed—prominently, openly, and conveniently to the public. In so far, therefore, as the case of *Loneragan v. Shockley* (33 L. D., 238) holds otherwise it is hereby expressly overruled.

The Department is therefore clearly of the opinion that the copy of the plat and notice in this case was not posted in accordance with the requirements of the law. It follows that the attempted notice is fatally defective, and the entryman's patent proceeding, being without sufficient legal basis, falls. The entry must, accordingly, be canceled.

Whilst the character and effect of the testimony submitted suggest to the Department serious doubt of the correctness of the decision of your office upon the question of the sufficiency of the entryman's alleged mining improvements, and to some extent as to the question of the character of the land, yet inasmuch as the conclusion above reached effectually disposes of the present patent proceedings it is deemed inadvisable to pass upon the other issues at this time, but rather that they be left as subjects of future consideration, if need be, should patent proceedings be prosecuted anew.

In this connection it may be observed that on behalf of appellants, and since this appeal was taken, a petition has been filed here, in which it is prayed that a special agent of the land department be directed to make an investigation in the case, alleging on the part of the entryman a fraudulent attempt to acquire title. In view of the result here, however, and so far as the present record discloses, no action by the Department to that end seems necessary and will therefore be withheld.

The decisions of your office are reversed.

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PATENT—INDIAN ALLOTMENT—CORRECTION OF CLERICAL ERROR.

FREDERICK H. BARNES.

Where patent in fee to an Indian allottee is not in accordance with the record, but by mistake covers lands not allotted to the patentee, the land department has power to recall and cancel the erroneous patent.

*Acting Secretary Pierce to the Commissioner of the General Land*  
(G. W. W.) *Office, December 7, 1907.* (C. J. G.)

The Department is in receipt of your office letter of November 25, 1907, relative to a patent in fee erroneously issued to one Frederick H. Barnes, an Otoe and Missouri Indian, Oklahoma.

The matter arises upon letter of the Indian Office dated November 8, 1907, recommending that the patent in question be canceled and the records of your office changed accordingly, which was referred by the Department to your office for action in accordance with said recommendation. Your office now requests to be advised whether said patent can properly be canceled, reference being made to the case of *United States v. Schurz* (102 U. S., 378).

It appears that on schedule of additional allotments made to the Otoe and Missouri Indians, approved January 17, 1907, *Frederick H. Barnes*, an Indian 38 years of age, was allotted the N.  $\frac{1}{2}$  of SE.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$  of NE.  $\frac{1}{4}$ , Sec. 24, and N.  $\frac{1}{2}$  of N.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$  of NE.  $\frac{1}{4}$ , Sec 26, T. 22 N., R. 2 E., and on schedule made to Otoe and Missouri children, approved June 1, 1906, *Fredric H. Barnes*, an Indian four years of age, was allotted—allotment No. 450—the SW.  $\frac{1}{4}$ , Sec. 13, T. 22 N., R. 2 E., upon which trust patents were issued.

March 7, 1907, the superintendent of Otoe Agency transmitted to the Indian Office the application of *Frederick H. Barnes* for a patent in fee to his allotment, and with it a trust patent theretofore issued. That office on April 25, 1907, forwarded the application to the Department, with favorable recommendation, which was approved here and your office was instructed to issue patent in fee to the allottee for the land described in the trust patent. Thereupon patent in fee was issued to *Fredric H. Barnes*, 38 years of age, for lands described in the schedule of additional allotments as above.

It now appears that the superintendent of Otoe Agency in transmitting the application of *Frederick H. Barnes* for a patent in fee erroneously inclosed the trust patent issued to the minor *Fredric H. Barnes*, allottee No. 450. The result is that the lands covered by the patent in fee which the Indian Office recommends be canceled, are not the lands allotted to *Frederick H. Barnes* on the schedule of additional allotments made to the Otoe and Missouri Indians. The Indian Office states that the fee simple patent in question was never delivered, and that it covers land which belongs to *Fredric H. Barnes*, a minor, who has never applied for a patent in fee.

Under authority of *United States v. Schurz*, *supra*, wherein it was held that—

title by patent from the United States is title by record, and the delivery of the instrument to the patentee is not, as in a conveyance by a private person, essential to pass the title”—

and case of *Spirlock v. Northern Pacific R. R. Co.* (22 L. D., 92), your office concludes:

As patent in fee was issued to a *Frederick H. Barnes* on allotment No. 450, for the lands described in such allotment, it is thought that the patentee is definitely fixed as the *Frederick* (or *Fredric*) *H. Barnes* who is described in the schedule of allotments made to the Otoe and Missouri children as being

a male four years of age. This being the case, it would seem that title in fee had passed to this infant and that it was beyond the power of the Department to now cancel the patent in fee, although the same was issued under an erroneous statement of the Indian agent that the recipient was an adult capable of managing his own affairs.

The case in 22 L. D., 92, was modified on review (23 L. D., 588). The case of *United States v. Schurz* is not deemed controlling upon the facts of this case. The patent issued in this case was not really in accordance with the record, and the question involved is purely one as to the power to correct a mistake which may be regarded as purely clerical in character and which was shown by the record; whereas the principle upon which the decision in the case of *United States v. Schurz* rests is that the authority of the Department to issue the patent was predicated upon a decision, judicial in its character. It was said in the case of *Frank Sullivan* (14 L. D., 389) :

The power of the land department, with the consent of the parties, to recall even a delivered defective patent, and to issue one in conformity to law, has frequently been sustained by the supreme court and this Department. Where a patent has issued which fails to conform to the record upon which the right to a patent rests, and has not passed out of the control of the Department, it is not only the right, but the duty of the Commissioner to withhold the delivery of such patent, and to issue one in conformity with the record. *Bell v. Hearne*, 19 How., 252; *Maguire v. Tyler*, 1 Black, 199, 8 Wall., 655; *Adam v. Norris*, 103 U. S., 594; *Wm. H. McLarty*, 4 L. D., 498; *W. A. Simmons et al.*, 7 L. D., 283.

\* \* \* \* \*

When a patent has issued in conformity with the record upon which the right to patent is predicated, and has been signed, sealed, and countersigned, and recorded, as in the case of *United States v. Schurz* (102 U. S., 378), the title to the land has passed, and the patent can not be recalled by the government, without the consent of the patentee, but where the patentee declines to receive the patent, it has not passed by delivery, although it may have been sent to the local officers for delivery, and the power to recall the defective patent, and to issue one in conformity to law is fully sustained by the authorities above cited. See also *Leroy v. Jemison*, 3 Sawyer, 389.

In the case at bar, the patent has never passed out of the control of the Department, and the patentee is not demanding its delivery, but, on the contrary, insists that the erroneous patent be canceled and a proper patent issued.

It was said in the case of *Bell v. Hearne*, *supra* :

Whatever appearance of a title he had, is owing to the mistake in the duplicate certificate returned to the General Land Office, and the patent issued in his name. But this patent was never delivered to him. The question then arises, had the Commissioner of the General Land Office authority to receive from John Bell the patent erroneously issued in the name of James Bell, and to issue one in the proper name of the purchaser? And the question, in our opinion, is exceedingly clear. The Commissioner of the General Land Office exercises a general superintendence over the subordinate officers of his department, and is clothed with liberal powers of control, to be exercised for the purposes of justice, and to prevent the consequences of inadvertence, irregularity, mistake, and fraud, in the important and extensive operations of that officer for

the disposal of the public domain. The power exercised in this case is a power to correct a clerical mistake, the existence of which is shown plainly by the record, and is a necessary power in the administration of every department.

See also case of David Laughton (18 L. D., 283).

You are advised that under the circumstances the fee simple patent in question can properly be canceled.

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**MILITARY BOUNTY LAND WARRANTS—SURVEYOR-GENERALS' CERTIFICATES.**

**ROY McDONALD ET AL.**

Departmental decision of June 20, 1907, in the case of Lawrence W. Simpson, on review, modified so as to give recognition to all locations of military bounty land warrants or surveyor-generals certificates made prior to that decision, in faith of the ruling of the Department in the cases of Victor H. Provensal, J. L. Bradford, and Charles P. Maginnis, or under the saving paragraph in the decision in the Simpson case on appeal, where the lands located were not at the time of the location reserved or appropriated to any particular purpose and with respect to which no question as to the right under the location is raised except that the lands are without the State of Missouri.

*Secretary Garfield to the Commissioner of the General Land Office,*  
(G. W. W.)                      *December 21, 1907.*                      (F. W. C.)

The Department has considered the appeal by Roy McDonald from your office decision of August 15, 1907, holding for cancellation his location made October 17, 1904, of the S.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$  and NE.  $\frac{1}{4}$  of SE.  $\frac{1}{4}$ , Sec. 22, T. 2 S., R. 21 W., Camden land district, Arkansas.

Said location was made with a military bounty land warrant originally issued to one Daniel Wimmer, which came into appellant's possession through a chain of assignments. The location, when made, was accepted by the local officers who signed the usual certificate November 17, 1904, and the papers were regularly transmitted to your office for examination with a view to the issue of patent thereon.

Your office decision gave no consideration to the locator's title to the warrant or any other features of the case further than to apply the ruling of this Department in the case of Lawrence W. Simpson (35 L. D., 399), as modified on review June 20, 1907 (ib., 609).

The appeal does not question the soundness of the decision in the Simpson case but urges that as the location was made in good faith, relying upon long established rules and clear adjudications of the Department, the rights initiated thereunder should in equity and justice be protected notwithstanding the change of ruling in the Simpson case.

The decisions of the Department relied upon as authorizing this location are as follows:

In the case of Victor H. Provensal it was held June 5, 1901 (30 L. D., 616), that the special provisions of the act of June 2, 1858 (11 Stat., 294), providing for the location of surveyor-general's scrip are in nowise affected by the general provisions of the act of March 2, 1889 (25 Stat., 854), restricting the sale of public lands at private entry to the State of Missouri; and in the case of Charles P. Maginnis (31 L. D., 222), it was held that the owners of the bounty land warrants issued under the act of March 3, 1855 (10 Stat., 701), providing for the location of such warrants, have the same rights with reference to the location thereof as they would have had if the act of March 2, 1889, *supra*, restricting the sale of public lands at private entry to the State of Missouri, had not been passed.

It is clear that under these decisions, particularly that last referred to, the location in question was properly allowed if the party making the location was rightfully possessed of the warrant used in the location of said land. The departmental decisions referred to were from their date followed and many titles given thereunder. In the case of Lawrence W. Simpson, however, decided by the Department January 31, 1907, the Department refused longer to follow said decisions, holding that military bounty land warrants and certificates issued under the act of June 2, 1858, may be located only upon lands subject to private cash entry at the date of location, which, as a consequence, restricts their location to lands in the State of Missouri. This decision, however, recognized that property rights might have been acquired upon the faith of the previous departmental constructions and for that reason held, in order to protect such previously acquired rights—

As property rights may have been acquired in the purchase of such warrants and certificates upon the faith of these decisions, all locations or applications to locate such warrants and certificates heretofore made, or locations of such warrants or certificates hereafter made by innocent purchasers who acquired their title after the date of those decisions, will be allowed to proceed in accordance therewith, but all certificates hereafter issued under the act of June 2, 1858, and all bounty land warrants assigned after the date hereof, will be confined in the location thereof to lands subject to location at the date of the location.

Upon review of said decision, June 20, 1907, it was modified by eliminating the paragraph above quoted, on the ground that the Department was without power to grant the protection contemplated by said paragraph. It was because of this modification of June 20, that your office decision appealed from held for cancellation the location here in question.

I will not at this time consider the effect of the act of March 2, 1889, upon the right to locate military bounty land warrants or certificates issued under the act of June 2, 1858, further than to say that

the Department is not disposed to depart from the ruling of the Simpson case as decided January 31, 1907.

The patents heretofore issued under the decisions in the Provensal and Maginnis cases can not be attacked collaterally in so far as the lands located had not been reserved or otherwise disposed of prior to location. In the case of *Noble v. Union River Logging Railroad Company* (147 U. S., 165, 174), in describing the class of patents which might be attacked collaterally, it was said:

This distinction has been taken in a large number of cases in this court, in which the validity of land patents has been attacked collaterally, and it has always been held that the existence of lands subject to be patented was the only necessary prerequisite to a valid patent. In the one class of cases, it is held that if the land attempted to be patented had been reserved, or was at the time no part of the public domain, the Land Department had no jurisdiction over it and no power or authority to dispose of it. In such cases its action in certifying the lands under a railroad grant, or in issuing a patent, is not merely irregular, but absolutely void, and may be shown to be so in any collateral proceeding. *Polk's Lessee v. Wendall*, 9 Cranch, 87; *Patterson v. Winn*, 11 Wheat., 380; *Jackson v. Lawton*, 10 Johns., 23; *Minter v. Crommelin*, 18 How., 87; *Reichart v. Felps*, 6 Wall., 160; *Kansas Pacific Railway Co. v. Dunmeyer*, 113 U. S., 629; *United States v. Southern Pacific Railroad*, 146 U. S., 570.

Upon the other hand, if the patent be for lands which the Land Department had authority to convey, but it was imposed upon, or was induced by false representations to issue a patent, the finding of the department upon such facts can not be collaterally impeached, and the patent can only be avoided by proceedings taken for that purpose.

On the other hand, the institution of suits by the United States to set aside the numerous patents already issued under the decisions in the Provensal and Maginnis cases, would be of doubtful propriety, even if a favorable termination could be hoped for. Such suits have not been suggested. This being so, upon what reasonable ground can all possible protection be denied those similarly situated—that is, those who had perfected location under the previous decision prior to the change in construction of the statutes, but whose claims by mere chance had not been reached for patent at the date of the Simpson decision? The equities of the two classes are surely equal, and patents, if given now, would be equally secure, from collateral attack at least, as those heretofore issued under the faith of those decisions.

Concerning the power and duty of the Department upon such a condition, it is but necessary to refer to the language of the Supreme Court of the United States in the case of *Williams v. United States* (138 U. S., 514, 524), quoted with approval in case of *Knight v. United States Land Association* (142 U. S., 161, 181), wherein it was said:

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 supervisory power which will enable him, in the face of these unexpected contingencies, to do justice. See also *Lee v. Johnson* (116 U. S., 48)—

and the general principles announced in the case of *United States v. Alabama Great Southern Railroad Co.* (142 U. S., 615, 621), wherein it was said:

We think the contemporaneous construction thus given by the executive department of the government, and continued for nine years through six different administrations of that department—a construction which, though inconsistent with the literalism of the act, certainly consorts with the equities of the case—should be considered as decisive in this suit. It is a settled doctrine of this court that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced. It is especially objectionable that a construction of a statute favorable to the individual citizen should be changed in such manner as to become retroactive, and to require from him the repayment of moneys to which he had supposed himself entitled, and upon the expectation of which he had made his contracts with the government—

and *United States v. McDaniel* (7 Pet., 1, 13–14), wherein it was said:

It will not be contended that one secretary has not the same power as another to give a construction to an act which relates to the business of the department. And no case could better illustrate the propriety and justice of this rule, than the one now under consideration. The defendant having acted as agent for navy disbursements, for a great number of years, under different secretaries, and having uniformly received one per cent, on the sums paid, as his compensation, he continues to discharge the duties, and receive the compensation, until a new head of the department gives a different construction of the act of 1804, by which these duties are transferred to the commandant of the navy yard. By this new construction, whether right or wrong, no injustice is done to the defendant, provided he shall be paid for services rendered under the former construction of the same act. But such compensation has been refused him.

It is insisted that as there was no law which authorized the appointment of the defendant, his services can constitute no legal claim for compensation, though it might authorize the equitable interposition of the legislature. That usage, without law or against law, can never lay the foundation of a legal claim, and none other can be set off against a demand by the government. A practical knowledge of the action of any one of the great departments of the government, must convince every person, that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law; but it does not follow that he must show statutory provision for everything he does. No government could be administered on such principles. To attempt to regulate, by law, the minute movements of every part of the complicated machinery of government, would evince a most unpardonable ignorance on the subject.

Whilst the great outlines of its movements may be marked out, and limitations imposed on the exercise of its powers, there are numberless things which must be done, that can neither be anticipated nor defined, and which are essential to the proper action of the government. Hence, of necessity, usages have been established in every department of the government, which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits. And no change of such usages can have a retrospective effect, but must be limited to the future. Usage cannot alter the law, but it is evidence of the construction given to it; and must be considered binding on past transactions.

In the two cases last quoted from, claims had been made for compensation on account of services rendered under an existing departmental construction of acts of Congress, payment of which was resisted on account of a change in the construction of the same acts by the respective departments. In the former case the court adopted the original departmental construction, while in the latter case the changed construction was approved, but in each instance the claim was allowed. The decisions clearly show that sudden changes in the construction of statutes, by those charged with their enforcement, are looked upon with disfavor, especially where a construction favorable to the individual has been acted upon and the change is made in such manner as to become retroactive.

In the light of the decisions above quoted, I am fully impressed that my plain duty under the circumstances presented requires that recognition be given to all locations completed under the faith of, and in the light of, the holding of this Department, where the lands located had not been at the time of said locations reserved or appropriated to any particular purpose, and in which no question as to the right under the location is raised, except that the land located is without the limits of the State of Missouri. There should be included within this protection those who, prior to the decision of June 20, 1907, entered or located lands under the paragraph in the original Simpson decision, hereinbefore quoted, and you will give such orders or directions as will carry into effect the conclusions herein reached.

The departmental decision of June 20, 1907, in the Simpson case is modified accordingly, and such modification makes it necessary to reverse the decision of your office holding for cancellation the location of McDonald, here in question, and the record is hereby remanded to your office for further consideration in the light of the holding herein made.



Section 6 of said act provided:

That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made, under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.

The act of 1887 was amended by the act of February 28, 1891 (26 Stat., 794), but it was specifically declared therein that patents should be issued in the manner and with the restrictions provided in said act of 1887.

Section 6 of the act of 1887 was amended by the act of May 8, 1906 (34 Stat., 182), known as the "Burke Act," the changes made being in these added words:

That at the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section five of this act, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law \* \* \* \* \* *Provided*, That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: *Provided further*, That until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States.

The act further provided:

That hereafter when an allotment of land is made to any Indian, and any such Indian dies before the expiration of the trust period, said allotment shall be canceled and the land shall revert to the United States, and the Secretary of the Interior shall ascertain the legal heirs of such Indian, and shall cause to be issued to said heirs and in their names, a patent in fee simple for said land, or he may cause the land to be sold as provided by law and issue a patent therefor to the purchaser or purchasers, and pay the net proceeds to the heirs, or their legal representatives, of such deceased Indian. The action of the Secretary of the Interior in determining the legal heirs of any deceased Indian, as provided herein, shall in all respects be conclusive and final.

The Indian appropriation act of June 21, 1906 (34 Stat., 325, 353), contains this provision:

That all restrictions as to sale, incumbrance, or taxation for allotments within the White Earth Reservation in the State of Minnesota, now or hereafter held by adult mixed-blood Indians, are hereby removed, and the trust deeds heretofore or hereafter executed by the Department for such allotments are hereby declared to pass the title in fee simple, or such mixed bloods upon application shall be entitled to receive a patent in fee simple for such allotments; and as to full bloods, said restrictions shall be removed when the Secretary of the Interior is satisfied that said adult full-blood Indians are competent to handle their own affairs, and in such case the Secretary of the Interior shall issue to such Indian allottee a patent in fee simple upon application.

The patents in question, drawn in conformity with the provisions of the act of May 8, 1906, *supra*, contain this clause:

the land above described, and hereby declares that it does and will hold the land thus allotted (subject to all statutory provisions and restrictions) for the period of twenty-five years, in trust for the sole use and benefit of the said Indian, and that at the expiration of said period the United States will convey the same by patent to said Indian, in fee, discharged of said trust and free of all charge or incumbrance whatsoever, if the said Indian does not die before the expiration of the trust period; but in the event said Indian does die before the expiration of that period this patent and the allotment upon which it is based shall be canceled, and the said land shall revert to the United States and be thereafter disposed of in the manner prescribed by law: *Provided*, That the President of the United States may, in his discretion, extend said period.

Your office wishes to be advised "whether the allotments under the 'Steenerson Act' are subject to the provisions of the 'Burke Act.'"

The act of April 28, 1904, was a special act providing for allotments to Indians on White Earth Reservation, upon which patents were to be issued in the manner prescribed by the general allotment act of 1887, which provided for a declaration in said patents—

that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located.

The amendatory act of May 8, 1906, which is a general act, provided—

that hereafter when an allotment of land is made to any Indian, and any such Indian dies before the expiration of the trust period, said allotment shall be canceled and the land shall revert to the United States, and the Secretary of the Interior shall ascertain the legal heirs of such Indian, and shall cause to be issued to said heirs and in their names, a patent in fee simple for said land, or he may cause the land to be sold as provided by law and issue a patent therefor to the purchaser or purchasers, and pay the net proceeds to the heirs, or their legal representatives, of such deceased Indian.

As this legislation prescribes a different mode of disposal of the land in case of the death of the allottee prior to the expiration of the trust period, it amounts to a repeal in that respect of the act of 1887. The question then arises whether the act of May 8, 1906, also repealed the portion of the act of 1887 incorporated by reference in the act of April 28, 1904. The form of the patents in question was drawn on the theory that the provisions of the "Burke Act" applied to allotments under the "Steenerson Act." It is said in Sutherland Statutory Construction, Vol. I, 2d Ed., 493:

A statute which refers to and adopts the provisions of another statute is not repealed by the subsequent repeal of the original statute adopted, but the provisions adopted continue in force so far as the new statute is concerned, the same as before the repeal.

And in Endlich on the Interpretation of Statutes, 695, it is said:

Where the provisions of a statute are incorporated, by reference, in another; where one statute refers to another for the powers given or rules of procedure prescribed by the former, the statute or provision referred to or incorporated becomes a part of the referring or incorporating statute; and if the earlier statute is afterwards repealed, the provisions so incorporated, the powers given, or rules of procedure prescribed by the incorporated statute, obviously continue in force so far as they form part of the second enactment.

See also 26 Am. and Eng. Ency. of Law, 714, and cases of *Kendall v. United States* (12 Pet., 524, 624) and *Postal Telegraph Cable Co. v. Southern Ry. Co.* (89 Fed. Rep., 190, 194).

Under the foregoing rules of construction it would be improper to draw the form of patents to cover allotments made under the Steenerson act with reference to the provisions of the Burke act which did not affect the former act. For these reasons the form of patent provided by the general allotment act of 1887 is the proper one to be issued to Indians on the White Earth Reservation.

With respect to the act of June 21, 1906, *supra*, and the act of March 1, 1907 (34 Stat., 1015, 1034), which re-enacts verbatim the provisions in question of the act of June 21, 1906, except for the substitution of the word "heretofore" for the word "now" in the third line thereof, these acts operate to pass fee simple title to adult mixed-blood Indians on White Earth Reservation to whom trust patents or deeds were theretofore or might thereafter be issued, and as to adult full-blood Indians they authorize the Secretary of the Interior to issue patents in fee simple to them upon being satisfied that they are competent to handle their own affairs; but said acts do not affect in any manner the construction placed herein on the Steenerson and Burke acts.

## MILITARY BOUNTY LAND WARRANT—ASSIGNMENT—CERTIFICATION.

## ROY McDONALD.

The land department having certified to the validity of an assignment in blank of a military bounty land warrant, that question should not be reopened after the warrant has been located by a subsequent assignee and after the land has been purchased upon the certificate issued upon that location; but where there is no evidence of assignment by the warrantee or his heirs and the warrant is claimed under decree of a court which assumed jurisdiction to adjudicate the ownership thereof in a proceeding wherein the warrantee or his heirs were not personally served, the assignee and locator of the warrant may be required to show that he purchased upon the faith of the certificate of the land department, and to that end he may be required to show how and from whom he purchased the warrant and whether he obtained it in good faith for a valuable consideration under and by virtue of the blank assignment, and that he is the owner thereof.

*Acting Secretary Pierce to the Commissioner of the General Land*  
(G. W. W.)                      *Office, December 27, 1907.*                      (E. F. B.)

By letter of August 30, 1907, you transmit the appeal of Roy McDonald from the decision of your office of June 5, 1907, requiring him to file affidavits showing from whom and in what manner he obtained military bounty land warrant No. 18,266, for one hundred and sixty acres, issued March 15, 1856, to John Smith, seaman, United States navy, and notifying him that upon failure to furnish such proof the location of the W.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , Sec. 4, and E.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 5, T. 4 S., R. 24 W., Arkansas, made with said warrant, will be canceled.

No assignment of this warrant appears to have been made by the warrantee or his heirs, but at a term of the Chancery Court held in and for Pulaski County, Arkansas, the first Monday in October, 1904, a decree was obtained upon a complaint of one T. E. Helm against C. K. O'Neal and N. C. McMillan, unknown heirs of George O'Neal, deceased, and the unknown heirs of John Smith, deceased, service of which was made by publication only, a decree was rendered finding that said warrant was sold and transferred by John Smith to George O'Neal by manual delivery, and from O'Neal to other intermediate transferees by the same manner of transfer, by which it became the property of N. C. McMillan, who, on March 28, 1904, transferred the same by writing to Edwin N. Spalding, who, on July 19, 1904, by assignment in writing, transferred the warrant to T. E. Helm, who procured said decree.

These warrants are assignable only under the legislative authority contained in section 2414, Revised Statutes, which declares that they may be "assignable by deed or instrument in 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."

Your office is not precluded by the decree of court obtained by Helm from inquiry into and passing upon the validity of such assignment, and you may require proof as to how and when, and upon what consideration, the warrant passed from the warrantee or his heirs. Homer Guerry (35 L. D., 310).

It appears, however, that the warrant was submitted to your office for examination by Harvey Spalding & Sons, with an assignment executed by T. B. Helm in blank, and on October 20, 1904, they were advised that when the name of an assignee shall have been written in the assignment, it will be sufficient in form, and the right of the assignee to use or assign the warrant, will be respected by your office.

In the case of Herbert D. Stitt, decided by the Department April 30, 1907, (not reported), it was said that it was the province of your office to determine whether the assignments are sufficient, independently of the adjudication of the courts, but having exercised your judgment upon that question, certifying to the validity of the assignment, that question should not be reopened after it has been located by a subsequent assignee, and after the land has been purchased upon the certificate issued upon that location, but your office may require such assignee and locator to show that he purchased upon the faith of your certificate and to that end you may require the locator to show how and from whom he purchased said warrant, and whether he obtained it in good faith for a valuable consideration under and by virtue of said blank assignment, and that he is the owner thereof. Frederick W. McReynolds (35 L. D., 429); Jake Salmen (35 L. D., 453).

Such showing should always be required in cases like this when there is no evidence of written assignment of the warrantee or his heirs.

Your decision is affirmed.

#### LANDS CLASSIFIED AS COAL—PRACTICE—BURDEN OF PROOF.

##### INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
Washington, D. C., December 27, 1907.

*Chiefs of Field Division and Registers and Receivers.*

GENTLEMEN: Lands classified as coal are, from the date of such classification, *prima facie* mineral in character. Where final certificate or its equivalent has not issued prior to date of such classification, a non-mineral claimant, applicant, entryman or selector has the burden of proof in a hearing under circular of November 25, 1907, on a charge that the lands are mineral. In such case it will be

sufficient in the first instance for the special agent to introduce the classification. He will also offer such other evidence as he may have.

Where final certificate or its equivalent issued prior to the date of classification, the burden is on the government to prove that the lands were known to be mineral prior to issuance of such final certificate or equivalent.

In view of the foregoing, it will ordinarily not be necessary to expend money in sinking holes or otherwise prospecting to expose the coal deposits in such coal lands as do not have the veins exposed. In such cases the conclusion must largely depend upon the geological formation of the lands in question and upon the discoveries on and geological formation of nearby land. You will, therefore, in the examination of such lands and in the collection of evidence for use at hearings, give careful attention to the geological formation of the tract examined and that of surrounding lands and of discoveries and developments of coal in their immediate vicinity. In this connection, your attention is directed to departmental instructions, 34 L. D., 194.

In special cases where the burden is on the government, and the special agent has reason to believe it is actually necessary to expose the coal, and that the coal is near the surface, requisition for funds for sinking holes or otherwise prospecting may be submitted. The appropriation for the protection of public lands and timber is such, however, as to preclude such expense except in exceptional cases.

Respectfully,

R. A. BALLINGER, *Commissioner.*

Approved:

FRANK PIERCE, *Acting Secretary.*

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ISOLATED TRACTS—SEC. 2455, R. S., AS AMENDED BY ACT OF JUNE 27, 1906.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,

Washington, D. C., December 27, 1907.

*Registers and Receivers,  
United States Land Offices.*

SIRS: The sale of isolated tracts of public lands (outside of the area in the State of Nebraska described in the act of March 2, 1907, 34 Stats., 1224), is authorized by the provisions of the act of June 27, 1906 (34 Stats., 517), amending section 2455 of the Revised Statutes.

1. Applications to have isolated tracts ordered into market must be filed with the register and receiver of the local land office in the district wherein the lands are situated.

2. Applicants must show by their affidavits, corroborated by at least two witnesses, that the land contains no salines, coal, or other minerals; the amount, kind, and value of timber or stone thereon, if any; whether the land is occupied, and if so the nature of the occupancy; for what purpose the land is chiefly valuable; why it is desired that same be sold; that applicant desires to purchase the land for his own individual use and actual occupation and not for speculative purposes, and that he has not heretofore purchased, under section 2455, Revised Statutes, or the amendments thereto, isolated tracts, the area of which, when added to the area now applied for, will exceed approximately 160 acres. If applicant has heretofore purchased lands under the provisions of the acts relating to isolated tracts, same must be described in the application by subdivision, section, township, and range.

3. The affidavits of applicants to have isolated tracts ordered into market, and of their corroborating witnesses, may be executed before any officer having a seal and authorized to administer oaths in the county or land district in which the tracts described in the applications are situated.

4. The officer before whom such affidavits are executed will cause each applicant and his witnesses to fully answer the questions contained upon the accompanying form and, after the answers to the questions therein contained have been reduced to writing, to sign and swear to same before him.

5. No sale will be authorized upon the application of a person who has purchased under section 2455, Revised Statutes, or the amendments thereto, any lands, the area of which, when added to the area applied for, shall exceed approximately 160 acres.

6. No sale will be authorized for more than approximately 160 acres embraced in one application.

7. The local officers will upon receipt of applications note same in pencil upon the tract books of their office and immediately thereafter forward the same to the General Land Office reporting the status of the land as shown by their records and the existence of any objection to the offering of the lands for sale.

8. An application for sale under these instructions will not segregate the lands from entry or other disposal, but such lands may be entered at any time prior to the time of receipt in the local land office of the letter authorizing such sale. Upon receipt of such letter the local officers will note thereon the time when it was received, and at once examine the records to see whether the lands or any part thereof have been entered. They will note on the tract book opposite such lands as

are found to be clear that sale has been authorized, giving date of the letter. Such lands will then be considered segregated for the purpose of the sale. If the examination of the records shows that all of the lands applied for have been entered, the local officers will not promulgate the letter authorizing the sale, but will report the facts to this office, whereupon the letter authorizing the sale will be revoked.

The local officers will notify the applicant of the allowance of his application as to the lands found to be clear, describing the tracts which may be sold, and also reporting to this office such tracts embraced in the application as have been entered (if any) prior thereto, whereupon the letter authorizing the sale will be revoked as to the tracts so entered. The applicant will be allowed thirty days from notice of the allowance of his application, in whole or in part, within which to deposit with the receiver an amount of money sufficient to cover the cost of publication of notice, which sum will be returned to him, *provided he is a bidder at the sale* but the lands are disposed of to another.

9. When lands are ordered to be offered at public sale the register and receiver will cause a notice to be published once a week for five consecutive weeks (or thirty consecutive days if a daily paper) immediately preceding day of sale, in a newspaper to be designated by the register, as published nearest to the land described in the application, using the form hereinafter given. The register and receiver will cause a similar notice to be posted in the local land office, such notice to remain posted during the entire period of publication. The register will require the publisher of the newspaper to file in the local office prior to the date fixed for sale evidence that publication has been had for the required period, which evidence may consist of the affidavit of the publisher accompanied by a copy of the notice published.

10. At the time and place fixed for sale the register or receiver will read the notice of sale, offer each body of land included in the notice separately, and allow all qualified persons present an opportunity to bid. After all bids have been offered the local officers will declare the sale closed and announce the name of the highest bidder, who will be declared the purchaser and who must immediately deposit the amount bid by him, and, if the highest bidder or bidders be other than the applicant for offering, an amount sufficient to cover the cost of publication of notice, with the receiver, and within ten days thereafter furnish evidence of citizenship, nonmineral and nonsaline affidavit, Form 4-062, or nonsaline affidavit, Form 4-062a, as the case may require. Upon receipt of the proof, and payment having been made for the lands, the local officers will issue the proper final papers. They will also, in the event of the sale of the lands to other than the applicant for the offering (the latter being a bidder for the lands), refund to applicant the amount originally

deposited by him to cover the cost of publication of notice. Should different tracts included in one notice be sold to several bidders other than the applicant, the cost of publication must be apportioned among them and collected for return to the applicant, as above indicated. If the applicant is the successful bidder for one or more of the tracts offered, the remaining tracts being disposed of to other bidders, the proportionate cost of publication only shall be collected from the successful bidders other than the applicant, for refund to the latter.

11. No lands will be sold at less than the price fixed by law, nor at less than \$1.25 per acre. Should any of the lands offered be not sold, the same will not be regarded as subject to private entry unless located in the State of Missouri (act of March 2, 1889, 25 Stats., 854), but may again be offered for sale in the manner herein provided.

12. After each offering where the lands offered are *not* sold, the local officers will report by letter to the General Land Office. No report by letter will be made when the offering results in a sale, but the local officers will issue cash papers as in ordinary cash entries, noting thereon the date of the letter authorizing the offering, and report the same in their current monthly returns. With the papers must also be forwarded the affidavit of publisher showing due publication, and the register's certificate of posting.

Very respectfully,

R. A. BALLINGER, *Commissioner.*

Approved:

FRANK PIERCE, *Acting Secretary.*

(Form 4-008B.)

APPLICATION FOR SALE OF ISOLATED OR DISCONNECTED TRACTS.

DEPARTMENT OF THE INTERIOR,  
UNITED STATES LAND OFFICE,

\_\_\_\_\_,  
\_\_\_\_\_, 19\_\_\_\_

To the Commissioner of the General Land Office:

The undersigned, whose post-office address is \_\_\_\_\_, respectfully requests that the \_\_\_\_\_ of Section \_\_\_\_\_, Township \_\_\_\_\_, Range \_\_\_\_\_, be ordered into market and sold under the act of June 27, 1906 (34 Stats., 517), at public auction, all the surrounding lands having been entered or otherwise disposed of. Applicant states that this land contains no salines, coal, or other minerals, and no stone except \_\_\_\_\_; that

(State amount and character.)

there is no timber thereon except \_\_\_\_\_ trees of the \_\_\_\_\_ species,

ranging from \_\_\_\_\_ inches to \_\_\_\_\_ feet in diameter, and aggregating about \_\_\_\_\_ feet stumpage measure, of the estimated value of \$\_\_\_\_\_ ; that the land is not occupied except by \_\_\_\_\_ of \_\_\_\_\_ post-office, who occupies and uses it for the purpose of \_\_\_\_\_, but does not claim the right of occupancy under any of the public land laws; that the land is chiefly valuable for \_\_\_\_\_, and that applicant desires to purchase same for his own individual use and actual occupation for the purpose of \_\_\_\_\_, and not for speculative purposes; that he has not heretofore purchased public lands sold as isolated tracts, the area of which when added to the area herein applied for will exceed approximately 160 acres. The lands heretofore purchased by him under said act are described as follows:\_\_\_\_\_

If this request is granted, applicant agrees to deposit in advance a sum sufficient to defray cost of publication of notice.

(Applicant will answer fully the following questions:)

Question 1. Are you the owner of land adjoining the tracts above described? If so, describe the land by section, township, and range.

Answer \_\_\_\_\_

Question 2. To what use do you intend to put the isolated tracts above described should you purchase same?

Answer \_\_\_\_\_

Question 3. If you are not the owner of adjoining land, do you intend to reside upon or cultivate the isolated tracts?

Answer \_\_\_\_\_

Question 4. Have you been requested by anyone to apply for the ordering of the tracts into market? If so, by whom?

Answer \_\_\_\_\_

Question 5. Are you acting as agent for any person or persons or directly or indirectly for or in behalf of any person other than yourself in making said application?

Answer \_\_\_\_\_

Question 6. Do you intend to appear at the sale of said tracts if ordered, and bid for same?

Answer \_\_\_\_\_

Question 7. Have you any agreement or understanding, expressed or implied, with any other person or persons that you are to bid upon or purchase the lands for them or in their behalf, or have you agreed to absent yourself from the sale or refrain from bidding so that they may acquire title to the land?

Answer \_\_\_\_\_

\_\_\_\_\_  
(Sign here with full Christian name.)

We are personally acquainted with the above-named applicant and the lands described by him and the statements hereinbefore made are true to the best of our knowledge and belief.

\_\_\_\_\_  
(Sign here with full Christian name.)

\_\_\_\_\_  
(Sign here with full Christian name.)

I certify that the foregoing application and corroborative statement were read to or by the above-named applicant and witnesses, in my presence, before

affiants affixed their signatures thereto; that affiants are to me personally known (or have been satisfactorily identified before me by \_\_\_\_\_, \_\_\_\_\_); that I verily believe affiants to be credible persons, and the (P. O. Address.) identical persons hereinbefore described; that said affidavits were duly subscribed and sworn to before me, at my office, at \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_

\_\_\_\_\_  
 (Official designation of officer.)

(Form 4-283A.)

NOTICE FOR PUBLICATION—ISOLATED TRACT.

PUBLIC LAND SALE.

DEPARTMENT OF THE INTERIOR,  
 \_\_\_\_\_ LAND OFFICE,  
 \_\_\_\_\_, 19\_\_.

Notice is hereby given that, as directed by the Commissioner of the General Land Office, under the provisions of the act of Congress approved June 27, 1906 (34 Stats., 517), we will offer at public sale to the highest bidder, at \_\_\_\_\_ o'clock, \_\_\_\_\_ M., on the \_\_\_\_\_ day of \_\_\_\_\_, next, at this office, the following tract of land: \_\_\_\_\_

Any persons claiming adversely to the above-described lands are advised to file their claims or objections on or before the time designated for sale.

\_\_\_\_\_  
 Register.

\_\_\_\_\_  
 Receiver.

SECOND HOMESTEAD ENTRY—RELINQUISHMENT—ACT OF JUNE 5, 1900.

LEAN *v.* KENDIG.

One who made a homestead entry which for any reason he failed to perfect and which resulted in its being lost or forfeited prior to the passage of the act of June 5, 1900, was under that act entitled to the benefits of the homestead law as though such former entry had not been made, provided such right of second entry was exercised prior to the act of April 28, 1904.

*Acting Secretary Pierce to the Commissioner of the General Land Office, December 27, 1907.* (G. W. W.) (A. W. P.)

An appeal has been filed on behalf of A. L. Lean from your office decision of February 5, 1907, wherein you affirm the action of the local officers and dismiss his contest against homestead entry, No. 23582, made February 27, 1901, by Aldus L. Kendig, for the S.  $\frac{1}{2}$  of the

SW.  $\frac{1}{4}$  and lots 3 and 4, Sec. 5, T. 161 N., R. 66 W., Devils Lake, North Dakota, land district.

February 17, 1906, Lean filed duly corroborated affidavit of contest against this entry, alleging, substantially, that Kendig was not qualified to make the same because he had, on December 27, 1898, made homestead entry No. 14124 of the N.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$ , the SE.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  and lot 1, Sec. 6, T. 161 N., R. 66 W., and on April 26, 1900, he relinquished said entry and received from one Sibley \$500 for making said relinquishment; that said Kendig was trying to sell the relinquishment of his entry of the land in controversy, and is using said entry for speculative purposes and not in good faith; and that he has abandoned the same, which is not due to either military or naval service. Notice issued thereon and hearing was regularly had, as result of which the local officers found that claimant "was at the date of his present entry a qualified entryman" under section 3 of the act of June 5, 1900 (31 Stat., 267), and recommended the dismissal of the contest.

Upon appeal therefrom your office by decision of February 5, 1907, found that Kendig's former homestead entry was made under the act of March 2, 1889 (25 Stat., 854); that he never perfected title to that tract, but forfeited his right thereto prior to the passage of the said act of June 5, 1900, by relinquishing the same; and that since his former entry was not perfected, it would be regarded as never having been made, because his rights under the act last above-mentioned were restored and he became entitled to the benefits of the homestead laws as though his prior entry had never been made. Accordingly you affirmed the action of the local officers and dismissed the contest.

The case is now before the Department upon appeal filed in behalf of the contestant. In support thereof it is strenuously contended that, inasmuch as Kendig received the sum of \$500 for the relinquishment of his former homestead entry, such entry was not "lost or forfeited" within the meaning of the said act of June 5, 1900. This contention is based on the definition of *lost*, as "to cease to have possession of, as by accident, to be rid of unintentionally;" and of *forfeit*, as "to lose as the penalty of some misdeed or negligence;" and that such a relinquishment could not be considered the result of accident or an unintentional happening or as forfeited to another without the consent of the owner and wrongdoer.

An examination of the papers in this case, as well as the records of your office, does not disclose that Kendig's former entry was made under the act of March 2, 1889, *supra*, as stated, or that he had ever prior to that time made a homestead entry. But even if this were the case, that fact alone would not invalidate the present entry, for, as said in the case of Samuel F. Honeycutt (31 L. D., 25), syllabus:

A homestead entryman who failed to perfect title under his entry, and thereafter made a second entry under the act of March 2, 1889, which second entry

was also not perfected, but "lost or forfeited," was by the act of June 5, 1900, restored to the status of a qualified homestead claimant and became entitled to the benefits of the homestead laws as though the second entry had not been made.

No testimony was offered by the contestant tending to establish his charges of speculation or abandonment; while it clearly appears from the evidence submitted by claimant that he has maintained a *bona fide* residence upon the land since date of entry, and at time of hearing had more than one hundred acres under cultivation, and had placed improvements thereon valued at more than \$500. The only question therefore presented for determination is, whether his relinquishment of the former homestead entry for which he received a valuable consideration amounts to such a disqualification as would prevent his making another such entry under the provisions of the act of June 5, 1900.

Section 3 of said act provides:

That any person who prior to the passage of this act has made entry under the homestead laws, but from any cause has lost or forfeited the same, shall be entitled to the benefits of the homestead laws as though such former entry had not been made.

While it does not appear that this question has ever been directly or specifically considered by the Department in any of the reported cases, yet it was in a measure involved in case of *Turney v. Manthey* (32 L. D., 561). Manthey's homestead entry, made July 25, 1897, was contested November 1, 1902, by Turney, who charged that at time of making said entry he had a similar entry in the Valentine, Nebraska, land district, which entry was still of record. From the evidence submitted it appeared that Manthey made the former entry May 20, 1896, and on May 20, 1897, prior to making the second entry, he signed and acknowledged a relinquishment of the former, endorsed on his duplicate receipt and delivered the same to his wife, with whom he, on the same day, executed an agreement of separation, and to whom he gave a bill of sale for their personal property; that the entryman's said wife had continued to reside on the land embraced in the former entry; that said entry was still intact; and that a decree of divorce between the entryman and his said wife had since been granted. Upon considering the case the Department was impressed with the belief that claimant's failure to mention his former entry was due to his very slight knowledge of the English language, and that he was acting in good faith and believed that when he executed his relinquishment of the first entry he was thereafter entitled to make a second. The records of your office also disclosed that subsequent to the hearing the relinquishment was presented and the former entry canceled. This entry had not been lost or forfeited according to counsel's interpretation, but the Department, after careful considera-

tion, determined that the evidence as a whole brought the entryman within the scope and privilege of the said act of June 5, 1900, and left the entry intact. In the case of *Cox v. Wells* (33 L. D., 657) it was charged that claimant relinquished a former homestead entry, for which he received a valuable consideration. Both the local office and your office held the charge insufficient and rejected the affidavit of contest. While it is true that on appeal the Department reversed this concurring judgment, yet it was not on the ground that such a charge against an entry made under the act of June 5, 1900, was sufficient, but that the act of April 28, 1904 (32 Stat., 527), modified the former act; that as this entry was made subsequent thereto, it must be disposed of thereunder; and that under said later act the charge constituted a sufficient cause of action. Otherwise it is apparent that the decision of your office would have been affirmed.

Without doubt the element of consideration entered into the execution of the relinquishment by Manthey in the case heretofore cited. Evidently it was given to the wife in the settlement of their property affairs based on the agreement for separation. But whether this be true or not, under the restricted interpretation of counsel herein, one who voluntarily relinquished his homestead entry to the Government, without any consideration whatever, could not be deemed to have lost or forfeited such entry. Such a relinquishment would be neither accidental nor without the consent of the entryman. But certainly it would not be seriously contended that such a person was not within the scope of the said act of June 5, 1900. In fact that was exactly the showing made in the case of Samuel F. Honeycutt, *supra*, wherein the Department reversed the judgment of your office and left the entry intact.

When one makes homestead entry of one hundred and sixty acres of vacant public land subject to such disposition, he thereby exhausts his homestead right. If, by any subsequent action of the entryman, either intentional or unintentional, the entry be canceled, the right to perfect such entry has been lost or forfeited. Section 3 of the said act of June 5, 1900, was enacted for the benefit of such persons who came within its scope as to date of making original entry. It must therefore be held that any one who made a homestead entry, which for any reason he failed to perfect and which resulted in its being lost or forfeited prior to the passage of the act in question (*James Potter*, 32 L. D., 242), was thereunder entitled to the benefits of the homestead laws as though such former entry had not been made. This right, as heretofore stated, however, was modified by the subsequent enactment of April 28, 1904, *supra*, but this feature is not material to the determination of the case at bar, as the entry herein was made prior to the passage of the said later act.

The decision of your office is accordingly affirmed.

## PARAGRAPH 42 OF REGULATIONS OF MAY 21, 1907, AMENDED.

## REGULATIONS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
WASHINGTON, D. C., *December 28, 1907.*

*Registers and Receivers,*

*United States Land Offices.*

SIRS: Paragraph 42 of the Mining Regulations, approved May 21, 1907 [31 L. D., 453; 35 L. D., 664], is amended to read as follows:

42. This sworn statement must be supported by a copy of each location notice, certified by the legal custodian of the record thereof, and also by an abstract of title of each claim, completed to the date of filing said statement and certified by the legal custodian of the records of transfers, or by a duly authorized abstracter of titles. The certificate must state that no conveyances affecting the title to the claim or claims appear of record other than those set forth.

Abstracters will be required to attach to each abstract certified by them a certificate stating that they have filed in the office of the Commissioner of the General Land Office a certified copy of the existing statute by which they are authorized to compile abstracts of title, and evidence in the form of a certificate by the proper State, Territorial, or county officer that they have complied with the requirements of such statute.

Very respectfully,

R. A. BALLINGER, *Commissioner.*

Approved:

FRANK PIERCE, *Acting Secretary.*

ALASKAN LANDS—POSSESSORY RIGHT—EFFECT OF JUDGMENT—SEC. 10,  
ACT OF MAY 14, 1898.

CRARY *v.* GAVIGAN ET AL.

The judgment of a court of competent jurisdiction awarding the right of possession as between adverse claimants in a proceeding in accordance with the provisions of section 10 of the act of May 14, 1898, as carried into the act of May 3, 1903, is binding upon the land department in so far as the right of possession as between the parties is concerned; but as to anything other than the award of the right of possession, the land department is not bound by the decree, and if any of the other matters considered by the court come before the land department in a direct proceeding and consideration thereof becomes necessary to a determination of its right or authority to dispose of any of the public lands, its action will not be controlled by the reasoning or conclusions of the court in reaching its judgment.

*Acting Secretary Pierce to the Commissioner of the General Land*  
(G. W. W.) *Office, January 4, 1908.* (E. O. P.)

Carl N. Crary, claiming as assignee of Thompson Gardenheir, has appealed to the Department from your office decision of July 21, 1906, affirming the action of the local officers, denying his motion to dismiss the adverse claim of John T. Gavigan *et al.*, filed in opposition to his application to enter, under the provisions of section 2306 of the Revised Statutes, certain land embraced in United States survey No. 337, located in the Juneau land district, Alaska, and allow his entry therefor.

The decision of your office and the local office is predicated upon the adjudication adverse to Crary, by the United States district court for the third judicial district, Alaska, in a suit instituted in furtherance of the adverse filed by Gavigan *et al.* at the time Crary sought to make entry of the land.

The proceeding was in accordance with that part of the act of March 3, 1903 (32 Stat., 1028), wherein it is provided the procedure shall be the same as that prescribed—

in the obtaining of patents to the unsurveyed lands of the United States, as provided for by section ten of the act hereby amended, and under such rules and regulations as shall be prescribed by the Secretary of the Interior, as hereinbefore provided.

Section 10 of the act referred to (May 14, 1898, 30 Stat., 409), after specifying the proof which must be offered in support of the entry, and for the filing of a plat of the land embraced therein, etc., provides that the local officers shall, at the expense of the applicant—

cause notice of such application to be published for at least sixty days in a newspaper of general circulation published nearest the claim within the District of Alaska, and the applicant shall at the time of filing such field notes, plat and application to purchase in the land office, as aforesaid, cause a copy of such plat, together with the application to purchase, to be posted upon the claim, and such plat and application shall be kept posted in a conspicuous place on such claim continuously for at least sixty days, and during such period of posting and publication or within thirty days thereafter any person, corporation or association, having or asserting any adverse interest in, or claim to, the tract of land or any part thereof sought to be purchased, may file in the land office where such application is pending, under oath, an adverse claim setting forth the nature and extent thereof, and such adverse claimant shall, within sixty days after the filing of such adverse claim, begin action to quiet title in a court of competent jurisdiction within the District of Alaska, and thereafter no patent shall issue for such claim until the final adjudication of the rights of the parties, and such patent shall then be issued in conformity with the final decree of the court.

The adverse filed by Gavigan on behalf of himself and those associated with him, rests upon settlements initiated long after the commencement of proceedings by Crary to perfect his location, but they

claim that the initial steps taken by Crary were ineffectual to defeat rights arising out of their settlements, because the land was not at the time such proceedings were commenced, subject to location or entry.

The court assumed jurisdiction upon the suit of the adverse claimants and held in their favor, the decree of the court being based upon a finding that prior to July 25, 1902, the date upon which the adverse claimants settled, the land was within the limits of a military cantonment and by reason thereof was reserved from disposition under the homestead laws.

It is contended by counsel for appellant that the court was without jurisdiction to determine the question as to whether this land was, at the time Crary instituted his proceedings under the location in question, subject thereto.

There can be no question as to the jurisdiction of the court in the proceedings had, to determine the superior right to the possession of the land involved as between the adverse claimants and by its decree to protect the one held to be entitled thereto, as the statute in express terms vests this power in the court. The decree in this case goes no further, and is therefore binding upon the Department.

If the decree was based upon an erroneous statement of facts, due to the fault of the parties or otherwise, or a mistaken conclusion based thereon, the errors committed should have been corrected by appeal, as such mistakes, if they exist, can not be inquired into in a subsequent proceeding between the parties before this Department.

Where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise its judgment, until reversed, is regarded as binding in every other court. (*Elliott v. Peirsol*, 1 Pet., 328, 340; *Thompson v. Tolmie*, 2 Pet., 156, 169; *McNitt v. Turner*, 16 Wall., 352, 366).

Though the Department might entertain grave doubts as to the soundness of some of the reasons advanced by the court as the basis of its decree, such reasons, being no part of the decree, afford no ground for a review thereof *by the Department*. The scope of a decree is clearly defined by the court in the case of *Burke v. Laforge* (12 Cal., 403, 408), in the following terms:

We do not understand that such reasons given for a finding are judgments. The point decided is the thing fixed by the judgment, but the reasons are not.

The only point presented to the court for decision in the case at bar was as to the *superior right of possession* to a particular tract of land. The decree does not go beyond the issue, and even though it may be based upon wrong conclusions it can not, for this reason, be attacked collaterally, and no reversal thereof having been obtained *on appeal*, such decree must be accepted by the Department as conclusive *between the parties*, upon the issue decided.

In accepting the award of the court as final in this case, the Department in no manner adopts the reasoning or conclusions of the court. As to anything other than the award of the right of possession, the Department is not bound by the decree and if any of the other matters considered by it come before the Department in a direct proceeding and consideration thereof becomes necessary to a determination of its right or authority to dispose of any of the public lands, its action will not be controlled by the conclusions reached by the court in this case, though such conclusions would of course be accorded such persuasive effect as they may seem to warrant.

But in this case, the court having had jurisdiction to decide the right of possession as between the parties, the Department, in the absence of any reversal of its decree on appeal, must accept it as conclusive evidence of the superior possessory right of the adverse claimants, and the action of your office in refusing to go behind the decree, direct a dismissal of such adverse proceeding and allow Cray's entry, is hereby affirmed.

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ROBERT H. ROBINSON.

Motion for review of departmental decision of September 24, 1907, 36 L. D., 98, denied by Acting Secretary Pierce January 9, 1908.

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PRACTICE—CONTEST PROCEEDING—EX PARTE TESTIMONY.

KRATZ *v.* HURD.

Final proof testimony can not be accepted in a contest proceeding for the purpose of establishing the facts therein recited or to overcome the testimony presented at the hearing; nor can the testimony presented at the hearing be impeached by an *ex parte* showing.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(G. W. W.) *Land Office, January 11, 1908.* (E. O. P.)

Eyevrett M. Hurd has filed motion for review of unreported departmental decision of October 4, 1907, affirming the action of your office holding for cancellation his homestead entry made August 27, 1900, of the S.  $\frac{1}{2}$  S.  $\frac{1}{2}$ , Sec. 31, T. 9 S., R. 10 W., Portland land district, Oregon, upon contest initiated by Harry Kratz.

The motion for review is based upon numerous allegations and the argument of counsel proceeds upon the assumption that they are all established by the record facts. It is insisted that the claimant under the law authorizing his entry might have made final proof

thereon in three years and that inasmuch as he did not complete the same within the shortest possible time but waited until the expiration of five years, his good faith is to be presumed, and inasmuch as the entryman was not required to live on the land after three years from date of entry the Department is unwarranted in finding that the charge made the basis of contest had been sustained. To this it may be answered that all the testimony proper for the Department to consider in connection with the contest proceeding shows that claimant did not reside upon the land even during the three years succeeding the making of his entry and the testimony is also sufficient to overthrow any presumption of good faith arising from the fact that proof was not made within the shortest possible time.

It is also contended that the charge made the basis of contest is defective in failing to assign sufficient grounds therefor, and in support of this counsel refers to the fact that abandonment is alleged in the usual manner as having continued for more than six months next preceding the filing of the contest. But the contest charge contains more than this. It is therein alleged, also, that the claimant has never resided upon or improved the land in any manner whatsoever. It can not be seriously urged that such a charge is not broad enough to put in issue the complainant's compliance with law during the whole period covered by his entry. (*Ashwell v. Honey*, 13 L. D., 121.)

The principal grounds for the motion find support only in the final proof testimony and in the *ex parte* affidavit of claimant. It is urged, however, that this constitutes a part of the present record and should be considered in connection with the testimony offered at the hearing. No doubt such *ex parte* statements might be introduced in evidence and made a part of the record for certain purposes, but they can not be accepted as evidence in a contest proceeding to establish or disprove any of the facts therein recited. This was the purpose for which such evidence was offered and its introduction was properly rejected as incompetent. It might have been admitted to prove that final proof had been made or that the testimony therein set out had been given if proof of such facts became material, but it could only be accepted for such purpose without reference or regard to the truth or falsity of the statements therein contained. Counsel certainly will not seriously contend that testimony properly presented at a hearing can be refuted or impeached by an *ex parte* showing. It is fundamental that before testimony can be considered the witness giving it shall have been subject to cross-examination. Claimant might, had he so desired, have offered testimony touching the facts set forth in the *ex parte* showing he now seeks to have considered, but having failed to do so, he can not now substitute therefor the final proof testimony or a mere affidavit. Without this there is

nothing to overcome the showing made on behalf of the contestant, and as such showing clearly establishes the contest charge and that charge is in itself sufficient, the action already taken must stand.

The motion for review is accordingly hereby denied.

PRACTICE—APPEAL—SERVICE OF ARGUMENT.

ALEXANDER J. NISBET.

The appellee is required to serve a copy of all argument filed by him, regardless of whether or not the appellant filed and served any argument in connection with the appeal and specifications of error.

*First Assistant Secretary Pierce to Alexander J. Nisbet, Roswell,*  
(F. W. C.) *New Mexico, January 17, 1908.* (E. O. P.)

The Department is in receipt of your letter of the 9th instant in which you request information as to whether, under Rule 93 of Practice, an appellee is required to serve a copy of his argument and citations upon an appellant who neglects to file or serve an argument in connection with his appeal and specifications of error.

The language of said rule plainly requires that "all arguments of either party shall be served on the opposite party," and unless, as suggested by you, the failure of appellant to file or serve an argument amounts to a waiver of his rights under the rule, the opposite party would be required to serve a copy of his argument and citations upon him. The Department is inclined to the view that such failure on the part of the appellant would not have this effect. It is noted that Rule 91 provides for the time of filing argument by the appellee and evidently contemplates the happening of just such a condition as you suggest, yet Rule 92 immediately following provides for the filing of appellant's reply thereto and this right is in no manner limited directly or by implication to such appellants as have filed and served argument in connection with the appeal and specifications of error. It is clear from the language of said Rule 92 that service of appellee's argument and citations is essential to a proper compliance by appellant with the terms thereof, as his closing argument is thereby restricted to one "strictly in reply."

The better practice would seem to be to require the service upon the opposite party of all papers submitted to the Department for its consideration in the determination of an issue.

## SECOND HOMESTEAD—SOLDIERS' ADDITIONAL.

WALTER A. STAFFORD.

Where one entitled under section 2 of the act of March 2, 1889, to make a second homestead entry for 160 acres, and also entitled to make a soldiers' additional entry under section 2306 of the Revised Statutes, exercises the former right, he thereby forfeits the latter; and such additional right is not, under section 2 of the act of June 5, 1900, restored by commutation of the second entry.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(F. W. C.) *Land Office, January 21, 1908.* (E. O. P.)

Motion for review of unreported departmental decision of August 1, 1907, has been filed on behalf of Walter A. Stafford. By said decision the action of your office, rejecting the application of Stafford to make entry, under the provisions of section 2306 of the Revised Statutes, as the assignee of John W. Johnson, was affirmed. The land described in said application is the SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 14, T. 152 N., R. 82 W., Minot land district, North Dakota.

The material facts, about which there is no dispute, are, briefly stated, as follows:

Johnson, through whom Stafford claims, served more than ninety days in the army of the United States during the war of the rebellion and was honorably discharged. June 30, 1868, he made homestead entry of the SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 10, T. 7 N., R. 28 W., Clarksville land district, Arkansas, which entry was canceled January 23, 1871, for abandonment. May 29, 1889, he made second homestead entry, under the provisions of section 2 of the act of March 2, 1889 (25 Stat., 854), of lots 1 and 2, E.  $\frac{1}{2}$  of NW.  $\frac{1}{4}$ , Sec. 7, T. 16 N., R. 1 W., Guthrie land district, Oklahoma, containing 167.22 acres, which entry he perfected under the provisions of section 21 of the act of May 2, 1890 (26 Stat., 81). He thereafter attempted to assign soldiers' additional right of entry for forty acres, based upon original entry made by him at Camden, Arkansas, which right Stafford now seeks to exercise.

Your office and the Department held that by making entry under the act of March 2, 1889 (*supra*), for the full area allowed by the homestead law, he exhausted his homestead right, and therefore possessed no soldiers' additional right under section 2306 of the Revised Statutes, and that Stafford therefore took nothing by the assignment.

It is urged in support of the present motion that this construction of the law is erroneous, for the reason that Johnson has never received the benefits of said section 2306, and even though he may have exhausted his homestead privilege in the manner stated, this right

was fully restored to him by the terms of section 2 of the act of June 5, 1900 (31 Stat., 267).

The question as to the effect of Johnson's second entry upon his right to make soldiers' additional entry is thus presented at the outset. It is argued that the case cited in the decision complained of (Charles P. Colver, 33 L. D., 329) is not controlling, inasmuch as the entry there involved was perfected by the submission of regular final proof while the second entry of Johnson was completed by the submission of proof and the making of payment as required by said section 21 of the act of May 2, 1890 (*supra*). It is contended that, if it now be held that such entry extinguished the right possessed by Johnson under said section 2306 prior to the making thereof, two considerations are exacted of him in connection therewith.

The right given by section 2306 of the Revised Statutes is the right to enter so much public land as added to that entered prior to the adoption of the Revised Statutes would aggregate one hundred and sixty acres. Under this section Johnson, at the time he made his second entry, had a right, which was assignable, to enter forty acres of public land. Section 2 of the act of March 2, 1889 (*supra*), conferred upon all persons who had not already perfected title under the homestead law the right to make entry of one hundred and sixty acres. If the reasons urged by counsel for Stafford are sound, it follows that Johnson might exercise the right thus conferred to its full extent, and yet retain his right to enter forty acres under the provisions of section 2306. Clearly this is not in accord with the clear intent of Congress as expressed in the language of section 2 of the act of March 2, 1889 (*supra*). To so hold would amount to an unjust discrimination as between persons of the same class, as it is plain that those who had exercised the additional right conferred by section 2306 could *not* proceed under section 2 of the act of March 2, 1889 (*supra*), but would be compelled to proceed under the provisions of section 6 of said act. It would be manifestly inconsistent to hold that by reversing the order of the exercise of the rights conferred, the right itself could be extended. Yet this is in effect the contention of counsel.

Neither is there any force in the contention that two considerations are required of Johnson with respect to his second entry. At the time he made it he was, for the reasons already noticed, possessed of two rights, which, however, could be exercised only in the alternative, and not in conjunction. This is the plain effect of the decision in the case of Charles P. Colver (*supra*). See also case of Herman Dierks (33 L. D., 362), and departmental circular of January 27, 1905 (33 L. D., 364), prepared in accordance therewith. By electing to claim the full benefit of section 2 of said act of March 2, 1889, Johnson waived his right to proceed under section 2306, and his homestead right was

fully satisfied. The fact that he completed his second entry in the manner described, instead of by the submission of ordinary final five year proof, has no bearing upon the right of Johnson under section 2306. It was the *making* and not the *perfection* of his second entry that determined his right. The method of completing the entry was optional with Johnson. His election to accept the terms of the act of May 2, 1890 (*supra*), and make the payment required, was purely voluntary and was made, as in other cases of commutation, in lieu of residence. The consideration thus exacted was in satisfaction of no other obligation, and the payment by Johnson of the amount required did not alter his position from what it would have been had he completed his entry by furnishing proof of residence and cultivation for the full period of five years, upon which period he would have been entitled to credit for the term of his military service.

The contention that the provisions of section 2 of the act of June 5, 1900 (31 Stat., 267), restored Johnson to the status occupied by him prior to the making of his second entry, is untenable. So far as restoring the *purely personal* right to make a homestead entry is concerned, this act had that effect, but the limitation imposed prohibiting commutation of entries made under said section 2 forbids extension thereof, by construction, beyond the recognition of a personal right of entry.

Independently of this, however, it is apparent from the language of said section 2306 that nothing more was intended to be granted thereby than a right to acquire title to one hundred and sixty acres of land under the homestead law, and the benefits conferred by said section are fully obtained when the person entitled thereto has perfected a homestead entry for the full area allowed. Any additional right to which he may thereafter become entitled under a special act must, in conformity with the settled interpretation of the general homestead law, and in the absence of any specific language to the contrary contained in such act, be deemed a purely personal privilege.

It is clear therefore that Johnson was not, at the date of his attempted assignment of an additional right of entry, possessed of such right, and the rejection of Stafford's application based upon such assignment was proper.

The decision complained of is accordingly hereby adhered to, and the motion for review denied.

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SMITH v. DRAKE.

Motion for review of departmental decision of October 21, 1907, 36 L. D., 133, denied by First Assistant Secretary Pierce January 25, 1908.

WHITE EARTH INDIAN RESERVATION—ALLOTMENTS AND ANNUITIES—  
RESIDENCE.

MINNIE H. SPARKS.

Residence upon the White Earth Indian reservation is a condition precedent to the right to an allotment of lands on that reservation under the acts of January 14, 1889, and April 28, 1904.

An Indian entitled to annuities under section 7 of the act of January 14, 1889, does not forfeit his right thereto by removing from the reservation and adopting the habits of civilized life.

*Assistant Secretary Wilson to the Commissioner of Indian Affairs,*  
(S. V. P.) *January 25, 1908.* (C. J. G.)

The Department has received your office letter of December 24, 1907, transmitting application of Minnie H. Sparks for reinstatement on the rolls of the Mississippi Chippewa Indians, White Earth Reservation, Minnesota.

The applicant and her daughter, Leila C. Sparks, were enrolled by the Chippewa commission in 1889—"Census Rolls of the Mississippi Chippewa Indians, Gull Lake and Scattered Bands"—under the provisions of the act of January 14, 1889 (25 Stat., 642). From the facts as stated in your office letter it appears that in 1889 a member of the Chippewa commission advised your office that neither Mrs. Sparks nor her daughter had ever resided on the White Earth Reservation; that he had notified Mrs. Sparks at Duluth, Minnesota, where she resided, that the condition precedent to enrollment and allotment was a *bona fide* residence on the reservation; that he sent her a copy of a departmental decision touching the question of "who is a Chippewa," and notified her that unless she could show residence on the White Earth Reservation her name as well as that of her daughter would be dropped from the rolls and their tentative allotments canceled, the same not having yet been approved. The letter from the Chippewa commissioner addressed to Mrs. Sparks is not in the record, but in her reply, dated September 8, 1899, she stated:

Regarding the legality of my allotment of land and my name appearing upon the pay rolls as a "Chippewa" I would say in response to your communication, that I know of no reason why my name should not be dropped if conditions are as set forth in your communication.

In his letter to your office, dated November 7, 1899, the commissioner stated:

I received a letter from her practically acknowledging receipt of my notice to her, and admitting that she never had any residence upon White Earth Reservation, when she says, she "knows of no reason why her name should not be dropped."

I inclose her letter which is a reply to my notice sent her on August 7th, 1899, in view of which I recommend that the name of Minnie H. Sparks and her daughter Leila C. Sparks be dropped from the rolls of the Chippewa Indians in Minnesota, and their allotments be canceled.

Your office on November 13, 1899, concurred in the recommendation of the commissioner and thereupon the names of Mrs. Sparks and her daughter were dropped from the White Earth rolls.

The act of January 14, 1889 (25 Stat., 642), after providing in the first section thereof for the appointment of commissioners to negotiate with all the different bands or tribes of Chippewa Indians in Minnesota for the cession of their reservations in that State, except the White Earth and Red Lake reservations, and to make a census of each tribe or band, further provided in section 3:

That as soon as the census has been taken, and the cession and relinquishment has been obtained, approved, and ratified, as specified in section one of this act, all of said Chippewa Indians in the State of Minnesota, except those on the Red Lake Reservation, shall, under the direction of said commissioners, be removed to and take up their residence on the White Earth Reservation, and thereupon there shall, as soon as practicable, under the direction of said commissioners, be allotted lands in severalty to the Red Lake Indians on Red Lake Reservation, and to all the other of said Indians on White Earth Reservation, in conformity with the act of February eighth, eighteen hundred and eighty-seven, entitled "An act for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes;" and all allotments heretofore made to any of said Indians on the White Earth Reservation are hereby ratified and confirmed with the like tenure and condition prescribed for all allotments under this act: *Provided, however,* That the amount heretofore allotted to any Indian on White Earth Reservation shall be deducted from the amount of allotment to which he or she is entitled under this act: *Provided further,* That any of the Indians residing on any of said reservations may, in his discretion, take his allotment in severalty under this act on the reservation where he lives at the time of the removal herein provided for is effected, instead of being removed to and taking such allotment on White Earth Reservation.

Your office in a letter dated October 5, 1893, "touching the question of 'who is a Chippewa,'" passed upon the application of one Mrs. Oakes for an allotment on the White Earth Reservation. She was born a member of the Mississippi Chippewa band, resident upon that reservation. Early in life she abandoned her tribe and married a man by the name of Oakes, of St. Paul, where she thereafter resided. After quoting from the foregoing section 3 your office said:

There can be no question then that removal to White Earth Reservation and residence thereon is under the law a precedent condition to the allotment of lands in the case of every Chippewa in Minnesota save the Red Lake Chippewas, and those Indians residing on other reservations who may elect under the last proviso of section 3 of the act to take their allotments on the reservation where they reside "instead of being removed to and taking allotments on the White Earth Reservation." It seems to me therefore that it would be safe to lay down the rule, in cases like that of the Oakes family, that before any such person can be enrolled and given an allotment it shall be shown to the satisfaction of the commissioners that he or she is a Chippewa Indian, actually resident in the State of Minnesota (Decision of the Department of March 26,

1891, heretofore referred to), and has removed to and taken up his or her residence on the White Earth Reservation, with the *bona fide* intention of permanently remaining there.

The foregoing was concurred in by the Assistant Attorney-General for this Department in an opinion rendered by him May 24, 1895, and presumably is the paper, a copy of which the Chippewa commissioner says he inclosed in a letter addressed to Mrs. Sparks, August 7, 1899, to which she replied September 8, 1899, as hereinbefore quoted. By the act of April 28, 1904 (33 Stat., 539), known as the Steenerson act, allotments were authorized to be made—

to each Chippewa Indian now legally residing upon the White Earth Reservation under the treaty or laws of the United States, in accordance with the express promise made to them by the commissioners appointed under the act of Congress entitled "An act for the relief and civilization of the Chippewa Indians in the State of Minnesota," approved January fourteenth, eighteen hundred and eighty-nine, and to those Indians who may remove to said reservation who are entitled to take an allotment under article seven of the treaty of April eighteenth, eighteen hundred and sixty-seven, between the United States and the Chippewa Indians of the Mississippi.

Mrs. Sparks has on several occasions since her name was dropped from the rolls applied for reinstatement for herself and daughter, and each time your office has concluded that they were not and are not entitled to enrollment on the White Earth rolls. In letter of September 17, 1904, to the Indian agent at White Earth, your office stated:

It seems very evident from your letter that Mrs. Sparks has never established a permanent residence on the White Earth Reservation and in the opinion of this office she is not entitled to enrollment on the White Earth rolls or to an allotment on the White Earth Reservation.

Your office states that since the passage of the act of April 28, 1904, the Indians of the reservation have been jealous of their rolls, protesting against additions being made thereto without their consent. Consequently the practice has been to instruct the agent to present applications for enrollment to the general council of the Indians. Such course was pursued in the case of Mrs. Sparks. Two propositions are advanced in support of her application for reinstatement, viz:

First, that there was no justification for the dropping of the name of Minnie H. Sparks from the rolls of Minnesota Chippewa Indians.

Second, the name of Minnie H. Sparks having been unlawfully dropped from the rolls, without the intervention of the tribal authorities, the same should be replaced on said rolls, and the applicant herein should be reinstated as a member of her original band directly by the same authorities which removed her name.

Apparently there is no question as to the Indian blood of Mrs. Sparks and she was recognized as a member of the Gull Lake band of Chippewa Indians by the action of the Chippewa commission in placing her name on the original census rolls of that tribe under the act of January 14, 1889. As such member she received annuities from

date of enrollment up to the time her name was dropped from the rolls, a period of ten years. In reference to the statement contained in her letter to the Chippewa commissioner in 1899, upon which action in dropping her name seems largely to have been based, she states in an affidavit that she was mistaken in supposing that she had never lived on the reservation, the fact being as recently ascertained that she lived there until the death of her mother which occurred when the daughter was eight years of age.

The uniform holding has been that a condition precedent to enrollment and allotment of lands on the White Earth Reservation under the acts of 1889 and 1904 is residence on or removal to said reservation. This was the construction placed upon said acts when on June 18, 1904 (Indian Division), the Department rendered decision in the case of what is known as the Sloan family, involving the question of their rights to annuities under the act of January 14, 1889. The Indian agent reported that with few exceptions the members of said family had never resided on the reservation, and recommendation was made that their names be dropped from the rolls. In said departmental decision of June 18, 1904, it was held:

The evident purpose of the act of January 14, 1889, was to gather to White Earth reservation all nomadic Chippewa Indians in Minnesota who had not adopted the habits of civilized life, with view to their civilization and the relief of the white settlements from the annoyance and dangers incident to the presence of these wanderers among them. As a condition to their right to an allotment they were required to "take up their residence" on White Earth reservation and allotments were "thereupon" to be made to them. Residence therefore became necessary to the taking of the allotment, but the act contained no requirement for continuity of residence by the allottee after obtaining an allotment. All allotments made under the act, whether on ceded lands or on White Earth diminished reservation, to Indians who never resided thereon, were made without authority of law, and should be reported for cancellation, if no patent has issued.

Nor is the condition of residence on allotted land, or yet on the reservation, imposed as to the right to draw annuities of tribal funds. The act of January 14, 1889, is but one of a series of acts having the general purpose to induce the Indian to abandon tribal relations and nomadic habits, and to adopt those of civilized life and to become independent and self-supporting. The act, section 3, makes express reference to the act of February 8, 1887 (24 Stat., 388). That act (ib., 390) provided that:

"Every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens \* \* \* without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

The enrollment of these applicants by the commission presumably shows them to be Chippewa Indians of Minnesota. Being so, they are entitled to the annuities arising from sale of the ceded lands under section 7 of the act of January 14, 1889. No distinction is there made in favor of such only of the

Chippewas as take allotments or reside on the reservation. Those who adopt the habits of civilized life residing apart from the tribe do so upon the invitation of the government and under its promise that they do not thereby forfeit their right to tribal property and are entitled to receive their annuities. So also, under the act of June 7, 1897 (30 Stat., 62, 90), are the children of a Chippewa woman, by blood intermarried with a white man, for nothing in the act of 1889 indicates that the invitation held out to all Indians to abandon tribal relations and to adopt the habits of civilized life was intended to be recalled as to the Chippewas by the act of 1889. The national policy to encourage the Indians generally to such course is not changed as to the Chippewas, and the condition of residence on the reservation imposed upon the right to take an allotment does not justify the withholding of annuities from such Chippewas as adopt civilized life and reside elsewhere than on the reservation.

\* \* \* \* \*

The dropping of these persons from the annuity rolls is therefore unauthorized. If their absence from the reservation is due to their adopting the habits of civilized life, they are entitled to their annuities and to be held for that purpose upon the tribal rolls, as also are the children of a Chippewa woman by blood intermarried with a white man. If they are nomadic Indians, without settlement and civilized manner of life, they are simply absentees from the tribe and reservation and to be so dealt with. Former departmental rulings holding that annuities are forfeited by failure to reside on the reservation are overruled.

It will be observed that this decision left undisturbed the ruling as to the necessity of residing on the White Earth Reservation to entitle Chippewa Indians to allotments of land thereon. But as to annuities it is clear under said decision that Mrs. Sparks having been duly enrolled and thereby recognized as a Chippewa, her name was improperly dropped from the rolls because of non-residence.

Your office calls attention to the admitted fact that Mrs. Sparks's ancestry belonged to the Red Lake band and not to the Gull Lake band of Mississippi Chippewas. But as Mrs. Sparks's mother during her lifetime resided in the Chippewa country and was recognized and enrolled as a member of the Gull Lake band, and Mrs. Sparks herself was enrolled with said band, for a long time sharing in its annuity payments, the fact of her Red Lake ancestry is not regarded as a bar to her present claim.

The names of Mrs. Sparks and her daughter will therefore be restored to the rolls in accordance with the rulings herein referred to.

#### PATENT—EFFECT OF—POWER TO CORRECT.

##### WRIGHT-BLODGETT Co.

Where a patent has issued which fails to conform to the record upon which the right to a patent rests, and has not passed out of the control of the land department, it is not only the right but the duty of that department to withhold the delivery of such patent and to issue one in conformity with the record; but where patent has issued in conformity with the record upon which the right to patent is predicated, and has been signed, sealed, countersigned and recorded, the title to the land has passed thereby and the land department is without further jurisdiction over the patent.

*First Assistant Secretary Pierce to the Commissioner of the General  
(S. V. P.) Land Office, January 25, 1908. (E. F. B.)*

This appeal is filed by the Wright-Blodgett Co. Ltd., and the Southwestern Lumber Co., from the decision of your office of November 6, 1907, refusing to reinstate the record of the patent issued to Jackson Dyal upon his homestead entry for the S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , and N.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 31, T. 1 N., R. 4 W., Natchitoches, Louisiana.

From the papers submitted it appears that the land in question was entered by Jackson Dyal October 30, 1900, upon which final proof was made March 16, 1901, and final certificate was issued thereon to Jackson Dyal April 11, 1901. Upon said certificate a patent was issued to Jackson Dyal October 8, 1901, in conformity with the final certificate and the entire record in the case.

The final certificate and the patent issued to Jackson Dyal were filed for record in the proper office for Rapides Parish, Louisiana, the former May 27, 1901, and the latter December 30, 1901.

April 22, 1901, after the issuance of the final certificate, Jackson Dyal conveyed said land, excepting ten acres, by warranty deed to the Wright-Blodgett Co., which was filed for record May 30, 1901.

In November, 1906, more than five years after the issuance of the patent to Jackson Dyal, and the sale of the land by him to appellant, your office received a communication from one Dr. J. H. Barron, stating he had purchased the land from John Dyal, familiarly known and called Jackson Dyal, and that the person who made out the homestead application wrote the name *Jackson* instead of *John*; that the entryman could neither read nor write and the error was carried into all the papers and the patent, but that his correct name was John. He asked how the patent could be corrected. He was advised by your office that application must be filed for the correction of the patent supported by evidence as to the correct name of the entryman, an authenticated abstract of title, and to surrender the original patent or file proof of its loss or destruction. February 4, 1907, Barron filed an application for the correction of a patent supported by his affidavit as to the correct name of the entryman and the loss of the patent. He filed also an abstract of title with the affidavits of two others that the name of the entryman is John, but that he was familiarly known as Jackson to distinguish him from another person named John Dyal.

Thereupon your office, notwithstanding the regularity in the issuance of the patent in strict conformity with the entire record, directed the local officers to correct the certificate so as to read John Dyal, which was done. You then assumed to cancel the patent, and on May 1, 1907, issued a patent for said land in the name of John Dyal, which was sent to said Barron.

The question as to the authority of your office to correct a clerical mistake, and to receive and cancel a patent erroneously issued in a wrong name, and to issue one in the proper name of the purchaser came before the Supreme Court in the case of *Bell v. Hearne* (19 How., 252).

In that case John Bell purchased a tract of public land and received from the local officers the cash certificate known as the patent certificate, certifying the purchase of the land by John Bell and of his right to a patent. In making up the duplicate certificate of purchase the register inadvertently and erroneously inserted the name of James Bell for that of John Bell, which was sent to the General Land Office with his monthly returns, and thereupon a patent was issued in the name of James Bell, which was sent to the local office and delivered to John Bell, who surrendered his cash certificate. Upon the representation of such facts to the Commissioner, and the surrender of the patent, the Commissioner canceled it and issued a new patent to John Bell. In the meantime the land had been levied upon and sold at sheriff's sale as the property of James Bell, and the defendant Hearne claimed under that title.

The court said that whatever appearance of title James Bell had was owing to the mistake in the duplicate certificate returned to the General Land Office and by the patent issued in his name which was never delivered to him. "The question then arises, had the Commissioner of the General Land Office authority to receive from John Bell the patent erroneously issued in the name of James Bell, and to issue one in the proper name of the purchaser?" The court held that he had, it being the exercise of "a power to correct a clerical mistake, the existence of which is shown plainly by the record and is a necessary power in the administration of every department."

It will be observed that in the case cited the cancellation of the erroneous patent and the issuance of a proper patent was upheld for the reason that the first patent did not conform to the record and that the latter did. The issuance of the first patent was the result of a palpable mistake clearly appearing upon the face of the record. It purported to convey the land to a person other than the purchaser. When it was discovered that the duplicate certificate of purchase did not agree with the application to purchase and the cash certificate issued to the purchaser, the record was corrected so as to speak the truth and upon that record the proper patent issued.

When a patent has issued which fails to conform to the record upon which the right to a patent rests, and has not passed out of the control of the Department, it is not only the right but the duty of the Commissioner to withhold the delivery of such patent and to issue one in conformity with the record. *Frank Sullivan* (14 L. D., 389, 391). But when a patent has issued in conformity with the record

upon which the right to the patent is predicated, and has been signed, sealed, countersigned and recorded, the title to the land has passed and the land department is without further jurisdiction over the patent. *United States v. Schurz* (102 U. S., 378). See also *Thaddeus McNulty* (14 L. D., 534). If such authority should be assumed it would not affect the right and interest of any one holding under such title without his consent.

In this case there is not the slightest intimation of irregularity or error disclosed by the record. The patent was issued strictly in conformity with the record and conveyed to the entryman the title to the land entered, even though the name under which he made the entry and by which the patent issued was not his true name. He could have conveyed the land either by that name or by any other name. Identity of the grantee is the material question. Whether that deed should be reformed or to whom the title to the entryman has been conveyed are questions resting solely within the jurisdiction of the courts and not of the land department.

While a conveyance to a fictitious person is void, any real person may be a grantee under a fictitious name and may make a valid conveyance under his real name or under any name he may choose to assume. (Brewster on Conveyance, Sec. 43.)

It follows that the action of your office in assuming to correct the record upon which the patent to Jackson Dyal was based and to cancel that patent and issue another in the name of John Dyal in lieu of it was void and of no effect.

Appellant asks that your office be instructed to call upon J. H. Barron and John Dyal for a surrender of the patent issued in the name of John Dyal and for reconveyance of the title, notifying them that upon their refusal to do so the Department will recommend suit to vacate the patent.

Such proceeding is not deemed necessary for the protection of appellants in view of the fact that no title passed by such patent and no authority is shown for the action of your office by the papers upon which the erroneous patent was issued.

Fortunately the patent issued to Jackson Dyal was not surrendered and has not been mutilated by having impressed upon the instrument itself the assumed act of cancellation. That patent as shown by the records of Rapides Parish, Louisiana, conveyed the title of the government to the land in question to Jackson Dyal, and those records also show that it was conveyed under that name to appellant.

The integrity of the records in your office can be restored by proper notation made thereon, referring to this letter as authority therefor.

You will take such action and furnish a copy of this letter to appellants.

## FORT SUMNER ABANDONED MILITARY RESERVATION—DISPOSAL OF LANDS.

## INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
Washington, D. C., January 27, 1908.

*Register and Receiver, Clayton, New Mexico.*

SIRS: I am in receipt of your letter dated July 12, 1907, reporting that pursuant to instructions of April 20, 1907, you offered for sale on July 11, 1907, the unsold tracts in the Fort Sumner abandoned military reservation, comprising 164.80 acres, of an assessed valuation of \$5,831.94, and that lot 2, Sec. 22, T. 2 N., R. 26 E., containing 2.72 acres, was the only tract sold.

The sale of these lands was in accordance with the provisions of the act of February 24, 1871 (16 Stat., 430), section 1 of which provides, in part, as follows:

Each subdivision shall be appraised and offered separately at public outcry to the highest bidder as hereinbefore provided, after which any unsold land or lot shall be subject to sale at private entry for the appraised value at the proper land office.

The remaining tracts in the list of unsold lands in said reservation having been offered for sale in accordance with the act, are, under the quotation above given, now subject to sale at private entry for the appraised value.

You are, therefore, authorized to accept the tender of the required amount for the unsold lands in the appraised list herewith inclosed.

Very respectfully,

R. A. BALLINGER, *Commissioner.*

Approved:

FRANK PIERCE, *First Assistant Secretary.*

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MUNN *v.* BARTHOLF ET AL.

Motion for review of departmental decision of November 13, 1907, 36 L. D., 162, denied by First Assistant Secretary Pierce January 28, 1908.

## PATENT—POWER OF LAND DEPARTMENT TO CORRECT DEFECTS OF FORM.

## INSTRUCTIONS.

The land department has the power to correct defects or mistakes in the form of a patent so as to make it conform to law.

*First Assistant Secretary Pierce to the Commissioner of the General Land Office, January 28, 1908.* (C. J. G.)

December 25, 1907, the Department, in a decision addressed to the Commissioner of Indian Affairs [36 L. D., 210], construing the acts of April 28, 1904 (33 Stat., 539), known as the "Steenerson Act," and the act of May 8, 1906 (34 Stat., 182), known as the "Burke Act," held that the trust patents issued to the Chippewa Indians on White Earth Reservation in Minnesota, should be drawn in accordance with the form prescribed by the first-named act, which declares that said patents should be issued "in the manner and having the same effect as provided in the general allotment act" of February 8, 1887 (24 Stat., 388).

The sole matter considered and discussed in said decision of December 26, 1907, was as to the form in which the patents in question should be executed. It now appears from an Indian Office letter dated December 25, 1907, that some 2,500 trust patents drawn with reference to the provisions of the Burke act have been executed and recorded and that a few of them have been actually delivered. The Indian Office recommended that your office be instructed to cancel these patents, except those that have been delivered, and to cancel the records of said patents in your office and to re-issue them under the form prescribed by the terms of the general allotment act. As to patents already delivered, it was recommended that they be re-issued if returned either to your office or the Indian Office. Said letter was approved and referred to your office December 28, 1907, for action in accordance with the recommendations therein made. This letter has been informally returned here with several papers attached reviewing the situation. The question is raised whether there is authority to cancel the patents already issued and re-issue new ones in their stead, reference being made to the case, among others, of *United States v. Schurz* (102 U. S., 378). No doubt is expressed as to the correctness of departmental ruling of December 26, 1907, the only question being whether or not, these patents having been signed, sealed, and recorded, the power to correct them has passed from the land department. Reference is also made to the act of April 23, 1904 (33 Stat., 297), which limits the power of the Department, without the previous authority of Congress to cancel trust patents issued to Indian allottees, to certain specific instances.

In determining the question raised herein it is well to ascertain the effect of the issuance of these patents and just what their proposed recall and cancellation involves, as distinguished, if there be a distinction, from the facts and circumstances on which the authorities cited are based; especially the case of *United States v. Schurz*, *supra*. Said patents were evidently not issued in accordance with the form prescribed by law. The Steenerson act, which has been determined to be the law applicable, specifically provides for the form of these patents and it is clear that there was no authority to insert therein any other terms than those prescribed in said act. *Deffeback v. Hawke* (115 U. S., 392). It is said in *Washburn on Real Property* (Vol. III, p. 185, 4th Ed.), that a patent "when regularly and properly issued, becomes a complete evidence of title." In the case of *Newhall v. Sanger* (92 U. S., 761), it was held, in effect, that patents to the railroad company not having issued in "compliance with the requirements of the acts of Congress, commonly known as the Pacific Railroad Acts," were invalid and passed no title. In the case of the *United States v. Schurz*, after referring to the proceedings involved in the issuance of a patent, the court said:

We are of opinion that when all that we have mentioned has been consciously and purposely done by each officer engaged in it, and where these officers have been acting in a matter within the scope of their duties, legal title to the land passes to the grantee, and with it the right to the possession of a patent.

In the case of *Charles H. Moore* (27 L. D., 481), after quoting from numerous authorities, it was said:

From these authorities and many others that might be cited, it must be considered as the settled law that a patent is void on its face not only when fatally defective by its own terms but also, whenever its invalidity appears by reference to any matter of which judicial notice may be taken, such as public statutes or treaties; and that such a patent is entirely null, conveys no title, and has no operative effect requiring resort to a court of equity for its avoidance.

These matters are referred to here not for the purpose of definitely determining that the patents in question were absolutely void, for in the view of the Department that is unnecessary, but to show the evident trend of authorities that might be invoked in support of that theory were it deemed necessary.

The case of *United States v. Schurz* arose on a petition for mandamus, the question primarily decided by the court being as to the necessity of manual delivery of a patent in order to pass title after all the formalities of its issuance have been regularly performed. It was held that delivery of an instrument when regularly signed, sealed, countersigned and duly recorded is not essential to pass title. The theory upon which the decision in that case rests is that the authority of the land department to issue the patent was predicated upon a decision judicial in its character, and all the cases cited in the attached papers involve the question of the power to cancel patents issued by

authority and direction of law. In the case of *United States v. Schurz*, one McBride, after the five years' residence and cultivation required by the homestead law, submitted final proof which the Commissioner of the General Land Office found to be in all respects in full compliance with law, and, as such, entitled McBride to a patent; that in accordance with such finding a patent was issued and transmitted to the local officers for delivery to McBride, but subsequently returned to the General Land Office. The land claimed by McBride was within the corporate limits of a town and without knowledge of this the local officers allowed McBride's entry. Application was then made to have said entry canceled as irregularly and improvidently allowed. This application was duly forwarded to the General Land Office, but prior to action thereon a patent was issued and transmitted for delivery to McBride. Subsequently, on taking up the matter, the claim of McBride was rejected and the undelivered patent canceled; thereupon he applied for writ of mandamus to compel delivery of said patent. The court held that—

When the officers whose action is rendered by the laws necessary to vest the title in the claimant have decided in his favor, and the patent to him has been duly signed, sealed, countersigned and recorded, the title of the land passes to him, and the ministerial duty of delivering the instrument can be enforced by mandamus.

In that case there was no question of the power of the land department to correct errors and mistakes. The patents issued in the present instance were not in accordance with the law or the record and the question is resolved into one merely as to the power to correct a mistake—a defect in the form of said patents—and to issue patents which shall conform to law. It has frequently been held by the Supreme Court and the Department that power exists to recall even a delivered defective patent and to issue one in conformity with law. It was said in the case of *Frank Sullivan* (14 L. D., 389) :

Where a patent has issued which fails to conform to the record upon which the right to a patent rests, and has not passed out of the control of the Department, it is not only the right, but the duty of the Commissioner to withhold the delivery of such patent, and to issue one in conformity with the record. *Bell v. Hearne* (19 How., 252) ; *Maguire v. Tyler* (1 Black, 199, 8 Wall., 655) ; *Adam v. Norris* (103 U. S., 594) ; *William H. McLarty* (4 L. D., 498) ; *W. A. Simmons et al.* (7 L. D., 283.)

In the case of *Bell v. Hearne*, *supra*, it was said :

The Commissioner of the General Land Office exercises a general superintendence over the subordinate officers of his Department, and is clothed with legal powers of control, to be exercised for the purposes of justice, and to prevent the consequences of inadvertence, irregularity, mistake and fraud in the important and extensive operations of that officer in the disposal of the public domain. The power exercised in this case is a power to correct a clerical mistake the existence of which is shown plainly by the record, and is a necessary power in the administration of every department.

As to the power of the Department to recall a defective patent, the Supreme Court in *Maguire v. Tyler*, *supra*, said:

Doubt as to the power of the Secretary to recall the patent can not be entertained, as the point has been directly decided by this court;

and in the case of *Adams v. Norris*, *supra*, it was said:

In short, it is but the common case of a grantor who, having failed to convey what he was bound to convey, makes another deed to correct the wrong.

There are other considerations equally potent which distinguish this case from that of *United States v. Schurz*, and allied cases. There, the cancellation of the patent would have involved destruction of the title it purported to convey; here, there are no conflicting claims or interests, the proposed cancellation will not disturb or be destructive of any legal rights, and there is no change either of ownership, name of the beneficiary or description of the land; merely a change in the recitals of the patent to render it conformable to the express provisions of law. There ought to be little or no question of the authority and jurisdiction to correct errors of the character in question. It does not require the exercise of a judicial function which in the case of a patent regularly and properly issued can only be exercised by a judicial tribunal. The form of these patents was drawn in accordance with a wrong construction or interpretation of the law. Recitals were inserted which were not authorized by law. Such being the ascertained fact it becomes the duty and with it goes the power to correct said patents in order that the patentees shall obtain what the law authorizes them to have. There must necessarily and obviously be lodged in the land department such power and discretion as will protect the patentees from the effects of accident, mistake or defects occurring in the execution of the patents. It was said in the case of *David Laughton* (18 L. D., 283):

This Department is charged with looking after and protecting the interest of the Indians in such matters as this. The government stands in a different relation to these people from that which it sustains to others seeking to obtain title to a portion of the public domain. The Indians are recognized as unfit and incapable of protecting themselves and therefore are entitled to demand that their interests shall be carefully conserved by this Department under whose care they have been placed.

Under these circumstances it seems unjust, if not a betrayal of the trust, to say to the Indians it is true a mistake has been made by which you suffer, but this Department will not correct that mistake for which it alone is responsible. I am of the opinion that this Department has the authority, and that it is its imperative duty to correct rolls of Indian allottees whenever it is clearly shown that a mistake has been made, and to correct a patent issued on the erroneous roll to make it correspond to the corrected one, at least, in those cases where the patent has never, in fact, been delivered to anyone claiming under it, or gone out of the possession of the Department.

The point has also been made that in view of the act of March 1, 1907 (34 Stat., 1015, 1034), which removed all restrictions on allot-

ments within the White Earth Reservation at that time or thereafter held by the adult mixed-blood Indians and declared the trust patents theretofore or thereafter executed for said allotments, to pass fee simple title to adult mixed-bloods at least now holding title in fee simple under the patents in question which can not therefore be canceled. There appears to be no available record showing who are or who are not mixed-bloods, and besides, the act is undoubtedly operative only upon patents legally and regularly issued. Certainly, said act ought not to be regarded as so finally operative upon defective patents as to prevent their cancellation for correction purposes in accordance with the law authorizing their issue. After such correction the act will remain operative in behalf of those entitled to its benefits, the only difference being it will have a legal form of patent to operate upon instead of an illegal one. Nor is it believed, for reasons similar to the foregoing, that there is anything in the act of April 23, 1904 (33 Stat., 297), forbidding the cancellation of these patents for the purpose of issuing others to the patentees in form and substance as specifically authorized by law.

The Department adheres to its approval of the Indian Office recommendations and in its opinion said recommendations should be carried out accordingly.

PRACTICE—APPEAL—NOTICE—REGISTERED MAIL.

WEISBECK *v.* MCGEE.

Where notice of a decision is given by registered letter addressed to the party by name, in care of his attorney, the time within which appeal may be filed does not begin to run from the time of delivery of the letter to the attorney but from the date of its actual receipt by the party himself.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(S. V. P.) *Land Office, January 30, 1908.* (E. F. B.)

With your letter of January 16, 1908, you transmit a second petition for certiorari, filed in your office June 28, 1907, by George W. McGee in person, complaining of the refusal of your office to transmit his appeal from the decision of your office of May 2, 1906, holding for cancellation his homestead entry made January 22, 1903, for the NW.  $\frac{1}{4}$  of Sec. 20, T. 130 N., R. 74 W., Bismarck, North Dakota, land district, upon the contest of John Weisbeck charging abandonment.

A petition for certiorari had previously been filed by McGee which was denied by the Department May 6, 1907, for the reason that petitioner failed to exhibit with his petition a copy of the decision of your office of which he complained. That omission has been supplied in the petition now under consideration.

Notice of your decision of May 2, 1906, was given by registered letter mailed May 28, 1906, and addressed "Geo. W. McGee, c/o F. H. Register, Bismarck, N. D." The return registry receipt was signed "Geo. W. McGee by F. H. Register." The appeal was filed August 14, 1906.

You found that service of said decision was made on F. H. Register, attorney for McGee, by said letter of May 28, 1906, and you refused to transmit the appeal for the reason that it was not filed in time, charging McGee with notice of said decision from that date.

If the notice, above referred to, was the only notice given it was not a service upon the attorney of McGee, as the address of the letter alone did not give him authority to open it but simply to receipt for it in the name of McGee, and to transmit it to the addressee, which he did. It is shown by affidavits filed with the petition that the registered letter to McGee was enclosed with a letter mailed by Register to McGee at his proper post office where it was received June 10, 1906. As the appeal was filed on the 65th day thereafter, it was in time and this petition should be granted.

You will therefore transmit the record to the Department for its consideration, and in view of the fact that the petition was filed in your office June 28, 1907, and was not transmitted until January 16, 1908, owing to a request of the contestant for time to answer, you will make it special and transmit the record as early as practicable.

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**PATENT—HEIRS OF TIMBER AND STONE APPLICANT—JURISDICTION OF  
LAND DEPARTMENT.**

THOMAS B. WALKER.

In the event of the death of an applicant to purchase under the timber and stone act prior to acquisition of the legal or equitable title to the land, patent therefor, upon completion of the entry by his heirs, will issue generally to the heirs of the deceased applicant.

Where patent issues in conformity with the record upon which it is predicated the title to the land passes thereby and the land department is thereafter without further jurisdiction over the patent.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(S. V. P.) *Land Office, January 31, 1908.* (L. R. S.)

The Department has considered the appeal of Thomas B. Walker from your office decisions rendered May 14 and December 5, 1907, refusing to cancel Susanville, California, cash patent No. 4039, issued to the heirs of Isaac J. Hastings, dated June 30, 1906, for the E.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$ , Sec. 9, and the W.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$ , Sec. 10, T. 43 N., R. 7 E., M. D. M., and issue a new patent for the same land in the name of Isaac J. Hastings.

The record shows that the local land officers on February 11, 1907, returned to your office said patent with the application of Thomas B. Walker, duly verified, alleging that he purchased said land at public sale on May 5, 1906, from Mrs. Lucy M. Hastings, administratrix of the estate of Isaac J. Hastings, deceased; that said sale was confirmed by the superior court on June 21, 1906, and a deed for said land was duly executed and delivered to said Walker on "July 7, 1906," and since that time he has not parted with any interest therein; that he refuses to accept said patent because issued to "the heirs of Isaac J. Hastings," and requests that it be canceled and that a new patent be issued in lieu thereof to Isaac J. Hastings.

It also appears, and your decision of May 14, 1907, found, that said Hastings filed his timber land sworn statement for said land in the local land office on May 21, 1903, made proof in support thereof on September 14, 1903, which was filed with the purchase money in the local land office on September 17, same year; that on September 18, 1903, the purchase money was returned to said Hastings and the proof suspended to await an investigation by a special agent; that on September 7, 1904, by direction of the special agent the purchase money being tendered a second time, cash receipt and cash certificate were issued to "Lucy M. Hastings, widow of Isaac J. Hastings;" that on April 18, 1906, your office instructed the local land officers to notify said Lucy M. Hastings that she would be allowed sixty days within which to show cause why patent should not issue to the "heirs of Isaac J. Hastings," which notice was received by her on May 3, 1906, and on May 7, same year, the local land officers transmitted a letter signed by the writer as "attorney for widow of Isaac J. Hastings," containing the statement that "she is satisfied that patent issue to 'heirs of Isaac J. Hastings', instead of widow."

It further appears that said entry was confirmed by the Board of Equitable Adjudication on June 9, 1906, on account of the defective procedure in making the proof.

The resident attorneys have filed in support of said application copies of the court proceedings relative to said sale and a copy of the deed executed by said Lucy M. Hastings, administratrix of the estate of Isaac J. Hastings, deceased, which was acknowledged on July 9, same year.

You denied said application on the ground that said applicant purchased said land long subsequent to issuance of final certificate in name of Lucy M. Hastings and after the correction of the certificate, also after notice to her, that the patent properly issued to the "heirs of Isaac J. Hastings," and that your office would not pass upon the legality of said court proceedings nor the equities between the applicant, said heirs, and Lucy M. Hastings, as administratrix, or widow

of said Isaac J. Hastings, deceased; that said patent should be returned for delivery to the heirs of Isaac J. Hastings or their legal representatives, and the local land officers were directed to give notice of said decision and make report thereon under circular of March 1, 1900 (29 L. D., 649).

On May 24, 1907, resident counsel for the applicant filed a motion for review of your said decision, alleging error—

(1) In regarding as material the fact that applicant's purchase of said land was subsequent to the issuance of final certificate in the name of Lucy Hastings and after the correction of said certificate;

(2) In holding that said patent properly issued to the heirs of Isaac J. Hastings instead of to Isaac J. Hastings and thereby pass the title to the "heirs, devisees, or assignees" of said Isaac J. Hastings under section 2448, U. S. R. S.;

(3) In refusing to pass upon the legal effect of the proceedings under which applicant claims; and

(4) That the effect of said decision is to pass title to public land to parties not entitled to the same, contrary to law and the evidence.

On December 5, 1907, you considered said motion, and after calling attention to the fact that the patentees described as "the heirs of Isaac J. Hastings" have not been served with notice of said application and no report had been made of the service of notice, as required by your said letter of May 14, 1907, you held that said patent was "issued in accordance with the established practice of the Department" for land within its jurisdiction and it "conveys the legal title to the property and constitutes a judgment of that tribunal upon the questions involved in the issue;" that the land department, which has exclusive jurisdiction in the first instance, having rendered its judgment to whom said patent should issue has no jurisdiction to reopen its decisions and determine the rights of the respective claimants, as requested in said application; that the record does not show that the patentees have rejected said patent and if they had they would not be estopped from asserting their legal title in the courts. Said motion for review was accordingly denied.

In their appeal counsel for applicant allege substantially the same errors as those urged in said motion for review.

It will be observed that the Commissioner of the General Land Office is required by law to perform all executive duties relative to the issue of patents for public lands of the United States (section 453, Revised Statutes of the United States), and your office had jurisdiction to determine to whom said patent should issue, in accordance with the record in the case. The decision of your office that patent should issue to "the heirs of Isaac J. Hastings" was deliberately made after notice to said Lucy M. Hastings, widow of Isaac J. Hastings, and without objection on her part. There was no clerical error or inadvertence

on the part of your office nor misdescription of the land in said decision and the tracts were a part of the public domain, subject to entry under the timber and stone act of June 3, 1878 (20 Stat., 89).

The patent followed the terms of the cash certificate and conveyed the title of the United States to the patentees, the "heirs of Isaac J. Hastings."

While it is true that said timber and stone act contains no specific directions concerning the submission of proof and the issuance of final certificate when the applicant dies after filing his statement, like the requirements of the homestead law (section 2291, Revised Statutes of the United States), yet the Department held in the case of heirs of William Friend that under said act of June 3, 1878, where an applicant had made proof and tendered the purchase money but died prior to the allowance of his entry, the heirs might complete the purchase. In the case of James T. Ball, decided May 24, 1905 (33 L. D., 566), the Department considered very fully the regulations and decisions relative to the payment of the purchase money under said timber and stone act and revoked the circular letter of your office dated November 19, 1903, "directing the return of moneys received with timber-land proofs on which final proof could not at the time be issued," and held that said purchase money must be placed in the hands of the receiver at the time of the submission of final proof, and when so paid is public money, subject to forfeiture under section 2 of said act.

Said section 2448 of the Revised Statutes reads:

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

In the case of Henry E. Stich (23 L. D., 457), it was held that said section 2448 was applicable only where the right to patent exists in the entryman at the time of his death, and the case was distinguished from that of Joseph Ellis (21 L. D., 377), in that the equitable title to the land was in Ellis upon the payment of the purchase money, and there was no obstacle in the way of patent issuing to him upon the correction of the certificate.

In the case of John C. Long (34 L. D., 476), the Department held that an applicant to purchase under the timber and stone act does not become the owner of the land applied for, with legal right to sell, mortgage, or otherwise encumber the same, until the required proof has been furnished, the purchase price tendered and received, receipt given therefor, and final certificate issued.

It is clear that at the death of said Isaac J. Hastings he was not the legal or equitable owner of the land, since the purchase money had been returned to him and no cash certificate had been issued for the land.

Patent was issued in conformity with the record and the title to the land having passed, it is considered that "all power of the Executive Department over it has ceased." *Bicknell v. Comstock* (113 U. S., 151); *United States v. Schurz* (102 U. S., 378).

On January 16, 1908, counsel for applicant filed a written stipulation, signed and acknowledged by "Lucy M. Hastings, widow and heir of Isaac J. Hastings, deceased," and also as "guardian of the persons and estates" of all the legal heirs of the estate of Isaac J. Hastings, naming them, consenting to and requesting the cancellation of said patent.

It is not perceived that said stipulation can change the status of the case. The jurisdiction of the Department having terminated with the issuance of the patent, the consent of said parties will not reinvest it with authority to cancel the patent and issue another, as requested. Besides, if the widow and guardian of the minor heirs so desires, no good reason is apparent why, upon being duly authorized, she may not convey their interests in the land to said Thomas B. Walker.

It does not appear that your office erred in said decisions and they are accordingly affirmed.

#### MILITARY BOUNTY LAND WARRANT—ASSIGNMENT—LOCATION.

##### HERBENSON *v.* WINTON.

Military bounty land warrants and locations thereof are treated as entireties and the assignment of a part of a location will not be recognized.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(S. V. P.) *Land Office, January 31, 1908.* (E. F. B.)

With your letter of December 11, 1907, you transmit for consideration by the Department the petition of Gilbert Herbenson for cancellation of the patent issued to Charles J. Winton April 17, 1905, for the S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 19, T. 24 N., R. 11 E., 4 P. M., Wisconsin, and that such other proceedings be had as may be necessary to protect his claim to the SE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$  of said section. You are of opinion that a suit to set aside and cancel said patent can not be maintained unless upon the ground that the land was not subject to the location upon which Winton's patent rests under the rule announced in the case of Lawrence Simpson, 35 L. D., 609.

September 15, 1857, Miles White located military bounty land warrant on the S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$  and SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 19, T. 24 N., R. 11 E., 4 P. M., Wisconsin, which was canceled January 9, 1860, because of conflict with a preemption claim, and the warrant was returned to

the locator who located it upon other lands for which patent was issued February 1, 1861.

February 29, 1904, Charles J. Winton located surveyor general's scrip (1017 D, 80 acres) on said S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , section 19, upon which patent was issued to him April 17, 1905. It is this patent that petitioner seeks to have cancelled.

Part of the land embraced in Winton's patent, to wit the SE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$  of said section 19, is claimed by Herbenson, under a deed from Miles White to Herman Zelig, executed September 12, 1857, and recorded September 15, thereafter, the day the warrant was located. In 1857 the tract was sold by the State for taxes, and petitioner through mesne conveyances claims under that title.

Herbenson alleges that he and his grantors have been in open and notorious possession of said premises since May 10, 1879, and that he has personally been in possession of the land since 1883, and was in the actual occupancy of it at the date of Winton's location; that he had no knowledge of the invalidity of White's location or the cancellation thereof, or that Winton had made location of the land, until about May 1, 1906; and that he has expended much time and money in improving the land, which probably was known to Winton when he made his location.

All the land covered by Winton's patent is claimed by William H. Milrea, who purchased the land from the Pike City Lumber Company, the immediate grantee of Winton.

Herbenson has also filed a homestead application for the SE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$  and George Gregorsen has filed an application to make adjoining farm homestead entry of the SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$  of said section.

Whatever equities may exist between Winton and Herbenson, it is evident from the foregoing that a suit for cancellation of the patent issued to Winton can not be maintained and that there is no obligation upon the Government to intercede in behalf of petitioner.

White did not acquire by his location such equitable right and title to any part of the land as would have authorized him to assign or convey it to another without the approval of your office.

The only authority for the assignment of bounty land warrants and of locations made therewith is given by section 2414, Revised Statutes (Act of March 22, 1852), which provides that all such warrants and all valid locations of the same are declared "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, so as to vest the assignee with all the rights of the original owner of the warrant or location."

Whatever right might be asserted and maintained by an assignee against the assignor under an assignment made without such approval, such assignment is not binding on the land department, which not only has authority to disapprove the assignment if not made in accordance with the regulations but to cancel the location if made upon land not subject to such location.

An assignment of a part of a location is not recognized for the reason that the object of the statute and the regulations issued thereunder is to keep the warrant indivisible and to preserve the identity and compactness of the entry. There can be no unlocated portion of a warrant.

Section 31 of the regulations designed to carry into effect the provisions of the statute (Section 2415 R. S.; 27 L. D., 223) provides as follows:

Each warrant is required to be distinctly and separately located upon a *compact* body of land; and if the area of the tract claimed should exceed the number of acres called for in the warrant the locator must pay for the excess in cash; but if it should fall short he must take the tract in full satisfaction for his warrant. A person can not enter a *body of land* with a number of warrants without specifying the particular tract or tracts to which each shall be applied; and for each warrant there must be a distinct location, certificate, and patent.

The warrant is merged in the location and when that location is approved by your office the certificate and patent issues for the entire tract to the locator or his proper assignee.

Section 40 of said regulations (27 L. D., 225) provides that—

When an entry made by the location of a warrant *properly assigned to the locator* has been canceled, the warrant will be returned, with a certificate attached thereto authorizing its *relocation* by the said locator or his assignees without a further payment of location fees. In no case, however, will such a certificate be attached to a warrant the assignments whereof are not such as would receive the approval of this office if presented for that purpose.

As no proper assignment had been made of White's location, and as part of the land located therewith was not subject to such location, your office had ample authority to cancel the location and the warrant was returned to the proper party for relocation. The land thereafter was subject to entry and disposal by the first legal applicant as public lands of the United States, and such was their status at the time of Winton's location and the patent issued thereon conveyed the legal title to the same and of the United States.

Being public lands at the date of the tax sale under which Herbenson claims, they were not subject to taxation and the tax deed under which he claims was absolutely void.

The Government is under no obligation to make good his title and his petition must be denied.

## HOMESTEAD ENTRY—CULTIVATION—FINAL PROOF.

## INGELEV J. GLOMSET.

A mere pretense of cultivation does not satisfy the requirements of the homestead law; and proof which fails to show *bona fide* compliance with law in the matter of cultivation must be rejected.

*Acting Secretary Pierce to the Commissioner of the General Land*  
(G. W. W.)                      *Office, November 30, 1907.*                      (P. E. W.)

The above-entitled case is before the Department upon the appeal of Ingelev J. Glomset from your office decision of June 7, 1907, affirming that of the local officers, rejecting her final proof and holding for cancellation her homestead entry, No. 18863, upon the S.  $\frac{1}{2}$  of SE.  $\frac{1}{4}$  of Sec. 15, and N.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$  of Sec. 22, T. 163 N., R. 76 W., Devils Lake, North Dakota, land district.

Said entry was made February 10, 1900, and final proof was submitted November 13, 1906, claiming residence on the land and compliance with the homestead law since June, 1900. The local officers rejected the proof because of insufficient residence and thereupon the claimant filed a motion for review accompanied by a further showing as to her financial and physical condition, in explanation of her absences from the land. This showing was forwarded to your office and the case was there fully considered as upon appeal. It was held in the decision appealed from that the additional showing admits that the proof does not disclose the true state of facts, and does not justify the claimant's admitted absence from the land.

The entire record has been carefully considered. It appears that after entry in February the claimant improved this land with a house, barn and well, fenced it, and established her residence thereon, in June, 1900, and that the periods during which she was present on the land from that time until final proof aggregate 37 months in a possible total of 76 months. As to cultivation it appears that only from a quarter to a half acre of the land has ever been planted to crops and at date of the proof only one additional acre had been broken, in 1906. The land is stated by claimant to be most valuable for pasturage and hay though she describes the soil as black loam with clay sub-soil. The land has at no time been used for grazing purposes. She was present on the land, during the season for cultivation, as follows: In 1900 during June only; in 1901 during the latter half of April and all of July; in 1902 five days in June; in 1903 during June and July; in 1904 during June, July and August; in 1905 not at all; and in 1906 not at all. Thus in the aggregate claimant was on the land less than 8 months out of the 35 during which, in contemplation of the homestead law, there should be actual and increasing cultivation. In point of time and effort, as well as

acreage and results, there has been practically a failure to cultivate this land.

The entryman claims that title to the land has been fully earned by compliance with the homestead law. That law, however, requires not only *bona fide* residence upon the land but actual cultivation. Claimant's cultivation is grossly inadequate to meet the requirements of the law and in its inadequacy casts further doubt upon the *bona fides* of the residence. The cutting of wild hay from a homestead entry can not be considered seriously as cultivation of the land. This is particularly true when the part of the land from which the hay was not cut has not been used for grazing purposes; and also when the total cultivation during the life of the entry amounts to not more than half an acre planted to crops and an additional acre plowed. A pretence of cultivation can not satisfy the requirements of the law any more than a pretence of residence.

The proof fails to show compliance with the essential requirements of the homestead law and must be rejected, and, the lifetime of the entry having expired, cancellation thereof must follow. Your decision is affirmed.

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RECLAMATION ACT—SECTIONS 4 AND 5.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
Washington, D. C., January 18, 1908.

REGISTERS AND RECEIVERS,

*United States Land Offices.*

SIRS: Your attention is called to sections 4 and 5 of the reclamation act, approved June 17, 1902 (32 Stat., 388), and you are instructed thereunder as follows:

1. The Secretary of the Interior will at the proper time, as provided in section 4, announce the area of lands which may be embraced in any entry thereafter made or which may be retained in any entry theretofore made under the reclamation act, and will determine and fix the charges which shall be made per acre for the lands embraced in such entries for the estimated cost for building the works and for operation and maintenance, and prescribe the number and amount and the dates of payment of the annual installments thereof.

2. The charges assessed against lands under this act attach to the lands themselves, and as annual installments thereof accrue they become fixed charges on the land in the nature of a lien. If any entry is canceled by reason of relinquishment, all annual installments due and unpaid on the relinquished entry at the date of its cancella-

tion must be paid at the time of filing application to enter by any person who thereafter enters the land.

3. A person who has entered lands under the reclamation act, and against whose entry there is no pending charge of noncompliance with the law or regulations, or whose entry is not subject to cancellation under this act, may relinquish his entry and assign to a prospective entryman any credit he may have for payments already made under this act on account of said entry, and the party taking such assignment may, upon making proper entry of the land and proving the good faith of the prior entryman to the satisfaction of the Commissioner of the General Land Office, receive full credit for all payments thus assigned to him, but must otherwise comply in every respect with the homestead law and the reclamation act.

4. All persons holding lands under homestead entries made under the reclamation act must, in addition to paying the charges mentioned above, reclaim at least one-half of the total irrigable area of their entries for agricultural purposes, and reside upon and cultivate the lands embraced in their entries for not less than the period required by the homestead laws and the reclamation act. Any failure to make any two payments when due, or to reclaim the lands as above indicated, or any failure to comply with the requirements of the homestead laws and the reclamation act as to residence and cultivation, will render their entries subject to cancellation and the money already paid by them subject to forfeiture. Persons who have resided upon and cultivated their lands for the length of time prescribed by the homestead laws will not thereafter be required to continue such residence and cultivation, and they may make final proof of reclamation and of residence and cultivation at any time when they can show residence and cultivation for five years.

5. Soldiers and sailors of the war of the rebellion, the Spanish-American war, or the Philippine insurrection, and their widows and minor orphan children who are entitled to claim credit for the period of the soldier's service under the homestead laws, will be allowed to claim credit under entries made under the reclamation act, but will not be entitled to receive final certificate or patent until all the charges mentioned above have been fully paid.

6. The widows or heirs of persons who make entries under the reclamation act will not be required to both reside upon and cultivate the lands covered by the entry of the person from whom they inherit, but they must reclaim at least one-half of the total irrigable area of the entry for agricultural purposes as required by the reclamation act and make payment of all unpaid charges before either final certificate or patent can be issued.

7. When any entryman or the heirs of any entryman apply to make final proof after all of the requirements of the homestead law as to

residence and cultivation have been complied with, you will permit them to do so, and if you find the proof offered by them to be regular and sufficient, you will, without issuing final certificate, forward the proofs to this office with your recommendation thereon, in all cases where all of the charges have not been fully paid. Upon receipt of the proof at this office it will be considered, and if found worthy of approval further action will then be suspended until all of the charges have been paid and proof of the reclamation of one-half the irrigable area furnished, when final certificate will issue. In all cases where suitable proof is offered after all charges mentioned above have been paid, you will consider the same and issue final certificate thereon.

8. If you find any final proof offered under this act to be irregular or insufficient, you will reject it and allow the entryman the usual right of appeal; and if this office finds any proof forwarded by you to be fatally defective in any respect, the entryman will be notified of that fact and given an opportunity to cure the defect or to present acceptable proof.

9. As soon as the area and charges have been fixed for lands embraced in any existing entry, or when any entry is made subsequent to the fixing of such area and charges, you should notify the entryman of such area and charges and furnish him with copy of the published notice issued by the Secretary of the Interior, and copy of these regulations.

Very respectfully,

R. A. BALLINGER,  
*Commissioner.*

Approved:

FRANK PIERCE,  
*First Assistant Secretary.*

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**HOMESTEAD ENTRY—DESERTED WIFE—SEPARATION BY MUTUAL  
CONSENT.**

**ROBERTS v. SEYMOUR.**

Separation of a husband and wife by mutual consent does not constitute the wife the head of a family within the meaning of section 2289 of the Revised Statutes, or authorize her to make a homestead entry as a deserted wife.

*First Assistant Secretary Pierce to the Commissioner of the General  
(S. V. P.) Land Office, February 1, 1908. (C. J. G.)*

An appeal has been filed by defendant in the case of Cumberland M. Roberts v. Louisa A. Seymour, from the decision of your office

of September 5, 1907, holding for cancellation her homestead entry for the SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$  and NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 10, T. 17 N., R. 3 E., New Orleans, Louisiana.

The entry was made January 10, 1905, it being stated in the homestead affidavit: "I am a widow above the age of 21, having been deserted by my husband, and that I am not in any way connected with him or anyone else in any other homestead entry." Affidavit of contest was filed against said entry August 21, 1906, it being alleged therein—

Mrs. Louisa A. Seymour is a married woman having a living husband, and that she and her husband have lived together as man and wife since the time she made application to enter the above described land, and they have never been legally divorced.

A hearing was had, at which both parties appeared, and upon the testimony submitted the local officers found that defendant was qualified to make entry at the time she did and recommended dismissal of the contest. Their decision was reversed by your office upon appeal.

The sole question involved is as to defendant's qualification at the time she made entry.

The right to make a homestead entry is conferred upon "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" (Section 2289, Revised Statutes). The right of a deserted wife to make entry rests in the statutory privilege accorded to the "head of a family," but the fact of desertion must be affirmatively shown before the right of entry accrues. *Porter v. Maxfield* (5 L. D., 42.) The testimony of plaintiff and witnesses is to the effect that they lived near the land in controversy and often saw Mr. and Mrs. Seymour; that the couple lived on said land as husband and wife and referred to each other as such; that they were together in January, 1905, when the household goods of defendant were removed to the land and both remained in the house over night; that they visited together in the neighborhood and it was supposed they lived together as man and wife, it not being known that they were separated.

The defendant testified that about the first of November, 1904, she and her husband agreed to separate, he promising to move her things wherever she wished them to go; that they divided all their property and she had her share of the household goods moved to the land in controversy after she made homestead entry therefor; that after that her husband continued to come to the place but that it was about four months after the separation before they lived together again; that she is still the head of a family, having to support herself, he not helping her at all; "he has contributed two six-cent calico dresses."

She further testifies that her husband stayed at her house several nights after he moved her things there but they were not living together—he did not stay there as her husband.

A witness for defendant testified that in the year of the alleged separation he visited the home of defendant and her husband once a month remaining there two or three days at a time; that he observed trouble was brewing between the parties which he thought would inevitably end in separation; that he heard the husband say it did not make any difference where the wife went he was perfectly willing to help her move; that defendant subsequently came to his house and told him she and her husband had separated, declaring that it was the best thing for them to do as they could not get along together, and that she had to attend to everything anyhow; that witness took her to look at the land in controversy which resulted in her homesteading it, she paying a former entryman \$300 for his relinquishment. This witness further testified that from certain business transactions he had with defendant in buying groceries, settling bills, and repaying borrowed money, he is positive she is the head of the family, the husband not being recognized at all in such transactions; that everything indicated that she was dependent upon her own resources even after they began living together again as man and wife.

Another witness for defendant testifies that she visited the old home of the Seymours quite often and knew they were not getting on well together and that she heard their agreement to separate. They separated in November, 1904, and to the best of witness's recollection they began living together again as man and wife in April, 1905; he did not do anything towards her support. Mr. Seymour would come to the land every two or three weeks and stay a few nights, but never offered to do anything in the way of work. She heard Mrs. Seymour say she would never live with her husband again.

Notwithstanding the testimony in behalf of defendant, it is not deemed that she has been affirmatively shown to be a deserted wife and head of family. It is inferred from the testimony as a whole that the husband was probably absent most of the time and was of an idle and improvident disposition, but he was nevertheless the head of the family. There is a clear distinction between separation by mutual agreement and desertion or abandonment. Only in the latter event is the wife recognized as the head of a family. In the case of *Brown v. Neville* (14 L. D., 459), it was held:

A married woman, living apart from her husband under a voluntary agreement of separation, is not qualified to file a preemption declaratory statement. and in the case of *Giblin v. Moeller's heirs* (6 L. D., 296), it was held:

Proof of temporary absences on the part of the husband, and of non-cohabitation for a year, would not warrant the allowance of a timber culture entry to a married woman claiming the right as a deserted wife and the head of a family.

There are marked similarities between this case and those cited herein. The cases referred to in support of the appeal are not considered controlling here as the facts are essentially different.

The decision of your office herein is affirmed.

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ALASKAN LANDS—POSSESSORY RIGHTS—SECTION 8, ACT OF MAY 17, 1884.

BARANOF ISLAND.

Under the proviso to section 8 of the act of May 17, 1884, all rights of possession to lands in Baranof Island, Alaska, then existing, are protected as against any subsequent disposition or reservation of the lands, and no action should be taken by the land department under the departmental order of February 13, 1907, reserving a portion of such lands, that will in any manner disturb rights of possession thereto; but the reservation may be continued pending legislation by Congress defining the particular terms and conditions upon which the possessory claimants may eventually acquire title to the tracts claimed by them, and while so continued the lands covered thereby are not subject to location with soldiers' additional rights.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(F. W. C.) *Land Office, February 3, 1908.* (E. O. P.)

Your office letter of May 27, 1907, calls the attention of the Department to certain matters not before it at the time reservation was made of land on Baranof Island, Alaska, and request is made for further direction as to the effect to be given to such reservation as against certain claimants for a portion of the land involved.

Said reservation was created by departmental order of February 13, 1907. The order extended to all the land described, no exception being made saving existing rights maintained and asserted to any of the tracts embraced in said reservation. The purpose of the order was to prevent a monopoly by individuals of the right to develop and commercialize certain hot springs situated on the island and believed to possess great curative properties.

At the time this action was taken proceedings had been instituted by F. L. Goddard and J. E. Brooks, looking to the acquisition of title to 12.27 acres of the land affected by the location of soldiers' additional right. The date of the inception of the right asserted by Goddard and Brooks was probably not then known. In any event it was not considered as constituting any legal impediment to the reservation of the land.

It now appears that the possessory claim of Goddard and Brooks rests upon conveyance from the original settlers whose occupation dates from the time of the purchase of the Territory from Russia. These claimants, relying upon the proviso in section 8 of the act of May 17, 1884 (23 Stat., 24), allege that they have proceeded under

their purchase of the possessory right in the development of the springs and have expended between \$2,000 and \$3,000 in the improvement of the property.

In view of the claim thus asserted your office expresses doubt as to the authority of the Department to reserve the land covered by their possessory claim to the prejudice of their right to acquire title to said land.

That the possessory right to public land in the district of Alaska is the proper subject of transfer is well settled. (*Carroll v. Price*, 81 Fed., 137; *Young v. Goldstein*, 97 Fed., 307.) If then this right was initiated prior to May 17, 1884, and there has been no subsequent abandonment thereof, it follows that these claimants are entitled to all the rights which the parties through whom they derive title might have asserted under the provisions of said section 8 of the act of May 17, 1884, *supra*, based upon settlement and occupation commenced prior to the passage of said act.

The proviso in section 8 reads 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 of Congress.

At the time this act was passed there was no law under which an absolute title to the public lands could be acquired. Not until the passage of the act of May 14, 1898 (30 Stat., 409), extending the homestead laws to the district of Alaska, was there any provision made for the acquisition of such title to non-mineral lands.

The object of the proviso quoted has been defined by the courts. As to this there is no conflict of opinion, but on the question as to the extent of the guaranty respecting the right to eventually acquire title to the land embraced in the protected settlement the decisions are not so clear.

In the case of *Carroll v. Price*, *supra*, referring to said proviso, the court said:

Under this provision, all persons who are in the actual use and occupancy of tracts of public land in this district, or who had laid claim to such tracts or pieces of land at the time this law was enacted are protected against intrusion, and their possession can not be disturbed. This provision is a mandate to the general land office to the effect that it can not grant title adversely to a citizen who is in actual possession or occupancy.

The Supreme Court of the United States, however, in the case of *Russian-American Company v. United States* (199 U. S., 570, 576), declined to accept such a broad construction of said proviso, but limited its application to—

such Indians or other persons who were in possession of lands at the time of the passage of the act, and reserved to them the power to acquire title thereto after future legislation had been enacted by Congress.

The court in this case reserved decision as to the extent of the guaranty contained in said proviso, in favor of those who by virtue of a claim initiated *prior* to the passage of the act were entitled to rely upon it.

The question was directly presented and considered by the court in the case of *Young et al v. Goldsteen* (97 Fed. Rep., 303, 308), where the court, referring to the terms of said proviso, said:

In our opinion, the language used is susceptible of but one construction, i. e., that Congress guaranteed to all persons in possession of lands in Alaska at that date the right ultimately to acquire a perfect title to the same. If anything less was intended then the act is wholly meaningless. If Congress meant only to guarantee to them undisturbed possession for the time being, reserving the right to ultimately pass such laws as would confiscate the property to the government or give it to another, then the act is worse than mockery. If the expression "the terms under which such persons may acquire title" means anything, it means that at some future date the Congress will pass needful legislation whereby their possession will ripen into perfect ownership.

If this construction of the court is sound, it is clear that the claim of Goddard and Brooks, once established in accordance with this proviso, is protected as against any attempted subsequent disposition or reservation of the land embraced therein. It follows also that upon the passage of such "needful legislation" providing for the disposition of the land, these claimants are entitled to proceed thereunder. If more than one method of acquiring title is open to them they may choose the manner of perfecting their possessory claim.

Your office is accordingly directed to consider the showing made on behalf of Goddard and Brooks concerning the initiation and maintenance of the claim asserted by them, and if satisfied that they are entitled to the protection accorded "Indians and other persons" by the act of May 17, 1884, *supra*, no action should be taken under or by virtue of said reservation that will in any manner disturb their possession. The reservation may, however, be continued pending legislation by Congress defining the particular terms and conditions upon which the possessory claimants may eventually acquire title to this particular tract. So long as said reservation is continued the right to locate soldiers' additional right thereon must be denied.

## ALASKAN LANDS—CEMETERIES—ACT OF SEPTEMBER 30, 1890.

## CITY OF JUNEAU.

The provisions of the act of September 30, 1890, authorizing incorporated cities and towns to purchase public lands for cemetery and park purposes, are applicable to cities and towns in the District of Alaska.

*Acting Secretary Pierce to the Commissioner of the General Land*  
(F. W. C.) . *Office, February 5, 1908.* (E. F. B.)

The appeal of the city of Juneau, Alaska, from the decision of your office of August 28, 1907, presents the question as to whether incorporated cities and towns in the District of Alaska are authorized to purchase public lands for cemetery purposes under the provisions of the act of September 30, 1890 (26 Stat., 502), which is as follows:

That incorporated cities and towns shall have the right, under rules and regulations prescribed by the Secretary of the Interior, to purchase for cemetery and park purposes not exceeding one-quarter section of public lands not reserved for public use, such lands to be within three miles of such cities or towns.

The question came before your office upon an application filed by the city of Juneau for an official survey of a tract of land containing about nine acres, lying within the incorporate limits of said town, but not embraced within the patented townsite. You refused the application because the provisions of the act of September 30, 1890, have not been specifically extended to Alaska, and that only such land laws are applicable to Alaska as relate solely to the disposition of lands therein, or where their provisions have been directly extended to that district.

While the general land laws providing for the disposal of the public lands are not by their own force extended to the District of Alaska, it does not follow that the grant of the right to purchase public lands for cemetery purposes made by the act of September 30, 1890, is restricted to incorporated cities and towns in the States and Territories over which the public land laws are operative by their own force.

The primary object of the statute was not to enact a law for the disposal of public lands, but to grant to all incorporated towns and cities the right to appropriate for cemetery purposes public lands lying within three miles of such city or town. The grant being for a necessary public use must be liberally construed in furtherance of the beneficent purpose contemplated by the statute, and in the absence of express limitation, its provisions must be extended to all beneficiaries coming within the evident spirit and purpose of the act.

The papers are returned to your office for such action as may be necessary and proper in accordance with the views expressed herein.

REPAYMENT—AUTHORITY OF LAND DEPARTMENT TO MAKE—ACT OF  
JUNE 16, 1880.

JOHN W. BLEE.

The repayment provided for by the act of June 16, 1880, is limited to *entries*; and repayment of moneys deposited with the local officers in anticipation of an entry which was never allowed, and carried into the Treasury, is not authorized by said act.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(F. W. C.) *Land Office, February 8, 1908.* (C. J. G.)

An appeal has been filed by John W. Blee from the decision of your office of August 15, 1907, denying his application for repayment of the purchase money tendered with his application for purchase, as coal land, the NW.  $\frac{1}{4}$  of Sec. 30, T. 8 N., R. 26 E., Lewistown, Montana.

May 24, 1906, John W. Blee filed coal declaratory statement No. 296 for said land, alleging possession May 1, 1906. He filed application to purchase March 6, 1907, alleging—

that I have expended in developing coal mine on the said tract in labor and improvements the sum of one hundred and seventy (\$170) dollars, the nature of said improvements being as follows: Establishing the boundary of said land and in investigating and proving the existence of a minable deposit and vein of coal on the said land.

He, on the same date, deposited the purchase money, taking the register's personal receipt, and on June 7, 1907, receiver's receipt, No. 22, issued, the same having written across its face: "Register's certificate not yet issued," in accordance with the requirements of paragraph 7 of the circular of May 16, 1907 (35 L. D., 568). The proof was suspended on account of the withdrawal of the land October 15, 1906, and in view of which said proof was regarded as insufficient. Your office accordingly on June 17, 1907, required Blee "to furnish additional affidavits showing when a mine of coal was actually opened upon the land, what work had been done or improvements made to develop the land for its deposits of coal, and when the improvements were begun and when completed." Thereupon, July 26, 1907, he made application for return of the purchase money which in the meantime had been deposited in the Treasury under the act of March 2, 1907 (34 Stat., 1245), and the circular of May 16, 1907, *supra*. Said application was denied by your office, as hereinbefore stated, for the reason that "there is no provision for the repayment of such moneys from the Treasury."

It is stated in the appeal that Blee was unable to furnish the evidence required of him by your office, and, treating his application for repayment as a relinquishment or waiver by him of the land covered by the coal declaratory statement, your office on December 24, 1907,

finally rejected his application to purchase and canceled said statement on its records.

This is not a case coming within the purview of the act of June 16, 1880 (21 Stat., 287), the only authority for repaying money once covered into the Treasury, as said act specifies that repayment shall be made upon certain canceled *entries*, so that, regardless of any equities in the case, it is now impossible to return this money, it having passed from the custody and control of the land department. It was stated in paragraph 7 of the circular of May 16, 1907:

As there is no provision for the repayment of such moneys from the Treasury, the Congress of the United States will be asked at its next session to provide relief in cases where the purchase money has been paid and the application rejected without taint of fraud.

And in the instructions of your office of July 26, 1907, to registers and receivers, supplemental to said paragraph 7, it was said:

As there is no law under which repayment of any of these moneys may now be made, it is useless to submit applications for their return.

When the Congress shall have provided for the return of such purchase money in meritorious cases, you will be duly advised and fully instructed regarding the same.

The decision of your office herein is affirmed.

#### REPAYMENT—RAILROAD GRANT—ADJUSTMENT—ACT OF JULY 1, 1898.

HARRY M. LOVE.

A homestead entry erroneously allowed for land within the Northern Pacific grant subsequent to the act of July 1, 1898, and actually abandoned prior to, although not canceled of record until after, the passage of the act of May 17, 1906, does not constitute a claim subject to adjustment under the provisions of said acts, and the entryman is entitled to repayment of the fees and commissions paid by him upon said entry.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(F. W. C.) *Land Office, February 8, 1908.* (C. J. G.)

An appeal has been filed by Harry M. Love from the decision of your office of December 16, 1907, denying application for repayment of the fee and commissions paid by him on homestead entry for lots 1, 2, and S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 3, T. 3 N., R. 25 E., The Dalles, Oregon.

The entry was made March 24, 1903, and canceled December 2, 1907. Repayment is claimed on the ground that said entry was in conflict with the grant to the Northern Pacific Railroad Company and therefore an entry erroneously allowed and that could not be confirmed within the purview of the repayment act of June 16, 1880 (21 Stat., 287).

The act of July 1, 1898 (30 Stat., 597, 620), provides that where, prior to January 1, 1898, any part of an odd-numbered section in either the granted or indemnity limits of the grant to the Northern

Pacific Railroad Company, to which the right of the grantee 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 in the act provided, the railroad grantee, upon a proper relinquishment, shall be entitled to select an equal quantity of land in lieu of that relinquished. Thereafter the tract so relinquished was to be treated as if no railroad right thereto had ever attached and the person claiming said tract, in good faith as aforesaid, was to be permitted to prove his title according to law as if no railroad grant had ever been made. The entry in question was not made until March 24, 1903, but the provisions of the act of July 1, 1898, were, by the act of May 17, 1906 (34 Stat., 197), extended to include any *bona fide* settlement or entry made subsequently to January 1, 1898, and prior to May 31, 1905, "where the same has not since been abandoned."

It having been found that this claimant came within the provisions of the act of July 1, 1898, as extended by the act of May 17, 1906, he was notified by your office August 6, 1906, that he would be permitted to elect either to retain or relinquish the land embraced in his entry under the regulations of February 14, 1899 (28 L. D., 103). The claimant desiring to take advantage of the provisions of these acts, which authorize an adjustment of conflicting claims to lands within the limits of the grant to the Northern Pacific Railroad Company, relinquished his claim to the land in question with view to selecting other land in lieu thereof. Upon examination of the proof submitted by him, your office on July 25, 1907, held said proof to be insufficient, finding: "It is evident that he abandoned the claim when he ascertained that the government would not irrigate the land." His election was accordingly rejected and his entry held for cancellation for abandonment, subject to appeal. No further action was taken by him and his said entry was canceled December 2, 1907. It does not clearly appear when claimant ascertained that the government would not irrigate the land nor, consequently, when, according to your office, he abandoned his claim. He stated in his proof: "In the summer of 1904 the consulting engineers sent out by the government to investigate the work in connection with the irrigating project then under consideration in that vicinity, reported adversely to the proposition, and during the years 1905-1906 no work has been done in connection therewith, and said project, to all intents and purposes, has been abandoned." Your office has found, however, that claimant's abandonment took place prior to the act of May 17, 1906, as otherwise he would be entitled to enter lieu lands under the provisions of said act.

This entry at the time of claimant's abandonment, as at all times, was in conflict with the railroad grant, and the act of May 17, 1906, was passed for the relief of those who had been erroneously allowed to enter lands covered by such grant, but that legislation applied only to those who had not abandoned their claims. While it is true claimant's entry was still of record at the time of the passage of the act of May 17, 1906, yet according to the facts in the case as expressly found by your office, he had actually abandoned said entry, which was in conflict with the railroad grant, before the passage of said act. In this view the case is controlled by the principles announced in the case of *Monroe Morrow* (36 L. D., 155). The only distinction between the facts of this and the *Morrow* case is that in that case the entry was canceled on the record for abandonment prior to the passage of the act of May 17, 1906, while here, although the entry remained of record at date of said act the land had nevertheless, as per the express finding of your office, been abandoned prior thereto. Under this finding the principles of the *Morrow* case, as stated, are controlling as there was in fact abandonment of the entry in face of the conflicting grant to the railroad company and prior to any legislation for the relief of those who were erroneously allowed to make entry of lands covered by such grant. In the view of your office the homestead entry might have been confirmed regardless of the conflict if claimant had continued to comply with law up to the passage of the act of May 17, 1906. As stated in the *Morrow* case, claimant's entry being always in conflict with the railroad grant, confirmation made possible only under such circumstances as the above, is clearly not the confirmation contemplated by the repayment act.

The decision of your office herein is reversed and if there be no other objection repayment of the fee and commissions as applied for will be allowed.

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**TIMBER AND STONE ENTRY—UNSURVEYED LAND—CONFIRMATION.**

**COBB v. OREGON AND CALIFORNIA R. R. Co.**

Land not included in the approved plat of survey of surrounding lands, as returned and filed, is not surveyed; and a timber and stone entry allowed for such land is a nullity and not subject to confirmation under the proviso to section 7 of the act of March 3, 1891.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(F. W. C.) *Land Office, February 8, 1908.* (E. O. P.)

James A. Cobb has appealed to the Department from your office decision of August 15, 1907, holding for cancellation his timber and

stone entry of the SE.  $\frac{1}{4}$  of Sec. 21, T. 26 S., R. 10 W., Roseburg land district, Oregon.

The entry in question was allowed by the local officers September 1, 1904, subsequent to the date of the filing of plat of survey of said township 26. Said plat, however, shows that this particular tract was not surveyed. Counsel insists that, even though the plat as returned and approved specifically excepts the land from the survey of the township, yet inasmuch as it is possible to locate and establish all corners by a private survey, so that the subdivisional lines can be extended by protraction, the land is in fact surveyed. There is no force in this contention. The determination of the extent of a survey is a matter vested exclusively in the land department. If for any reason the lines have not been run and a tract is excluded from a survey which might have been extended over it, this action can not be questioned by one seeking to make entry of the land. Land not included in an approved plat of survey as *returned* and *filed* is *not surveyed*. Land intentionally and specifically excluded from an approved plat of surrounding lands can not upon any theory be treated as surveyed.

The right to make timber and stone entry is by the law authorizing such entry restricted to surveyed lands. It follows therefore that the action of the local officers in allowing this particular entry was erroneous. It is urged, however, that inasmuch as no other objection is raised to the allowance of the entry, and as no steps looking to its cancellation were taken until after the expiration of two years from the issuance of final receipt thereon, the same is confirmed under the terms of the proviso to section 7 of the act of March 3, 1891 (26 Stat., 1095).

This presents the question as to the jurisdiction of the Department to dispose of *unsurveyed* land under the timber and stone law. If without jurisdiction the allowance of such an entry was a mere nullity and conferred no rights whatever upon the entryman, nor does such entry come within the confirmatory provision of the statute cited. If, on the other hand, title to unsurveyed land might be acquired under the timber and stone law, and the allowance of the entry was merely irregular and voidable only, then the same falls within the saving provisions of the statute. To this latter class of cases the decision of the Department in the case of Montana Implement Company (35 L. D., 576), cited and relied upon by counsel, applies. The Department was careful in this case not to extend the rule to entries void in their inception, and allowed confirmation upon the ground that the land was subject to the particular kind of entry involved. In the present case the Department is without authority to permit timber and stone entry of unsurveyed lands and the attempted entry of this particular tract by Cobb was a mere nullity. There was in fact no entry upon which the confirmatory provisions of the statute

could operate. (*Mee v. Hughart*, 13 L. D., 484; *United States v. Smith*, *Ib.*, 533.)

The decision appealed from is hereby affirmed and confirmation of the entry denied.

NORTHERN PACIFIC GRANT—ADJUSTMENT—ACT OF JULY 1, 1898.

HEUSLER *v.* NORTHERN PACIFIC RY. CO.

A settler upon lands within the limits of the Northern Pacific grant who prior to the act of July 1, 1898, sold to another his right to purchase the lands from the company, and abandoned his residence thereon, thereby recognized the company's superior right and terminated his own interest in the land, and therefore has no claim subject to adjustment under said act.

*First Assistant Secretary Pierce to the Commissioner of the General Land Office, February 10, 1908.* (F. W. C.) (E. O. P.)

Charles Heusler has appealed to the Department from your office decision of August 5, 1907, declining to accept a relinquishment of his claim to the S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 35, T. 5 N., R. 3 E., Vancouver land district, Washington, preliminary to a transfer thereof to other lands under the provisions of the act of July 1, 1898 (30 Stat., 597, 620).

It is admitted by the applicant that he sold his right to purchase the land from the railroad company prior to July 1, 1898, and abandoned his residence thereon, which he alleges was established in 1891.

Counsel insists, however, that this was not an abandonment of his homestead claim, which it is contended might thereafter be asserted even though residence on the land was discontinued. To this the Department can not assent. It is clear from the applicant's own statement that at the time of the sale of this right he believed it was the only claim he had to the land and that he intended to pass to his transferee all his right thereto. No other intention could well have been entertained by the parties to the transaction, for it is improbable that the purchaser would have paid his money for a claim which his vendor reserved the right to dispute. It amounted to a virtual admission that the railroad company had a right to sell and must be held to have terminated any adverse claim which he might theretofore have been asserting as effectually as though he had recognized the superiority of the railroad's claim by himself purchasing the land from it. The Department in the unreported case of *Charles Peterson v. Northern Pacific Railway Company*, decided May 6, 1907, held that one who purchased from the railroad company *prior* to the passage of the act of July 1, 1898, *supra*, had no such claim as was subject to adjustment under said act. The same would be equally true in the case of one who had prior to that time sold such right of purchase

to another, there being no proof that he did not by such sale intend to recognize the railroad's claim and pass whatever right he had to the land.

It is urged in argument, while denying that this case is such a one, that even though the adverse claim was not being asserted at the date of said act, yet it may properly be subject to adjustment thereunder. Counsel asserts that there is nothing in the act which warrants its limitation to claims in existence at the date of its passage. The contrary has already been decided by the Department (*Newkirk v. Northern Pac. Ry. Co.*, 32 L. D., 369; *Neil v. same*, 34 L. D., 209, 210), and this construction is in accord with the plain provisions and evident purpose of the act. Only settlers "who have occupied and may be on said lands" at the date of the passage of the act are entitled to prove their claims upon the relinquishment by the railroad company of its claim, and the right to transfer such claim to other lands can only be exercised by such persons as might have been entitled to perfect them had the railroad company relinquished.

The decision appealed from is hereby affirmed.

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MATHISON *v.* COLQUHOUN.

Petition for rehearing in this case, wherein the Department rendered decision September 12, 1907, 36 L. D., 82, denied by First Assistant Secretary Pierce, February 10, 1908.

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WITHDRAWAL—EFFECT OF ERRONEOUS INCLUSION OF LAND NOT INTENDED TO BE WITHDRAWN.

IRA J. NEWTON.

A withdrawal erroneously made to include lands not intended to be embraced therein is nevertheless effective as to such lands, and unless and until released from withdrawal no rights inconsistent therewith will be recognized as attaching to any of the land actually withdrawn.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(F. W. C.) *Land Office, February 10, 1908.* (E. O. P.)

Counsel for Ira J. Newton has filed motion for review of unreported departmental decision of September 28, 1907, affirming the action of your office rejecting his application to make homestead entry of the E.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , E.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 25, T. 2 N., R. 9 W., I. M., Lawton land district, Oklahoma.

The application was rejected upon the ground that the land applied for was included in the Fort Sill wood reserve, and not subject to homestead entry.

It is contended that the said reserve as described by metes and bounds in the order creating it does not embrace the tracts described, and it is insisted that such description is controlling and that the Department is without authority to recognize any extension of the reserve beyond said boundaries, notwithstanding the platted location thereof as well as the general description contained in the order of withdrawal has been accepted as correctly defining the area of the reserve, and conforms to the notations made upon the official records.

It is clear that the actual withdrawal made in the establishment of said reserve extended beyond the limits defined by the designated metes and bounds and included the land sought to be entered by Newton. Whether or not the interpretation placed upon the order creating said reserve is correct is immaterial so far as the question here involved is concerned. Of course if it were satisfactorily established that the withdrawal had been erroneously made to include lands not intended to be embraced therein, this would present a reason for modifying the order of withdrawal, but until such action is taken no rights, inconsistent with the order of withdrawal, can be recognized as attaching to the land *actually* withdrawn.

This applicant has no equitable ground upon which to base his claim to recognition. He could not have been misled as to the extent of the withdrawal actually made, as the records defining it were open to him and of their contents he was bound to take notice. No vested right of his has been affected, as no such right can be gained by the mere presentation of an application to make homestead entry.

After carefully considering the matters set up in support of said motion the Department finds no sufficient reason for disturbing the decision complained of, and the motion is accordingly hereby denied.

CONTESTANT—PREFERENCE RIGHT—APPLICATION TO PURCHASE  
UNDER TIMBER AND STONE ACT.

HARRIS *v.* HEIRS OF RALPH H. CHAPMAN.

An application to purchase under the timber and stone act, filed in due time, is a valid exercise of the preference right of entry obtained by a successful contest against a homestead entry covering the same land.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(F. W. C.) *Land Office, February 14, 1908.* (J. F. T.)

Mary J. Harris has appealed to the Department from your decision of November 4, 1907, sustaining the action of the local officers and dismissing her protest against the timber and stone application of the heirs of Ralph Chapman, deceased, made July 2, 1907, under the act of June 3, 1878, for lots 1 and 2, and the E.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , Sec. 30,

T. 39 N., R. 5 E., Lewiston, Idaho, land district, because said protest does not allege any material fact warranting a hearing.

You also reject the timber and stone application of said Harris, made July 16, 1907, for the same land, because subsequent to that by Chapman's heirs, and this appeal is taken from that ruling also.

The facts upon which your decision is based are all of record and are so fully and clearly set forth in your decision that repetition thereof is unnecessary.

The main contention of appellant is that an application to purchase under the timber and stone act of June 3, 1878, is not a valid exercise of a preference right to enter lands within the meaning of section 2 of the act of May 14, 1880, as amended by the act of July 26, 1892 (27 Stat., 270), awarding a preference right.

This contention is believed to be without merit, and such an application properly made in due time is held to be a valid exercise of a preference right obtained by the successful contest of a homestead entry upon the land for which such application is made.

Your decision is affirmed.

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HOMESTEAD AND TIMBER LAND CLAIMANTS *v.* STATE OF WASHINGTON.

Motion for review of departmental decision of September 20, 1907, 36 L. D., 89, denied by First Assistant Secretary Pierce, February 14, 1908.

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CHARLES O. DELAND.

Petition for re-review of departmental decision of July 16, 1907, 36 L. D., 18 (review of which was denied November 14, 1907, 36 L. D., 167), denied by First Assistant Secretary Pierce, February 15, 1908.

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PATENT—CONFIRMATION—ACTS OF JUNE 15, 1844, AND MAY 25, 1896.

MCLEOD ET AL. *v.* HEIRS OF SHADRACK HANCOCK.

Patent is not necessary to vest title confirmed by the act of May 25, 1896; but where the claimant also comes within the provisions of the act of June 15, 1844, he is entitled thereunder to have a patent issued to him as evidence of the title vested by the confirmation.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(F. W. C.) *Land Office, February 18, 1908.* (E. O. P.)

James M. McLeod *et al.* have appealed to the Department from your office decision of March 11, 1907, dismissing their protest against

the issuance of patent to the heirs of Shadrack Hancock for the SE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 31, T. 3 S., R. 17 E., Gainesville land district, Florida.

October 31, 1839, Shadrack Hancock purchased the E.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 31, T. 3 S., R. 17 W., and the E.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 6, T. 4 S., R. 17 E., Tallahassee Meridian, containing 243.31 acres, and paid the purchase price thereof, \$304.13, to John C. Cleland, then receiver of the St. Augustine land office. The money was never accounted for nor the entry reported to the General Land Office. Because of this all the land entered by said Hancock, except the tract here involved, was afterwards disposed of by the United States.

The right to the patent for which application is made by the heirs of Hancock is asserted under the provisions of the act of June 15, 1844 (5 Stat., 671).

The tract in question formed a part of the Spanish Arredondo grant, made March 20, 1817, which grant was confirmed by decree of court, November 24, 1834, in accordance with the acts providing for the confirmation of claims in Florida to the extent and at the place "as in the plat and certificate of survey of the same made by Don Andreas Burgevin, and dated the 14 September, 1819" (Ex. Doc. No. 126, Senate, 48 Cong., 1st Session), which decree was affirmed by the Supreme Court (*United States v. Chaires*, 10 Pet., 308).

The boundaries of the grant were not, prior to the extension of the public surveys over the land embraced therein, definitely marked on the ground. This condition existed in 1831, when the lands in T. 3 S., R. 17 E., were offered at public sale, and thereafter a large number of entries were made of such lands, upon some of which patents issued.

The claimants under the Spanish grant in 1881, in the United States District Court for the Northern District of Florida, filed a motion to redocket the case. They alleged that about 13,000 acres of the land covered by the grant had been sold or otherwise disposed of by the United States, and that they were, therefore, entitled to the benefits of the act of May 26, 1824 (4 Stat., 52), which was extended to Florida by the act of May 23, 1828 (4 Stat., 284), which authorized the entry of other lands in lieu of those decreed to the claimant which had been sold or disposed of by the United States. A supplemental decree was asked granting such relief. April 10, 1882, a decree was entered, by the terms of which the grant claimants became entitled to enter in lieu of, and in full satisfaction of the grant, 20,000 acres of land. By the same decree the titles to lands sold by the United States were confirmed and the residue of the lands covered by the grant were declared to be thereafter held and taken as a part of the public lands of the United States and disposed of as other

public lands. This decree became final September 11, 1883, and November 30, following, script was issued to the grant claimants for the full amount of 20,000 acres, and all their rights under the grant terminated. Congress by the act of May 25, 1896 (29 Stat., 137), confirmed all entries made of lands within the limits of said grant prior to April 10, 1882, together with certain other claims made prior to said date, and provided that all other of said lands should be disposed of "according to the laws of the United States."

The protest of McLeod *et al.* is based upon a claim of title to said tract acquired by adverse possession. In support of this claim it is alleged in said protest that the ancestor of said protestants, F. McLeod, in 1854 purchased the land from one James A. Jones, entered into possession and, with his wife to whom he transferred the land in 1868, continuously occupied and claimed the same up to the time of his death, about twelve years ago. It is alleged that the protestants continued in the occupancy of the land until within the last ten or twelve years, and that they still claim the same and have title thereto, and that said possession has been open, notorious and exclusive under claim of title. There is nothing to show by what title the grantor of said F. McLeod claimed. It is not alleged, nor does it anywhere appear, that said title has ever been quieted in the protestants or any of the parties through whom they claim, or that any proceedings have ever been instituted for that purpose.

The Department is thus called upon to determine, at the outset, whether it should, as between the parties before it, recognize the title set up by protestants. The land department is admittedly not the proper forum in which to try or establish such a title. Any recognition it might give thereto would add nothing to the stability of the title, which can only be perfected in a court of competent jurisdiction after proof of all the matters necessary to sustain it. Until this has been done the claim rests upon mere allegations, the truth or sufficiency of which this Department is without power to determine. Had the title asserted been settled by proper decree it might perhaps be set up here in opposition to the issuance of a patent if it were shown that such patent would cloud or encumber the title. The record does not disclose such a condition. The question of title based upon the claim asserted by protestants never having been tried or determined, the issuance of patent as requested will in no manner affect their right to prosecute their claim, as they must do eventually if they continue to rely upon it, in the proper forum.

The patent when issued will add nothing to the force of the confirmation upon which the heirs of Hancock rely. Unless that confirmation passed the title the patent will not protect it, and the adverse claim of protestants may be as well and effectually set up after as before its issuance. (*Langdeau v. Hanes*, 21 Wall., 530.)

On the other hand, the Department must accord persons claiming under a title derived directly from the United States the full measure of relief extended by an act of Congress by virtue of which the relief is demanded. The act of June 15, 1844 (5 Stat., 671), provides as follows:

That in all cases where it shall appear, to the satisfaction of the Commissioner of the General Land Office, that individuals had applied to John C. Cleland, late receiver at St. Augustine, in Florida, while acting as receiver, for the entry of any of the lands in that district, and had made payment to him therefor, as required by law, and where said Cleland failed to furnish the usual evidence of such payments to the register of the land office aforesaid, and to make the usual returns thereof to the General Land Office, such individuals shall be entitled to receive patents for such entries, where the lands applied for by them have not since been sold: but if sold, the money paid by them may be applied to the purchase of any other land in that district subject to entry at private sale: *Provided*, That this act shall only apply to those cases where evidence that such application was made, is now in the General Land Office.

The act of May 25, 1896, *supra*, passed to the heirs of Hancock all the right and title of the United States to the tract in question. Whether or not the title thus conferred is a valid one can only properly be determined in the courts. If any title vested it has already passed *under* the confirmatory act and the issuance of patent will not strengthen it. But the patent will afford *evidence* of the title which vested by the confirmation and to this the heirs of Hancock under the specific provisions of the act of June 15, 1844, *supra*, above quoted, are clearly entitled.

The rights of the protestants are in no manner prejudiced by investing confirmees with the naked evidence of whatever title they may possess. The issuance of patent is not an adjudication by the Department that such title is the paramount one, but is a determination only that whatever title the United States had in and to the land passed to them under the confirmatory act of 1896. The question as to the superiority of title must be settled in the courts, whose province the Department can not invade. The rights of the patentees depend solely upon and date from the confirmatory act and they can "derive no aid from the patent" subsequently issued. (*Langd au v. Hanes*, *supra*, p. 531; *Toltec Ranch Co. v. Cook*, 191 U. S., 532.) If, therefore, the adverse claim of protestants could have been successfully asserted after such confirmation, it can be as successfully maintained after the issuance of patent. The protest can not, therefore, be recognized as constituting any sufficient ground for declining to issue the patent applied for in conformity with the provisions of the act of June 15, 1844, *supra*.

No consideration has been given to that part of your decision allowing the heirs of Hancock to make cash entry of "an amount of

land, the area of which shall be the difference between 243.31 acres and the SE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$  of said section 31, 41.11 acres." Inasmuch, however, as this privilege may be a barren right because of there being no lands in Florida subject to such cash entry, and for the further reason that the title of said heirs may yet fail because of failure of title in the United States, the Department is of opinion they should not be restricted to one form of relief if there be other ways open to them. The original entry having been erroneously allowed of lands within the Spanish grant, the parties may be entitled to repayment of the purchase money. In this respect the case differs from that of Thomas Hogan, referred to in your decision.

With this modification, the Department, without passing upon any question of superiority of right or title to the land as between the applicants for patent and the protestants, and without adopting your conclusions in this regard, hereby affirms the action of your office in dismissing said protest.

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HOMESTEAD ENTRY—QUALIFICATION—CITIZENSHIP—MONGOLIAN.

SKI HARA.

As under section 2169 of the Revised Statutes a Mongolian is not eligible to citizenship, a native of Japan can not, by filing a declaration of intention to become a citizen, or by virtue of an inoperative decree of a court purporting to confer citizenship upon him, acquire the right to make a homestead entry.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(G. W. W.) *Land Office, February 20, 1908.* (C. J. G.)

An appeal has been filed by Ski Hara from the decision of your office of August 2, 1907, rejecting the commutation proof submitted by him on cash entry No. 13585 and holding for cancellation his original homestead entry No. 26966, for lot 1, and NE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$  and N.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 30, T. 156 N., R. 91 W., Minot, North Dakota.

The basis for the action of your office is that what purports to be a certified copy of Ski Hara's declaration of intention to become a citizen, filed in connection with his original homestead entry, contains erasures and substitutions which render the paper valueless as evidence, upon which showing said entry should not have been allowed; and furthermore that Ski Hara is not eligible under the naturalization laws to citizenship and therefore is not a qualified applicant under the homestead laws.

The matter of the changed copy of certificate as to declaration of intention need not be considered, especially in view of the fact that there has been filed here a certificate of a clerk of court indicating that Ski Hara's original declaration of intention was in proper form.

Under section 2169 of the Revised Statutes the power to naturalize is limited to "aliens being free white persons, and to aliens of African nativity and to persons of African descent." Mongolians are not white persons within the meaning of the naturalization laws; accordingly a native of Japan, being an alien Mongolian, is not entitled to become a citizen of the United States, not being included within the term "white persons." *In re Saito* (62 Fed. Rep., 126); and to the same effect are the cases of *Re Ah Yup* (5 Sawy., 155); *Fong Yue Ting v. U. S.* (149 U. S., 716); and *United States v. Wong Kim Ark* (169 U. S., 649).

It is shown by the records that an order was entered in the district court for the county of Ramsey, North Dakota, admitting Ski Hara to citizenship, and it is urged here that for that reason it is not within the authority of your office to question or annul the decision of the court in that respect. Similar facts existed in the case of *In re Takuji Yamashita* (70 Pac. Rep., 482). In that case a native of Japan applied for admission as an attorney in the courts of the State of Washington, whose laws preclude the admission of any person who is not a citizen of the United States. Yamashita had obtained from the Superior court of Pierce county, Washington, an order admitting him to citizenship. It was held that the judgment upon its face showed that Yamashita was of the Japanese race; that Japanese are not entitled to become citizens of the United States; that as the court is without authority to pronounce the judgment its determination was void and must be disregarded. It was decided that he could not be admitted to citizenship. See also cases of *Re Hong Yen Chang* (24 Pac. Rep., 156); and *Re Gee Hop* (71 Fed. Rep., 274).

The decision of your office herein was proper and is hereby affirmed.

LOCATION OF WARRANTS, SCRIP, CERTIFICATES, SOLDIERS' ADDITIONAL RIGHTS, ETC.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., February 21, 1908.*

REGISTERS AND RECEIVERS,  
*United States Land Offices.*

GENTLEMEN: In cases of applications to locate all scrips, warrants, certificates, soldiers' additional homestead rights, or to make lieu selections of public lands of the United States, the following requirements will govern on and after April 1, 1908:

1. The location or selection must be accompanied, in addition to the evidence required by existing rules and regulations, by the affidavit

of the locator, selector, or some credible person possessed of the requisite personal knowledge of the premises, showing that the land located or selected is not in any manner occupied adversely to the locator or selector.

2. You will require the locator or selector, within twenty days from the filing of his location or selection, to begin publication of notice thereof, at his own expense, in a newspaper to be designated by the register as of general circulation in the vicinity of the land, and to be the nearest thereto. Such publication must cover a period of thirty days, during which time a similar notice of the location or selection must be posted in the local land office and upon the lands included in the location or selection, and upon each and every noncontiguous tract thereof.

3. The notice must describe the land located or selected, give the date of location or selection, and state that the purpose thereof is to allow all persons claiming the land adversely, or desiring to show it to be mineral in character, an opportunity to file objection to such location or selection with the local officers for the land district in which the land is situate, and to establish their interest therein, or the mineral character thereof.

4. Proof of publication must consist of an affidavit of the publisher, or of the foreman or other proper employee of the newspaper in which the notice was published, with a copy of the published notice attached. Proof that the notice remained posted upon the land during the entire period of publication, must be made by the locator or selector or some credible persons having personal knowledge of the fact. The register will certify to the posting in his office. The first and last days of such publication and posting must in all cases be given.

Very respectfully,

R. A. BALLINGER,  
*Commissioner.*

Approved:

JAMES RUDOLPH GARFIELD,  
*Secretary.*

**PATENT—ENTRY—VACATION OF PATENT—RESTORATION OF LAND.**

ALICE M. REASON.

By the issuance of patent upon an entry the entry is merged in the patent, and upon cancellation of the patent the entry can not be regarded as still in force.

Upon vacation of a patent by judicial proceeding it is the final judgment of the court that operates to revest title to the land in the United States and to restore it to the public domain; but it devolves upon the land department to determine when and how the land shall again become subject to disposal, and no action looking to disposal thereof should be taken until the finality of the judgment is established.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(F. W. C.) *Land Office February 21, 1908.* (J. R. W.)

Alice M. Reason appealed from your decision of October 13, 1906, rejecting her application of November 4, 1905, for homestead entry for the W.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$  of NW.  $\frac{1}{4}$ , and NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 25, T. 163 N., R. 70 W., Devils Lake, North Dakota.

October 20, 1891, homestead final certificate issued for this land to Andre Fleury, and patent issued to him February 29, 1892. Suit was thereafter instituted by the United States against him and others to cancel the patent and quiet title in the United States, which resulted, September 1, 1905, in decree of the United States Circuit Court, District of North Dakota, that "the title, legal and equitable, . . . is in the United States, and that none of the defendants has any right, title, or interest to the same." Copy of this decree was certified by the clerk, October 31, as the final decree in the cause, and was filed for record in the proper county and recorded, November 3, 1905.

November 4, 1905, Reason filed her homestead application, accompanied with her affidavit that patent was canceled September 1, 1905, by the court, as above stated. November 7, 1905, the local officers transmitted the application to your office without action, reporting that Fleury's final certificate and patent appeared intact on their record. Your office record shows that the United States Attorney, North Dakota, November 9, 1905, reported that W. N. Steele, not party to the suit, claiming to be an innocent incumbrancer without notice, would commence proceedings to vacate the decree, and recommended the land be withheld from entry for the present; April 30, 1906, he reported that Steele's petition to intervene was pending. You held that as Fleury's entry for the land had not been canceled, Reason's application should be rejected.

It was error to hold Fleury's entry as in force. That was satisfied by and merged in the patent. An entry is that recorded memorandum, made in the records of the land department, whereby the initiation of an individual right is recognized by the United States, ultimately to acquire title to public lands. *Nelson v. Northern Pacific Railway* (188 U. S., 108, 127); *Parsons v. Venzke* (164 U. S., 89, 92); *Bowlby v. Hays* (34 L. D., 376, 380). An entry is a contract by the United States with the entryman to convey the title. *Mary C. Sands* (34 L. D., 653); *Parsons v. Venzke, supra*. When the contract is consummated by a patent the entry no longer exists, for the contract, or entry, is satisfied and discharged. There is no longer a subsisting entry.

It is the final judgment of a court of competent jurisdiction that operates to revest title to the land in the United States and to restore

to the public domain land once patented. No action of the land department is necessary. When and how it becomes open to entry depends, as in respect to all other parts of the public domain, on action of the land department.

The condition of lands once patented and restored to the public domain by judicial cancelation of the patent is similar to that of patented lands restored to the public domain by voluntary relinquishment of the owner. In respect to lands of the latter class, it was held in *Maybury v. Hazletine* (32 L. D., 41, syllabus) that:

No act should be done or permitted by the government looking to disposal of said lands until the title tendered has been examined, found satisfactory, definitely accepted, and noted on the records of the local office.

The government owes to its grantees of title the obligation of every grantor to do no act afterwards in derogation of their right or that of their grantees, tending to embarrass their title, except as any other grantor might properly do. If the United States sues to recover a title granted, it is bound to make all interested parties defendant, and can not grant adverse rights until it has recovered title. If title be recovered by judicial proceedings, it is not certainly revested until the decree is final. In the face of proceedings pending in a proper court questioning the finality or conclusiveness of such a decree, the land department should not permit another entry of the land. It follows that the land department may properly require evidence of the finality and conclusiveness of the decree purporting to cancel a patent before permitting another entry for the same land.

In the present case you were advised that the finality and conclusiveness of the decree was still a question pending in the court which rendered the decree, upon proceedings instituted by one claiming under Fleury's patent. Your rejection of Reason's application to make entry was therefore proper under the circumstances, and your decision is affirmed.

The uncertainty of condition of title did not prevent her from acquiring rights in the land by settlement, dependent on ultimate determination that it was public land, which can be recognized, and entry may be permitted pursuant to such settlement when the conclusiveness and finality of the decree is shown, and it is thus ascertained that the land is restored to the public domain.

## FINAL PROOF--DESERT-LAND ENTRIES--EVIDENCE OF WATER RIGHTS.

## INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., February 21, 1908.*

REGISTERS AND RECEIVERS,  
*United States Land Offices.*

GENTLEMEN: You will accept as competent record evidence of water rights in final proofs on desert-land entries abstracts of title compiled from public records, certified by an authorized public officer, or certified by an abstracter of title whose abstracts are admissible as evidence in the state or territory in which the record exists.

Abstracters will be required to attach to each abstract certified by them a certificate stating that they have filed in the office of the Commissioner of the General Land Office a certified copy of the existing statute by which they are authorized to compile abstracts of title, and evidence in the form of a certificate by the proper State, Territorial, or county officer that they have complied with the requirements of such statute.

Copies of instruments furnished in connection with desert-land entries or proof thereon made from the original instruments and not from the public record thereof must be certified by an officer authorized to administer oaths under the public land laws. (See act of March 4, 1904, 33 Stat., 59.)

Very respectfully,

FRED DENNETT,  
*Assistant Commissioner.*

Approved:

FRANK PIERCE,  
*First Assistant Secretary.*

FEES OF SURVEYORS GENERAL--CERTIFIED COPIES OF PLATS AND RECORDS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., February 21, 1908.*

*United States Surveyors-General.*

SIRS: It appears that the rates established by law for the services of registers and receivers in furnishing exemplified copies of plats and other records of their offices, are entirely inadequate to meet the expense of like services when rendered by surveyors-general, and it is therefore ordered that hereafter you will collect for such services

the exact cost thereof, as nearly as may be, taking into account the value of the material, the time consumed and the compensation of the employees doing the work.

Inasmuch as the charges to be made for like services by the Surveyor-General of Louisiana, are fixed by law (4 Stat., 494), the foregoing instructions do not apply to this office.

Very respectfully,

R. A. BALLINGER,  
*Commissioner.*

Approved:

FRANK PIERCE,  
*First Assistant Secretary.*

NORTHERN PACIFIC GRANT—ADJUSTMENT—ACT OF JULY 1, 1898.

NORTHERN PACIFIC RY. CO. *v.* HUSTON.

Claimants for lands within the limits of the Northern Pacific grant entitled to an election under the act of July 1, 1898, who after the passage of that act have placed it beyond their power to return the land to the railway company in substantially the same condition as at the date of the act, should be held to have elected to retain it.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(G. W. W.) *Land Office, February 26, 1908.* (E. O. P.)

The Department is in receipt of a communication dated February 2, 1908, from counsel for the Northern Pacific Railway Company, protesting against the action of your office of December 3, 1907, declining to suspend action upon the application of one Frank L. Huston to relinquish his claim to certain lands in townships 5 and 6 north, ranges 13, 14, 15, 17, 18 and 19, east, Vancouver land district, Washington, preliminary to a transfer thereof to other lands under the provisions of the act of July 1, 1898 (30 Stat., 597, 620).

November 2, 1907, counsel for the railway company advised your office that it had substantial reasons for believing that the land, or a large part of it, the claim to which Huston is seeking to transfer, had been or was about to be denuded of its timber, and complained that it would be inequitable to compel it to take lands the value of which had been greatly depreciated by acts chargeable directly or remotely to the party who now sought to take other lands in lieu thereof. This complaint was accompanied by a request that action on the application of Huston to relinquish be suspended pending an investigation by your office. The railway company contends that if such investigation discloses a condition substantially as alleged in its complaint, the application should be rejected upon the ground that the act of the original claimants or their grantee amounted to an election to retain the land.

It appears that patents have been issued for nearly all the lands involved, and the company alleges that each and every one of the claims was originally in conflict between the individual claimant and the company and that patents were only issued after final decisions had been rendered by the Department.

Your office in dismissing the protest of the company evidently proceeded upon the theory that the Government had no real interest in the controversy and that the transfer of the individual claims being authorized by the act under which application therefor was made, the right is strictly a legal one the exercise of which is in no manner controlled by equitable principles.

Your office denied the materiality of proof of any facts which might evidence an intent upon the part of the individual claimant to retain the land as against the company, upon the ground that the railroad company, having at all times asserted a superior right, should have taken steps to prevent the performance of any acts of waste tending to depreciate or destroy the value of the land.

In the opinion of the Department the force of this reasoning is destroyed when the relative positions of the parties to the adjustment under the act of July 1, 1898, are considered. By its acceptance of the terms of that act the railroad company put it out of its power to successfully assert a superior right to the land in dispute as against the individual claimant, whatever it might have done prior to that time. The individual claimant by the terms of the act became entitled to retain or relinquish his disputed claim. The first step in the plan of adjustment must be taken by him. The act placed in his hands the right of election and the exercise of that right the railway company could not defeat. The railway company having voluntarily lodged this power in the individual applicant, it can hardly be said that it was thereafter asserting a superior right to the land. Its right was wholly dependent upon the election of the individual claimant. Congress certainly never intended that the right of the railway company should be further impaired by permitting the individual claimant to defer his election until he had destroyed the value of the land and then relinquish a barren claim. Congress intended an adjustment of conflicting claims. Adjustment implies an equitable settlement and precludes the idea of unfair dealing or the taking of undue advantage by either of the parties thereto. When the object of a statute is plain every rule of construction requires that it be so interpreted and administered as to carry out such object, if this can be accomplished without doing violence to the language used. This is the view adopted by the Supreme Court in the case of *Humbird v. Avery* (195 U. S., 499), expressed as follows:

Obviously, the first inquiry should be as to the object and scope of the act of 1898. Upon that point we do not think any doubt can be entertained, if the

words of the act be interpreted in the light of the situation, as it actually was at the date of its passage. Here were vast bodies of land the right and title to which was in dispute between a railroad company holding a grant of public lands and occupants and purchasers,—both sides claiming under the United States. The disputes had arisen out of conflicting orders or rulings of the Land Department, and it became the duty of the Government to remove the difficulties which had come upon the parties in consequence of such orders. The settlement of those disputes was, therefore, as the Circuit Court said, a matter of public concern. If the disputes were not accommodated, the litigation in relation to the land would become vexatious, extending over many years and causing great embarrassment. In the light of that situation Congress passed the act of 1898, which opened up a way for an adjustment upon principles that it deemed just and consistent with the rights of all concerned,—the Government, the railroad grantee, and individual claimants.

It is true the individual claimant is entitled to notice of his right to retain or relinquish his claim to the land in dispute. It does not follow, however, that prior to the receipt of such notice he may not by his own act estop himself from exercising his option. An election may be made as well by an act *in pais* as by formal declaration. The Department has recognized this principle by requiring election to be made within a certain time after notice and treating a failure to act within that time as an election to retain the land. Should the claimant after the passage of the act perform other acts indicating a clear intention to retain the land, he might thereafter be estopped from asserting the contrary. The commission of waste upon the land might well be treated as an act of election when it occasions a substantial detriment to the estate. The use or destruction of timber standing upon the land at the time the claimant became entitled to relinquish or retain the land is certainly strong evidence of his intention to exercise the latter right. If not evidence of that it could only be evidence of unfair dealing and this the spirit of the act upon which his alternative right depends does not sanction. The failure of the railway company, even if it had the power to do so, to prevent the performance of such acts would not operate to defeat the estoppel arising therefrom. Ignorance of his rights under the statute is equally immaterial. In the opinion of the Department, all persons entitled to an election under the act of July 1, 1898, who after its passage have placed it beyond their power to return the land to the railway company in substantially the same condition as at the *date* of the act, should be held to have elected to retain it.

The Department agrees with your office that the Government should not be put to the expense of investigation necessary to determine the truth of the matters alleged by the railway company in opposition to the application of Huston to transfer his claim to other lands. No provision has been made for a hearing in such cases, yet it is clear that this is the only method by which the facts can properly be presented for consideration. The railway company will, in the

event it desires to further oppose the right asserted by Huston, be required to fully set forth the grounds of its complaint and apply for a hearing thereon. If, in the judgment of your office, the matter can be determined at a single hearing, the local officers will be directed to proceed therewith. If this is impracticable, separate hearings may be ordered, at which the respective parties will be permitted to make such showing as they desire, the burden in each case being upon the railway company to sustain the charges made by a preponderance of the evidence.

Until full opportunity has been given the railway company to apply for a hearing, no further action will be taken by your office looking to the adjustment of the pending claims of Huston or others of a like character, and final action thereon will be governed by the facts disclosed at such hearings.

#### SURVEY—DEPUTY SURVEYOR—RETURNS.

##### HOMER SANTEE.

A deputy surveyor is required by his contract with the government to execute all surveys "in his own proper person," and in case he attempts to delegate this power, and returns surveys as having been executed by him which in fact were executed by another, he is liable to the penalty of having the surveys rejected, notwithstanding they may in other respects conform to all requirements.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(F. W. C.)      *Land Office, February 28, 1908.*      (E. F. B.)

By decision of January 11, 1908, you rejected the surveys made by Homer Santee, deputy surveyor, of the boundaries of the Colorado Indian reservation, under contract No. 146, and of public lands in township 5 N., R. 13 W., Colorado, under contract No. 143, for the reason that said surveys were not executed by said deputy "in his own proper person," as stipulated in his contract.

Upon the returns of these surveys the attention of the deputy surveyor was called to necessary correction required to be made before they could be filed for platting. These corrections were made by the agent of the deputy surveyor and the surveyor-general reported that they were in satisfactory form and appear to have been executed conformably to the instructions "and spirit of the manual," but it was then learned that the surveys had not been executed by the deputy in person, but by a representative employed by him, and for that reason the surveys were rejected.

It is contended by appellant that the stipulation entered into with the government to execute said surveys in his own proper person is

merely directory, and that even though said requirement should be held to be mandatory, the offer of the deputy to return to the field and execute in his own proper person all the lines run during his personal absence should have been accepted as a substantial compliance with the terms of the contract, and said surveys should be accepted.

A deputy surveyor is required to execute all surveys "in his own proper person" and such is the express stipulation in the contract. He can not delegate this power to another, and if he fraudulently or otherwise returns surveys appearing to have been executed by the deputy, but which in fact were not executed by him, he is liable to the penalty of having his surveys rejected, whether they in other respects conform to the instructions or not. It is such a violation of the terms of his contract as will warrant your office in rejecting them or not as you may see proper.

While the Department is not disposed to control or interfere with your discretion in such matters, it is suggested, in view of the importance of having the surveys in question expedited, and to avoid any unnecessary delay and expense incident to the issuing of notices inviting proposals for new survey, that the offer of the deputy to return to the field and execute in his own proper person *all the lines run during his personal absence from the field*, be accepted not in acknowledgment of any right or privilege due him, but solely in the interest of the government.

While the deputy has no right to complain of the result of his conduct in submitting fraudulent returns of said surveys, your office has the right to waive it and not to enforce the penalty which he has incurred when it may be to the interest of the government to do so. See *W. C. Miller et al.* (21 L. D., 526).

In the event this course is adopted, a very definite and limited period should be fixed for the completion of the work.

With this added suggestion, your decision is affirmed.

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ENTRY—AMENDMENT—SECTION 2372, REVISED STATUTES.

INSTRUCTIONS.

Rules governing amendments of original entries.

*Acting Secretary Pierce to the Commissioner of the General Land*  
(G. W. W.)                      *Office, February 29, 1908.*                      (F. W. C.)

Section 2372 Revised Statutes authorizes amendments of entries only in cases where final certificate has issued. However, under the supervisory authority vested in the Secretary of the Interior, in

the disposal of public lands, amendments of original entries may be allowed to correct mistake, clerical error, or inadvertence causing misdescription of the lands intended to be entered, or for other equitable cause.

In passing upon applications to amend original entries, you will be governed generally by the following rules:

ERROR OF LAND DEPARTMENT.

1. Where, as the result of an error of the Land Department, mistake in description occurs, or tracts are improperly included, the entry may be amended to embrace the lands originally intended to be entered. If none of the lands intended to be entered are subject to disposition, a new entry may be made. If one or more legal subdivisions of the land intended to be entered are vacant, the entry may be amended to embrace such subdivisions and other contiguous tracts subject to entry, sufficient to make up the area allowed, or entryman may, if he so elects, make a new entry.

MISTAKE IN DESCRIPTION BY ENTRYMAN.

2. Where through no fault of the entryman, mistake in description is made by him, or persons acting for him, amendment may be made so as to embrace the land originally selected and intended to be entered, if all of it be subject to entry, and if not, then such of it as is subject to entry, and such other contiguous tracts subject to entry as will make up the area allowed. No amendment will be allowed for such error to embrace lands, each and every subdivision of which is different from that originally selected and intended to be entered.

MISTAKE IN CHARACTER OF LAND.

3. Where through no fault of an entryman, the lands embraced in an entry are found to be so unsuitable for settlement purposes as to make the completion of the entry impracticable, amendment may be allowed by eliminating one or more of the subdivisions entered and including other tracts in lieu thereof. But in such case at least, a legal subdivision approximating forty acres in area, of the land originally entered, shall be retained, and the entry as amended embrace contiguous tracts. The application to amend must be filed within one year from the date of the original entry.

4. You will not allow amendments in behalf of entrymen who make entry without due care in the examination and selection of the land nor where good faith is not clearly shown, and you will therefore in all cases require a full and satisfactory showing to be made.

Very respectfully,

FRANK PIERCE,  
*Acting Secretary.*

## INDIAN ALLOTMENT—CANCELLATION OF PATENT—RESTORATION OF LAND—ACT OF APRIL 23, 1904.

RICHARD A. WINCKLER.

The provision in the act of April 23, 1904, that upon the cancellation of the patent issued upon a wrongful or erroneous allotment, as therein provided for, the lands shall not be opened to settlement for sixty days after such cancellation, operates to reserve such lands from all forms of disposition for the specified period.

*First Assistant Secretary Pierce to the Commissioner of the General (F. W. C.) Land Office, February 29, 1908. (C. J. G.)*

An appeal has been filed by Richard A. Winckler, assignee of Hiram D. Partridge, from the decision of your office of August 26, 1907, holding for rejection his soldiers' additional application, under section 2306 of the Revised Statutes, for the NE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 28, T. 44 N., R. 13 W., Wausau, Wisconsin.

The land was formerly embraced in allotment No. 67 of Sarah Gordon, a Chippewa Indian, against which an application to contest was filed by Frank Berquist, who alleged that a double allotment had been made to this Indian. Upon recommendation of the Commissioner of Indian Affairs the allotment in question and the trust patent issued thereon were canceled, it having in the meantime been reported by the Indian agent that double allotment had in fact been made to Sarah Gordon, it appearing that she had also received an allotment on the Bad River reservation, which she elected to retain. The local officers were advised by your office on June 8, 1907, of the cancellation, and Berquist was also advised that he gained no preference right by reason of his application to contest the allotment and his said application was denied.

Notation of the cancellation of the allotment was made on the records of the local office June 11, 1907, and June 12, 1907, the Indian agent, S. W. Campbell, as assignee of David S. Maxson and Sylvester E. Bebb, filed soldiers' additional application for the land covered by said allotment, which was on the same date transmitted to your office. The appellant herein, Richard A. Winckler, as assignee of Hiram D. Partridge, filed a similar application June 20, 1907, which the local officers rejected for conflict with the prior application of Campbell. From this action Winckler appealed to your office, claiming that Campbell, by reason of his official position, was disqualified from filing on the land. No appeal has been taken by Campbell. It appears that on August 17, 1907, Frank Berquist filed application to enter said land under the timber and stone act.

Your office, in its decision now here on Winckler's appeal, rejected the soldiers' additional applications of both Campbell and Winckler

as being in violation of a restriction contained in the act of April 23, 1904 (33 Stat., 297), held Berquist to be the first legal applicant for the land, and directed the local officers to take appropriate action upon his timber and stone application. Said act, which is entitled "An act amending the act of Congress approved January twenty-sixth, eighteen hundred and ninety-five, entitled 'An act authorizing the Secretary of the Interior to correct errors where double allotments of land have erroneously been made to an Indian, to correct errors in patents, and for other purposes,'" provides, among other things—

That in all cases where it shall appear that a double allotment of land has heretofore been, or shall hereafter be, wrongfully or erroneously made by the Secretary of the Interior to any Indian by an assumed name or otherwise . . . said Secretary is hereby authorized and directed during the time that the United States may hold the title to the land in trust for any such Indian, and for which a conditional patent may have been issued, to rectify and correct such mistakes and cancel any patent which may have been thus erroneously and wrongfully issued whenever in his opinion the same ought to be canceled for error in the issue thereof . . . and no proclamation shall be necessary to open to settlement the lands to which such an erroneous allotment patent has been canceled, provided such lands would otherwise be subject to entry: *And provided*, That such lands shall not be opened to settlement for sixty days after such cancellation.

It is urged by Winckler that as the act only specifically prohibits "settlement" for a given period after cancellation of an allotment it was not intended thereby to also prohibit "entry" of the land embraced therein, there being a clear distinction between the two terms. The above proviso is construed by your office to preclude both settlement and entry until after the expiration of sixty days from the time cancellation of the allotment is noted on the records of the local office. In ordinary course, upon cancellation of this allotment the land embraced therein would immediately become subject to disposition unless there were some inhibition against it. The act in question contains such inhibition. While there is a recognized distinction between settlement and entry yet the act itself apparently uses those terms interchangeably. Thus it says: "No proclamation shall be necessary to open to settlement the lands to which such an erroneous allotment patent has been canceled, provided such lands would otherwise be subject to entry."

When the object to be attained by the inhibition is considered and when it is reflected that if the same were limited merely to settlement the act would practically be a nullity, it was undoubtedly intended that the lands embraced within canceled allotments should be reserved from all forms of disposition; that is, should not be subject to the initiation of any claim or acquisition of any right in any manner whatever for sixty days after the cancellation of said allotments.

Under the homestead laws a claim or right may be initiated either by settlement or entry; therefore, by prohibiting settlement Congress necessarily meant to also forbid entry, as the term settlement comprehends the same rights secured by entry, it merely being another mode of initiating claim under the homestead laws.

The attention of your office is called to a protest in the record against the timber and stone application of Frank Berquist which should be considered when said application is reached in regular course.

The decision of your office herein is affirmed.

SECOND HOMESTEAD ENTRIES—ACT OF FEBRUARY 8, 1908.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., February 29, 1908.

REGISTERS AND RECEIVERS,

*United States Land Offices.*

1. The act of February 8, 1908 (Public—No. 18), allows a person otherwise qualified to make a second homestead entry where such person has made and lost, forfeited, or abandoned a former homestead entry prior to the passage of said act, and such former entry was not canceled for fraud nor abandoned or relinquished for a consideration.

2. The person applying to make second homestead entry under this act must file in the local land office an application to enter a specific tract of public land subject to homestead entry, accompanied by his affidavit executed before an officer authorized to administer oaths in homestead cases, stating description of former entry by section, township, and range numbers (or number of entry and name of land office where made); date of entry; when he lost, forfeited, or abandoned the same; that it was not canceled for fraud, and whether he received anything for abandoning his claim or relinquishing the entry. This affidavit must be corroborated by the affidavit of one or more persons having knowledge of the facts relative to the abandonment of his claim or the relinquishment of the former entry, which corroborated affidavit may be executed before any officer authorized to administer oaths, and having an official seal.

3. Section 2 of the act of June 5, 1900 (31 Stat., 267), allows a second homestead entry to a person otherwise qualified who, prior to the date of the act, made homestead entry and commuted same under the provisions of section 2301, Revised Statutes, and the amendments thereto, but such second entry is not subject to commutation.

4. The act of May 22, 1902 (32 Stat., 203), allows a second homestead entry to a person otherwise qualified who, prior to May 17, 1900, made and perfected a homestead entry, paying therefor the

price provided under the law opening the land for settlement, but to which land, had he not perfected title prior to the date mentioned, he would have been entitled to receive a patent without payment under the "free homes act." Said act does not allow commutation unless proof submitted on land first entered shows five years' residence.

5. A person applying to make second entry under the provisions of the acts described in paragraphs 3 and 4, of a specific tract of public land subject to homestead entry, must file with such application his affidavit, describing his original entry by section, township, and range numbers (or number of the entry and name of the land office where made), date of the entry and date when final entry was made therefor. As the facts required to be shown in support of such application are matters of record no corroboration will be necessary.

6. When an application is presented the register and receiver will examine same and, if not executed before a proper officer, or (when made under the act of February 8, 1908) if not corroborated, or if otherwise fatally defective, they will reject the same subject to appeal. Upon proper showing the register and receiver may, if the person is entitled thereto, allow second homestead entry to be made, and must indorse upon the application and receiver's duplicate receipt: "Allowed under section 2 of the act of June 5, 1900," or "Act of May 22, 1902," or "Act of February 8, 1908," as the case may be.

7. In addition to the general acts hereinbefore mentioned, there are a number of acts of Congress applicable only to limited areas which, in certain contingencies, permit the allowance of second homestead entries. For specific information relative thereto, reference is made to the general circular of this office, issued January 25, 1904, and to the special acts of Congress applicable to the areas in question.

8. In the absence of legislation by Congress extending the homestead right, the making of one homestead entry exhausts the homestead right, and this Department is without authority in such cases to allow second homestead entries to be made. When applications to make second entry are presented, and applicants fail to show that they come within the purview of any of the acts of Congress allowing second homestead entries, registers and receivers will reject such applications, giving the reasons therefor and allowing the usual right of appeal.

9. All pending applications will be considered and disposed of under these regulations.

Very respectfully,

R. A. BALLINGER,  
*Commissioner.*

Approved:

JAMES RUDOLPH GARFIELD,  
*Secretary.*

(PUBLIC—No. 18.)

AN ACT Providing for second homestead entries.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That any person who, prior to the passage of this act, has made entry under the homestead laws, but from any cause has lost, forfeited, or abandoned the same, shall be entitled to the benefits of the homestead law as though such former entry had not been made, and any person applying for a second homestead under this act shall furnish the description and date of his former entry: *Provided,* That the provisions of this act shall not apply to any person whose former entry was canceled for fraud, or who relinquished the former entry for a valuable consideration.

Approved, February 8, 1908.

Affidavit in support of application for second homestead entry under act of February 8, 1908, may be in form substantially as follows:

I, \_\_\_\_\_, of \_\_\_\_\_, applicant to make second homestead entry for the \_\_\_\_\_, of section \_\_\_\_\_, township \_\_\_\_\_, range \_\_\_\_\_, \_\_\_\_\_ meridian, within the \_\_\_\_\_ land district, do solemnly swear that I have not heretofore made any entry under the homestead laws except entry No. \_\_\_\_\_, made \_\_\_\_\_ at the \_\_\_\_\_ land office, for the \_\_\_\_\_, of section \_\_\_\_\_, township \_\_\_\_\_, range \_\_\_\_\_, \_\_\_\_\_ meridian; that I lost, forfeited, or abandoned the said entry on or about \_\_\_\_\_; that said entry was not canceled for fraud, and I received no consideration for abandoning or relinquishing the entry except \_\_\_\_\_.

I hereby certify that the foregoing affidavit was read to or by affiant in my presence before affiant fixed signature thereto; that affiant is to me personally known (or has been satisfactorily identified before me by \_\_\_\_\_); that I verily believe affiant to be a credible person, and that said affidavit was duly subscribed to before me at my office in \_\_\_\_\_, within the \_\_\_\_\_ land district, this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

\_\_\_\_\_  
 \_\_\_\_\_  
 (Official designation of officer.)

We, \_\_\_\_\_, of \_\_\_\_\_, and \_\_\_\_\_, of \_\_\_\_\_, do solemnly swear that we are well acquainted with the above-named affiant, and personally know that the statements made by him relative to the abandonment (or relinquishment) of his former homestead entry are true.

I hereby certify that the foregoing affidavit was read to or by affiants in my presence before affiants affixed signatures thereto; that affiants are to me personally known (or have been satisfactorily identified before me by \_\_\_\_\_); and that said affidavit was duly subscribed to before me at \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

\_\_\_\_\_  
 \_\_\_\_\_  
 (Official designation of officer.)

## CONTEST—NOTICE—AFFIDAVIT FOR PUBLICATION.

INSTRUCTIONS.<sup>a</sup>

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
Washington, D. C., November 14, 1902.

REGISTERS AND RECEIVERS,  
*United States Land Offices.*

SIRS: No affidavit for service by publication in a contest case will be received or made the basis for such service unless the affidavit shows that it has been made within sixty days of the time of its presentation at your office.

Whenever an affidavit for service by publication in a contest case is filed in your office, you will proceed to act promptly thereon, in order that too much time may not elapse between the date of the filing of said affidavit and the day when the notice can be first published; and this even though owing to the press of business in your office it may be necessary for you to set the case for a hearing at some time more or less remote.

Whenever for any reason—whether congestion of business or otherwise—you are unable to act promptly in the disposition of such applications for service by publication, and more than sixty days will have elapsed from the date of such affidavits for service by publication and the day when the contest notice can be first published, you will thereupon require a new showing in support of the application before taking action thereon.

You are enjoined to strictly observe these requirements, in order that the further remanding of contest cases on account of the defect mentioned may be avoided.

Very respectfully,

W. A. RICHARDS,  
*Assistant Commissioner.*

Approved:

E. A. HITCHCOCK,  
*Secretary.*

## CONSTRUCTIVE RESIDENCE—MILITARY SERVICE.

JAMES M. ESTERLING.

A homestead entryman who enlisted for a fixed term during a time of war is entitled to credit for constructive residence during his absence occasioned thereby, notwithstanding the war may terminate prior to the expiration of the term of enlistment.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(G. W. W.) *Land Office, March 3, 1903.* (A. W. P.)

An appeal has been filed on behalf of James M. Esterling from your office decision of November 8, 1906, rejecting final proof offered in sup-

<sup>a</sup> Omitted from volume 31.

port of his homestead entry No. 11159, made February 20, 1900, and now embracing lot 2 and the SW.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$ , Sec. 4, T. 22 N., R. 14 W., Alva, Oklahoma, land district.

Esterling submitted final proof before John W. Bishop, United States Commissioner, at Cleo, Oklahoma, on April 16, 1906. According to his testimony he established residence on the land in June, 1900; has improvements, valued at \$65, consisting of a house, ten by eleven feet, stable, and forty-five acres of breaking, which was cultivated for six seasons; that he was absent "taking treatment" from the last of March, 1901, to middle of April, 1902, and again from January 13, 1903, to January 12, 1906, serving in the United States army. No other absence from the land. His proof witnesses substantially corroborate this testimony, with the additional statement that he was in an asylum in Norman, Oklahoma, on account of his impaired mind, and when he returned therefrom lived on the land up to the time of his enlistment in the regular army. The local officers accepted this final proof and issued final certificate No. 6725-A thereon April 27, 1906.

Upon consideration of said proof your office by decision of November 8, 1906, found that:

From date of entry to date of proof is six years, one month and twenty-six days. His military service is verified by the records of the War Department, and shows him entitled to six months and two days credit from January 13, 1903, the date of his enlistment, to July 15, 1903, when the Philippine Insurrection ceased, on his term of residence, which added to the period of time he actually resided on the land, allowing him credit for the time he was confined in the asylum, aggregates three years, seven months and twenty-nine days, showing a deficit in the required term of residence of one year, four months and one day.

Accordingly you rejected the proof and held the final certificate for cancelation, but left the entry intact to afford claimant opportunity to submit new proof within the lifetime of his entry, when he could show satisfactory compliance with the law as to residence.

From said decision Esterling has appealed to the Department, alleging error in allowing him credit for but six months and two days on account of military service. In support thereof it is contended that claimant enlisted in the army of the United States, January 13, 1903; that his regiment was ordered to the Philippines in June, 1903, but on account of illness he was unable to join his regiment until December, 1903, arriving at Manila, December 28, 1903; that he at once entered into active service with his company in pursuit of insurrectionists; that he was thus engaged until July, 1905, when he with his company was sent back to the United States, arriving about August 12, 1905; and that he was sent to Fort McPherson, Georgia, where he was honorably discharged January 12, 1906. For this reason claimant urges that it was an injustice to give him credit for military service only until July 15, 1903, when he was prior thereto sent to the

Philippines to aid in the suppression of the insurrection, where he was thus detained until the date as above recited; that at least he should be allowed such credit until his return, if not until his ultimate discharge; and that this is in conformity with the act of June 16, 1898 (30 Stat., 473), which provides:

That in every case in which a settler on the public land of the United States under the homestead laws enlists or is actually engaged in the Army, Navy, or Marine Corps of the United States as private soldier, officer, seaman, or marine, during the existing war with Spain, or during any other war in which the United States may be engaged, his services therein shall, in the administration of the homestead laws, be construed to be equivalent to all intents and purposes to residence and cultivation for the same length of time upon the tract entered or settled upon; and hereafter no contest shall be initiated on the ground of abandonment, nor allegation of abandonment sustained against any such settler, unless it shall be alleged in the preliminary affidavit or affidavits of contest, and proved at the hearing in cases hereafter initiated, that the settler's alleged absence from the land was not due to his employment in such service: *Provided*, That if such settler shall be discharged on account of wounds received or disability incurred in the line of duty, then the term of his enlistment shall be deducted from the required length of residence without reference to the time of actual service: *Provided further*, That no patent shall issue to any homestead settler who has not resided upon, improved, and cultivated his homestead for a period of at least one year after he shall have commenced his improvements.

This legislation was enacted for the benefit of settlers and entrymen engaged in the war with Spain. Prior to its enactment the Department had rendered an opinion (26 L. D., 672) holding that under existing legislation enlistment in the military service of the United States in the said war would not excuse homestead claimants from complying with the law as to residence and improvements. By the act of March 1, 1901 (31 Stat., 847), sections 2304 and 2305 of the Revised Statutes were also amended to include military service during the Spanish war or the then-existing Philippine insurrection.

But the war with Spain was terminated by the treaty of Paris, in December, 1898, and the President by proclamation of July 4, 1902 (32 Stat., 2014), declared the Philippine insurrection at an end, except as to the country inhabited by the Moro tribes, over which territory civil government was established July 15, 1903, under authority of an act of the Philippine Commission of June 1, 1903. Hence it was that your office determined that claimant was entitled to credit for military service only from date of enlistment until July 15, 1903, the date when the Philippine insurrection ceased.

It will be further observed that the act of June 16, 1898, *supra*, also provides that thereafter no contest shall be initiated on the ground of abandonment, nor allegation of abandonment sustained against a settler, unless it shall be alleged and proven that the settler's alleged absence from the land was not due to his employment in the army, navy, or marine corps of the United States. But where the

period of abandonment charged was subsequent to the ending of the Philippine insurrection, however, the Department has held that the facts of which it took judicial notice afforded *prima facie* proof that such default was not due to military or naval employment. *Hallquist v. Cotton* (35 L. D., 625), and later cases not reported. As was said in the above-cited case (syllabus):

The land department will take judicial notice of the existence of any war in which the United States is engaged; and the fact that during the period of abandonment charged in a contest against a homestead entry the United States was not engaged in any war, is *prima facie* evidence that the entryman's alleged absence was not due to military service.

While any military service performed by Esterling subsequent to July 15, 1903, was as a member of the regular army of the United States, for which he was not entitled to credit *under the said act* of June 16, 1898, yet it does not follow that his absence from the land was not excusable on account of his enlistment prior to that time. Having enlisted for a fixed term during a time of war, and the termination of his enlistment not depending upon the conclusion thereof, he could not leave the service until the time of enlistment had expired. His service in the army *during* the war was therefore the direct cause of his absence from the land after its termination and prior to the expiration of his term of enlistment, and, independently of the act allowing credit on account thereof, should be accepted as a sufficient excuse therefor. In the administration of the homestead law the Department has long held that where, after the establishment of a *bona fide* residence, an entryman was called away by official employment, his absence would not be construed as an abandonment of the entry so long as good faith be manifested by cultivation and improvement of the land. This recognition of official duty as an excuse for absence from the land has been equally applicable, whether the duty was imposed by the appointing power or by election. Such entrymen, however, were at liberty at any time to terminate their official employment and return to their homestead entries. But the claimant herein, while an employee of the government, was not, after the acceptance of his services, in position to sever such relation during the period of his enlistment, other than by desertion, which would have subjected him to court martial and sentence—a dishonorable record. Hence, even from this standpoint, logic strongly favors extending such credit to this entryman. His establishment and maintenance of a *bona fide* residence on the land up to date of enlistment is not questioned, and the final proof shows continued cultivation and improvement thereof during his absence. In view of this fact and the conclusion heretofore reached, the Department is of the opinion that, in the absence of other material objection, the entry should be passed to patent, and it is accordingly so directed.

RAILROAD SELECTION—RIGHT TO MAKE SUBSTITUTE SELECTION—  
EFFECT OF SUBSTITUTION.

## NORTHERN PACIFIC RY. CO.

In the absence of any valid intervening adverse claim, a railroad company may file a new selection in substitution for a pending selection covering the same land, the later selection constituting an abandonment of all rights under the former and taking effect as of the date presented.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(F. W. C.) *Land Office, March 3, 1908.* (E. O. P.)

The Northern Pacific Railway Company has appealed to the Department from your office decision of June 25, 1907, holding for cancellation its selection, per list No. 182, of the W.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 10, T. 43 N., R. 2 E., Coeur d'Alene land district, Idaho, made under the provisions of the act of July 1, 1898 (30 Stat., 597, 620).

The record discloses that prior to the filing of said list No. 182, the company, October 1, 1901, applied to select the same tracts, while the land was yet unsurveyed, per list No. 78, under the provisions of the act of March 2, 1899 (30 Stat., 993). October 8, 1903, after the filing of plat of survey, the company adjusted its said selection to conform therewith. Prior thereto one Charles Darry filed homestead application for said tracts and applied to contest the company's selection. This controversy is no longer a factor in the case as Darry has since relinquished all claim to the land. With the termination of said conflict, no apparent bar was interposed to the allowance of the company's selection under its said list No. 78, and your office held that the acceptance of the subsequent list, No. 182, could not be allowed in the face of the prior selection.

It is alleged on appeal that the loss assigned in support of the first selection was of *unselected* indemnity lands within the Mt. Rainier National Forest, for which at the time list No. 78 was proffered the company believed it was entitled to select other land under the act of March 2, 1899, *supra*; that this right was subsequently denied by the Department, and because of its inability to assign a valid base for such selection, new selection was made under the act of July 1, 1898, *supra*.

The general rule is that land included in a *prima facie* valid selection is not subject to other selection adverse to the rights asserted thereunder (*Hastings & Dakota Ry. Co. v. St. Paul, M. & M. Ry. Co.*, 13 L. D., 535). In the present case, however, the rights under the subsequent selection are not adverse to those asserted under the prior one, but if the facts are as alleged it is only tendered by way of substitution on account of the construction placed upon the act of

March 2, 1899, by the Department after the filing of said list No. 78 (*Northern Pacific Ry. Co. v. Mann*, 33 L. D., 621).

The Department has held that a substitution of new tracts for those first assigned in support of a selection, attempted by way of amendment, amounted to an abandonment of the former selection to the extent of the substitution (*Southern Pacific Ry. Co. v. Davis*, 26 L. D., 595). Where adverse rights are involved, no new selection should be allowed to the prejudice of such rights, but if such new selection be treated as an abandonment of all rights under the first no such prejudice can result, as all rights under the subsequent selection would attach only as of the date it was tendered. The object of the rule being to protect valid intervening adverse claims, the extent of its application should be measured by the necessities of the case. The Department is of opinion the filing of said list No. 182 may properly be treated as an abandonment of all claims under said list No. 78, and in the absence of other valid objection thereto, be allowed to stand as of the date presented and the former selection canceled.

The action of your office is accordingly hereby reversed.

NORTHERN PACIFIC GRANT—ADJUSTMENT—RIGHT OF INDIVIDUAL  
CLAIMANT TO MAKE SELECTION.

HUSTON *v.* NORTHERN PACIFIC RY. CO.

The right to select other lands in lieu of those relinquished by an individual claimant under the act of July 1, 1898, does not accrue until acceptance of the tendered relinquishment by the Commissioner of the General Land Office; and prior to that time application to select will not be accepted subject to final determination of the right of selection.

*First Assistant Secretary Pierce to the Commissioner of the General  
(F. W. C.) Land Office, March 4, 1908. (E. O. P.)*

Frank L. Huston, claiming as transferee of Albert Ebert, has appealed to the Department from your office decision of September 3, 1907, rejecting his application to select, under the provisions of the act of July 1, 1898 (30 Stat., 597, 620), unsurveyed land described as the NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 4, SW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 9, SE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 8, NE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 17, T. 35 N., R. 9 E., Seattle land district, Washington, in lieu of the SE.  $\frac{1}{4}$ , Sec. 21, T. 6 N., R. 14 E., Vancouver land district, Washington.

Relinquishment of his claim to the land made the basis of the right to select was tendered December 28, 1906, by said Huston but had not up to the date of your decision been accepted, and his said application was rejected upon the ground that until his *right* of selection is recog-

nized by acceptance of his relinquishment he is not entitled to make selection under the act of July 1, 1898, *supra*.

The action of your office is in strict accord with the regulations adopted by the Department governing the administration of said act (28 L. D., 103, 111). By paragraph 27 thereof the inception of the right of the individual claimant to transfer a claim to other land is fixed as of the time he receives "notice of the acceptance of his relinquishment" by the land department. The requirement of paragraph 32 of said regulations that the claimant must set forth in his application to select "the acceptance by the Commissioner of the General Land Office of the relinquishment" makes such acceptance a condition precedent to the right to select other lands.

It is contended on appeal that even though the selection could not be allowed prior to acceptance of the relinquishment of the former claim, the application therefor should have been accepted subject to final determination of his right to transfer his claim to the land selected.

It is urged that such action would not have been contrary to the regulations of the Department nor the terms of the statute. The proposition advanced by claimant in support of this view "that after a relinquishment has been accepted the person so relinquishing can then make a transfer selection" tends rather to refute than sustain it, as it is admitted that the proffered relinquishment upon which the right of transfer is based has *not been accepted*.

The practice adopted under the act of June 4, 1897 (30 Stat., 11, 36), requiring selection of lieu lands to be tendered with the relinquishment of the claim to the lands within forest reserves, is invoked to uphold the contention that a like practice might be permitted under the act of July 1, 1898, *supra*.

While both of said acts involve an exchange of lands, the analogy extends no further. The object of the act of June 4, 1897, *supra*, was to free the lands within forest reserves from any claim asserted there-to adverse to the Government. Those claims were easily ascertainable, and an *ex parte* showing might properly be accepted as sufficient proof of the right to make lieu selection. The purpose of the act of July 1, 1898, *supra*, is not primarily an exchange of land or transfer of subsisting claims, but the adjustment of conflicting claims to which a transfer or exchange is an incident. (Northern Pacific Ry. Co., 34 L. D., 153, 155). In the administration of said act the United States occupies the position of mediator. The plan of adjustment is indicated by the act and before selection of other lands to which the original claim may be transferred is permissible, it is necessary to determine which of the adverse claimants is entitled to the right of transfer. Good administration demands that no right be recognized as attaching to or encumbering any of the public lands until all the

steps necessary to establish such rights have been taken. It is true, as contended by counsel, that the settlement of this question may involve delay. The same objection has heretofore been urged by the railway company, and the Supreme Court in the case of *Humbird v. Avery* (195 U. S., 480, 509) disposed of it in the following language:

But it is suggested that the final action of the Department may be indefinitely postponed, to the great injury of the railroad grantee and those claiming under it. Delay in such matters was a contingency which the alleged successor in interest of the railroad grantee must have taken into account when accepting the act and assenting to the plan of settlement embodied in it.

This reasoning applies with even greater force in the case of the individual claimant with whom lies the first right of election. He can not, like the railway company, be forced to transfer his claim and his election to do so is in every sense voluntary, and it is imposing no hardship to require him in accepting an alternative right to take it *cum onera*. Good administration demands that the observance of the rule announced in your office decision be adhered to, and for the reasons herein stated said decision is hereby affirmed.

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ISOLATED TRACTS—PARAGRAPH 2 OF CIRCULAR OF DECEMBER 27,  
1907, MODIFIED.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,  
*Washington, D. C., March 4, 1908.*

*The Commissioner of the General Land Office.*

SIR: The limitation contained in paragraph 2 of instructions of December 27, 1907 [36 L. D., 216], to effect that not more than 160 acres of land will be ordered into market upon the application of an individual or corporation under the provisions of the act of June 27, 1906, may be waived in cases where it is shown to your office upon satisfactory evidence that isolated tracts not exceeding 120 acres each in area are entirely surrounded by land owned by the applicant for offering and have been isolated for five or more years. In such cases in addition to showing above facts and complying with the other requirements of the circular of December 27, 1907, applicant should be required to show that the lands are not valuable for farming but are chiefly valuable for grazing or for special use in connection with the adjoining lands.

Very respectfully,

FRANK PIERCE,  
*First Assistant Secretary.*

## TIMBER TRESPASS—BOXING TREES FOR TURPENTINE—CULTIVATION.

ROBERT L. MCKENZIE.

Boxing and chipping trees for turpentine purposes on unperfected homestead entries constitutes a trespass and can in no sense be considered as cultivation within the spirit of the homestead law.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(G. W. W.) *Land Office, March 7, 1908.* (A. W. P.)

An appeal has been filed on behalf of Robert L. McKenzie from your office decision of April 2, 1907, wherein you affirm the action of the local officers and hold for cancelation his homestead entry No. 32178, for the SE.  $\frac{1}{4}$ , Sec. 8, T. 2 S., R. 14 W., Gainesville, Florida, land district.

McKenzie made entry of said tract February 24, 1903, and on August 27, 1904, submitted commutation proof, which was accepted by the local officers, who issued cash certificate thereon September 22, 1904. March 11, 1905, your office suspended the entry, based on the adverse report of Special Agent Paul that—

he had made a personal examination of said tract and found thereon, a rough board dwelling, turpentine still, commissary, barn, 8 small board cabins for negro hands; about 3 acres cleared and fenced and some evidence of cultivation. Claimant single, makes his home across the St. Andrews Bay, 15 miles away, at another still, owned by himself and E. L. Vickers, and of which claimant was manager until Jan. 1904. Actual residence in good faith never established although claimant has visited tract occasionally since June 1904. Timber was boxed within one month after date of entry was made in order to procure the turpentine. 7000 boxes cut by McKenzie, Vickers & Co. during March 1903, and timber worked by said company during season of 1903 & 1904.

Upon application of the entryman hearing was regularly had and evidence adduced, as a result of which the local officers, on July 30, 1906, found "utter want of good faith" on the part of claimant, and accordingly recommended the cancelation of the entry. Upon appeal therefrom your office, by decision of April 2, 1907, wherein the case was fully considered, found and held as follows:

It is shown that he [claimant] remained as much of the time at the turpentine establishment at Gay as he did upon the land in question, and it is evident from all the facts and circumstances that when he was on the land in question he was not there with the view of making the same his home, but solely for the purpose of looking after his turpentine interests.

All his acts go to show that he took up the land for the purpose of working the timber for turpentine and not in good faith for a home. Your decision is affirmed and said entry is held for cancellation.

From your said decision, as stated, appeal has been taken, and counsel for claimant was heard orally in support thereof. The Department has now carefully examined the entire record, having in

mind the matters urged on behalf of the entryman. It appears that the tract in question is covered by a growth of pine timber; that shortly after entry claimant, who was in the turpentine business and manager for such an establishment more than five miles distant therefrom, boxed the timber on this tract, cutting about seven thousand boxes, and continued working it for turpentine until proof was offered, and that on the issuance of cash certificate sold the said land. In connection with this undertaking, there were erected on the land shortly after entry a turpentine still, commissary, house, and a number of small shacks for the turpentine hands. The cost of the house was estimated at from one hundred to three hundred dollars, and all the improvements above mentioned at from \$1000 to \$1500. This business belonged to a firm of which claimant was a member and manager from date of entry up to December, 1903, when he disposed of his interest to another, but in May, 1904, bought same back and again became a member of the firm. The party who bought the interest in the firm in December, 1903, testified that his holding embraced also a half interest in the homestead entry. Claimant's testimony, however, directly contradicts this, his statement being, in effect, that the contract was only for his interest in the business, and the privilege of boxing the trees on his entry for a period of three years. Claimant, it seems, also retained his position as manager of the other similar establishment up to the time of offering commutation proof, and according to his own testimony divided his time between the two places during that period.

A homestead entryman, who is in good faith endeavoring to cultivate and improve his entry and maintain a *bona fide* residence thereon, may cut and remove timber therefrom necessary to the accomplishment of this purpose, and such timber may be sold if not needed for improvements. It is not allowable to such an entryman, however, to cut the timber on the lands or take any crude turpentine or other material therefrom for the purpose of speculation. Boxing and chipping trees for turpentine purposes on unperfected homestead entries can not be considered as cultivation within the spirit of the homestead law. In fact, it has been repeatedly held that one who does this is a timber trespasser upon government lands. *United States v. Taylor* (35 Fed. Rep., 484), and later cases. In addition to this, the Department long entertained the view that it was an indictable offense under section 2461 of the Revised Statutes, as held in the case of *United States v. Leatherberry* (27 Fed. Rep., 606). See also *John T. Wooton* (5 L. D., 389). The Circuit Court of Appeals, however, expressed a *contra* view in the case of *Bryant v. United States* (105 Fed. Rep., 941), as result of which Congress, on June 4, 1906 (34 Stat., 208), passed an act making such action a misdemeanor.

The injury, present and prospective, inflicted upon trees by the ordinary method of boxing is very accurately described as follows by Special Agent Griffin (4 L. D., 1):

A "box" or gash is cut into the side of a tree, perhaps 10 inches wide and 6 inches deep, and of such a shape as to catch and retain a considerable quantity of the crude turpentine gum. The next year another "box" is cut at another point in the circumference of the tree, and so on. Besides this, the tree is subjected to a "chipping" process, the bark being cut through down into the woody portion, for 12 or 18 inches above the upper edge of the "box," in order to keep a fresh bleeding surface continually exposed. In four or five years the life of the tree is exhausted. Even should the process of "boxing" be discontinued, decay will ensue from the action of the weather and worms upon the portion of the wood already exposed. There can be no healing process and no future growth to a pine tree once tapped by the turpentine gatherer's ax. Drippings of gum accumulate in the "boxes" and about the root of the dying tree. From the carelessness of some traveler, or from lightning striking some tree in the forest, fires originate and the entire timber is consumed. After its destruction the land will be covered in a few years with a growth of worthless scrub oaks, rendering it entirely valueless.

While the subsequent legislation above referred to is not material to the present determination of this proceeding, yet the entryman must be presumed to have known the long holding by the courts and construction by the Department that such action on his part would constitute a trespass (P. G. Cromartie, 1 L. D., 607), and to say the least that it was not compliance with the essential requirements of the homestead law. The record discloses in fact that there was not such a *bona fide* endeavor, especially as to residence and cultivation, and that the improvements made on the land were largely those placed there by the company in the conduct of its turpentine business. The conclusion of Special Agent Paul, as result of his investigation, and the finding of your office that the entry was made for the purpose of using the timber for turpentine only and not in good faith for a home, are warranted.

The concurring judgment of the local officers and of your office is correct, and accordingly the same is hereby affirmed.

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STATE OF LOUISIANA.

Petition for re-review of departmental decision of June 6, 1904, 33 L. D., 13, denied by First Assistant Secretary Pierce, March 9, 1908.

## HOMESTEADS IN FOREST RESERVES—SURVEYS—ACT OF JUNE 11, 1906.

## REGULATIONS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., March 12, 1908.*

REGISTERS AND RECEIVERS,  
*United States Land Offices,*

SIRS: Your attention is called to paragraph 8 of the regulations of July 23, 1907 (36 L. D., 30), relative to the surveying of lands entered within national forests, under the act of June 11, 1906 (34 Stat., 233), and you are informed that surveys of tracts entered under this act will not be required when such tracts can be described as quarter-quarter sections or lotted portions of surveyed sections, or as a quarter or a half of a surveyed quarter-quarter section or rectangular lotted tract, or as a quarter or a half of a surveyed quarter-quarter-quarter section or rectangular lotted tract.

The requirements of that paragraph and of the act of June 11, 1906, extend only to unsurveyed lands and to parts of lotted subdivisions of surveyed sections which are not rectangular, and not to platted subdivisions or aliquot parts of such platted subdivisions as are rectangular.

Very respectfully,

Approved:

FRANK PIERCE,

*First Assistant Secretary.*

FRED DENNETT,

*Commissioner.*

SOLDIERS' ADDITIONAL—APPROXIMATION—COMBINATION OF FRACTIONAL PORTIONS OF RIGHTS.

GEORGE P. WILEY.

The holder of a number of fractional portions of different soldiers' additional rights may combine and locate them upon one body of land of their aggregate quantity; but the rule of approximation can not be invoked in such case unless the excess area of the combined rights be less than the deficiency would be if the smallest legal subdivision of the location were eliminated and unless all other prerequisites to the application of the rule exist as to each separate fractional portion of right involved in the location.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(G. W. W.) *Land Office, March 12, 1908.* (P. E. W.)

May 15, 1906, there was transmitted to your office the application of George P. Wiley to enter, under section 2306 of the Revised Statutes, the E.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  of Sec. 20, T. 26 N., R. 25 E., Waterville, Washington.

Said application was based on the soldiers' additional homestead rights, apparently valid and duly assigned to him, of Joseph Barney for 17.91 acres; Jacob Bowers for 4.79 acres; Oliver Bouvier for 2.10 acres; John S. McPherren for 3.43 acres; George A. Way for 1.73 acres, and Frederick Zimmerer for 10.08 acres.

This application for entry of 80 acres upon bases aggregating 40.04, was by your office letter of May 18, 1907, rejected, as not coming within the rule of approximation, and claimant was notified that he would be allowed sixty days from notice to elect which subdivision of the land applied for he would retain, failing of which or to appeal, his application, which was thereby held for rejection, would be rejected without further notice.

By letter dated June 25, 1907, counsel for applicant requested that said application be returned to the land office "for amendment" but it was not stated in what manner it was desired to amend the same. This request was denied by your office letter of July 20, 1907, and said counsel was advised that upon compliance with your said office letter of May 18, 1907, proper action would be taken in the matter.

Under date of August 17, 1907, counsel for applicant requested that said application be finally rejected and the papers returned to the applicant. In view thereof your office on October 7, 1907, instructed the local officers to—

advise the applicant that he will be allowed sixty days in which to submit an affidavit, corroborated, showing the character of the land involved at the time of filing said application, and also its present character, and to state on what ground he bases his request for the rejection of said application and the return of the papers representing the alleged rights on which the same is based, and that upon receipt of such affidavit his said request will be duly considered.

In response thereto the applicant, on November 14, 1907, filed such affidavit describing the past and present condition of the land and further stating that—

the reason he desired the return of said papers was for the purpose of either being permitted to amend his said application, or if said application was rejected to obtain the soldiers' additional assignment papers and then make two applications for said land, that is, an application for each subdivision; that one of his applications would have 20.01 acres of soldiers' additional rights, and the other one 20.03 acres; that affiant understands the ruling to be that if his soldiers' additional right amounts to over one-half of the legal subdivision applied for that he can obtain the whole subdivision.

Thereupon your office, on January 10, 1908, held that—

as the only reason for requesting the rejection of said application and for the return of said assignments is for the purpose of refiling two applications of 40 acres each for the same lands, based on the same alleged rights, divided in the proportion of 20.01 and 20.03 acres, and thereby securing 39.96 acres of land by paying \$1.25 per acre, the request is denied.

It was further ordered in your said decision that the applicant be given thirty days' notice to elect which of said legal subdivisions he will retain, failing of which or to appeal, "the entry will be authorized for one of said legal subdivisions if no objection appears, and rejected as to the other legal subdivision, without further notice."

The applicant has appealed to the Department from the—

several rulings in this matter. First, denying the right of amendment; second, refusing to return the papers to the applicant for the purpose of amendment; third, for refusal to reject the application and return the papers to the applicant.

There appears to be no question as to the validity of, and applicant's title to, the additional rights in question, and were the appeal based upon, and asserting nothing further than, his right to a return thereof, following a rejection of the application as made, the applicant acquiescing therein, the Department is of the opinion that such appeal would be well taken. But the applicant repeats in this appeal that—

the ground of appeal is that this applicant intended to locate the two fractional homestead rights on the two different forty acres, one fractional combination on one forty and the other fractional combination on the other forty . . . . under the rule of approximation. . . . Relying upon his understanding of the rule of approximation, applicant has broken and fenced the eighty-acre tract in question . . . . and a rejection of either forty will entail much additional expense if not the possibility of loss by some other person seizing the rejected tract.

The question thus presented is not merely in the abstract whether the applicant is entitled to a return of his papers upon rejection of his application but involves the right of combining such fractional rights in such manner as that, under the rule of approximation, any trifling excess over the half of the smallest legal subdivision of land, forty acres, will entitle the owner to purchase the remainder thereof, thus nullifying, to that extent, and defeating the purpose of, the act of Congress which abolished private cash entries of public lands.

It can not be reasonably urged that the act granting soldiers' additional rights contemplated such an extension of the right. The act expressly limits the right to enter "so much land as when added to the quantity previously entered shall not exceed one hundred and sixty acres." Conceding the utmost liberty in the disposal of this "unfettered gift," it is still the duty of the Department to provide means for preventing its use in a manner evasive of other statutes relating to the disposal of public lands. Thus while recognizing the soldier's privilege to assign his additional right in as many different fractions as he may see fit, it was seen that this presented a different case from all other classes to which the rule of approximation was applicable since in all others there was but one entire right, one

entry, and one application of the rule, while in this case many entries may be made under one original right. And if with each entry there might be an application of the rule of approximation it is apparent that the various assignees of the fractional rights would in the aggregate obtain a much larger quantity of land than the soldier himself could have obtained under the act which expressly limits the gift to only enough land to eke out the 160 acres granted by the general homestead law. Hence the Department, by circular of August 7, 1903 (32 L. D., 206), provided that—

Hereafter, in allowing soldiers' additional homestead entries . . . the rule of approximation will be applied only when the entire additional right, originally due to the soldier . . . is offered as a basis for the entry. If part of the right is located upon a tract agreeing in area with such right surrendered or located, then this circular will not prevent the application of the rule of approximation as to the remainder, if offered in its entirety as a basis for the entry.

In the present case all the soldiers' additional rights tendered, excepting that derived from Jacob Bowers, for 4.79 acres, were assigned to the applicant subsequently to the date of the said circular. Only in respect to this right does the further provision in said circular become applicable, that—

If the right has been divided, and a part located and entry allowed therefor, before the date of this circular, the rule of approximation may be applied as to the outstanding and unused portion of such right, in the manner and to the extent above directed as to the additional right originally due.

The latter right being for so small an acreage the conclusion herein will not be affected by the exception noted.

Said instructions were followed in the case of Guy A. Eaton (32 L. D., 644), where the Department said:

The entire right originally due the soldier is offered as a basis for the entry applied for, but if . . . the soldier had still retained a portion of his right, the rule of approximation has never been applied to an entry made under said right, and the circular referred to . . . contemplates and permits one application of said rule to each original right of additional homestead entry under said statute.

In the case of John S. Morton (34 L. D., 441), it was held that—

Only one application of the rule of approximation is allowed to each original right of soldiers' additional entry, and where the right is divided the rule may be applied only in the location of one portion thereof.

The Department said therein:

It thus not appearing that the rule has been heretofore invoked in connection with this soldiers' additional right, and since the present application exhausts the right it is believed that the rule of approximation may properly be applied herein.

Thus while, as said in the case of Ole B. Olsen (33 L. D., 225), "where a number of such fractional portions of rights have been

assigned to the same person, he is entitled to enter an amount of public land equal to the aggregate amount of all such fractions owned by him," it is entirely clear from the foregoing that the applicant herein may not, by combining six fractional rights in two portions of 20.01 and 20.03 acres respectively, have two applications of the rule of approximation so as to permit him to purchase 39.60 acres upon a right of .04 acres. In this manner any and all soldiers' additional rights could be made the basis of purchase of many times 160 acres instead of a base limited to filling out the one original homestead right. To state the proposition is to refute it. And if it were shown herein that there has been no previous application of the rule of approximation in the case of any of these six rights it must further be shown that the proportionate addition would not in any of these cases render the excess over 160 acres greater than the present deficiency (see the case of *Whitcher v. Southern Pacific R. R. Co.*, 3 L. D., 459), and still further that the present application tenders the entire remaining right of each soldier named and exhausts the same.

The Department is clearly of the opinion that the application was properly rejected. Authority is not found, however, for the allowance thereof in part over the objection and against the desire of the applicant. No adverse right appearing there is no reason why he should not have opportunity to furnish another and appropriate base for all the land embraced in his application and improved by him. The case is therefore remanded with instructions to notify the claimant that if within thirty days after notice he shall furnish a valid and sufficient base for the allowance of a soldiers' additional homestead entry for the land in question, such entry will be allowed if no adverse right has then intervened. Should the applicant fail to furnish such valid and sufficient base in support of his application the same will be rejected and the papers returned, the land in question thus being thrown open to entry by the first legal applicant.

As thus modified, your said decision is hereby affirmed.

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WALLACE *v.* CLARK.

Petition for review and reconsideration of departmental decision of June 24, 1907, 35 L. D., 622, denied by First Assistant Secretary Pierce, March 13, 1908.

OKLAHOMA LANDS—PASTURE RESERVE—EXTENSION OF TIME FOR  
PAYMENTS.

## INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., March 19, 1908.*

REGISTER AND RECEIVER,  
*Lawton, Oklahoma.*

SIRS: You are advised that on March 11, 1908, an act [Public — No. 49] to extend the time of payments on lands sold under the acts of June 5, 1906, and June 28, 1906, was approved by the President, a copy of which is herewith enclosed.

You will note the fact that certain additional payments are required as a condition precedent to the extension of time in each case as follows: Before an extension of time is granted for payments required by the act of June 5, 1906, the entryman must pay into your office four per centum on the total amount of his deferred payments, and before an extension of time is granted on the payments required by the act of June 28, 1906, the purchaser must pay into your office five per centum on the total amount of his deferred payments. [See explanatory telegram, p. 311.] You are directed to issue receipts to the entrymen for the amounts so paid and thereafter dispose of the money so received, and account for the payments and forward duplicates of the receipts in the same manner in which you account for and dispose of the payment of annual installments required under said acts.

In cases where the first annual installments required by said acts remain unpaid after the expiration of one year from the date of the entry, you will notify the entryman that unless he, within sixty days from the date of such notice, either pays such installment or secures an extension of time by making the additional payment required by the act of March 11, 1908, his entry will be canceled and the payments theretofore made will be forfeited.

The act of March 11, 1908, also provides as follows:

That all persons or their legal assignees whose applications to purchase any of the pasture lands mentioned in the act of June twenty-eight, nineteen hundred and six (and whose applications were rejected because such persons were sublessees), shall have the right to purchase under the provisions of this act the lands so originally applied for by them.

You are, therefore, directed to notify all persons whose applications to purchase under the act of June 28, 1906, were rejected because they were sub-lessees, and any known legal assignees of such persons, that they will be permitted to purchase the lands covered by their sub-leases, or assignments, at the appraised value thereof heretofore fixed

under the act of June 28, 1906, at any time within sixty days after the date of such notice, in the same manner and subject to the same conditions under which the original lessees were entitled to purchase under said act of June 28, 1906. Such purchases will be reported and all moneys received thereunder will be disposed of by you in the same manner pursued under sales made under said act.

Very respectfully,

FRED DENNETT, *Commissioner.*

Approved:

JAMES RUDOLPH GARFIELD,  
*Secretary.*

OKLAHOMA PASTURE RESERVE LANDS—EXTENSION OF TIME FOR  
PAYMENT.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., April 6, 1908.*

REGISTER AND RECEIVER,

*Lawton, Oklahoma:*

As condition precedent extension time on payments for pasture lands under act March eleventh, nineteen hundred eight, you will require only payment of interest on installments due. Modify notices to entrymen accordingly.

DENNETT, *Commissioner.*

Approved:

GARFIELD, *Secretary.*

SOLDIERS' ADDITIONAL—REMARIED WIDOW—SECTION 2307, R. S.

HENRY S. KLINE.

Where the widow of a soldier made homestead entry for less than 160 acres and remarried prior to the enactment of the Revised Statutes and remained a married woman at that date and until her death, she was never in her lifetime entitled to make an additional entry under section 2307 of the Revised Statutes, and no such right therefore exists in her estate after her death.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(G. W. W.) *Land Office, March 19, 1908.* (P. E. W.)

Henry S. Kline has appealed to the Department from your office decision of January 14, 1908, holding for rejection his substituted

application as assignee of Edmond Opdyke, administrator of the estate of Elizabeth Opdyke Nevill, to enter, under section 2306 of the Revised Statutes, the NE.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 34, T. 150 N., R. 76 W., Devils Lake, North Dakota, based on the military service of Samuel Opdyke and the homestead entry, No. 1284, made by his widow, the said Elizabeth Opdyke Nevill, at Boonville, Missouri, September 9, 1865, for forty acres of land. Rejection was upon the ground that no additional right existed.

The admitted facts in the case are that said Samuel Opdyke rendered the requisite military service and died in the service, January 23, 1863, without having made a homestead entry; that his widow after making said homestead entry No. 1284 in her own right, was remarried on November 4, 1866, to James Nevill and remained his wife until her death on July 23, 1894. Dying intestate, her estate was administered upon by said Edmond Opdyke, who upon order of the proper court made sale of the additional right sought to be asserted herein, as an asset of her estate. Sale thereof to C. W. Journey was by said court approved on November 30, 1901.

It is contended in the appeal that, having made said homestead entry No. 1284 while the widow of the soldier, the said Elizabeth Opdyke thereby, and upon the military service of her deceased husband, became entitled to an additional homestead right of 120 acres, and appellant relies upon the cases of Homer E. Brayton (31 L. D., 443) and Roy McDonald, A. L. Clark Lumber Co., Transferee (36 L. D., 205). In the former it was held:

The widow of a soldier who made homestead entry in her own right, prior to the adoption of the Revised Statutes, for less than 160 acres of land, is, by virtue of the provisions of sections 2306 and 2307 of such statutes, entitled to an additional homestead right, and if she fails to exercise such right it becomes upon her death an asset of her estate, subject to distribution as other personal property.

Upon authority of the latter case it is urged that, the applicant having purchased the right in question relying upon the foregoing decision, the same having the effect of law, "entries made and applications filed in compliance with a decision in force at the time should be acted upon in accordance with the said decision."

If a soldiers' additional homestead right ever existed in favor of the decedent, whose administrator made the assignment upon which the present application is based, that right was an asset of her estate. See the case of Inkerman Helmer (34 L. D., 341).

But upon careful examination of the act and all the departmental decisions thereunder it must be held that said decedent never became seized of an additional right of entry. In the case of John M. Maher (34 L. D., 342, 343), distinguishing the unreported case of Robert E. Sloan, assignee of Sarah N. E. Pruitt, decided upon appeal June 29,

1904, and upon motion for review November 22, 1904, the Department said:

Upon motion for review of its said decision of June 29, 1904, the Department in its unreported decision of November 22, 1904, said:

"Upon further and more mature consideration of the questions involved in this case, this Department is of the opinion that Mrs. Pruitt never became vested with a right of additional entry. Said statute confers the right upon the widow upon the express condition *that she be unmarried*. At the time of its passage, Mrs. Pruitt was not unmarried. . . . Therefore she never became seized of an additional right of entry and hence she conveyed no such right by her assignment. For this reason the motion for review is denied."

The said case therefore differs and must be distinguished from the present case on the vital point on which the Department based its denial of a review, for herein it is conceded that, *being at the time unmarried*, the widow of the soldier became seized of such additional right by and upon the enactment of the legislation which conferred it.

Having thus found that the right once existed in the soldier's widow, the Department in that case, quoting the said case of Homer E. Brayton, *supra*, upon which applicant relies herein, held that such right was not destroyed by her remarriage or death and that "upon her failure to exercise it during her life, it becomes an asset of her estate."

The cases cited and all other cases touching the existence of such additional right in favor of the widow of a soldier hold in effect that it is only in case such widow was unmarried at date of the legislation conferring the right, that she was vested therewith. No case is found which expressly or impliedly recognizes such right as existing or arising in favor of a soldier's widow who was not unmarried at date of the act which bestowed it. The reason is that it was a compensatory gift to her as the relict and representative of the soldier, and in recognition of his military service. If she were remarried that sole reason for bestowing the right upon her no longer existed.

Thus the Department said in the case of John C. Mullery *et al.* (34 L. D., 333, 336-7):

The contingency of the death of the soldier whose services had earned such compensatory gift and property right . . . is recognized and provided for in the said section 2307, which necessarily includes section 2306 with section 2304. Under said section the said Harriet James became "entitled to all the benefits enumerated in this chapter" as the widow of said John James and not otherwise, thus recognizing and emphasizing the compensatory and existing property right as earned by the soldier and extended to other persons only as they stood near to and represented him.

So too in the case of John S. Maginnis (32 L. D., 14), the Department said:

Section 2307 of the Revised Statutes allows the widow of a deceased soldier, who would have been entitled to the benefits of section 2304, all the benefits enumerated in that chapter, the right of additional entry being one of the benefits, but this is allowed her on the express condition that she be unmarried.

In the present case the widow remarried prior to the passage of the act and was married at its date and until her death. The right therefore never existed in her favor and the administrator of her estate could not assign that which was never *in esse*. Neither could the assignee acquire any right which may be sustained under the rule laid down in the case of Roy McDonald, *supra*.

Your said decision is accordingly hereby affirmed.

RESERVATION—ADMINISTRATIVE SITE IN CONNECTION WITH FOREST  
RESERVE—ACT OF MARCH 4, 1907.

INSTRUCTIONS.

The prohibition in the act of March 4, 1907, against the creation or enlargement of forest reserves within certain States except by act of Congress, in no wise affects the right of the executive department, in the exercise of the general power to reserve portions of the public domain for public uses, to set apart a tract of land for use in connection with the administration and protection of forest reserves heretofore created.

*Secretary Garfield to the Commissioner of the General Land Office,*  
(G. W. W.) *March 20, 1908.* (W. C. P.)

The Department is in receipt of your office letter of February 14, 1908, relative to the request of the Department of Agriculture that the S.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$ , Sec. 11, T. 32 S., R. 68 W., 6th P. M., Colorado, be withdrawn for use as an administrative site by the Forest Service.

In this letter attention is called to the provision in the act of March 4, 1907 (34 Stat., 1256, 1271), reading as follows:

That hereafter no forest reserve shall be created, nor shall any additions be made to one heretofore created within the limits of the States of Oregon, Washington, Idaho, Montana, Colorado, or Wyoming, except by act of Congress.

The opinion is expressed that, "Whilst such a withdrawal may not be directly in contravention of the act of March 4, 1907, it certainly is indirectly," and that therefore the proposed order can not be legally made.

It is not proposed to create a forest reserve nor to make an addition to one. The real question is: Does the provision of law quoted above prohibit the setting apart of portions of the public lands for use by the Forest Service in the administration of reserves heretofore created?

The proposition that the executive department has authority to appropriate or set apart portions of the public land for public uses, is too well established to require argument in its support or citation of the long list of decisions sustaining it, beginning with *Wilcox v. Jackson* (13 Pet., 498).

That the particular use proposed to be made of these tracts is one authorized by law can not be successfully disputed. This was held in the opinion adopted by the Department October 24, 1906 (35 L. D., 262), and referred to by your office letter as well worthy of consideration. The necessity for creation of forest reserves and for their effectual administration is coming to be more thoroughly understood and appreciated, not only by those who have made a special study of the situation but by the public generally. As expressed by President Roosevelt: "The forest problem is in many ways the most vital internal problem of the United States." The Congress has recognized the vast importance of this matter and has not only authorized the creation of forest reserves but has made appropriations at each session for several years for administration of such reserves; and also for investigations and experiments along lines calculated to assist in promotion of the purposes for which they were created.

The proposed withdrawal is not to be made under laws authorizing the creation of forest reserves. The prohibition in the act of 1907, which was clearly directed against the exercise of authority given by those laws, should not be enlarged by construction to include prohibition against the exercise of the recognized power of the Executive to set apart portions of the public land for a public use—in this case for use in connection with the administration and protection of forest reserves heretofore created.

Upon consideration of the matter, the Department is convinced that the proposed withdrawal is not within the prohibition of the act of 1907; that it is within the general power of the executive department; and that the tracts mentioned are suitable and needed for the purpose to which it is proposed to devote them.

You will cause to be prepared the appropriate order to effect the withdrawal.

STATE SELECTION—FILING OF APPLICATION BY AGENT—AFFIDAVITS ACCOMPANYING SELECTION.

TAYLOR ET AL. *v.* STATE OF CALIFORNIA.

A State in making selection of lands at the time they are opened to entry may file its list through a personal representative; and although the required affidavits accompanying the same may have been executed prior to the time fixed for the opening, if they were executed within a reasonable time prior to the filing of the application, the facts therein recited should, in the absence of any showing to the contrary, be accepted as true at the date the list is presented.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(G. W. W.) *Land Office, March 20, 1908.* (E. O. P.)

Nora E. Taylor, William Forsyth, Mary L. Forward, homestead applicants, and Wilton C. Supan, Loria A. Wood, Estella L. Lcomis,

Arminto Marquis, Cora L. Cunningham, Thomas W. Cunningham, Frank C. Wilson, and Nellie J. Supan, timber-and-stone claimants, have appealed to the Department from your office decision of December 11, 1906, reversing the action of the local officers and directing that indemnity school land list (State Nos. 3803, 3804, 4603, 4604, 4605, 4606) presented on behalf of the State of California, October 31, 1906, be considered as filed at 10:09 o'clock a. m., of said day.

The land described in said list is situated in townships 29 and 30 N., R. 2 E., M. D. M., and townships 29 and 30 N., R. 3 E., M. D. M., Redding land district, California, and became subject to entry at 9 o'clock a. m., October 31, 1906.

The list was presented by one Pierce, whose number in the line formed prior to the hour of opening was 32. With the list he presented a letter from the State surveyor-general advising the local officers that said list would be presented by a special messenger, in conformity with the decision of the Department in the case of *State of California v. Koontz et al* (32 L. D., 648, 650). This letter did not designate the messenger referred to therein by name or in any manner identify Pierce as the person selected by the State to present the list. This appears to have been the principal reason for the action of the local officers in rejecting said list, they apparently being of opinion that unless the representative of the State was fully identified he was not a "proper person" within the meaning of the departmental decision above cited. Though the list in question is not with the present record, it would appear that some of the papers necessary to the perfection of said list were executed prior to the time the lands were open to entry, and this was also objected to by the local officers, and is urged by counsel on appeal here as a fatal defect.

Each of the homestead claimants allege prior settlement. As the only question now before the Department is the propriety of permitting the filing of the list presented under the circumstances recited, the superior right of such claimants based upon their alleged settlements can not be determined at this time. This matter can and must be settled in another proceeding if the action appealed from is sustained.

The fact that the list in question was prepared and some of the affidavits accompanying the same were executed prior to the opening of the land to entry affords no sufficient reason for rejecting the list. The cases cited by counsel wherein it is held that no claim can be initiated to land opened to entry at a specified time where the required affidavits in support of the entry are executed prior to the time fixed, are not controlling. In the case of a State making selection of land to satisfy its grant, the necessities of the case demand that the lists be prepared in advance, and if the affidavits required

are executed within a reasonable time prior to the filing of the application the facts therein recited should, in the absence of any showing to the contrary, be accepted as true at the date the list is presented. This in no manner tends to prejudice the rights of others, for the right of the State is not initiated by the mere preparation of its list, but only by the filing thereof and if at that time any reason exists for denying the right, the list may be successfully attacked upon that ground, notwithstanding facts recited in any affidavits previously prepared and which were true at the date of the execution of such affidavit. The State in relying upon such evidence of its right assumes the risk of attack, but the rights of adverse claimants are in no manner prejudiced on account of the acceptance for filing of its list based upon such showing.

It is urged also that by permitting the State to file its list through a personal representative an undue advantage is given it over individuals seeking to make entry at the same time. The advantage, however, rests upon the extent of the right to which the State may be entitled and not to the manner of its exercise. The fact that the State may secure a large area affords no reason for requiring it to observe a different procedure in the initiation of its claim. The extent of the right in all cases is measured by the statute and with this the Department has nothing to do, and in the administration of the law must put all claimants upon an equal footing, so far as this equality is affected by rules of procedure.

The fact that the person who actually presented said list was not named in the letter purporting to authorize him to act as the agent of the State for that purpose is immaterial. The fact that he did so act and that the State has relied upon his act as the basis of its claim is sufficient of itself to establish the agency. It is alleged in an affidavit filed by Birmingham and Wilson, timber-and-stone applicants, that Pierce could not have been the person selected by the State to file said list and it was intimated that it was delivered to him after he obtained his place in line. If the list were directly attacked because fraudulently presented and this fact established it might afford a sufficient reason for rejecting it, but that question is not now before the Department. That can only be determined after a full hearing had upon proper application of the parties setting up the charge.

The action of your office is hereby affirmed. The State's list will be treated as filed at the time of its presentation. Unless the homestead applicants are able to establish, in the usual manner, a superior right by virtue of prior settlement, their rights are subject to whatever rights the State may have gained by the filing of its list. None of the applications transmitted with the appeal appear to have been finally acted upon by the local officers, and the same will be returned to them for proper disposition.

## WITHDRAWN COAL LANDS—NOTICE OF CLAIM—CLASSIFICATION.

## INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
Washington, D. C., March 21, 1908.

REGISTERS AND RECEIVERS,  
*United States Land Offices.*

SIRS: Lands noted on the tract books as "coal lands" under direction of circular dated April 24, 1907 (35 L. D., 681), are not subject to disposal under the coal land laws prior to their restoration to such entry by the filing in your office of classification maps and lists of such lands, except as provided in circular of May 20, 1907 (35 L. D., 683); but it is hereby directed that where a qualified person or association of persons has gone upon such lands since their withdrawal and disclosed coal deposits and opened and improved a coal mine or mines thereon, such persons or association of persons will be permitted to file in the proper land office a *notice of claim* which notice should briefly give the address of the claimant; the date of actual possession and commencement of improvements; the date upon which the mine was opened and improved; the character, value, and extent of such improvements; the description by legal sub-divisions of the land claimed, which should not exceed the maximum area which may be entered and purchased under the coal land laws; and a declaration of intention to claim said tract upon its restoration under and conformably to such coal land laws and regulations and at such price and upon such terms and conditions as may be in force at the time of said restoration.

Upon the filing of any such *notice of claim* you will make pencil notations thereof upon the plats and tract books of your office and when classification maps and lists embracing such lands are filed in your office, as provided for in the circular of April 24, 1907 (35 L. D., 681), you will notify such claimant by registered mail, at the address given in his *notice of claim*, of the restoration, price, terms, and conditions upon which he may file upon, purchase and enter said lands, or the coal deposits therein, allowing him sixty days from the date of such notice within which to assert *formal claim* thereto under the coal land laws, advising him that upon failure to avail himself of the privilege thus extended the lands and deposits therein will be disposed of without regard to his prior *notice of claim* filed hereunder.

Very respectfully,

FRED DENNETT, *Commissioner.*

Approved:

JAMES RUDOLPH GARFIELD,  
*Secretary.*

## COAL LAND—PREFERENCE RIGHT.

## CHARLES S. MORRISON (ON REVIEW).

The coal-land law contemplates a total period of substantially fourteen months during which a claimant, in the actual possession of a tract, who has opened and improved a mine or mines of coal thereon, has a preferred right to purchase; for the first sixty days, absolutely; for the remaining one-year period, conditioned upon the filing of a declaratory statement.

Notwithstanding a preference-right claimant's failure to file his declaratory statement within the time prescribed by the statute, in the absence of an intervening adverse right in, or disposition of, the land involved, the subsequent presentation of the declaratory statement, within the ensuing year, will thereupon afford him the same security, but not beyond the period which, he would have enjoyed had he filed it within the time so prescribed. Departmental decision herein of October 21, 1907, 36 L. D., 126, vacated in so far as in conflict.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(G. W. W.) *Land Office, March 24, 1908.* (F. H. B.)

Charles S. Morrison has filed motion for review of departmental decision of October 21, 1907 (36 L. D., 126), in the case entitled as above, to which end, the case being *ex parte*, a formal entertainment of the motion is unnecessary. It is accompanied by briefs of counsel, which have been amplified by an oral argument.

For a more particular statement of the case and of the reasons upon which the result complained of was reached, reference may be had to the above-cited report of the decision; but it will be convenient to repeat that the claimant, Morrison, filed his declaratory statement, under the coal-land laws (Secs. 2347-2352, Revised Statutes), more than sixty days after the date of his claimed initiation of a preference right of entry of the tract involved, and that subsequent to the presentation of his declaratory statement, but prior to his application to purchase, the land was included within the limits of a withdrawal by executive order. The concurring action of the local officers and your office, whereby his application to purchase was rejected in view of the withdrawal, was sustained by the Department, on the ground that the claimant had not, within the meaning of the amendatory executive order of January 15, 1907 (35 L. D., 395), "any right acquired in good faith under the coal-land laws and existent at the date of such withdrawal," it being held in that connection (syllabus) that—

Unless the declaratory statement is filed within the sixty-days period, in accordance with the statute and in which respect its provisions are mandatory, the preference right lapses and leaves nothing to be secured by a declaratory statement thereafter filed, notwithstanding no rights in others have intervened.

Primarily, it is urged that the decision is counter to the decisions, regulations, and practice which obtained at the time the declaratory

statement was filed, and is given a retroactive effect. Upon the merits the contention is reiterated, that the provisions of the coal-land laws as to the time within which the declaratory statement is to be filed are not mandatory, but merely directory, and that a declaratory statement filed after the expiration of the sixty-days period, as in this case, but prior to the intervention of any action adverse to the claimant, should not and could not legally be disregarded.

To support this contention counsel cite the corresponding provisions of the former pre-emption law and the uniform interpretation thereof, following *Johnson v. Towsley* (13 Wall., 72, 90), to the effect that in the absence of an intervening settlement a failure to file the prescribed declaratory statement within the time limited was not prejudicial to the claimant's right.

The cited provisions of that law (now repealed), from the original act of 1841 and the amendatory act of 1843, afterward incorporated in the Revised Statutes, were contained in sections 2264 and 2265, which read as follows:

Sec. 2264. When any person settles or improves a tract of land subject at the time of settlement to private entry, and intends to purchase the same under the preceding provisions of this chapter, he shall, within thirty days after the date of such settlement, file with the register of the proper district a written statement, describing the land settled upon, and declaring his intention to claim the same under the pre-emption laws; and he shall, moreover, within twelve months after the date of such settlement, make the proof, affidavit, and payment hereinbefore required. If he fails to file such written statement, or to make such affidavit, proof, and payment within the several periods named above, the tract of land so settled and improved shall be subject to the entry of any other purchaser.

Sec. 2265. Every claimant under the preemption law for land not yet proclaimed for sale is required to make known his claim, in writing, to the register of the proper land office within three months from the time of the settlement, giving the designation of the tract and the time of settlement; otherwise his claim shall be forfeited and the tract awarded to the next settler, in the order of time, on the same tract of land, who has given such notice and otherwise complied with the conditions of the law.

The case of *Johnson v. Towsley*, *supra*, involved a settlement by the latter party upon unoffered land (subject, therefore, to the provisions carried into section 2265). He failed to file his declaratory statement within the prescribed period of three months after the initiation of his pre-emptive right, and until about eight months after settlement, but prior to the initiation of the claim of his adversary. Said the court, in part, upon that point:

If no other party has made a settlement or has given notice of such intention, then no one has been injured by the delay beyond three months, and if at any time after the three months, while the party is still in possession, he makes his declaration, and this is done before any one else has initiated a right of pre-emption by settlement or declaration, we can see no purpose in

forbidding him to make his declaration or in making it void when made. And we think that Congress intended to provide for the protection of the first settler by giving him three months to make his declaration, and for all other settlers by saying if this is not done within three months any one else who has settled on it within that time, or at any time before the first settler makes his declaration, shall have the better right. As Towsley's settlement and possession were continuous, and as his declaration was made before Johnson or any one else asserted claim to the land or made a settlement, we think his right was not barred by that section, under a sound construction of its meaning.

In *Emmerson v. Central Pacific Railroad Company* (3 L. D., 117) it was held that "the provision relating to offered land (Sec. 2264, R. S.) is so similar in language that the same construction must necessarily be given it." And in a long line of decisions, which it would serve no purpose to cite, that construction was consistently applied and followed.

Upon a careful review of the question, comparing the provision of the coal-land laws respecting the presentation of the declaratory statement, and the further provision that "upon failure to file the proper notice [declaratory statement], or to pay for the land within the required period, the same shall be subject to entry by any other qualified applicant," with the similar language of the corresponding provisions of the pre-emption law, the Department is constrained to yield to the contention that the same considerations should govern as to the conservation and duration of the preference right under the coal-land laws.

In consideration of the effort or expenditure involved in opening and improving a mine or mines of coal upon the tract in the possession of the claimant, the law contemplates a total period of fourteen months, substantially, during which his right to purchase is preferential, or exclusive; for the first sixty days, absolutely; for the remaining one-year period, conditioned upon the filing of declaratory statement. The office of the declaratory statement being to protect and preserve the previously acquired right for the definite term fixed by the statute, its absence exposes the land to other appropriation or disposition at any time after the initial period of sixty days; but upon the same considerations, and by the analogy of the preemption law, nothing else than the claimant's omission intervening, it would seem clear that the subsequent presentation of his declaratory statement should afford him the same security he would have enjoyed had he filed it within the time prescribed by the statute.

In the decision under review the Department cited the case of *McKibben v. Gable* (34 L. D., 178, 181), in which it was said that, as the office of the declaratory statement is merely to preserve and not to create the preference right, if the right does not exist the declaratory statement has no office to perform and is without force or effect for any purpose. That language was used, however, with reference

to the case in which no preference right of entry has been acquired at all; and the Department is persuaded that in such a case as the present it would have no room for application; that the provision with respect to the time within which the declaratory statement is to be filed is but directory after all; and that the tardy presentation of the declaratory statement is merely at the hazard of defeat in the interval.

This does not mean, however, and is not to be taken to mean, that the principle can be extended to an indefinite time after the expiration of the sixty-days period in any case; for the total period during which the acquired right may thus subsist, and be exercised as such, is definitely fixed by the statute. Section 2350 provides that "all persons claiming [preference rights of entry] under section twenty-three hundred and forty-eight shall be required to prove their respective rights and pay for the lands filed upon within one year from the time prescribed for filing their respective claims." In other words, the right which may thus be relied upon can not be carried beyond the period for which it would be inviolate under a declaratory statement filed in strict accordance with the terms of the statute and within which proof and payment must be made in the exercise of such a right, *i. e.*, one year after the expiration of the sixty-days period; not one year from a subsequent date on which the declaratory statement has been filed. A delay in the presentation of that statement can not operate to enlarge the right beyond that fixed by the statute and which can be enjoyed by filing within the time limited.

Something of a concession to the contention of counsel, "that there is a scientific distinction between the right created by opening and improving and working of coal lands under R. S., Sec. 2348, and the preference feature of that right," may perhaps be found in what is above held in the matter of the failure to file a declaratory statement within the time specified by the statute; but the Department is unable to concede, in that connection, that an executive withdrawal which would be effective if no preference right had been acquired would not be equally effective when that right is defeasible otherwise or has finally lapsed. It is true that the Department has on many occasions said, and as late as *Lehmer v. Carroll et al.* (on review, 34 L. D., 447), that the failure of a preference right claimant to file or purchase within the time limited would not operate to forfeit his right to purchase and enter thereafter notwithstanding, except in favor of some other qualified applicant. When those decisions were written, however, there had been no withdrawals to take into consideration; and what was thus said was not upon the ground that the claimant had secured an enduring equitable claim apart from the preference which he had acquired and lost, but upon the ground that under the law the way is equally open to purchase and entry without

a preference right, or without its assertion if acquired, and therefore after its termination, no other disposition intervening. At the same time the temporary withdrawals which have been made are expressly intended not to affect any right so acquired in good faith and existent at the date of withdrawal, which could not be divested by the action of a rival applicant.

By further affidavit, in connection with the motion for review, the claimant in this case has with more particularity alleged the opening and improvement of a mine upon the tract involved, and the disclosure of three distinct beds of coal therein, prior to the presentation of his declaratory statement. Having filed that statement prior to the date of the order of withdrawal involved in this case, and having applied to purchase within one year from the expiration of the period of sixty days from the initiation of his right, his proffered application to purchase should, in accordance with the foregoing, be accepted if all else be found to be regular.

The decision under review, in so far as it is contrary to what is above held, is vacated accordingly, the decision of your office from which the appeal was taken is reversed, and the record is returned for such further proceedings as may appropriately be had in the case.

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SETTLEMENT—ENTRY—CHIPPEWA INDIAN LANDS.

LARSON *v.* HANSEY.

In contemplation of that portion of the instructions of June 23, 1905, governing the opening of certain Chippewa lands, which forbids intending settlers and entrymen to go upon the lands prior to the hour of opening, presence upon a public road running through the lands is equivalent to presence upon the land, and one who in violation of the instructions makes settlement from such point of vantage immediately at the hour of opening is not entitled to assert a superior right by reason thereof as against another who made entry for the same tract one minute after the hour of opening.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(G. W. W.) *Land Office, March 25, 1908.* (E. O. P.)

January 7, 1908, the Department entertained motion for review of its unreported decision of August 28, 1907, affirming that of your office of March 8, 1907, dismissing the contest of Peter M. Larson against homestead entry of the SE.  $\frac{1}{4}$ , Sec. 8, T. 145 N., R. 31 W., Cass Lake land district, Minnesota, made by Charles J. Hansey. Service having been made as directed in the order entertaining said motion and all parties having been fully heard, the case is now before the Department for final disposition.

Preliminary to a consideration of the questions of law involved, a brief statement of the facts, about which there is no dispute, will more clearly define the positions of the respective parties to the controversy.

The tract described is a part of the Chippewa lands opened to settlement and entry at 9 o'clock A. M., August 15, 1905, under the act of January 14, 1889 (25 Stat., 642), as amended by the act of June 27, 1902 (32 Stat., 400). Hansey's entry was made one minute after the hour of opening. Larson's contest is grounded upon a claim of prior settlement.

Between section 17 and section 8 is a public road, four rods in width, half of which is laid out across the south side of section 8. Larson, with his family, had taken a position on this road just south of the north line thereof and immediately opposite the land in controversy, and promptly at nine o'clock A. M. of the day of opening, stepped across the road line and posted notice of his settlement claim; then moved about six rods northward and commenced digging a well. He has since resided continuously on the land. It is not disputed that that portion of the road referred to is within the body of the land opened to settlement and entry under the instructions of June 23, 1905, which read in part as follows:

All persons who go upon any of the lands . . . with a view to settlement and entry . . . will be considered and dealt with as trespassers and preference will be given the prior legal applicant, notwithstanding such unlawful settlement.

The action heretofore taken is based upon the finding that Larson's presence on the road at the place described constituted an entry upon the land in violation of the terms of said circular, because of which he was not entitled to assert a superior right by virtue of his alleged settlement as against Hansey, the legal applicant.

It is contended by counsel for movant that the highway south of said section 8 was not a part of the public land covered by the departmental instructions, declaring that a settlement made upon the land opened to entry August 15, 1905, would not be recognized as the basis for a preferred right of entry. The question thus raised is no longer an open one. There being no specific exceptance made of the land covered by the public road, the rule announced in the case of *Smith v. Townsend* (148 U. S., 490, 498-499), wherein a similar prohibition was construed and applied to a similar state of facts, is controlling. The court held:

Construing the statutes in the light of these observations, it will be noticed, first, that the provisions apply to the land collectively. The prohibition is against entering upon "any part of said lands," meaning thereby the whole body of lands, and in this body was included the right of way of the railroad company. . . . Doubtless whoever obtained title from the Government to

any quarter section of land through which ran this right of way would acquire a fee to the whole tract subject to the easement of the company, and if ever the use to this right of way was abandoned by the railroad company, the easement would cease, and the full title to that right of way would vest in the patentee of the land. But whether this be so or not, it is enough that in the cession, in the acts of Congress, and in the proclamation of the President, the land was dealt with as an entirety, with certain metes and bounds, and it is that body of lands, thus bounded, which all parties were forbidden to enter upon who desired thereafter to enter any portion as a homestead.

Another contention of counsel is that the refusal of the Department to recognize a settlement initiated in violation of its instructions as conferring a superior right of entry upon the settler is not authorized by the law providing for the opening of the land to entry and settlement. From this it is argued that the instructions may, in this particular, be disregarded for the purpose of gaining an advantage the Department has declared it would not sanction. This contention is based primarily upon the theory that by the terms of said instructions a penalty, amounting to the forfeiture of a statutory right, was imposed. The statutory right, the assertion of which the instructions is alleged to have denied, is the right to go upon the land opened to entry for the purpose of making settlement thereon prior to the time fixed. To this view the Department can not accede.

Section 5 of the act of June 27, 1902, *supra*, after providing for the classification as agricultural land, the land from which the timber had been removed, provides further:

As soon as practicable after the passage of this act the Secretary of the Interior shall open to homestead *settlement*, as herein provided, the lands on all the reservations, or portions of reservations, which have been ceded to the United States by the Chippewa Indians in Minnesota, including the four reservations last aforesaid, which have been examined and found to be agricultural lands, and shall immediately proceed to have examined, as herein provided, the remaining lands, and shall without delay open to homestead settlement those found to be agricultural lands.

There can be no doubt from the language used that the time for opening the land to *settlement* was to be fixed by the Secretary of the Interior. Had Congress intended to permit settlement upon the land at any time there would have been no necessity for such legislation. Congress, when it conferred upon the Secretary of the Interior the authority to prescribe the time settlement might be made, clearly intended that he should exercise authority sufficient to make his action effective, otherwise the mere fixing of the time would have amounted to nothing.

No forfeiture is declared by the statute for entry upon the land prior to the time fixed in the sense that any right is lost on account thereof. The same is true with respect to the departmental instructions, which provide only that a settlement depending for its validity upon an act performed in direct violation of said instructions

would not be recognized to defeat the right of a qualified applicant initiated in compliance with the law and the regulations. This holding is not in conflict with departmental decision rendered in the case of Madella O. Wilson (17 L. D., 153), cited and relied upon by counsel to uphold his contention that the Secretary of the Interior can not, in the absence of statutory authority, direct the forfeiture of a legal right.

In the present instance the premature entry of Larson upon the land lost him nothing so far as the future exercise of his homestead right was concerned, nor was he thereafter prevented from making a valid settlement on the land, provided only such settlement was not promoted by nor dependent upon his premature entry in violation of the terms of the circular, and prejudicial to the rights of one who had complied with the terms thereof.

It is set up in argument that Larson might have entered upon the tract in controversy without going upon any of the land to which the instructions referred, had he believed he was not permitted to enter in the manner he did. Conceding that this allegation could be established, yet the fact remains that the settlement relied upon to defeat the entry of Hansey was accomplished by a violation of the instructions and he can not now be heard to say that it could have been made in a different and lawful manner to excuse his wrongful act.

After considering the matter presented in support of the contention that Larson, by reason of his settlement, gained a right of entry superior to that of Hansey, the Department is convinced that the regulations issued for the guidance of prospective entrymen were fully warranted, and that its prior decision rendered in accordance therewith is correct.

The motion for review is accordingly hereby denied.

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WILLIAMS *v.* STATE OF IDAHO.

Motion for review of departmental decision of July 17, 1907, 36 L. D., 20, denied by First Assistant Secretary Pierce March 26, 1908.

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RAILROAD GRANT—RECOGNITION OF SUCCESSOR TO LAND-GRANT RIGHTS.

GREAT NORTHERN RAILWAY COMPANY.

The Great Northern Railway Company recognized as the successor in interest to the land-grant rights of the St. Paul, Minneapolis and Manitoba Railway Company, and directions given that patents for all earned lands the ultimate title to which remains in the United States shall issue to that company.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(G. W. W.) *Land Office, March 26, 1908.* (G. B. G.)

Your office letter of March 6, 1908, transmits for consideration and instructions an application on behalf of the Great Northern Railway Company that patents be issued to it for lands of the grant on behalf of the St. Paul, Minneapolis and Manitoba Railway Company.

In support of this application there is submitted certified copy of laws constituting the charter of the Great Northern railway, formerly known as the Minneapolis and St. Cloud Railroad Company, and certified copy of deed of conveyance executed October 11, 1907, by the St. Paul, Minneapolis and Manitoba Railway Company of all its rights of property to the said Great Northern Railway Company, among which properties is specified "various lands granted to it by the United States of America and by the State of Minnesota to aid in the construction of the railroad hereinbefore described; and of sundry contracts for the sale of said lands, entered into by divers persons and corporations, upon which contracts sums of money are due and payable," and generally, among other things, "all lands granted to the party of the first part by the United States or by the State of Minnesota or by any other municipality or government, to aid in the construction of the said railways hereinbefore described; together with all contracts for the sale thereof and the moneys accrued and to accrue thereunder."

The deed appears to be in form and execution sufficient to pass title of the properties described therein to the Great Northern Railway Company, and the only question for consideration of this Department is one of administration.

In the case of the Atlantic and Pacific Railroad Company (12 L. D., 116), it was held as to lands granted to that company, that patents must issue in the name of said company for lands that were earned by the construction of its road irrespective of the fact that a portion of the road was at the date of the decision owned by another company, although it appeared that the list when approved would in law be for the benefit of such other company.

In the case of Northern Pacific Railroad Company (24 L. D., 138), it was held that lands granted to the Northern Pacific Railroad Company should be patented to that company and not to a grantee thereof, it being said that obvious reasons existed for such disposal of the matter, one of which was specified as the onerous duty of examining the sufficiency of the transfers made from time to time by the railroad corporations of the country or by settlers upon such land after a right of disposition thereof should have accrued, thereby presenting a mass of quasi-judicial work which would seriously embarrass this Department in the orderly administration of its affairs.

In the case of the Union Pacific Railroad Company (29 L. D., 26), your office was directed to thereafter issue to said company, as the successor in interest of the Union Pacific Railway Company, patents for any land which the latter company was entitled to by virtue of its grants but of which it had been divested under sales and conveyances made in pursuance of decrees rendered in causes pending in the Circuit Court of the United States in the districts of Nebraska, Colorado, Wyoming, and Utah.

In the case of the Union Pacific Land Company (29 L. D., 94), your office was directed to thereafter issue patents to said land company, as the successor in interest to the Leavenworth, Pawnee Western Railroad Company, the Union Pacific Railway Company, and the Kansas Pacific Railway Company, claimed by the land company under decree of the United States Circuit Court for the district of Kansas.

In the case of Northern Pacific Railway Company (29 L. D., 387), your office was directed to recognize the Northern Pacific Railway Company as the successor in interest of the Northern Pacific Railroad Company in the approval of lists of lands on account of the grant to the latter company, and in the case of *Jones v. Same Company* (34 L. D., 105), it was held that the Northern Pacific Railway Company is the lawful successor in interest to the land-grant rights of the Northern Pacific Railroad Company, and, upon the opinions of the Attorney-General of the United States, February 6, 1897, and April 12, 1906, it was further held that applications for patents by the railway company would be acted upon by this Department upon the same considerations which should govern in case there had been no foreclosure and the application had been made by the old company.

In view of the policy controlling administrative procedure, as evidenced by these later decisions and instructions, there would seem to be no reason why the Great Northern Railway Company should not be recognized as the successor in interest to the land-grant rights of the St. Paul, Minneapolis and Manitoba Railway Company, and that all earned lands the ultimate title to which remains in the United States should be patented to the successor company.

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NORTHERN PACIFIC GRANT—INDEMNITY—JOINT RESOLUTION OF  
MAY 31, 1870.

NORTHERN PACIFIC RY. Co.

The measure of the grant made by the joint resolution of May 31, 1870, is not the *whole* of the unsatisfied loss within the limits of the grant of July 2, 1864, but sufficient lands "to make up such deficiency . . . to the amount of lands that have been granted, sold, reserved, occupied by homestead settlers, preempted or otherwise disposed of *subsequent* to the passage of the act of July 2, 1864."

Where the company has used losses to support selections in the first indemnity belt that if free might be used to support selections in the second indemnity belt, substitution of other proper bases for the first indemnity selections may be permitted with a view to releasing the bases originally assigned therefor for use as bases in making second indemnity selections.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(G. W. W.) *Land Office, March 26, 1908.* (G. B. G.)

This is a motion for re-review of departmental decision of October 30, 1902, affirming your office decision of August 13, 1901, which held for cancellation a certain list of indemnity selections filed by the Northern Pacific Railroad Company October 17, 1883, aggregating 9757.84 acres of land lying within the Duluth land district, Minnesota.

These tracts are within what is known as the second indemnity belt of the Northern Pacific land grant created by the joint resolution of May 31, 1870, and the action of the Department upon the list of selections in question was upon the ground that the bases assigned therefor were invalid, they having been reserved by withdrawal on account of the grant of May 5, 1864 (13 Stat., 64), prior to the passage of the act of July 2, 1864 (13 Stat., 365), making the original grant to the Northern Pacific Railroad Company. A motion for review of this decision was filed but suspended to await judicial expression upon the correctness of the holding of the Department in the case of Northern Pacific Railroad Co. v. Rooney (29 L. D., 242; 30 L. D., 403), which involved the same question then presented by this record and upon which the decision of the Department herein was based.

Pending this suspension and on January 14, 1907, the Supreme Court of the United States in the case of Northern Lumber Co. v. O'Brien (204 U. S., 190), sustained the position of the Department in this matter, holding in substance and effect that said grant of July 2, 1864, did not include lands occupying the status of those assigned for the bases of the selections here involved.

Following this decision and on January 29, 1907, the Department denied the company's motion for review upon the ground that the bases assigned having been lost to the grant by reason of reservation prior to July 2, 1864, are not available for second indemnity selections. It is now urged in support of the motion for rereview that the grant of indemnity made by the joint resolution of 1870 is one of quantity, the measure thereof being the difference between the acreage of loss to the grant on account of exceptions found in the act of 1864 and the sufficiency of available acreage within the indemnity limits established under that grant, and that it is not therefore necessary to specify a loss in place limits occurring *after* July

2, 1864, to support a selection of second indemnity lands. Tentatively considering this contention the Department July 2, 1907, expressed the opinion that the company should be afforded such relief, either by granting its full contention "and recognizing selections within the second indemnity belt to the amount of disposals after the passage of the act of July 2, 1864, upon the designation of any unused loss to the grant without regard to the date disposition was made of the lands so specified," or by permitting the substitution of other bases for those heretofore used in the first indemnity belt and available as bases for second indemnity selections.

The joint resolution of May 31, 1870 (16 Stat., 378, 379), provides: in the event of there not being in any State or Territory in which said main line or branch may be located, at the time of the final location thereof, the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter, then said company shall be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such State or Territory, within ten miles on each side of said road, beyond the limits prescribed in said charter, as will make up such deficiency, on said main line or branch, except mineral and other lands as excepted in the charter of said company of eighteen hundred and sixty-four, to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of subsequent to the passage of the act of July two, eighteen hundred and sixty-four.

Your office, responding to the suggestions above referred to, September 5, 1907, strongly recommends that the main contention of the company be denied, but advises that there is no insurmountable objection to the allowance of substitution of bases, but submits that—

After the cancellation of the second indemnity selections, however, by this office, under the decisions of the Department in January last, based upon the Supreme Court decision in the case of the Northern Lumber Co. v. O'Brien (Jan. 14, 1907), and prior to the suspension of April 1, 1907, of said departmental decisions a number of homestead and timber and stone entries were admitted and since they were made while the land was open to entry, protection should be afforded them and the company's selections of those lands should remain canceled and I so recommend.

The main contention of the company is broader than it is stated to be in said departmental letter of July 2, 1907, it being apparently urged that even under the present plan of adjustment, which requires specific designation of losses in support of an indemnity selection, the joint resolution of May 31, 1870, makes a grant of such *quantity* of lands as will make up the "deficiency on said main line or branch," so that the company may receive "the amount of lands per mile granted by Congress to said company within the limits prescribed by its charter" (being the act of 1864). This contention can not be sustained. It may be admitted for the sake of the argument that the joint resolu-

tion of May 31, 1870, makes a grant of quantity, but it does not follow and is not true that the measure of the grant is represented by the *whole* of the unsatisfied loss within the limits of the grant of 1864. That such was not the intention of Congress is clearly expressed in the joint resolution itself the measure of the grant being "the amount of lands that have been granted, sold, reserved, occupied by homestead settlers, preempted or otherwise disposed of *subsequent* to the passage of the act of July 2, 1864." This language does not include, but on the contrary clearly excludes losses not occurring after July 2, 1864, and to admit the company's contention would do violence to this very specific and important limitation.

It may be that under a scheme of adjustment that would not require a designation of losses tract for tract the sum total of the loss to the grant after July 2, 1864, might be taken as the measure of the grant and selections allowed within the second indemnity belt until such loss is satisfied. But under existing conditions this is impracticable, for the reason that the adjustment has proceeded for years under regulations which require a designation of loss tract for tract, and it is said that many losses, which were available for bases for indemnity selections within the second indemnity limits have been satisfied by selections within the first indemnity limits, and the confusion that would necessarily arise from changing the plan of adjustment at this late day constrains the Department to reject the company's suggestion in its entirety.

There is, however, merit in the argument that the company having used losses in support of selections in first indemnity limits, which if free might be used in support of selections in second indemnity limits, and there being other unsatisfied losses available for first indemnity selections, the Department should release those bases formerly used upon the substitution of other unsatisfied bases, and permit the released bases to be used in support of the second indemnity selections here in question. This will be done subject to the limitations suggested by your office letter of September 5, 1907, above quoted. All rights initiated upon these lands under any of the public land laws at a time when they were freed from the pending selections and subject to appropriation, will be protected, but otherwise the company will be permitted to proffer substitute bases for the consideration of your office.

With this modification the departmental decision of October 30, 1902, will stand.

## HOMESTEAD ENTRY WITHIN IRRIGATION PROJECT—DEATH OF ENTRYMAN—SALE OF RIGHT FOR BENEFIT OF MINOR HEIR.

## HEIRS OF FREDERICK C. DE LONG.

Upon the death of a homesteader having an entry within an irrigation project, leaving no widow, and only minor heirs, his right may, under section 2292 of the Revised Statutes, be sold for the benefit of such heirs.

If in such case the land has been subdivided into farm units, the purchaser takes title to the particular unit to which the entry has been limited; but if subdivision has not been made he will acquire an interest in only the land which would have been allotted to the entryman as his farm unit; in either case taking subject to the payment of the charges authorized by the reclamation act and regulations thereunder and free from all requirements as to residence and cultivation.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(G. W. W.) *Land Office, March 26, 1908.* (E. O. P.)

October 28, 1907, you referred to the Department the request of one Frank J. Smith for authority to sell for the benefit of the minor heir of a deceased entryman, the S.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 2, T. 4 N., R. 5 W., B. M., Boise land district, Idaho, and asked to be advised in the premises.

The tract in question was withdrawn from entry December 22, 1903, under the provisions of the act of June 17, 1902 (32 Stat., 388), except under the provisions of the homestead law as modified by the terms of said act. Entry thereof was made by Frederick C. De Long, May 2, 1905, who thereafter appears to have fully complied with the law up to the time of his death, January 29, 1907. The land at that time had not been subdivided into farm units. The question presented concerns the application of section 2292 of the Revised Statutes to entries made under the terms and subject to the conditions of the act of June 17, 1902, *supra*.

Unless the conditions which burden an entry made under the act of June 17, 1902, *supra*, effect such a change in the general homestead law as to render the provisions of said section 2292 inconsistent or incompatible therewith, said section should be given effect, as there is no direct language in the act of June 17, 1902, *supra*, purporting to repeal said section.

Entry of land withdrawn in connection with an irrigation project is made subject to all the "provisions, limitations, charges, terms, and conditions" of said act. Where at the time of entry the area which may be embraced in a single entry has not been ascertained, the extent of the right thereby initiated, measured by the area to which, upon final perfection thereof, it may attach, is indeterminate, though the *quality* of the right when perfected is in no manner affected by this limitation, but remains the same as that acquired under the general homestead law. Neither does the fact that the land to which title

may be acquired is subject to its proportionate share of the charges incident to the construction of the works, etc., alter the nature of the completed right.

Section 2292 of the Revised Statutes authorizes a sale by the persons designated within two years after the death of a homestead entryman, leaving surviving him no widow or heirs other than minors, of the land embraced in the entry, and the purchaser will acquire "the absolute title." By the terms of said section the "right and fee" in such cases also vest in such minor heir.

The manifest purpose of this section is to permit the minor heir of a deceased homesteader to reap the full benefits of the ancestor's entry without compelling him to further comply with the requirements of the homestead law as to residence and cultivation. But relieving the minor of this burden in connection with an entry made within a reclamation project in no degree enlarges his interest in the land beyond that which would have passed to the ancestor had he lived and complied with the requirements of the law for the full period. In such a case the entry would have been subject to reduction to the farm unit theretofore or thereafter fixed; also to the reclamation's charges assessed against it. No title could therefore have vested, notwithstanding the compliance shown respecting residence and cultivation, in any particular land until the entry had been made to conform to the farm unit and the charges paid. But a completed homestead right would have been secured subject to the conditions named, and it is this completed right which may be disposed of under section 2292 for the benefit of the minor heir.

The Department is of the opinion that the homestead entry of Frederick C. De Long, deceased, now belonging to Rhoda A. De Long, his minor child and only heir, may be sold under the provisions of said section 2292, according to the laws and practice of the State of Idaho. If the project has been divided into farm units, the sale should be of the particular unit to which the entry is thus limited, but if such division has not been made the purchaser will acquire an interest in only the land which would have been finally allotted to the original entryman as his farm unit. In either case the interest of the purchaser in the entry will be subject to the payment of the charges authorized by the Reclamation Act and the regulations thereunder, and no patent should be issued until these charges have been paid. But the purchaser will not be compelled to comply with the terms of the homestead law as to residence and cultivation.

OKLAHOMA LANDS—SCHOOL SECTIONS—SECTION 8, ACT OF JUNE 16,  
1906.

ANDREW J. BILLAN.

A homestead entry of record at the date of the act of June 16, 1906, excepts the land covered thereby from the provisions of section 8 of that act, reserving sections 13 for the benefit of the future State of Oklahoma, and upon the cancellation thereof the reservation declared by that section does not attach, but the land becomes public domain subject to disposition as other public land.

*First Assistant Secretary Pierce to the Commissioner of the General  
(G. W. W.) Land Office, March 27, 1908. (E. O. P.)*

The Department has before it the appeal of Andrew J. Billan from your office decision of June 10, 1907, denying motion for review of your decision of February 16, 1907, and holding for cancellation his homestead entry, allowed September 26, 1906, for the NE.  $\frac{1}{4}$  of Sec. 13, T. 12 N., R. 21 W., I. M., Lawton land district, Oklahoma.

Cancellation of the entry in question was directed upon the ground that the same was erroneously allowed, it being held that the land covered thereby was not subject to homestead entry because of the reservation contained in the 8th section of the act of June 16, 1906 (34 Stat., 267), providing for the admission of the future State of Oklahoma, which reads in part as follows:

That section thirteen in the Cherokee Outlet, the Tonkawa Indian Reservation, and the Pawnee Indian Reservation, reserved by the President of the United States by proclamation issued August nineteenth, eighteen hundred and ninety-three, opening to settlement the said lands, and by any acts of Congress since said date, and section thirteen in all other lands which have been or may be opened to settlement in the Territory of Oklahoma, and all lands heretofore selected in lieu thereof, is hereby reserved and granted to said State for the use and benefit of the University of Oklahoma, and the University Preparatory School, one-third; of the normal schools now established or hereafter to be established, one-third; and the Agricultural and Mechanical College, and the Colored Agricultural Normal University, one-third.

The tract described forms a portion of one of the sections 13 which had never, prior to the passage of the act of June 16, 1906, *supra*, been reserved from disposition under the homestead laws. At the date of the passage of the act the land in question was embraced in the homestead entry of one Fritz, which entry was made January 28, 1903, and relinquished September 26, 1906, the date Billan's entry was placed of record.

The State of Oklahoma was invited by the Department to present its claim and there has been transmitted through the local land office an opinion of the Attorney-General of the State which, presumably, is intended as a response to the invitation. The view is therein expressed that Congress has the power to reserve and grant any land

to which no vested right has attached, and inasmuch as no exception is contained in the act under consideration, inchoate rights were destroyed and the land to which they were attached, which fell within the scope of the grant, passed to the State.

The *power* of Congress to do all this is indisputable. The question here presented does not, however, go to the existence of the power but concerns only the intent of Congress to exercise it. The courts have uniformly and repeatedly held that in the absence of specific words clearly indicating a different purpose Congress will not be presumed to have intended that a reservation or grant of *public lands* should operate upon tracts which at the date thereof were segregated from the mass of such lands. The position of the State, if adopted, would destroy the rights of those persons who were in possession of land within the reserved limits under valid entries made prior to the passage of the act and prevent them from perfecting their claims. This doctrine goes beyond any yet announced and is not sustained by any authority known to the Department.

In determining the extent of the reservation made by the act of June 16, 1906, *supra*, the conditions existing at the date of its passage must be clearly understood. The public land in the Territory had been opened to settlement and entry at different times under the various acts of Congress providing therefor. The first reservation of sections 13 in the lands thus opened was made by proclamation of the President of August 19, 1893 (28 Stat., 1222). This reservation affected only those lands embraced in the Cherokee Outlet, the Tonkawa and Pawnee Indian reservations. Subsequent acts of Congress (28 Stat., 897; 29 Stat., 490; 31 Stat., 679), made similar reservations. But prior to the proclamation of the president of August 19, 1893, *supra*, Congress by the acts of March 2, 1889 (25 Stat., 1004), May 2, 1890 (26 Stat., 81, 90), February 13, 1891 (26 Stat., 749, 758), March 3, 1891 (26 Stat., 1016), made provision for the opening to settlement and homestead entry of a large portion of the territory, and by none of said acts was section 13 within the area disposed of in any manner reserved or withheld from disposition, but homestead entry thereof was permitted under the same conditions as governed entry of the other land. The tract in question is situated in this territory. Not until after the rendition of departmental decision of December 15, 1906 (35 L. D., 348), was there any doubt entertained by the officials of the local land office that the land was properly subject to homestead entry. It is stated in said decision, construing the language of section 8 of said act, that:

A most careful analysis of the section leads irresistibly to the conclusion that it was intended to reserve for the new State those sections 13 remaining undisposed of at the date of the passage of the act anywhere within the territory, and to grant such lands to the new State to be apportioned in the manner provided by said act.

A large number of entries embracing portions of sections numbered 13 within the territory wherein there had been no prior reservation of such sections was still of record at the date of the passage of said act of June 16, 1906, and such entries were thereafter, and prior to the departmental decision of December 15, 1906, relinquished for a valuable consideration, amounting to a practical sale of the land in order that another might make entry thereof, and the sole question presented by this record is: Did the reservation provided for in the said act operate upon the land included in such entries upon the filing of a relinquishment by the entryman under the circumstances detailed?

Your office held that upon the cancellation of entries of record at the date of the passage of said act the land covered thereby became immediately subject to the reservation therein made in the same manner as though there had been no prior appropriation thereof operating as a segregation of the land from the public domain at the date of the passage of said act. In other words, a continuing effect was given to the reservation authorized by which its operation was extended by each successive cancellation of an entry of record at the date of its passage. If this be a correct interpretation of the language used in section 8 of the act, it is clear that the entry of Billan was erroneously allowed and was properly held for cancellation and that it is beyond the power of the Secretary of the Interior to afford him any relief.

Turning to the language of the act material to the question here presented, and considering it according to settled rules of construction applied to similar language in other acts making grants of public lands, it is observed that the words "is hereby reserved and granted" are words of present grant and reservation. The grant, however, could not operate as one *in presenti*, the grantee named not being in existence.

There can not be a grant unless there is a grantee, and consequently there can not be a present grant unless there is a present grantee. *Hall v. Russell* (101 U. S., 503, 509).

The grant being one *in futuro*, the necessity for an immediate reservation becomes apparent. Without it the grant might have been entirely defeated by the disposition of the lands upon which it could operate at the time it became effective. Its primary object was the protection of the future grant. There is nothing in the language used to indicate an intention on the part of Congress that it should serve any other purpose. Its scope, therefore, could only be co-extensive with that of the grant had it been *in presenti* to the Territory for the use of the future State. *John W. Bailey et al.* (5 L. D., 216). Unless such grant would have been operative upon all

lands to which no *vested* right had attached at the date thereof, the reservation made by the act of June 16, 1906, *supra*, can have no greater effect. The question is thus narrowed to one respecting the effect of a grant *in presenti*, upon land which at the date of the grant, was segregated from the mass of public land by an existing homestead entry.

The Department has repeatedly held in cases involving similar grants, from the operation of which *specific exception* was made of land covered by a valid *settlement* claim, that upon the abandonment of such claim subsequent to the time the grant was definitely fixed by a survey of the designated sections, the grant attached as of the date of survey, and that no rights could be acquired as against the grant, by the purchase of the possessory right of the prior settler. *Knight v. Hauche* (2 L. D., 188); *Cleveland v. Dunlevy* (4 L. D., 121); *Gonzales v. Townsite of Flagstaff* (10 L. D., 348); *Thomas F. Talbot* (8 L. D., 495). The rule that no rights are gained by the purchase of a settlement claim or the relinquishment of a homestead entry is well settled. It does not follow, however, that because no right of entry can be thus acquired, the land covered by an *entry of record* at the time of a grant is not excepted from its operation, however it may be as to land upon which no more than a mere settlement had been made before, and continued until, the time of such grant. So far as conferring any vested right upon the settler or homestead entryman is concerned, neither the settlement nor the entry has such effect. *Whitney v. Taylor* (158 U. S., 85, 95). But the effect of a homestead entry actually made is widely different from that of a mere naked settlement, in so far as it operates to sever the land covered thereby from the public domain. *Kansas Pacific Railway Co. v. Dunmeyer* (113 U. S., 629, 644).

While the Department has not always observed this distinction (*John Johansen*, 5 L. D., 408; *Thomas E. Watson*, 4 L. D., 169; same on review, 6 L. D., 71; *Thomas F. Talbot*, 8 L. D., 495; *Odillon Marceau*, 9 L. D., 554; *Ravenaugh v. Washington*, 13 L. D., 434; *Francis P. Carlisle*, 24 L. D., 581; *Law v. Utah*, 29 L. D., 623), it is clearly marked and carefully preserved by the courts. In the case of a settler the Government has assumed no obligation with respect to the ultimate disposition of the land. No promise is extended to him that when the land is finally brought into market it will be disposed of under the laws recognizing prior settlement as the basis of a right to acquire title thereto. The only right gained by such a settler is a preference over others *in the event* the land settled upon at the time disposition thereof is provided for, is subject to his entry. (*Buxton v. Traver*, 130 U. S., 232.) In the absence of any reservation in a grant of lands covered by such settlement, the inchoate right of the

settler might be destroyed. In the case of one claiming under a homestead entry of record, the promise given by the Government and accepted by the entryman amounts, first, to a recognition of his right to enter the particular tract and that it is subject to disposition under the homestead law, and, second, that upon compliance with the conditions imposed he will be permitted to acquire the legal title to the land entered. The right conferred upon a homestead entryman is not essentially different from that acquired by a donation claimant under the act of September 27, 1850 (9 Stat., 496). In speaking of this right the Supreme Court in the case of *Hall v. Russell* (101 U. S., 503, 510), defined it "a present right to occupy and maintain possession, so as to acquire a complete title to the soil."

A right initiated by an entry of record is clearly distinguishable from one depending upon mere settlement, the possessor of which has not at the time of the attachment of a grant protected his claim by making actual entry of the land covered thereby. *Gonzales v. French* (164 U. S., 338, 344). The decisions of the Department holding that upon the abandonment of a settlement claim a subsequent grant of the land immediately attaches, are based upon the ruling of the Supreme Court in the case of *Water and Mining Company v. Bugbey* (96 U. S., 165, 167) in which it was held that the existence of a mere settlement claim, sufficient if asserted by the settler to have defeated the grant, could not, if subsequently abandoned, be set up by a third party to defeat it. In that case the settler never asserted his claim by making *proper filing* in the land office. On the contrary, he recognized the right of the State to the land by acquiring title through it. The court held that the right to assert a claim as against the grant, based upon a mere settlement, was personal to the settler, that he was not bound to set it up, and that the grant could only be defeated by proper action on his part. The court in this case took no exception to the decision rendered in the case of *Sherman v. Buick* (93 U. S., 209, 214), where, in construing and applying the same act to a case where the settler had *protected* his settlement by proper filing of record, it was held:

It is very plain that, by the seventh section, so far as related to the date of settlement, it was sufficient if it was found to exist at the time the surveys were made which determined its locality, and, as to its nature, that it was sufficient if it was by the erection of a dwelling house, or by a cultivation of any portion of the land. These things being found to exist when the survey ascertained their location on a school section, the claim of the State to that particular piece of land was *at an end*.

Had the settler in the case of *Water Power Co. v. Bugbey, supra*, placed his claim of record, thereby evidencing an assertion of it, the decision therein would undoubtedly have been the same as in the case of *Sherman v. Buick, supra*, as the rule announced in the latter case is adhered to in the case of *Kansas Pacific Ry. Co. v. Dunmeyer* (113

U. S., 629, 642), where the two cases are noticed and distinguished, and the rule announced in the Bugbey case is sustained upon the ground that, because of failure to place it of record, there was no proof of the existence of any settlement claim at the time the grant attached. (*Lansdale v. Daniels*, 100 U. S., 113, 116). Recordation of the claim is the only proper evidence of its existence. (*Northern Pacific R. R. Co. v. Colburn*, 164 U. S., 383, 386-7). In prescribing this method of evidencing a claim based upon prior settlement, it was the intention of Congress to make it exclusive in order that other rights, initiated in ignorance thereof, might not long afterwards be defeated by "fugitive and uncertain testimony of occupation." (*Tarpey v. Madsen*, 178 U. S., 215, 228.) Had the claim been asserted in the manner prescribed, the grant would have been defeated even though the claim were never perfected. A homestead entry of record occupies a position, so far as a segregation of the land is concerned, identical with that of a settlement claim which has been followed up by the filing of a preemption declaratory statement based thereon.

When the declaratory statement is accepted by the local officers and the fact noted on the land books, the effect is precisely the same as that which follows from the acceptance of the verified application in a homestead case. *Whitney v. Taylor* (158 U. S., 85, 95, 96).

It is clear, therefore, that the rule adopted by the Department with respect to mere settlement claims which have never been established by a timely assertion thereof by a filing in the land office, is not controlling in the case of a homestead entry of record at the time a reservation or grant of the land becomes effective. A mere settlement is not such a segregation of the land as would prevent the attachment of a grant, but words of exception are necessary to the protection of rights asserted under it. An *entry* is a segregation of the land covered thereby which, *independently* of specific exception, is sufficient to intercept the attachment of the grant.

The reservation under consideration is made in the same terms as the grant to which it relates and no more extended operation can be given it than would be accorded the grant itself had it been *in presenti*. The language employed, standing alone, is sufficient to carry all the land in said sections 13 where title had not already passed out of the United States. The words used are "and section 13 in all other lands which have been or may be opened to settlement in the Territory of Oklahoma", and there are no words of exception or limitation. But, as said in the case of *Missouri, Kansas and Texas Ry. Co. v. Kansas Pacific Ry. Co.* (97 U. S., 491):

It is always to be borne in mind, in construing a Congressional grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress.

The court, in passing upon similar grants, reached the conclusion that it was not the intent of Congress to include in laws which operate as conveyances, any other than public land, employing the term in its broad and unrestricted sense as meaning only those lands which may be disposed of without prejudice to the rights of those whose inchoate claims have previously *attached*. A presumption of intention to destroy such rights never arises by implication. (*Bardon v. Northern Pacific R. R. Co.*, 145 U. S., 535, 542.) Not only are such rights not destroyed by a grant in general terms, but it is held that such rights are not to be prejudiced by permitting the grant to operate upon the tracts to which they have attached, subject to such inchoate rights. Only by excepting such land from the scope of the grant would the possessor of the inchoate right be relieved from possible controversy with the grantee, who, if the grant were conditional only upon the elimination of the prior claim, would be interested in defeating it.

It is not conceivable that Congress intended to place these parties as contestants for the land with the right in each to require proof from the other of complete performance of its obligations. Least of all is it to be supposed that it was intended to raise up, in antagonism to all the actual settlers on the soil, whom it had invited to its occupation, with an interest to defeat their claims, and to come between them and the Government as to the performance of their obligations. *Kansas Pacific Ry. Co. v. Dunmeyer* (113 U. S., 629, 641).

In the case of *Wilcox v. Jackson* (13 Pet., 496, 513), the court said:

But we go further and say that whensoever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands, and that no law or *proclamation*, or sale, would be construed to embrace it, or *operate* upon it; although no reservations were made of it.

This rule of construction was affirmed by the court in the case of *Hastings and Dakota Railroad Company v. Whitney* (132 U. S., 357, 360), where approval of it is given in the following language:

The doctrine first announced in *Wilcox v. Jackson* (13 Pet., 498), that a tract lawfully appropriated to any purpose becomes thereafter severed from the mass of public lands, and that no subsequent law or proclamation will be construed to embrace it or to *operate* upon it, although no exception be made of it, has been reaffirmed and applied by this court in such a great number of cases that it may now be regarded as one of the fundamental principles underlying the land system of this country.

An exception is not necessary in legislative grants to remove from their operation land to which a right has already attached. Such grants are confined to land "which Congress could rightfully bestow without disturbing existing relations and producing vexatious conflicts." *Bardon v. Northern Pacific R. R. Co.* (145 U. S., 535, 542); see also *Leavenworth, etc., R. R. Co. v. U. S.* (92 U. S. 733, 746).

The same reasoning which supports the rule with respect to a grant *in presenti* applies with equal force to a legislative withdrawal made

to protect a grant *in futuro*. So far as the *attachment* of either is concerned, no distinction is possible.

In the absence of express words clearly authorizing it, no more extended operation can be given to a reservation than to a grant, and the reservation made by the act under consideration must be restricted in its scope to such lands as at the date of reservation were subject to no outstanding claims sufficient, under the well-settled rules of construction applied by the courts in such cases, to segregate it from the mass of public land. Such lands only is Congress presumed to have had in mind at the time of making the reservation. It follows, therefore, that as the grant authorized by the act of June 16, 1906, *supra*, could only have extended to unappropriated public lands, and as the sole object of the reservation was to protect the grant and not to extend it, only land having this character on June 16, 1906, fell within the reservation, and the fact that land thus appropriated might subsequently be restored to the public domain did not, in the absence of express direction, subject it to the terms of the act. A homestead entry of record is such an appropriation of the land covered thereby as severs it from the mass of public land, and the cancellation of the homestead entry of record June 16, 1906, did not restore the land embraced therein to the operation of the act but merely rendered it subject to disposition under the general public-land laws. *Hastings & Dakota Railroad Company v. Whitney* (132 U. S., 357, 361). The entry of Billan was therefore properly allowed, and cancellation thereof by your office, for the reasons stated, was erroneous.

The Department has not at this time considered the effect of the act of June 16, 1906, with respect to lands free from existing claims at the date of the admission of the State.

Independently of the conclusion reached solely upon the legal grounds, the claimant is entitled to much equitable consideration. At the time his entry was made the country was practically settled and there was little or no vacant land open to entry. The only way that a right could be initiated under the homestead law was by the procurement of the relinquishment of an existing entry. This the claimant did by paying therefor a price equivalent to the value of the land. His money was paid relying on the good faith of the law as then interpreted and accepted by your office, which held that sections 13 in this Territory were not subject to any claim of the State. He proceeded innocently in the belief that by complying with the conditions imposed he would be permitted to acquire title to the land. The case is free from all suggestion of abandonment of the land by the prior entryman in the sense in which the term is generally employed, and but for the consideration received for the relinquishment of his entry, which at the time was nearly four years old and evidently nearing perfection, he would have completed the same, thereby defeating all

claims of the State. The State by the mere change of entrymen has lost nothing, and under the circumstances disclosed it would be grossly inequitable to permit it to take advantage of this claimant's efforts and expenditure to obtain a home. However, the decision already reached renders unnecessary any consideration of the equitable features presented, which might possibly have been invoked for his protection.

For the reasons herein stated the decision appealed from is hereby reversed.

DESERT LAND—CAREY ACT—LISTS OF LANDS PATENTED BY STATES.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

Washington, D. C., March 30, 1908.

*The Commissioner of the General Land Office.*

SIR: You are directed to request each of the States to whom lands have heretofore been patented under the act of August 18, 1894 (28 Stat., 372), and acts amendatory of and supplemental thereto, to furnish to your office a tabulated statement showing the names of the persons to whom such States have passed title to such lands, and the amount and description of lands patented by the States to each of such persons, and to hereafter request each of such States to annually furnish a like statement of the lands patented each year ending with December first.

Very respectfully,

JAMES RUDOLPH GARFIELD,

*Secretary.*

WALTER A. STAFFORD.

Motion for review of departmental decision of January 21, 1908, 36 L. D., 231, denied by First Assistant Secretary Pierce, March 31, 1908.

ABANDONED MILITARY RESERVATION—FOREST RESERVE.

INSTRUCTIONS.

There is nothing in the act of July 5, 1884, providing for the disposition of lands in abandoned military reservations, to prevent the reservation of any such lands for a national forest under the provisions of section 24, of the act of March 3, 1891.

Opinion of October 26, 1906, 35 L. D., 277, vacated.

*Secretary Garfield to the Commissioner of the General Land Office,*  
(G. W. W.) *March 31, 1908.* (L. R. S.)

The Department has considered your report dated February 12, 1908, upon the letter of the Secretary of Agriculture dated December

7, 1907, recommending the creation of the enlarged Sierra National Forest, California, with boundaries as indicated on the diagram attached, and transmitting draft of proclamation by the President, prepared by the Forest Service, to carry out said recommendation.

You report that the Sierra National Forest, as shown by said diagram, surrounds the General Grant and Sequoia National Parks, and includes within its exterior limits the Old Camp Independence Military Reserve and a part of the abandoned Mount Whitney Military Reserve, "the remainder of which and the Old Camp Independence Wood Reserve were included within the boundaries of the Sierra National Forest by proclamation of July 25, 1905;" that said abandoned military reservations were turned over to this Department by Executive orders of July 22, 1884, and February 2, 1904, to be disposed of under the act of July 5, 1884 (23 Stat., 103).

You refer to the approved opinion of the Assistant Attorney-General for this Department of October 26, 1906 (35 L. D., 277), which held, *inter alia*, that lands subject to disposal under said act of July 5, 1884, can not be included within a forest reservation, and you state that "in the absence of any ruling by the Department recognizing the right of the Executive to reserve lands of such character," you can not recommend that the lands within the abandoned Mount Whitney and Camp Independence Military Reservations be included within the National Forest, as recommended.

You call attention, however, to the fact that prior to said decision of October 26, 1906, the greater part of said abandoned Mount Whitney Military Reservation and also of the Old Camp Independence Wood Reservation were included within the limits of the Sierra National Forest by said proclamation of July 25, 1905, which does not appear to have been considered by the Department in said decision of October 26, 1906.

It appears that your office, June 22, 1906, reported to the Department upon a letter from the Commissioner of Fisheries dated May 26, 1906, referred through the President, the Secretary of War, and this Department, requesting "that the limits of the Mount Whitney Military Reservation be extended so as to include the whole of Volcano Creek," for the purpose of protecting the fish in the streams flowing through the reservation, and your office expressed the opinion that lands in the abandoned military reserve can not "be set aside as a fish preserve or for any other purpose, except by act of Congress." Your office also referred to the fact that nearly all of the land in said military reserve was temporarily withdrawn April 26, 1904, under the direction of the Secretary, and the boundaries of the Sierra National Forest were extended so as to include said land by proclamation of the President dated July 25, 1905 (34 Stat., 3133-3139), and expressed the opinion that said action was wholly ineffective to reserve said

land for forestry purposes or place it under the jurisdiction of the Secretary of Agriculture.

Your report and accompanying papers were referred to the Assistant Attorney-General August 3, 1906, for his opinion whether the action suggested "can, under existing law, be carried out," and while no mention is made in said opinion of October 26, 1906, of the Executive action culminating in said proclamation of the President of July 25, 1905, it does not necessarily follow that said action was not considered.

January 31, 1908, the Secretary of Agriculture addressed a letter to this Department requesting the reconsideration and review of said decision of October 26, 1906, and insisting that said abandoned military reservations may be included in the national forest under a correct interpretation of the act of March 3, 1891 (26 Stat., 1095).

Section 24 of said act of March 3, 1891, declares:

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.

Subsequent legislation, act of June 4, 1897 (30 Stat., 11), provides for the modification of Executive orders and proclamations and authorizes the issuance of rules and regulations by the Secretary of the Interior for the management of forest reserves. The act of February 1, 1905 (33 Stat., 628), transfers the care of national forests to the Department of Agriculture, excepting the enforcement of laws which "affect the surveying, prospecting, locating, appropriating, entering, relinquishing, reconveying, certifying, or patenting of any of such lands."

Section 1 of said act of July 5, 1884, authorizes the President to place under the control of the Secretary of the Interior the lands "of any military reservation heretofore or hereafter declared" which are useless for military purposes, to be disposed of in accordance with the subsequent provisions of said act.

Section 2 declares "that the Secretary of the Interior may, if in his opinion the public interests so require, cause the said lands or any part thereof, in such reservations, to be regularly surveyed or to be subdivided into tracts of not less than forty acres each and into town lots or either or both."

The act further provides for the appraisal of said land and the sale thereof at public auction to the highest bidder for cash, with a proviso protecting the rights of actual settlers on the land prior to January 1, 1884, also for the sale of the improvements on the land and for the disposition of lands containing valuable mineral deposits only "under the mineral land laws of the United States."

It was stated in said opinion of October 26, 1906, that "the reservation of lands for military purposes is an appropriation of the land for use by the United States and such reservation takes them out of the category of public lands as that term is defined by the court in *Newhall v. Sanger* (92 U. S., 761, 763)." Also that since special provision has been made by Congress for the disposal of abandoned military reservations, they can not be disposed of in any other manner. In said case the court said: "The words public lands are habitually used in our legislation to describe such as are subject to sale or other disposal under general land laws."

Respecting the definition of the term "public land," as given in said decision, attention should be called to the fact that the court had under consideration a grant in aid of a railroad which was limited to public lands of a certain character and description, and as such grants are strictly construed against the grantee the term "public land" was given its most limited operation.

By the act of 1891 provision was made for the reservation of a certain class of public lands for a public benefit and necessarily the term was used in its broadest significance to embrace any part of the public domain not already appropriated to a specific purpose, and freed from the rightful claim of others under some of the public land laws.

It is further to be observed that in the interpretation of the statutes the intention of the law-making power must govern, and "a thing may be within the letter of a statute and not within its meaning and within its meaning and not within its letter." *Smythe v. Fiske* (23 Wall., 374, 384), cited with approval by the Supreme Court in *Hawaii v. Mankichi* (190 U. S., 197, 212).

The act of July 5, 1884, *supra*, makes provision for the disposition of a class of reservations ascertained to be useless for military purposes and it may very properly be included in the term "general laws" as defined by the Supreme Court in *Newhall v. Sanger*.

In the case of the State of Florida (on review, 19 L. D., 76, 80), the Department decided that said ruling in the case of *Newhall v. Sanger* did not authorize the holding that certain tracts "within the corporate limits of St. Augustine were not subject to disposal under general laws," citing the case of *Falconer v. Hunt et al.*, referring to the act of May 14, 1880 (21 Stat., 140), and holding that "what is meant by the phrase public lands as used in this statute is public in the sense that no other party had any claim to them."

In the case of *United States v. Blendaur* (128 Fed. Rep., 910), the Circuit Court of Appeals for the 9th circuit denied the contention of the appellee that the land in question could not be legally set apart as a part of a forest reservation because it was not public land but had been previously set apart for a special purpose, namely, entry

under the homestead law. The court cited with approval the case of *United States v. Bisel* (8 Mont., 20, 30), in which it is said:

There is no statutory definition of the words "public lands" and the meaning of them may vary somewhat in different statutes passed for different purposes and they should be given such meaning in each as comports with the intention of Congress in their use.

The court further stated:

The title to the land in question was at the time of the passage of the act of March 3, 1891, in the Government. The land was a part of the public domain and was public land of the United States within the true intent and meaning of those words as used in section 24 of said act, and continued in that condition up to the time the orders were issued setting aside and reserving said land as a part of the forest reserve.

After a careful consideration of the whole matter, it is now held that the title to the land within said military reservations is in the Government; that the President has the power to reserve the same for forest purposes under said act of March 3, 1891, and that the provisions of the act of July 5, 1884, must be construed not to be such a disposition of the land in question that would prevent its reservation for a national forest.

The opinion of October 26, 1906, *supra*, to the contrary, will no longer be followed.

The papers are herewith returned, and you are requested to have a letter prepared for my signature transmitting said proclamation to the President in accordance with the views herein expressed.

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HELENA ETC. CO. *v.* DAILEY.

Motion for review of departmental decision of August 27, 1907, 36 L. D., 144, denied by First Assistant Secretary Pierce, April 2, 1908.

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ROBERTS *v.* SEYMOUR.

Motion for review of departmental decision of February 1, 1908, 36 L. D., 258, denied by Secretary Garfield, April 9, 1908.

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NOTICE OF LOCATION OF WARRANTS, SCRIP, CERTIFICATES, SOLDIERS' ADDITIONAL RIGHTS, ETC.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., March 26, 1908

REGISTERS AND RECEIVERS,

*United States Land Offices.*

GENTLEMEN: Referring to circular of February 21, 1908 [36 L. D., 278], requiring publication and posting of notice in scrip, warrant,

certificate, soldiers' additional cases, and lieu locations and selections, you are advised that this office has no printed forms for publication and posting upon the land, but that such notices may be prepared by you, or by the locator or selector and submitted to you for approval, and should be in substance as follows:

## NOTICE FOR PUBLICATION.

————— Land Office,  
 —————, 190—.

Notice is hereby given that —————, of ———, County of ———, State of ———, has filed in this office his application to (enter, locate or select), under the provisions of the act of Congress, approved ———, ——— (or Sec. — R. S.) the ——— of Sec. —, T. —, R. —. Any and all persons claiming adversely the lands described, or desiring to object because of the mineral character of the land, or for any other reason, to the disposal to applicant, should file their affidavits of protest in this office, on or before the — day of ———, 190—.

—————,  
*Register.*

The date last mentioned in the above notice should be not later than thirty days after the beginning of publication and posting.

A similar notice must be posted in your office during the same period and the register's certificate as to posting should be made on form 4-227, modified so as to show the first and last dates of such posting.

The affidavit of the locator, selector or entryman as to the non-mineral character of the land, and that it is not occupied adversely, should be made upon form 4-061a., modified by striking out reference to the act of June 4, 1897, in other cases than selections under that act.

Very respectfully,

FRED DENNETT,  
*Commissioner.*

## SOLDIERS' ADDITIONAL—HONORABLE DISCHARGE MUST BE SHOWN.

BENJAMIN F. LEPPER.

To entitle one to the privileges conferred by sections 2304, 2306 and 2307 of the Revised Statutes the soldier whose military service is alleged as the basis for the right must have been honorably discharged; and such fact can not be inferred from the official record which shows that the soldier was "dismissed the service."

*First Assistant Secretary Pierce to the Commissioner of the General*  
 (G. W. W.) *Land Office, April 11, 1908.* (L. R. S.)

The Department has considered the appeal of Benjamin F. Lepper, assignee of Lafayette Brashear, administrator of the estate of Elisha

W. Dodson, deceased, from your office decision rendered January 10, 1908, rejecting his application to enter, under sections 2306 and 2307, Revised Statutes of the United States, the N.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$ , Sec. 3, and the SE.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$ , Sec. 6, T. 12 N., R. 27 E., M. M., Lewiston, Idaho, land district, containing 80 acres.

The record shows that said application is based upon the military service of said Dodson in the army of the United States during the civil war, as shown by the records of the War Department, and his homestead entry No. 5333 for the SE.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$ , Sec. 11, T. 7 N., R. 20 W., containing 40 acres, made September 22, 1870, at the Clarks-ville, Arkansas, land office, which was canceled January 28, 1878, upon a relinquishment executed by Nancy C. Dodson, as the widow of the said Elisha W. Dodson.

Your office rejected said application because said Dodson "was not honorably discharged from the service, therefore, his military service does not constitute a legal basis for the rights claimed."

It is shown by a report from the War Department of April 1, 1907, that said Dodson was mustered into service for three years in Company A, Third Regiment Arkansas Cavalry, October 29, 1863, and "was dismissed the service as a captain, in orders dated February 13, 1864."

His application is accompanied by a certificate from the adjutant-general of Arkansas dated March 5, 1902, that said Dodson "was appointed from private to first lieutenant October 18, 1863; dismissed February 13, 1864."

The appellant insists that your office decision "is contrary to law and the evidence," because it appears that said Dodson served more than ninety days in the United States army during the civil war of 1861 and 1865, and that his dismissal from the service was not a "dishonorable discharge," and his military service constitutes a "legal basis for the right claimed."

It will be observed that one of the essential requirements of section 2304, Revised Statutes of the United States, in order to secure its benefits is that the "private soldier and officer who has served in the army of the United States during the recent rebellion for ninety days," must have been "honorably discharged" from such service, and said section 2306 declares that—

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, when added to the quantity previously entered, shall not exceed one hundred and sixty acres.

Section 2307 provides that—

In case of the death of any person who would be entitled to a homestead under the provisions of section twenty-three hundred and four, his widow, if

unmarried, or in case of her death or marriage, then his minor orphan children, by a guardian duly appointed and officially accredited at the Department of the Interior, shall be entitled to all the benefits enumerated in this chapter, subject to all the provisions as to settlement and improvement therein contained; but if such person died during his term of enlistment, the whole term of his enlistment shall be deducted from the time heretofore required to perfect the title.

It is clear that the person claiming the benefits of said sections must show that the soldier whose military service is alleged as the basis of the right to make an additional homestead entry has been "honorably discharged," and such fact can not be inferred from the record, which shows that the soldier, as in this case, was dismissed from the service.

Captain Dodson was not entitled to make an additional entry under said section in his lifetime and hence his administrator had no such right which he could assign.

From a careful examination of the record, it does not appear that your office erred, and the decision appealed from is accordingly affirmed.

RAILROAD GRANT—INDEMNITY—SELECTION—ASCERTAINED DEFICIENCY.

OREGON AND CALIFORNIA R. R. Co.

The right of a railroad company does not attach to any specific lands within the indemnity limits of its grant until selection, notwithstanding the loss on account of which indemnity might be taken is ascertained to be largely in excess of all the land subject to indemnity selection.

*Secretary Garfield to the Commissioner of the General Land Office,*  
(G. W. W.) *April 16, 1908.* (E. O. P.)

The Department has before it the appeal of the Oregon and California Railroad Company from your office decision of September 26, 1907, rejecting its application to make indemnity selection of certain lands in T. 27 S., R. 1 W., W. M., Roseburg land district, Oregon, per list No. 101, because of a prior withdrawal of said lands made August 3, 1903, for forestry purposes.

It is alleged on behalf of the company that prior to the withdrawal it had been definitely ascertained that the loss on account of which indemnity might be taken was largely in excess of all the land subject to indemnity selection. Because of this it is contended the right of the company attached without selection and solely by virtue of the ascertained deficiency, to all the remaining indemnity lands and that the subsequent withdrawal was ineffective to defeat the claim of the company. Plat of survey of the lands involved was not filed until March 6, 1906, the date said list was tendered.

The following language used by the Supreme Court in the case of *The St. Paul & Pacific R. R. Co. v. Northern Pacific R. R. Co.*, (139

U. S., 1, 19), is relied upon to support the proposition that no selection of indemnity lands is necessary to vest title thereto in the company where the area of such lands is known to be insufficient to supply a loss to the grant, viz.—

As to the objection that no evidence was produced of any selection by the Secretary of the Interior from the indemnity lands to make up for the deficiencies found in the lands within the place limits, it is sufficient to observe that all the lands within the indemnity limits only made up in part for these deficiencies. There was, therefore, no occasion for the exercise of the judgment of the Secretary in selecting from them, *for they were all appropriated.*

The Department in the case of the Southern Pacific R. R. Co. (18 L. D., 314) refused to give the broad effect contended for by counsel to the language quoted and adhered to the settled rule that "the condition of the lands at the date of selection alone determines whether they are subject to selection." The real question presented in the case of *United States v. Colton Marble & Lime Co.* (146 U. S., 615) was not the same as that decided in the case of *St. Paul & Pacific R. R. Co. v. Northern Pacific R. R. Co.*, *supra*, and the court, while referring thereto, was careful to state that "this case does not rest upon that proposition." Neither was a determination of the question a material issue in the case of *Oregon and California R. R. Co. v. United States* (189 U. S., 103, 105). Statements made by the court touching matters not directly in issue have not the same controlling effect as those related to the question directly presented and necessarily involved in reaching a correct conclusion (*Cohens v. Virginia*, 6 Wheat., 264, 398). The court in the case of *Oregon and California R. R. Co. v. United States*, *supra*, must have recognized the principle, for had it given controlling effect to that portion of the decision in the case of *St. Paul & Pacific R. R. Co. v. Northern Pacific R. R. Co.*, *supra*, above quoted, it could not consistently have affirmed numerous earlier decisions and announced the following rule based thereon (p. 113):

Having regard to adjudged cases, it is to be taken as established that, unless otherwise expressly declared by Congress, no right of the railroad company attaches or can attach to specific lands within indemnity limits until there is a selection under the direction or with the approval of the Secretary.

The same rule is laid down in the case of *Humbird v. Avery* (195 U. S., 480, 507).

Indeed the application of any other rule for fixing the time of attachment of the company's claim to indemnity lands would in every case be impracticable and generally impossible, as the area thereof is an ever-varying quantity. Lands which to-day may be subject to selection may to-morrow be excepted from that class and *vice versa*. The variation is not due alone to a diminution of the area, as it is not impossible the area may be increased. Unless all persons who

might seek to initiate a claim to any land subject to indemnity selection were put upon notice by a withdrawal made thereof immediately upon determining that the loss to the grant could probably not be satisfied therefrom, conflict and hardship would certainly result if the mere ascertainment of loss in excess of the indemnity lands then remaining operated *proprio vigore* to vest title thereto in the company. Where, as in the present case, the land was unsurveyed at the time the fact upon which the vesting of title would depend, all the land situated within the indemnity limits would, of necessity, have to be included in the withdrawal, for until survey there could be no designation of the odd and even numbered sections, and it is only from the former the company can satisfy its loss. Without such withdrawal, the difficulty of administering the grant along the broad lines contended for by the company, when considered in connection with all the rights of innocent third persons which might be destroyed by the application of such a rule, is sufficient to condemn it.

The Supreme Court in construing the terms of a similar grant (*Hewitt v. Schultz*, 180 U. S., 139) held that there was no authority for withdrawing the lands subject to indemnity selection. Unless the Department has authority to protect the right of selection by a withdrawal it is apparent it cannot recognize a vested right to the identical lands that would have been included therein when no selection has been made thereof. The basis of this conclusion, viz., that the railroad grantee by virtue of its right to select indemnity lands held no advantage over the settler or applicant, precludes the idea that without selection or approval thereof the company could acquire a vested right to any of the indemnity lands.

The fact that the grant cannot be enjoyed to its full extent constitutes no sufficient ground for recognizing a right to indemnity lands different from that conferred by the statute. The right is none the less substantial because the extent of its enjoyment is uncertain. The conditions which rendered it uncertain were fully understood by the grantees, and the fact their effect might not have been accurately anticipated affords no ground for waiving them.

However, in the case under consideration, it cannot be said that the lands now sought to be selected may not at some future time be subject thereto, and as long as this possibility remains the right has not been destroyed.

The Department after considering all the matters advanced in support of the appeal, is of opinion that the rule heretofore obtaining, that until selection no right attaches to any lands within indemnity limits, is the correct one, and that there was therefore no legal bar to the withdrawal of the lands in controversy prior to such selection. The decision appealed from is affirmed.

## CITIZENSHIP—INHABITANT OF STATE AT DATE OF ADMISSION.

## WILLIAM J. PARKER.

One who at the date of the admission of North Dakota into the Union was an inhabitant and recognized as a member of that political community became by such admission a citizen of the United States.

Exercise of the elective franchise by an inhabitant of a State the laws of which restrict the right to vote to citizens of the United States raises the presumption of citizenship.

*Secretary Garfield to the Commissioner of the General Land Office,*  
(G. W. W.) April 16, 1908. (C. J. G.)

An appeal has been filed by William J. Parker from the decision of your office of September 13, 1907, requiring him to furnish further evidence of citizenship in connection with his final proof on homestead entry for the SW.  $\frac{1}{4}$  of Sec. 34, T. 155 N., R. 80 W., Devils Lake, North Dakota.

The entry was made April 5, 1900, and in his original homestead affidavit Parker stated that he was a native-born citizen of the United States. On final proof which was made April 22, 1907, in answer to the question whether he was a native-born citizen of the United States he replied that he had made application for final citizenship, while in an accompanying affidavit of the same date, he stated:

I was born in Galt, Ontario, Canada, on or about March 13, 1864, and thereafter, and in about the month of April, 1875, emigrated to the United States of America, with my parents, John J. Parker and Ellen Parker, crossing the river from Ontario, Canada, at Sarnia, Canada, to Port Huron, in the State of Michigan, in the United States of America, and after arriving in the State of Michigan, I went with my parents, and they located on a farm near Imlay City, in the State of Michigan, where they resided for a great many years. I lived on the farm with my parents until 1886. Prior to 1886, and before I attained my majority, my Father declared his intention to become a citizen of the United States of America, and he subsequently became a full citizen of the United States of America, but I am not sure whether he became a full citizen of the United States before I attained my majority or afterwards. On leaving Michigan, in 1886, I came directly to the Territory of Dakota, and located near McCanna, in Grand Forks County, in said Territory of Dakota, where I continued to reside until about the year 1900. After coming to the Territory of Dakota, and before the Territory was admitted into the Union as North and South Dakota, I exercised the elective franchise, and voted at the elections, and after the Territory was admitted into the Union I continued to reside at McCanna, in the State of North Dakota, and always exercised the elective franchise, and voted at the elections, and honestly and in good faith always believed that I was a citizen of the United States, and never believed that I owed any allegiance to any foreign power, and since coming to the Territory of Dakota, in 1886, have always borne allegiance to the United States of America, and I have not intended at any time, or believed, that I was a subject of any foreign power, and my right to citizenship in the United States has never been questioned until I made application to make proof on said prem-

ises above described, which was the cause of the delay in issuing the receipt and which was no fault of mine.

That at the time I made H. E. on said tract, I was asked by the attorney who drew the papers, whether I was a citizen of the United States, and I made reply to said question, "I am supposed to be," and at that time and all times prior and since, I came to the Territory of Dakota, I honestly believed I was a citizen. That no question was asked me at the time I made said H. E., with reference to my being a native born citizen, and since talking with my attorneys, I am inclined to think that the statement must have been put into the filing papers that I was a native born citizen.

The affidavit was corroborated only as to the statement therein made by appellant to the effect that he was a resident of the Territory of Dakota at the time said Territory was divided and admitted into the Union as the States of North and South Dakota. No record evidence of the filing by appellant's father of declaration of intention to become a citizen of the United States or of subsequent naturalization is furnished. In fact, the only evidence that the father ever filed declaration of intention and became invested with citizenship is the statement made by appellant himself. The case differs in this respect from that of *Boyd v. Thayer* (143 U. S., 135), referred to and relied upon in the appeal, wherein there was record evidence of declaration of intention to become a citizen of the United States prior to the time the son attained his majority, although there was no record or other written evidence of completion of naturalization, and wherein the court held that even if the father did not complete his naturalization before the son attained his majority, the son did not lose the inchoate status which he had acquired through his father's declaration of intention to become a citizen. The court said:

Clearly minors acquire an inchoate status by the declaration of intention on the part of their parents. If they attain their majority before the parent completes his naturalization, then they have an election to repudiate the status which they find impressed upon them, and determine that they will accept allegiance to some foreign potentate or power rather than hold fast to the citizenship which the act of the parent has initiated for them. Ordinarily, this election is determined by application on their own behalf, but it does not follow that an actual equivalent may not be accepted in lieu of a technical compliance.

This Department has held that:

The minor child of an alien, who, during the minority of such child declares his intention to become a citizen, but does not complete his naturalization before the child attains his majority, or thereafter, occupies under the homestead law the status of one who has filed his declaration of intention to become a citizen.

*Meriam v. Poggi* (17 L. D., 579); *Somers v. Heuer* (19 L. D., 507); *Weisner v. Clem* (26 L. D., 300); *Hastings and Dakota Ry. Co. v. Rognlin* (29 L. D., 497).

Appellant is probably not in position, upon his bare statement that his father declared his intention to become a citizen during the son's minority and in the absence of record or other evidence that such was the fact, to invoke the above ruling in the case of *Boyd v. Thayer*; although it is a fact worthy of note that his statement as to the declaration of intention and subsequent naturalization on the part of his father is in no wise contradicted by anything in the record. In other respects there are marked similarities between the facts of appellant's case and those of *Boyd v. Thayer*, if the statements made by him be true. On going to the Territory of Dakota, having attained his majority, appellant exercised the elective franchise, voting at elections both before and after that Territory was divided and admitted as States, believing himself to be a citizen of the United States and his rights in this respect being in no manner questioned. As to this phase the court in the case of *Boyd v. Thayer*, said:

It is true that naturalization under the acts of Congress known as the naturalization laws can only be completed before a court, and that the usual proof of naturalization is a copy of the record of the court. But it is equally true that where no record of naturalization can be produced, evidence that a person, having the requisite qualifications to become a citizen, did in fact and for a long time vote and hold office and exercise rights belonging to citizens, is sufficient to warrant a jury in inferring that he had been duly naturalized as a citizen.

The Department has held in the case of *Brezee et al. v. Hutchinson's Heirs* (26 L. D., 565):

A presumption as to the continuity of alienage, when once shown, may be overcome, where no record of naturalization is found, by a presumption of citizenship growing out of a long continued exercise of the rights and duties of a citizen; and the son of an alien, in such case, is entitled to the benefit of such presumption of citizenship, where no record of the naturalization of the father during the minority of the son can be produced.

As to the effect of voting the Department has held:

Of course, this is not conclusive, but the offer and acceptance of a vote raises a strong presumption that it is legal and that the person voting is a citizen.

*William Heley* (6 L. D., 631); *Southern Pacific R. R. Co. v. Brown* (9 L. D., 173).

Evidence of voting will raise a presumption of citizenship, as fraud on the part of the voter is not to be presumed.

*Jones v. Southern Pacific R. R. Co.* (19 L. D., 270).

The evidence in this case shows that appellant was a resident or inhabitant of the Territory of Dakota prior to and at the date of the admission of North Dakota as a State. The organic and enabling acts and the act of admission are substantially similar to those of the State of Nebraska which were involved in the case of *Boyd v. Thayer*.

The enabling act of Dakota Territory (February 22, 1889, 25 Stat., 676), entitled "An act to provide for the division of Dakota into two States and to enable the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and state governments and to be admitted into the Union on an equal footing with the original States," etc., provides in section 1 thereof—

That the inhabitants of all that part of the area of the United States now constituting the Territories of Dakota, Montana, and Washington, as at present described, may become the States of North Dakota, South Dakota, etc.

In the case of *Boyd v. Thayer* it was said:

Naturalization is the act of adopting a foreigner, and clothing him with the privileges of a native citizen \* \* \*

Congress in the exercise of the power to establish a uniform rule of naturalization has enacted general laws under which individuals may be naturalized, but the instances of collective naturalization by treaty or by statute are numerous.

\* \* \* \* \*

Congress having the power to deal with the people of the Territories in view of the future States to be formed from them, there can be no doubt that in the admission of a State a collective naturalization may be effected in accordance with the intention of Congress and the people applying for admission.

Admission on an equal footing with the original States, in all respects whatever, involves equality of constitutional right and power, which cannot thereafter be controlled, and it also involves the adopting as citizens of the United States of those whom Congress makes members of the political community, and who are recognized as such in the formation of the new State with the consent of Congress.

The court accordingly held with respect to the claimant in that case—

in short, he was within the intent and meaning, effect and operation of the acts of Congress in relation to citizens of the Territory, and was made a citizen of the United States and the State of Nebraska under the organic and enabling acts and the act of admission.

Appellant herein occupied a similar status upon the admission of North Dakota as a State and under the ruling of the court he became a citizen upon such admission, if not theretofore one, endowed with all the qualifications and entitled to all the privileges of a citizen of the United States, and as such was entitled to make and complete the homestead entry in question. Therefore no further evidence of citizenship should be required. The court clearly recognizes an equivalent for a technical compliance with the ordinary rules governing naturalization, so in that view this case turns upon the question of sufficiency of evidence.

To recapitulate the matters that may properly be given weight in the determination of this case: (1) Appellant makes affidavit, and it is not shown to the contrary, that his father declared his intention



A hearing was duly had, and the local officers, relying upon their own recollection of the incidents attending the opening, in connection with the testimony adduced at the hearing, found in favor of Carrier.

Cain appealed to your office, which, by decision of March 2, 1907, found from the evidence that Cain's application was tendered first and that she was entitled to the right of entry, and thereupon reversed the action of the local officers.

Carrier appealed to the Department, which by decision August 5, 1907 (not reported), sustained the decision of your office.

Carrier filed what is in effect a combined motion for review of said departmental decision and a petition for the exercise of the supervisory power of the Secretary to reopen the matter from the beginning on the question of the correctness of the action of the local officers in treating the conflicting applications as simultaneous. The motion was entertained and served upon the opposite party, and both parties have fully presented their contentions with respect to the matters in issue both by briefs and by oral argument before the Department.

It is well established that as between two applicants for the same tract of public land the first in time is deemed to have the superior right, in the absence of settlement by either; and also that even if but a few seconds intervene between two applications they should not be treated as simultaneous.

These principles, however, are announced in cases involving applications presented during the regular, ordinary course of business in the local offices, when conditions are normal, and it is usually not difficult to determine which is first in time. When extraordinary conditions obtain, however, such as usually result when lands are first opened to entry, and there is a great rush of applicants at the local office at the hour of opening, all striving to push ahead of the others and get their applications in first, it is frequently a physical impossibility to determine, with any degree of certainty, if at all, which among a number of applicants for the same tract of land first tendered his application. To meet this condition, and arising out of the necessities of the situation, a practice has grown up to establish rules for the presentation of applications different from the general rule which is observed when conditions are normal. In some instances, where the applicants have formed in line, the local officers have recognized and respected this line formation and received the applications in the order in which the persons stood in line. In other instances, the local officers have announced to intending applicants that the applications of all persons waiting at the local office at the hour of opening would be treated as simultaneous and in case of conflict the right of entry would be awarded the highest bidder. Neither of

these rules is directly authorized by statute, but are rules of administration, made necessary by the emergency conditions, and adopted with a view to affording all applicants a fair and equal opportunity and to insure the orderly conduct of business. The action of local officers in adopting such rules has long been recognized and sanctioned by both your office and the Department.

In *Melville and Kelly* (1 L. D., 157) it was stated that—

It is a fact, when new plats of public lands are filed in the local offices, there is an unusual "rush" of claimants, in person and by attorney, each striving to secure an entry of the tract or tracts desired—

and the rule was there laid down for the guidance of local officers under such circumstances that—

All persons in the office immediately after the opening of the same for business, who have written applications for entry of a tract on the same section under the timber culture law, shall be considered simultaneous applicants, and you will accordingly dispose of the right of entry under the rule laid down in *Helfrich v. King* (2 C. L. L., 378), which is as follows:

1. Where neither party has improvements on the land, it should be sold to the highest bidder.

In instructions of May 8, 1885 (3 L. D., 534), governing the opening of certain Indian lands, the local officers were instructed that in case of conflicting applications "they shall be treated as made simultaneously, and the right to enter determined in the usual manner."

In *Jacobs v. Champlin et al.* (4 L. D., 318), construing the decision in the case of *Melville and Kelly*, *supra*, it was said:

These instructions were given with reference to the filing of new plats in the local land office and the usual rush of claimants for priority, and it is therein said that on the morning of October 19th the crowd was so great that it was impossible for all claimants to pass their applications to the register and receiver at the same time; therefore, under the circumstances of that case, the applications should be regarded as simultaneous.

In the present case the local officers state that their action in holding the applications of Carrier and Cain simultaneous and awarding the right of entry to the highest bidder was in accord with the practice theretofore followed in their office without objection by your office. The practice is of long standing, and as shown in the case of *Northern Pacific R. R. Co. v. Gosney*, was followed as recently as January 25, 1906, on which date certain lands in the Bismarck, North Dakota, land district were opened to entry. A number of intending applicants had collected prior to the hour of opening and were informed by the register that the applications of all persons present at the opening would, in case of conflict without settlement, be treated as simultaneous and the right of entry awarded to the highest bidder. When the applications were received it developed that the homestead application of Gosney and the application of the Northern Pacific Railway Company to make selection were in conflict, and the

right of entry was awarded to Gosney as the highest bidder. The company appealed, contending that it was error on the part of the local office to regard the applications as simultaneous. Your office, however, by decision of December 1, 1906 (subsequent to the contrary action of your office and the Department in the present case), upon full consideration of this contention by the company, sustained the local office, and upon further appeal the Department, by decision of April 22, 1907 (601 L. & R., 13), affirmed the action below, holding that—

no reason appears for disturbing the arrangement made by the local officers under the exigencies of the case, and their action taken is approved.

Section 6 of the act of April 24, 1820 (3 Stat., 566), now section 2365, Revised Statutes, provides:

Where two or more persons apply for the purchase, at private sale, of the same tract, at the same time, the register shall determine the preference, by forthwith offering the tract to the highest bidder.

The practice thus inaugurated with respect to private cash entries has, by reason of the necessity of providing some method of determining the right of entry among simultaneous rival applicants, been adopted by the land department as applicable to other classes of applications. It is shown by departmental decisions to have been followed with respect to homestead, timber-culture, and desert-land applications and applications to make railroad selection. (*Helfrich v. King, supra*; *Melville and Kelly, supra*; *James McCormick*, 3 L. D., 555; *Instructions*, May 8, 1885, *supra*; *Lindsey v. Adams*, 21 L. D., 444; *Northern Pacific Ry. Co. v. Gosney, supra*.) The practice is specifically recognized and approved with regard to homestead applications on page 13 of the present General Circular. No reported decision is found in which it has been followed with respect to timber-and-stone applications; but no reason is perceived why exception should be made of applications of this class. In fact, as the timber-and-stone act provides for a *sale* of lands, entry thereunder would seem to be more nearly analogous to a private cash entry than entry under the homestead, timber-culture, or desert-land laws. In a case like the present, where conflicting applications were presented during the rush attending the opening upon the filing of a township plat, there would seem to be as much difficulty in determining a question of priority between timber-and-stone applicants as between applicants under the homestead or any other law. Every reason for regarding conflicting applications of one class as simultaneous under such circumstances is equally applicable to all others.

The action of the local officers in holding the applications of Carrier and Cain simultaneous and awarding the right of entry to Carrier as the highest bidder was in accord with long-established and well-settled practice in similar cases and should be sustained.



jected because of the withdrawal, and, upon appeal, that action was affirmed by your office. °

Further appeal was taken to the Department. Because of various modifications and amendments of the original order of withdrawal, and particularly that of January 15, 1907 (35 L. D., 395), which provided that "nothing in any withdrawal of lands from coal entry heretofore made shall impair any right acquired in good faith under the coal-land laws and existent at date of such withdrawal," the case, by unreported departmental decision of May 25, 1907, was remanded to your office for further consideration and appropriate action.

Thereupon your office held as follows:

To acquire a preference right under section 2348, Revised Statutes, a person must have opened and improved a coal mine upon the land. The expenditure of \$25 in cleaning out old workings was not the opening and improving of a mine of coal within the terms and meaning of the statute—*McDowell v. Crawford*, Secretary, March 16, 1907, not reported—and it cannot be held that Mrs. Filer had acquired a right in good faith under the coal land laws which existed at the date of the withdrawal and such as to bring her within the departmental order of January 15, 1907, before referred to, and circular of instructions of May 20, 1907.

In the present appeal the applicant contends substantially that your office holding is error; that good faith on the part of applicant is apparent; that the Government, by reason of the withdrawal, does not occupy the position of an adverse claimant; that the applicant was not called upon, or given opportunity, to comply with the circular of January 21, 1907 (35 L. D., 395), as to an additional showing in the premises; and that to sustain the decision of your office will be to deprive the applicant for all time of her right to purchase and enter coal lands, a privilege granted by Congress to all qualified citizens alike.

In order to obtain a preference right to entry under the coal-land laws (Sections 2347–2352, Revised Statutes), the claimant must have actual possession and have opened and improved a mine or mines of coal. In case of conflicting claims, priority of possession and improvements followed by proper filing and continued good faith are determinative (Section 2351, Revised Statutes). Paragraph 7 of the present coal-land regulations (35 L. D., 665, 668), in part, provides:

A perfunctory compliance with the law in this respect will not suffice, but a mine or mines of coal must be in fact opened and improved on the land claimed.

There is no authority under which a coal mine upon public lands, entry not having been made, may be worked and operated for profit and sale of the coal, or beyond the *opening and improving* of the mine as a condition precedent to a preference right under section 2348 of the Revised Statutes.

Whatever else may be involved, the statute clearly contemplates the actual opening of a mine of coal and its improvement as such.

Charles S. Morrison (36 L. D., 126, 129). Substantial steps, taken in good faith, looking to the creation of an operating and producing coal mine are essential. What specific work or workings constitute the opening of a mine, or what accomplishes the improvement of a mine when opened, are matters as to which no arbitrary and inflexible rule can be laid down. Each case as it arises must be determined upon the facts disclosed.

The unreported departmental decision of March 16, 1907, in the case of McDowell *v.* Crawford, cited by your office and quoted at length in appellant's printed brief, held that the act of merely clearing the face or surface of an outcrop of coal in order to determine the depth of the coal bed was not the opening and improving of a mine within the terms and meaning of the statute. Can it well be said that merely "cleaning out old coal prospects" at an expense of \$10 is sufficient under the circumstances of this case? Whereby does such work alone, in any substantial manner and under any reasonable view, constitute the actual opening and improving of a mine of coal? It is true, it is alleged that the applicant caused to be located and opened a valuable mine of coal, but such an averment, followed by the specific statement of what was in fact done, is of no avail to enlarge the effect of the acts actually performed. The showing is clearly to the effect that the claimant has endeavored to utilize principally old workings upon the ground. The Department is of opinion that the record fails to show that the applicant, at the time her declaratory statement was filed, was invested with a preference right of entry as contemplated by the coal-land laws. Therefore, at the date of the withdrawal and when application to purchase was made, no such right existed.

It is, however, urged that under the former practice prevailing in the land department, the showing made was fully sufficient to sustain the application to enter in any *ex parte* case; that only an intervening claimant under a valid right could defeat the application; and that the Government does not, by reason of the withdrawal, occupy any such position.

The Department, in analogous cases, has held otherwise. In the case of Joshua L. Smith (31 L. D., 57, 59), involving a prior settlement claim upon land afterwards included within a national forest, it was said:

In this case there is no individual adverse claimant, but the government, by its Chief Executive, has claimed all the land within the boundaries of said reservation for a specific purpose, excepting only the lands coming within the above category; and the executive order, reserving the land for a specific public purpose, must be held to be at least as effective upon the claims of settlers as would be the adverse claim of one who wished the land for his own use.

Citing that case, the decision in the case of Hattie E. Bradley (34 L. D., 191, 193) gave that effect to the withdrawal for forest purposes there involved. With equal reason it may be said that the executive order here interposed is essentially of like effect.

The appellant complains because she was not called upon, or given an opportunity, to make a further showing in the premises, pursuant to the circular of January 21, 1907, *supra*. She needed no specific permission to make such showing. The right to file additional evidence at any stage of such a proceeding as this, to cure defects in the proof or the record, is expressly allowed by rule 100 of practice. She does not now show or claim that the facts are otherwise than as set forth in the proof presented, and it is upon the record as made that the present appeal is prosecuted.

It does not follow, as contended by the applicant, that if her pending application be finally rejected she will be deprived from hereafter entering coal land. Unless disqualified otherwise, no reason is apparent why she might not apply, when the land is restored, to purchase and enter these tracts upon the then existing terms and conditions, or perhaps, upon a proper showing, other lands instead.

In view of the foregoing, the decision appealed from is affirmed. The offered application to purchase stands rejected, and with it the coal declaratory statement.

**SECOND HOMESTEAD—CHIPPEWA LANDS—COMMUTATION—ACT OF  
APRIL 28, 1904.**

**ADAM SIPLE.**

A homesteader who in the exercise of his right to make second entry under the provisions of the act of April 28, 1904, enters Chippewa agricultural lands, opened to disposal under the act of January 14, 1889, may, by virtue of the act of March 3, 1905, extending the provisions of section 2301 of the Revised Statutes to such lands, commute his entry by paying the price provided in the act of 1889, notwithstanding the provision in the act of 1904 forbidding commutation of entries allowed thereunder.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(G. W. W.) *Land Office, April 21, 1908.* (A. W. P.)

An appeal has been filed on behalf of Adam Siple from your office decision of April 25, 1907, wherein you affirm the action of the local officers in rejecting his commutation proof offered in support of homestead entry No. 8278, for the S.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$ , Sec. 30, and the N.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$ , Sec. 31, T. 161 N., R. 36 W., Crookston, Minnesota, land district.

It appears that this entry, which was made April 14, 1905, was allowed under the act of April 28, 1904 (33 Stat., 527), claimant having made a former homestead entry, which was relinquished August 27, 1904.

Considering especially the said act of April 28, 1904, the Department, in the case of *Cox v. Wells* (33 L. D., 657, 659), held that in order to entitle one to the benefits thereof it must be shown, among other things, that the prior entry was made and abandoned or relinquished before the date of the passage of that act. See also circular of September 1, 1905 (34 L. D., 114).

It is noted that claimant's former homestead entry was not relinquished until after the date of the passage of this act. This fact alone, however, is not necessarily fatal to the allowance of a second homestead entry, when, in fact, the former entry was abandoned prior to that time, even though not formally relinquished until subsequent thereto. Theodore Golle (35 L. D., 375). And in view of the fact that the said act of April 28, 1904, conferred upon the Commissioner of the General Land Office the authority to allow a second homestead entry in all cases wherein it was shown to his satisfaction that the applicant was entitled thereto, the Department must at this late date presume that the necessary showing was made by Siple, which satisfied your office that he was entitled to make such entry under the provisions of said act of April 28, 1904. Hence, in the absence of any suggestion as to the invalidity of this entry, the question will not now be considered.

The commutation proof in question was offered by Siple on September 1, 1906, and was by the local officers, on September 18, thereafter, rejected, *supra*, for the reason that entries made under the act of April 28, 1904, were not entitled to the benefits of commutation. Upon appeal therefrom, your office, by decision of April 25, 1907, held that the act of March 3, 1905 (33 Stat., 1005), which authorized the acceptance of commutation proofs on entries of Chippewa lands, did not by implication repeal the provisions of section 3 of the act of April 28, 1904, which denied the right of commutation to all second homestead entries made thereunder. Accordingly, you affirmed the action of the local officers.

The case is now before the Department on appeal filed in behalf of Siple, based upon the following specifications of error:

First. . . . in rejecting said commuted proof and in deciding that the proof should not be allowed.

Second. In deciding that the third section of the act of April 28, 1904, applies to this case.

Third. In failing to find that the statute entitled "An act to allow the commutation of homestead entries in certain cases," approved January 26, 1901 (31 Stat., 740), allowing the right to commute on all homestead entries, was repealed

by said act of April 28, 1904; in holding that the provisions of the act approved March 3, 1905, extending the right to commute all entries made on Chippewa lands in the State of Minnesota, did not apply to this case, and in not allowing said commuted proof.

Considering the matters alleged in support of this appeal, it will be observed that by the act of January 14, 1889 (25 Stat., 642), provision was made for the acquirement of certain lands in Minnesota by cession and relinquishment from the Chippewa Indians, and it was therein provided that the agricultural lands so acquired should be disposed of to actual settlers only under the provisions of the homestead law, and each settler was required to pay for the lands entered the sum of one dollar and twenty-five cents per acre, in five annual payments, and was to be entitled to patent only upon proof of payment of said sum and upon due proof of the occupancy of said land for the period of five years.

The Free Homestead Act of May 17, 1900 (31 Stat., 179), provided that all settlers under the homestead laws upon agricultural public lands which had been acquired by treaty or agreement and opened to settlement prior thereto, who had resided, or should thereafter reside, upon the tract entered for the period required by existing law, should be entitled to a patent for the land so entered, "upon the payment to the local land officers of the usual and customary fees, and no other or further charge of any kind whatsoever shall be required from such settler to entitle him to a patent for the land covered by his entry."

It will thus be observed that in all such cases these settlers were thereafter relieved from making the payment of the Indian price for the land. Subsequently thereto, by act of January 26, 1901 (31 Stat., 740), the provisions of section 2301 of the Revised Statutes, authorizing commutation of homestead entries, were "extended to all homestead settlers affected by or entitled to the benefits of the provisions of" the Free Homestead Act, *supra*. But it was therein provided that in commuting such entries, the entrymen should pay the price provided in the law under which the original entry was made.

Again, by the act of March 3, 1905, *supra*, it was provided:

That the provisions of section twenty-three hundred and one, Revised Statutes of the United States, as amended, be, and the same are hereby, extended to all homestead settlers who have made or shall hereafter make homestead entries under the provisions of the act entitled "An act for the relief and civilization of the Chippewa Indians in the State of Minnesota," approved January fourteen, eighteen hundred and eighty-nine.

Thus, it will be noted that, while by the said act of January 26, 1901, the provisions of section 2301 of the Revised Statutes were extended to all homestead settlers on lands acquired and opened to set-

tlement prior to the passage of the said act of May 17, 1900, the above act of March 3, 1905, extended same to all homestead settlers who had then made or who shall thereafter make homestead entry of any of the Chippewa lands. The purpose and intent of this later act was well stated in the report of the Committee on Public Lands of the House of Representatives recommending its passage. Therein it was said, substantially, that large tracts of the Chippewa lands had been from time to time examined and those which contained no pine timber were classed as agricultural and opened to settlement and entry; that in this manner more than one million acres were opened before May 17, 1900, and almost as great an acreage had since that date been listed and opened; and that the passage of the act in question would extend the commutation provisions of the homestead law to all these lands, while at the present time its benefits were enjoyed by homestead entrymen only on those lands opened to settlement and entry prior to the passage of the said act of May 17, 1900.

While the homestead entry in question was allowed because of the fact that the applicant showed to the satisfaction of your office that he was entitled to the benefits of the said act of April 28, 1904, section 3 of which prohibits the making of commutation proof, yet it must be also observed that the entry was made under the act of January 14, 1889, which governed the disposition of these Chippewa lands. The said act of April 28, 1904, was a general act, allowing all those who came within its provisions the benefit of the homestead laws. as though such former entry had not been made.

The act of January 14, 1889, was a special act providing for the acquisition and disposition of a specific tract of land. This act was also followed later by another special act—that of March 3, 1905, *supra*—which extended the privileges of section 2301 of the Revised Statutes to all homestead settlers making entry within this limited territory.

In view of these facts and considering especially the language of the several acts in question, the Department is of the opinion that while the said act of April 28, 1904, prohibits the offering of commutation proof on homestead entries made thereunder, yet when Siple, who because of certain qualifications was allowed under that act to make homestead entry of a tract disposed of under the said act of January 14, 1889, as amended by the special act of March 3, 1905, the manner in which he should earn title was governed by the latter acts, the effect of which was to allow him to offer commutation proof, and in so doing to pay the price provided in the original act of January 14, 1889, under which his said entry was made.

Entertaining this view, the judgment of your office is reversed, and if the proof in question be found otherwise sufficient, you will accept the same. issue certificate thereon, and pass the entry to patent.

WARE SCRIP—LOCATION ONLY UPON LAND SUBJECT TO PRIVATE ENTRY.

HERBERT DIERKS.

The provision of the act of December 28, 1876, restricting the location of the certificate therein authorized to be issued to the legal representatives of Samuel Ware to land "subject to sale," contemplates that location thereof may be made only upon land subject to sale at private cash entry.

*First Assistant Secretary Pierce to the Commissioner of the General Land Office, April 23, 1908.* (G. W. W.) (E. F. B.)

By decision of December 27, 1907, you rejected the application of Herbert Dierks to locate Ware certificate of location No. 4, subdivision 2, upon the SW.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$ , Sec. 1, T. 8 S., R. 28 W., Camden, Arkansas, for the reason that the land applied for is not subject to private cash entry.

This certificate of location was issued under authority of the act of December 28, 1876 (19 Stat., 500), in lieu of a New Madrid location which failed because the land located was found by the Supreme Court to belong to the State of Kentucky.

The act of February 17, 1815 (3 Stat., 211), granted to persons owning lands in the county of New Madrid, Missouri, which were injured by earthquake, authority "to locate the like quantity of land on any of the public lands of the said territory, the sale of which is authorized by law." The act of December 28, 1876, under which the certificate in question was issued, required the Commissioner of the General Land Office "to issue a certificate of new location to the legal representatives of Samuel Ware, authorizing them to locate said certificate on six hundred and forty acres of any land in what was Missouri Territory, subject to sale."

The words "subject to sale," and "subject to sale at private entry," or "the sale of which is authorized by law," have the same significance, and are intended to mean lands subject to sale by private cash entry.

As the land applied for is not subject to sale at private entry, your decision is affirmed.

MANNER OF PROCEEDING ON SPECIAL AGENTS' REPORTS.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., April 25, 1908.*

*To Special Agents and Registers and Receivers:*

Paragraph 7 of General Land Office circular dated November 25, 1907 [36 L. D., 112, 178], entitled "Manner of Proceeding upon Special Agents' Reports," is hereby amended to read as follows:

If a hearing is asked for, the local officers will consider the same and confer with the special agent relative thereto and fix a date for the hearing, due

notice of which must be given entryman or claimant. The above notice may be served by registered mail. By ordinary mail a like notice will be sent the special agent; and, when the land is in a national forest, the proper forest field officer will be also notified.

You will hereafter be governed accordingly.

Very respectfully,

FRED DENNETT, *Commissioner.*

Approved:

FRANK PIERCE,

*First Assistant Secretary.*

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CRARY *v.* GAVIGAN ET AL.

Motion for review of departmental decision of January 4, 1908, 36 L. D., 225, denied by First Assistant Secretary Pierce, April 28, 1908.

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COAL LANDS—VERIFICATION OF APPLICATIONS, DECLARATORY STATEMENTS, AND AFFIDAVITS.

INSTRUCTIONS.

*First Assistant Secretary Pierce to the Commissioner of the General Land Office, April 29, 1908.* (F. H. B.)  
(G. W. W.)

The Department has considered your memorandum of the 24th instant, relative to the verification of the affidavits required of declarants and entrymen under the coal-land laws, in which you submit a proposed modification of the existing regulations (Par. 16) [35 L. D., 665, 670], so as to provide as follows:

16. Each application, declaratory statement and affidavit, forms whereof are given above, must be verified before the register or receiver or some officer authorized by law to administer oaths in the land district wherein the lands involved are situate.

The proposed amendment is hereby approved, and you will take the necessary steps to give it effect.

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NORTHERN PACIFIC RAILROAD GRANT—INDEMNITY SELECTION.

NORTHERN PACIFIC RY. CO. *v.* SANTA FE PACIFIC R. R. CO.

The Northern Pacific Railway Company is not restricted, in making selection of indemnity lands under the provisions of the act of July 2, 1864, and the joint resolution of May 31, 1870, to lands on the same side of the line of road as the lands lost to the grant and assigned as base for the selection.

*First Assistant Secretary Pierce to the Commissioner of the General Land Office, April 30, 1908.* (E. O. P.)  
(G. W. W.)

The Santa Fe Pacific Railroad Company, by H. H. Hoyt, attorney, has appealed to the Department from your office decision of July 26,

1907, denying his application to contest selection made by the Northern Pacific Railway Company of the N.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$ , Sec. 23, T. 55 N., R. 16 W., Duluth land district, Minnesota.

The Northern Pacific Railway Company first tendered its selection October 17, 1883, per list No. 15. April 10, 1893, rearranged list was filed assigning loss on account of which selection was made of tracts within the withdrawal of May 26, 1864, under the grant of May 5, 1864, for the Lake Superior and Mississippi Railroad. This not constituting sufficient basis for the selection the same was held for cancellation by your office April 15, 1901.

December 19, 1901, the Northern Pacific Railway Company, as successor in interest of the original selector, designated by way of substitution the SE.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  and the SW.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$ , Sec. 33, T. 132 N., R. 37 W., as basis for said selection, which your office adjudged to be valid.

The proposed contest rests upon the following charges:

First: That the original selection was invalid and that, because the Northern Pacific Railway Company did not succeed to the rights of the original grantee, when that selection failed it was without authority to make a new selection or substitute a valid base to sustain the old selection.

Second: That selection of indemnity lands must be confined to the area on the same side of the line of road as is the location of the tracts lost to the grant.

It is not denied that the base designated to support the original selection was insufficient. The Department has, however, settled the question of the successorship of the Northern Pacific Railway Company to the rights of the original beneficiary of the grant favorably to the railway company and adversely to the contention of counsel. (Hugh R. Ferguson, 33 L. D., 635; *Jones v. Northern Pacific Ry. Co.*, 34 L. D., 105).

It is urged in argument that the lands selected and those lost to the grant must be located in the identical twenty-five mile section of the line of road. No authority is cited to support this construction of the law authorizing such selections, and the Department knows of none. On the contrary, the plain language of the joint resolution of May 31, 1870 (16 Stat., 378), permits of selection in the second indemnity belt any place within the State or Territory where the loss occurred.

The right of the company to select, as indemnity, lands on the opposite side of the line of road from those lost to the grant and made the basis of such selection, presents a question which appears never to have been directly passed upon by the Department. The contention of appellant that the lost and selected lands must be on the same

side of the line of road as the lands lost finds support in the decision rendered in the case of *Southern Pacific R. R. Co. v. Smith* (74 Fed., 588). A careful comparison of the language of the grant to the Burlington and Missouri River Railroad Company, made by section 20 of the act of July 2, 1864 (13 Stat., 356, 364), with that of the grant made to the Northern Pacific Railroad Company the same day (13 Stat., 365, 367), discloses that the former is a grant of quantity while the latter is one of lands in place. The court in the case of *United States v. Burlington, etc., R. R. Co.* (98 U. S., 334, 339), upon which the decision above referred to is based, so defined the character of the grant to the Burlington and Missouri River R. R. Co., and held:

There is no limitation of distance from the road within which the selection is to be made, and the court can make none.

There being no fixed lateral limits within which the quantity might be selected, it is apparent the grant might be fully satisfied by taking an equal area on each side of the line. Where the grant is one of specific sections in place it is improbable an equal area could be secured in satisfaction of the grant on each side of the road. Congress realized this and provided in the original granting act that selection might be made of lands in lieu of deficiencies existing at the date of definite location, within ten miles of the outer limits of the grant. This limit was extended by the joint resolution of May 31, 1870 (16 Stat., 378), where it was found impossible to make up the loss in any State or Territory within existing limits, by creating a second indemnity belt ten miles in width beyond the limits of the first. Neither by the terms of the original act nor the joint resolution is the right of selection of indemnity lands restricted by any requirement that the loss on account of which selection is made should have occurred on the same side of the line of road as the tract selected. Unlike the grant to the Burlington and Mo. R. R. Co., there is nothing in the language of the grant to the Northern Pacific Railway Co. that indicates that it should, when adjusted, be of an equal amount of land on each side of the line of road. There being no such limitation imposed by Congress, the Department has no authority to annex one. While the court in the case of *Southern Pacific R. R. Co. v. Smith*, *supra*, based its conclusion upon the decision rendered in the case of *United States v. Burlington, etc., R. R. Co.*, *supra*, no consideration was given to the language of the different granting acts and the distinction above referred to was not observed. The Department is of opinion such distinction is material and when made the basis of a proper construction of these separate grants is controlling, and that the application of the rule laid down by the court with respect to a grant of lands in quantity having no fixed lateral limits would be an unwarranted limitation upon the right of the Northern Pacific Rail-

way Company, or its successor in interest, to select indemnity lands within a definite area on account of a loss of designated sections in place.

It may further be said that in the administration of none of the railroad land grants having defined limits has any such requirement been imposed and if it were doubtful the Department would not feel warranted in disturbing the uniform construction covering a period of more than half a century.

The decision of your office is accordingly hereby affirmed.

**SCHOOL LANDS—EFFECT OF INDEMNITY SELECTION PRIOR TO APPROVAL.**

STATE OF WASHINGTON.

No such right is acquired by an application to select indemnity school lands, prior to approval thereof, as will prevent other disposition of the lands by Congress.

*First Assistant Secretary Pierce to the Commissioner of the General (G. W. W.) Land Office, April 30, 1908. (E. O. P.)*

The State of Washington has appealed to the Department from your office decision of October 8, 1907, holding for cancellation its school land indemnity selections of the tracts described in lists Nos. 6, 7 and 8, situated in the North Yakima land district, Washington. Said lists were filed in the local office September 6, 1902.

A portion of the tracts selected form a part of the area without the Yakima Indian reservation as established by the old survey but within the limits of said reservation as declared by the act of December 21, 1904 (33 Stat., 595). Your office held said lists for cancellation because the tracts thus situated were not public land subject to such selection.

The State in its appeal contends that Congress had no power to declare the extent of said reservation by an act passed subsequent to the ratification of the treaty establishing it and also that the tender of the indemnity selections prior to the passage of said act, even conceding it to be within the power of Congress, operated to invest the State with a prior right, the protection of which was guaranteed by that provision of the act which reads as follows:

Where valid rights have been acquired prior to March fifth, nineteen hundred and four, to lands within said tract by bona fide settlers or purchasers under the public land laws, such rights shall not be abridged.

It is insisted in support of the first contention that Congress can not declare by subsequent legislation the meaning and effect of treaty stipulations, and consequently that the act of December 21, 1904, *supra*, can be given no retroactive effect but must be considered and treated as a grant operative only from the date of its passage.

If the construction of the Indian treaty announced by Congress effected a destruction of vested rights in the other party thereto, the injured party might seek relief if dissatisfied with the construction adopted. But a party not possessed of a vested right in the land affected could set up no such claim. However, that is not the case presented, as it is clear this action of Congress amounted only to a recognition of a claim asserted by the Indians under the original treaty, and there can be no question as to the power of Congress to settle this claim by acceding to the demands of the Indians and correcting a former erroneous survey to conform to the stipulations of the treaty, thus giving full effect to the original intention of the parties.

If, however, the act referred to were considered as a grant merely, the pendency of the State's application to select, unapproved, would not defeat the grant in the absence of specific exception therefrom of the tracts selected. Until a vested right in the land had been acquired, the power of Congress to deal with it is undisputed. The tender of an application to select indemnity school land is not essentially different from the application of a railroad company to select indemnity for a loss of lands within the primary limits of its grant. In either case approval of the selection is essential to the passing of the title and the acquisition by the selector of a vested right. (*Wisconsin R. R. Co. v. Price Co.*, 133 U. S., 496, 511; *Todd v. State of Washington*, 24 L. D., 106, 108.)

It is not contended that the State is a settler, but it is urged that it occupies the position of a purchaser and therefore entitled to claim the benefit of the exception made in the act declaring the extent of the reservation. The analogy attempted can not be sustained. The consideration tendered had not been accepted at the date of the passage of the act. It remained for the Department, acting in a judicial, as distinguished from a ministerial capacity, to pass upon the sufficiency of that consideration as well as the right of the State to take the lands selected and the authority of the Department to dispose of them. Until these matters had been determined the transaction was incomplete and no rights had been surrendered either by the State or the United States. The refusal of the United States to proceed destroys no vested right of the State. Its right to select other lands by virtue of the loss assigned in support of this selection remains unimpaired, and this selection never having been approved no vested right in the lands selected had been acquired.

The Department, after consideration of all the matters urged in support of the appeal, finds no reason for disturbing the action of your office and the decision appealed from is accordingly hereby affirmed.

SUGGESTIONS TO HOMESTEADERS AND PERSONS DESIRING TO MAKE  
HOMESTEAD ENTRIES.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., March 9, 1908.*

1. Persons desiring to make homestead entries should first fully inform themselves as to the character and quality of the lands they desire to enter, and should in no case apply to enter until they have visited and fully examined each legal subdivision for which they make application, as satisfactory information as to the character and occupancy of public lands can not be obtained in any other way.

As each applicant is required to swear that he is well acquainted with the character of the land described in his application, and as all entries are made subject to the rights of prior settlers, the applicant can not make the affidavit that he is acquainted with the character of the land, or be sure that the land is not already appropriated by a settler, until after he has actually inspected it.

Information as to whether a particular tract of land is subject to entry may be obtained from the register or receiver of the land district in which the tract is located, either through verbal or written inquiry, but these officers must not be expected to give information as to the character and quality of unentered land or to furnish extended lists of lands subject to entry, except through plats and diagrams which they are authorized to make and sell as follows:

For a township diagram showing entered land only .....	\$1.00
For a township plat showing form of entries, names of claimants, and character of entries .....	2.00
For a township plat showing form of entries, names of claimants, character of entry, and number .....	3.00
For a township plat showing form of entries, names of claimants, character of entry, number, and date of filing or entry, together with topography, etc .....	4.00

A list showing the general character of all the public lands remaining unentered in the various counties of the public-land States on the 30th day of the preceding June may be obtained at any time by addressing "The Commissioner of the General Land Office, Washington, D. C."

All blank forms of affidavits and other papers needed in making application to enter or in making final proofs can be obtained by applicants and entrymen from the land office for the district in which the land lies.

2. *Kind of lands subject to homestead entry.*—All unappropriated surveyed public lands are subject to homestead entry if they are not mineral or saline in character and are not occupied for the purposes of trade or business and have not been embraced within the limits of any withdrawal, reservation, or incorporated town or city; but homestead entries on lands within certain areas (such as lands in Alaska, and lands withdrawn under the reclamation act, certain ceded Indian lands, and lands within abandoned military reservations, etc.) must be entered subject to the particular requirement of the laws under which such lands were opened to entry. None of these particular requirements are set out in these suggestions, but information as to them may be obtained by either verbal or written inquiries addressed to the register and receiver of the land office of the district in which such lands are situated.

#### HOW CLAIMS UNDER THE HOMESTEAD LAW ORIGINATE.

3. Claims under homestead laws may be initiated either by settlement on surveyed or unsurveyed lands of the kind mentioned in the foregoing paragraph, or by the filing of a soldier's or sailor's declaratory statement, or by the presentation of an application to enter any surveyed lands of that kind.

4. *Settlements may be made under the homestead laws* by all persons qualified to make either an original or a second homestead entry of the kind mentioned in paragraphs 6 and 13, and in order to make settlement the settler must personally go upon and improve or establish residence on the land he desires. By making settlement in this way, the settler gains an exclusive right to enter the lands settled upon as against all other persons, but not as against the Government should the lands be withdrawn by it for other purposes.

A settlement made on any part of a surveyed technical quarter section gives the settler the right to enter all of that quarter section which is then subject to settlement, although he may not place improvements on each 40-acre subdivision; but if the settler desires to initiate a claim to surveyed tracts which form a part of more than one technical quarter section he should perform some act of settlement—that is, make some improvement—on each of the smallest legal subdivisions desired. When settlement is made on unsurveyed lands, the settler must plainly mark the boundaries of all the lands claimed by him.

Settlement must be made by the settler in person and can not be made by his agent, and each settler must, within a reasonable time

after making his settlement, establish and thereafter continuously maintain an actual residence on the land, and if he, or his heirs or devisees, fail to do this, or if he, or his heirs or devisees, fail to make entry within three months from the time he first settles on surveyed lands, or within three months from the filing in the local land office of the plat of the survey of unsurveyed lands on which he made settlement, the exclusive right of making entry of the lands settled on will be lost and the lands will become subject to entry by the first qualified applicant.

5. *Soldier's and sailor's declaratory statements* may be filed in the land office for the district in which the lands desired are located by any persons who have been honorably discharged after ninety days' service in the Army or Navy of the United States during the war of the rebellion or during the Spanish-American war or the Philippine insurrection. Declaratory statements of this character may be filed either by the soldier or sailor in person or through his agent acting under a proper power of attorney, but the soldier or sailor must make entry of the land in person, and not through his agent, within six months from the filing of his declaratory statement, or he may make entry in person without first filing a declaratory statement if he so chooses. The application to enter may be presented to the land office through the mails or otherwise, but the declaratory statement must be presented at the land office in person, either by the soldier or sailor, or by his agent, and can not be sent through the mails.

BY WHOM HOMESTEAD ENTRIES MAY BE MADE.

6. Homestead entries may be made for a quarter section or less by any person who does not come within either of the following classes:

- (a) Married women, except as hereinafter stated.
- (b) Persons who have already made homestead entry, except as hereinafter stated.
- (c) Foreign-born persons who have not declared their intention to become citizens of the United States.
- (d) Persons who are the owners of more than 160 acres of land in the United States.
- (e) Persons under the age of 21 years who are not heads of families, except minors who make entry as heirs, as hereinafter mentioned, or who have served in the Army or Navy for at least fourteen days.
- (f) Persons who have acquired title to or are claiming under any of the agricultural public land laws, through settlement or entry made since August 30, 1890, any other lands which, with the lands last applied for, would amount in the aggregate to more than 320 acres.

7. *A married woman*, who has all of the other qualifications of a homesteader, may make a homestead entry under any one of the following conditions:

(a) Where she has been actually deserted by her husband.

(b) Where her husband is incapacitated by disease or otherwise from earning a support for his family and the wife is really the head and main support of the family.

(c) Where the husband is confined in a penitentiary and she is actually the head of the family.

(d) Where the married woman is the heir of a settler or contestant who dies before making entry.

(e) Where a married woman made improvements and resided on the lands applied for before her marriage, she may enter them after marriage if her husband is not holding other lands under an unperfected homestead entry at the time she applies to make entry.

A married woman can not make entry under any of these conditions unless the laws of the State where the lands applied for are situated give her the right to acquire and hold title to lands as a *femme sole*.

8. *If an entryman deserts his wife* and abandons the land covered by his entry, his wife then has the exclusive right to contest the entry if she has continued to reside on the land, and on securing its cancellation she may enter the land in her own right, or she may continue her residence and make proof in the name of and as the agent for her husband, and patent will issue to him.

9. *If an entryman deserts his minor children* and abandons his entry after the death of his wife, the children have the same rights the wife could have exercised had she been deserted during her lifetime.

10. *If a husband and wife are each holding an original entry* or a second entry at the same time, they must relinquish one of the entries, unless one of them holds an entry as the heir of a former entryman or settler. In cases where they can not hold both entries, they may elect which one they will retain and relinquish the other.

11. *The unmarried widows of soldiers and sailors who were honorably discharged* after ninety days' actual service during the war of the rebellion, or the Spanish-American war, or the Philippine insurrection, may make entry as such widows, if their husbands died without making entry; but a widow may make entry in her own right as an unmarried woman, regardless of the fact that her husband may have made entry, but she can not claim credit for her husband's service.

12. *A person serving in the Army or Navy of the United States* may make a homestead entry if some member of his family is residing on the lands applied for, and the application and accompanying affidavits may be executed before the officer commanding the branch of the service in which he is engaged.

13. *Second homestead entries* for a quarter section or a smaller legal subdivision of public lands may be made, under statutes specifically authorizing such entries by the following classes of persons, if they are otherwise qualified to make entry:

(a) By a former entryman who commuted his entry prior to June 5, 1900.

(b) By homestead entryman who, prior to May 17, 1900, paid for lands to which they would have been afterwards entitled to receive a patent without payment, under the "Free homes act."

(c) By any person who for any cause lost, forfeited or abandoned his homestead entry before February 8, 1908, if the former entry was not canceled for fraud or relinquished for a valuable consideration.

(d) Any person who has already made final proof for less than 160 acres under the homestead laws may, if he is otherwise qualified, make a second or additional homestead entry for such an amount of public lands as will, when added to the land for which he has already made proof, not exceed in the aggregate 160 acres.

Any person desiring to make a second entry must first select and inspect the land he intends to enter and then make application therefor on blanks furnished by the register and receiver. Each application must state the date and number of his former entry and the land office at which it was made, or give the section, township, and range in which the land entered was located. Any person mentioned in paragraph (c) above must show, by the oaths of himself and some other person or persons, the time when his former entry was lost, forfeited, or abandoned and that it was not canceled for fraud or abandoned or relinquished for a valuable consideration.

14. *An additional homestead entry* may be made by a person for such an amount of public lands adjoining lands then held and resided upon by him under his original entry as will, when added to such adjoining lands, not exceed in the aggregate 160 acres. An entry of this kind may be made by any person who has not acquired title to and is not, at the date of his application, claiming under any of the agricultural public land laws, through a settlement or entry made since August 30, 1890, any other lands which, with the lands then applied for, would exceed in the aggregate 320 acres; but the

applicant will not be required to show any of the other qualifications of a homestead entryman.

15. *An adjoining farm entry* may be made for such an amount of public lands lying contiguous to lands owned and resided upon by the applicant as will not, with the lands so owned and resided upon, exceed in the aggregate 160 acres; but no person will be entitled to make entry of this kind who is not qualified to make an original homestead entry.

#### HOW HOMESTEAD ENTRIES ARE MADE.

16. A homestead entry may be made by the presentation to the land office of the district in which the desired lands are situated of an application properly prepared on blank forms prescribed for that purpose and sworn to before either the register or the receiver, or before a United States commissioner, or a United States court commissioner, or a judge or a clerk of a court of record, in the county or parish in which the land lies, or before any officer of the classes named who resides in the land district and nearest and most accessible to the land, although he may reside outside of the county in which the land is situated.

17. *Each application to enter and the affidavits accompanying it must recite all the facts* necessary to show that the applicant is acquainted with the land; that the land is not, to the applicant's knowledge, either saline or mineral in character; that the applicant possesses all of the qualifications of a homestead entryman; that the application is honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person, persons, or corporation; that the applicant will faithfully and honestly endeavor to comply with the requirements of the law as to settlement, residence, and cultivation necessary to acquire title to the land applied for; that the applicant is not acting as the agent of any person, persons, corporation, or syndicate in making such entry, nor in collusion with any person, corporation, or syndicate to give them the benefit of the land entered or any part thereof; that the application is not made for the purpose of speculation, but in good faith to obtain a home for the applicant, and that the applicant has not directly or indirectly made, and will not make, any agreement or contract in any way or manner with any person or persons, corporation, or syndicate whatsoever by which the title he may acquire from the Government to the lands applied for shall inure, in whole or in part, to the benefit of any person except himself.

18. *All applications to make second homestead entries* must, in addition to the facts specified in the preceding paragraph, show the number and date of the applicant's original entry, the name of

the land office where the original entry was made, and the description of the land covered by it, and it should state fully all of the facts which entitle the applicant to make a second entry.

19. *All applications by persons claiming as settlers* must, in addition to the facts required in paragraph 21, state the date and describe the acts of settlement under which they claim a preferred right of entry, and applications by the widows, devisees, or heirs of settlers must state facts showing the death of the settler and their right to make entry; that the settler was qualified to make entry at the time of his death, and that the heirs or devisees applying to enter are citizens of the United States, or have declared their intentions to become such citizens, but they are not required to state facts showing any other qualifications of a homestead entryman, and the fact that they have made a former entry will not prevent them from making an entry as such heirs or devisees, nor will the fact that a person has made entry as the heir or devisee of the settler prevent him from making an entry in his own individual right, if he is otherwise qualified to do so.

20. *All applications by soldiers, sailors, or their widows*, or the guardians of their minor children should be accompanied by proper evidence of the soldier's or sailor's service and discharge, and of the fact that the soldier or sailor had not, prior to his death, made an entry in his own right. The application of the widow of the soldier or the sailor must also show that she has remained unmarried, and applications for children of soldiers or sailors must show that the father died without having made entry; that the mother died or remarried without making entry, and that the person applying to make entry for them is their legally appointed guardian.

#### RIGHTS OF HEIRS UNDER THE HOMESTEAD LAWS.

21. *If a homestead settler dies* before he makes entry, his widow has the exclusive right to enter the lands covered by his settlement, and if there be no widow, then any person to whom he has devised his settlement rights by proper will has the exclusive right to make the entry; but if a settler dies leaving neither widow nor will, then the right to enter the lands covered by his settlement passes to the persons who are named as his heirs by the laws of the State in which the land lies. The persons to whom the settler's right of entry passes must make entry within the time named in paragraph 4 or they will forfeit their right to the next qualified applicant. They may, however, make entry after that time if no other qualified person has applied to enter the lands.

22. *If a homestead entryman dies before making final proof* his rights under his entry will pass to his widow; but if there be no

widow, and the entryman's children are all minors, the rights to a patent vests at once in them, or the lands may be sold for their benefit in the manner in which other lands belonging to minors are sold under the laws of the State or Territory in which the lands are located.

If the children of a deceased entryman are not all minors and his wife is dead, his rights under his entry pass to the person to whom such rights were devised by the entryman's will, but if an entryman dies without leaving either a widow or a will, and his children are not all minors, his rights under his entry will pass to the persons who are his heirs under the laws of the State or Territory where the lands are situated.

23. *If a contestant dies after having secured the cancellation of an entry of any kind, his right as a successful contestant to make entry passes to his heirs; but if a contestant dies before he has secured the cancellation of the entry he has contested his heirs may continue the prosecution of his contest and make entry if they succeed in securing the cancellation of the entry contested.*

*No foreign-born person can claim rights as heirs under the homestead laws unless they have become citizens of the United States, except that aliens who have declared their intentions to become citizens may make entry as the heirs or devisees of settlers or contestants.*

24. *Minor children of soldiers or sailors who have been honorably discharged after ninety days' actual services during the war of the rebellion, the Spanish-American war, or the Philippine insurrection may make a joint entry, through their guardian, if their fathers failed to make homestead entry and their mothers have died or remarried without making entry after their father's death.*

#### RESIDENCE AND CULTIVATION.

25. *The residence and cultivation required by the homestead law means a continuous maintenance of an actual home on the land entered to the exclusion of a home elsewhere, and continuous annual cultivation of some portion of the land. A mere temporary sojourn on the land, followed by occasional visits to it once in six months or oftener, will not satisfy the requirements of the homestead law, and may result in the cancellation of the entry.*

26. *No specified amount of either cultivation or improvements is required, but there must in all cases be such continuous improvement and such actual cultivation as will show the good faith of the entryman. Lands covered by homestead entry may be used for grazing purposes if they are more valuable for pasture than for cultivation to crops. When lands of this character are used in good faith for pasturage, actual grazing will be accepted in lieu of actual cultiva-*

tion. The fact that lands covered by homestead entries are of such a character that they can not be profitably cultivated or pastured will not be accepted as an excuse for failure to either cultivate or graze them.

27. *Actual residence on the lands entered must begin within six months* from the date of all homestead entries, except additional entries and adjoining farm entries of the character mentioned in paragraphs 14 and 15 and residence with improvements and annual cultivation must continue until the entry is five years old, except in cases hereafter mentioned, but all entrymen who actually resided upon and cultivated lands entered by them prior to making such entries may make final proof at any time after entry when they can show five years residence and cultivation.

Under certain circumstances, leaves of absence may be granted in the manner pointed out in paragraph 36 of these suggestions, but the entryman can not claim credit for residence during the time he is absent under such leave.

28. *Residence and cultivation by soldiers and sailors* of the classes mentioned in paragraph 5 must begin within six months from the time they file their declaratory statements regardless of the time when they make entry under such statement, but if they make entry without filing a declaratory statement they must begin their residence within six months from the date of such entry, and residence thus established must continue in good faith, with improvements and annual cultivation for at least one year, but after one year's residence and cultivation the soldier or sailor is entitled to credit on the remainder of the five-year period for the term of his actual naval or military service, or if he was discharged from the Army or Navy because of wounds received or disabilities incurred in the line of duty he is entitled to credit for the whole term of his enlistment.

29. *A soldier or sailor making entry during his enlistment* in time of peace is not required to reside personally on the land, but may receive patent if his family maintain the necessary residence and cultivation until the entry is five years old or until it has been commuted, but a soldier or sailor is not entitled to credit on account of his military service in time of peace.

30. *Widows and minor orphan children of soldiers and sailors* who make entry as such widows and children must begin their residence and cultivation on the lands entered by them within six months from the dates of their entries, or the filing of declaratory statement, and thereafter continue both residence and cultivation for such period as will, when added to the time of their husbands' or fathers' military or naval service, amount to five years from the date of the entry, and if the husbands or fathers either died in the service or were discharged on account of wounds or disabilities incurred in the

line of duty, credit for the whole term of their enlistment, not to exceed four years, may be taken, but no patent will issue to such widows or children until there has been residence and cultivation by them for at least one year.

31. *Persons who make entry as heirs of settlers* are not required to both reside upon and cultivate the land entered by them, but they must within six months from the dates of their entries begin, and thereafter continuously maintain either residence or cultivation on the land entered by them for the required five-year period, unless their entries are sooner commuted.

32. *The widow, heirs, or devisees of a homestead entryman*, who dies before he earns patent, are not required to both reside upon and cultivate the lands covered by his entry, but they must within six months after the death of the entryman begin either residence or cultivation on the land covered by the entry, and thereafter continuously maintain their residence or cultivation for such a period of time as will, when added to the time during which the entryman complied with the law, amount in the aggregate to the required five years, unless they sooner commute the entry.

33. *Homestead entrymen who have been elected or appointed* to either a Federal, State, or county office after they have made entry and established an actual residence on the land covered by their entries are not required to continue such residence during their term of office, if the discharge of their *bona fide* official duties necessarily requires them to reside elsewhere than upon the land; but they must continue their cultivation and improvements for the required length of time.

A person who makes entry after he has been elected or appointed to office is not excused from maintaining residence, but must comply with the law in the same manner as though he had not been elected or appointed.

34. *Neither residence nor cultivation is required* on lands covered by an adjoining farm entry, or an additional entry of the kinds mentioned in paragraphs 14 and 15; but a person who makes an adjoining farm entry is not entitled to a patent until he has continued his residence and cultivation, for the full five years, on the adjoining lands owned by him at the time he made entry or on the lands entered by him, unless he sooner commutes his entry after fourteen months' residence on either the entered lands or the adjoining lands owned by him. A person who has made an additional entry for lands adjoining his original entry is not entitled to a patent to the lands so entered until he has earned a patent to the adjacent lands embraced in his original homestead entry, but if he has earned a patent under his original entry at the time he makes his additional homestead entry he is entitled at once to a patent under the additional entry.

35. *Neither residence nor cultivation by an insane homestead entryman is necessary if such entryman made entry before he became insane and complied with the requirements of the law up to the time his insanity began.*

#### LEAVES OF ABSENCE.

36. Leaves of absence for one year or less may be granted to entrymen who have established actual residence on the lands entered by them in all cases where total or partial failure or destruction of crops, sickness, or other unavoidable casualty has prevented the entryman from supporting himself and those dependent upon him by a cultivation of the land.

Applications for leaves of absence should be addressed to the register and receiver of the land office where the entry was made and should be sworn to by the applicant and some other disinterested person before such register and receiver or before some officer in the land district, using a seal and authorized to administer oaths, except in cases where through age, sickness, or extreme poverty the entryman is unable to visit the district for that purpose, when the oath may be made outside of the land district. All applications of this kind should clearly set forth:

(a) The number and date of the entry, a description of the lands entered, the date of the establishment of his residence on the land, and the extent and character of the improvements and cultivation made by the applicant.

(b) The kind of crops which failed or were destroyed and the cause and extent of such failure or destruction.

(c) The kind and extent of the sickness, disease, or injury assigned, and the extent to which the entryman was prevented from continuing his residence upon the land, and, if practicable, a certificate signed by a reliable physician, as to such sickness, disease, or injury, should be furnished.

(d) The character, cause, and extent of any unavoidable casualty which may be made the basis of the application.

(e) The dates from which and to which the leave of absence is requested.

#### COMMUTATION OF HOMESTEAD ENTRIES.

37. All original, second, and additional homestead, and adjoining farm entries may be commuted, except such entries as are made under particular laws which forbid their commutation.

When actual residence was established within six months from the date of any entry made before November 1, 1907, and thereafter continuously maintained with improvements and cultivation until the expiration of fourteen months' from the date of the entry and in cases

where there has been at least fourteen months' actual and continuous residence and cultivation on any land covered by any entry made after November 1, 1907, the entryman or his widow, heirs, or devisees may obtain patent by proving such residence and cultivation and paying the cost of such proof, the land office fees, and the price of the land, which is \$1.25 per acre outside of the limits of railroad grants and \$2.50 per acre for land within the granted limits, except as to certain lands which were opened under statutes requiring payment of a price different from that here mentioned.

#### HOMESTEAD FINAL AND COMMUTATION PROOF.

38. Either final or commutation proof may be made at any time when it can be shown that residence and cultivation have been maintained in good faith for the required length of time, but if final proof is not made within seven years from the date of a homestead entry the entry will be canceled unless some good excuse for the failure to make the proof within the seven years is given with satisfactory final proof as to the required residence and cultivation made after the expiration of the seven years.

39. *By whom proof may be offered.* Final proof must be made by the entrymen themselves, or by their widows, heirs, or devisees, and cannot be made by their agents, attorneys in fact, administrators, or executors, except in the following cases:

(a) If an entryman becomes insane after making his entry, patent will issue to the entryman on proof by his guardian, or other legal representative, that the entryman had complied with the law up to the time his insanity began.

(b) If a person has made a homestead entry and afterwards died while he was serving as a soldier or a sailor during the Spanish-American war or the Philippine insurrection, patent will issue upon proof made by his widow, if unmarried, or in case of her death or marriage, then his minor orphan children, or his, her, or their legal representatives.

(c) Where entries have been made for minor orphan children of soldiers or sailors, proof may be offered by their guardian, if any, if the children are still minors at the time the proof should be made.

(d) When an entryman has abandoned the land covered by his entry, and deserted his wife, she may make final or commutation proof as his agent, or, if his wife be dead and the entryman has deserted his minor children, they may make the same proof as his agent, and patent will issue in the name of the entryman.

(e) When an entryman dies leaving children, all of whom are minors, and both parents are dead, the executor or administrator of the entryman, or the guardian of the children, may, at any time within

two years after the death of the surviving parent, sell the land for the benefit of the children by proper proceedings in the proper local court, and patent will issue to the purchaser; but if the land is not so sold patent will issue to the minors upon proof of death, heirship, and minority being made by such administrator or guardian.

40. *How proofs may be made.*—Final or commutation proofs may be made before any of the officers mentioned in paragraph 16, as being authorized to administer oaths to applicants.

Any persons desiring to make homestead proof should first forward a written notice of his desire to the register and receiver of the land office, giving his post-office address, the number of his entry, the name and official title of the officer before whom he desires to make proof, the place at which the proof is to be made, and the name and post-office addresses of at least four of his neighbors who can testify from their own knowledge as to facts which will show that he has in good faith complied with all the requirements of the law.

41. *Publication fees.*—The entryman should, at the time he informs the register of his desire to make final proof, forward to the receiver sufficient money to pay the newspaper for publishing the notice, which fees will not exceed the fees provided by the State laws for the publication of legal notices of a similar kind. If the entryman does not forward the money to pay these fees he may forward a statement from the publisher of the paper, in which the notice is to be published, showing that he has arranged with the publisher for the payment of the fees.

42. *Duty of officers before whom proofs are made.*—On receipt of the notice mentioned in the preceding paragraph, the register will issue a notice naming the time, place, and officer before whom the proof is to be made and cause the same to be published once a week for five consecutive weeks in a newspaper of established character and general circulation published nearest the land, and also post a copy of the notice in a conspicuous place in his office.

On the day named in the notice the entryman must appear before the officer designated to take proof with at least two of the witnesses named in the notice; but if for any reason the entryman and his witnesses are unable to appear on the date named, the officer should continue the case from day to day until the expiration of ten days, and the proof may be taken on any day within that time when the entryman and his witnesses appear, but they should, if it is at all possible to do so, appear on the day mentioned in the notice. Entrymen are advised that they should, whenever it is possible to do so, offer their proofs before the register or receiver, as it may be found necessary to refer all proofs made before other officers to a special agent for investigation and report before patent can issue, while, if the proofs are made before the register or receiver, there is less likelihood of this

being done, and there is less probability of the proofs being incorrectly taken. By making proof before the register or receiver the entryman will also save the fees which they are required to pay other officers, as they will be required under the law to pay the register and receiver the same amount of fees in each case, regardless of the fact that the proof may have been taken before some other officer.

Entrymen are cautioned against improvidently and improperly commuting their entries, and are warned that any false statement made in either their commutation or final proof may result in their indictment and punishment for the crime of perjury.

43. *Fees and commissions.*—When a homesteader applies to make entry he must pay in cash to the receiver a fee of \$5 if his entry is for 80 acres or less, or \$10 if he enters more than 80 acres, and in addition to this fee he must pay, both at the time he makes entry and final proof a commission of \$1 for each 40-acre tract entered outside of the limits of a railroad grant and \$2 for each 40-acre tract entered within such limits. On all final proofs made before either the register or the receiver or before any other officer authorized to take proofs, the register and receiver are entitled to receive 15 cents for each one hundred words reduced to writing, and no proof can be accepted or approved until all fees have been paid.

In all cases where lands are entered under the homestead laws in Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming the commission due to the register and receiver on entries and final proofs, and the testimony fees under final proofs, are 50 per cent more than those above specified, but the entry fee of \$5 or \$10, as the case may be, remains the same in all the States.

United States commissioners, United States court commissioners, judges, and clerks are not entitled to receive a greater sum than 25 cents for each oath administered by them, except that they are entitled to receive \$1 for administering the oath to each entryman and each final proof witness to final proof testimony, which has been reduced to writing by them.

FRED DENNETT,  
*Commissioner.*

Approved March 9, 1908.

FRANK PIERCE,  
*First Assistant Secretary.*

## SOLDIERS' ADDITIONAL—QUALIFICATIONS OF APPLICANT—REQUIREMENT AS TO AGE.

TALLMADGE *v.* GRINDEN.

The fact that a woman who applies to locate a soldiers' additional right is under twenty-one years of age is no ground for rejection of the application, if it be shown that under the laws of the State she has attained her majority.

*Acting Secretary Woodruff to the Commissioner of the General  
(S. V. P.) Land Office, August 30, 1907. (P. E. W.)*

Carlton H. Tallmadge has appealed to the Department from your office decision of April 13, 1907, holding his homestead application subject to, and allowing, the application of Clara Grinden, in the exercise of her preference right gained by successful contest of a former entry, to enter, under section 2306 of the Revised Statutes, the SE.  $\frac{1}{4}$ , Sec. 31, T. 157 N., R. 75 W., Devils Lake, North Dakota.

The validity of the bases offered appears and the only question presented by the appeal is whether the admitted fact that Grinden was under the age of twenty-one years when she presented her application is fatal to the allowance thereof.

It is urged in the appeal that the statute granting soldiers' additional rights is part of the homestead laws and must be interpreted in accordance therewith as to the qualifications of applicants in any matter where specific rules are lacking.

The Department has held otherwise. In the case of Cornelius J. MacNamara (33 L. D., 520) it is held that—

While the right generally called the soldiers' additional homestead is embodied in the Revised Statutes as section 2306, in the chapter entitled "Homesteads," the act by which this right was conferred was no part of the body of the homestead laws, as is seen by examination into its character and history. It was merely a bounty, having no more reference to the body of the homestead laws than had any other of the many acts granting military land bounties, except that it made reference to the homestead acts to point out and identify the beneficiaries.

The statute itself prescribes no qualifications for, and places no limit to, the exercise of the right granted thereby. The regulations require an affidavit of *bona fide* ownership of the right at date of the application, proof that it had not theretofore been exercised, non-saline and nonmineral affidavits, and proof of the citizenship of the applicant. Under the laws of North Dakota females attain their majority at the age of eighteen years and there is no question of the applicant's citizenship. No reason appearing why the application should not be allowed, your said decision is hereby affirmed.

## REPAYMENT—ACT OF MARCH 26, 1908.

## INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
Washington, D. C., April 29, 1908.

TO REGISTERS AND RECEIVERS,

*United States Land Offices.*

GENTLEMEN: Your attention is called to the following provisions of the act of Congress approved March 26, 1908 (Public, No. 66), entitled "An act to provide for the repayment of certain commissions, excess payments, and purchase moneys paid under the public land laws:"

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That where purchase moneys and commissions paid under any public land law have been or shall hereafter be covered into the Treasury of the United States under any application to make any filing, location, selection, entry, or proof, such purchase moneys and commissions shall be repaid to the person who made such application, entry, or proof, or to his legal representatives, in all cases where such application, entry, or proof has been or shall hereafter be rejected, and neither such applicant nor his legal representatives shall have been guilty of any fraud or attempted fraud in connection with such application.

SEC. 2. That in all cases where it shall appear to the satisfaction of the Secretary of the Interior that any person has heretofore or shall hereafter make any payments to the United States under the public land laws in excess of the amount he was lawfully required to pay under such laws, such excess shall be repaid to such person or to his legal representatives.

SEC. 3. That when the Commissioner of the General Land Office shall ascertain the amount of any excess moneys, purchase moneys, or commissions in any case where repayment is authorized by this statute, the Secretary of the Interior shall at once certify such amounts to the Secretary of the Treasury, who is hereby authorized and directed to make repayment of all amounts so certified out of any moneys not otherwise appropriated and issue his warrant in settlement thereof.

The foregoing act is additional to the provisions of sections 2362 and 2363, United States Revised Statutes, and to the act of June 16, 1880 (21 Stat., 287).

The first section authorizes the return to the applicant, or to his legal representatives, of purchase moneys and commissions covered into the Treasury of the United States under any application to make any filing, location, selection, entry, or proof, where such application has been or shall hereafter be rejected, in cases where neither the applicant nor his or her legal representatives shall have been guilty of any fraud or attempted fraud in connection with said application.

This section refers more particularly to moneys covered into the Treasury of the United States as directed in office circular "M" of May 16, 1907 (35 L. D., 568) and circular letter "M" of July 26,

1907; that is, moneys deposited with proof under the timber and stone, desert land, coal land, or mineral land laws.

APPLICATIONS.

Applications for repayment under this section should be made in the following or equivalent form:

To the Commissioner of the General Land Office.

SIR:

I hereby make application for the return of the purchase money and commissions paid with my — under the — law, for the — of section —, township —, range —, as per receiver's receipt No. —, issued at —, bearing date the — day of —, 19—, and which is surrendered herewith, and on oath declare that I am the identical (or legal representative of the) person who made said payment, and that there was no fraud or attempted fraud in connection with the effort to obtain title to the described tract of land.\*—

(Applicant sign here.) — —

(P. O. address.) — —

State of — }  
County of — } ss.

Subscribed and sworn to before me this — day of —, 19—.

— —  
— —

\*If the receipt has been lost or destroyed, so state.

The affidavit may be made before the register or receiver, or any officer authorized to administer oaths. When made before a justice of the peace, a certificate of official character is required.

The *second* section authorizes the return to the person who made the payment, or to his legal representatives, of any moneys paid under any of the land laws of the United States, in excess of the legal requirements.

APPLICATIONS.

Applications for repayment under this section should be made in the following or equivalent form:

To the Commissioner of the General Land Office.

SIR:

I hereby make application for the return of the amount paid in excess of the lawful requirements on entry of the — of section —, township —, range —, as per receiver's receipt No. —, issued at —, bearing date the — day of —, 19—, and on oath declare that I am the identical (or legal representative of the) person who made said payment.

(Applicant sign here.) — —

(P. O. address.) — —

State of — }  
County of — } ss.

Subscribed and sworn to before me this — day of —, 19—.

— —  
— —

Affidavits in this class of claims may also be made before the register or receiver, or any officer authorized to administer oaths. When made before a justice of the peace, a certificate of official character is required.

#### HEIRS, EXECUTORS, AND ADMINISTRATORS.

Where application is made by heirs, satisfactory proof of heirship is required. This must be the best evidence that can be obtained, and must show that the parties applying are the heirs and the only heirs of the deceased.

Where application is made by executors, a certificate of executorship from the probate court must accompany the application.

Where application is made by administrators, the original, or a certified copy, of the letters of administration must be furnished.

Section 3477, United States Revised Statutes, prohibits the transfer or assignment of claims against the United States, and, therefore, any attempted transfer or assignment of a claim under either of the beforementioned sections can not be recognized.

#### TRANSMITTAL OF APPLICATIONS.

Applications for repayment may be filed either in this office or in the proper district land office.

When an application is filed in the district land office the register and receiver shall transmit the same with a full report of the facts in the case, as shown by their official records, and recommend either the allowance or the disallowance of the claim.

The third section of the act directs the Secretary of the Interior to at once certify to the Secretary of the Treasury the amount of any excess moneys, purchase moneys, or commissions, ascertained by the Commissioner of the General Land Office to be due under this act, and the Secretary of the Treasury is authorized and directed to make repayment of all amounts so certified out of any moneys not otherwise appropriated and to issue his warrant in settlement thereof.

#### CREDIT MAY BE ALLOWED FOR PRIOR PAYMENT IN SECOND APPLICATION TO COMMUTE.

In cases where the commutation homestead proof upon which you have issued certificate and receipt has been rejected by this office, the certificate canceled, and the original entry allowed to stand subject to future compliance with the law, you will not, when second commutation proof is accepted, require a second payment of purchase money, unless the prior payment has been repaid; but the register will issue his certificate, bearing proper number and date, noting thereon and in the register's and receiver's joint abstract:

“Purchase money paid —, 19—, per receiver's receipt No. —.”

The purchase price, which will be inserted in the proper column of the abstract in red ink, will not be included in the footing.

The receiver will issue receipt (Form 4-131) for testimony fee paid in the second proof, with notation to show that the "purchase money was paid —, 19—, per receiver's receipt No. —."

Before allowing credit on account of payment in a prior canceled cash entry, as hereinbefore set forth, the register and receiver are charged with the duty of ascertaining from the Commissioner of the General Land Office that no application for repayment of the original purchase money has in the meantime been approved.

Very respectfully,

FRED DENNETT,  
*Commissioner.*

Approved:

FRANK PIERCE,  
*First Assistant Secretary.*

GIG HARBOR ABANDONED MILITARY RESERVATION—DISPOSAL OF  
LANDS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., May 4, 1908.*

REGISTER AND RECEIVER,  
*Seattle, Washington.*

SIRS: Your attention is invited to the act of Congress approved June 9, 1906 (34 Stat., 229), copy hereto attached, providing for the subdivision and sale of certain lands in the State of Washington. The lands described in said act embrace all the unpatented and unreserved lands in abandoned military reservations Nos. 22 and 33, Gig Harbor. The lands have been regularly surveyed and subdivided into 10-acre tracts, or less, and appraised, in accordance with the provisions of the act. The official plat of survey has heretofore been filed in your office, and a copy of the appraised list, which has been approved by the Secretary of the Interior, accompanies this letter.

1. The lands as subdivided are described as Lots 1 to 15, inclusive, Sec. 4; Lots 1 to 4 and 7 to 38, inclusive, Sec. 5; Lots 1 to 16, inclusive, Sec. 7; Lots 1 to 12, inclusive, Sec. 8, all in T. 21 N., R. 2 E.; and Lots 4, 5, 6, 7, 8, Sec. 33, T. 22 N., R. 2 E., containing 752.89 acres.

2. The lands not entered by a settler, as provided below, will be offered at public sale, at your office, commencing at 10 o'clock a. m. on August 18, 1908, and the offering will continue during office hours each day until all the lands have been offered.

3. You will offer the lands by the smallest legal subdivision and will sell them to the highest bidders for cash at not less than the appraised price and not less than \$2.50 per acre.

4. Any settler who was in actual occupation of any portion of such lands on June 9, 1906, who settled thereon in good faith for the purpose of securing a home, and is by law entitled to make a homestead entry, shall be entitled to enter the land so occupied, not exceeding twenty acres in a body, according to the official plat of survey.

5. Any settler claiming such right of entry, shall be entitled to make entry of lands claimed, at any time between July 17 and August 17, 1908, upon furnishing his affidavit, corroborated by the affidavits of two persons, satisfactorily establishing his right to make entry under the act, and paying \$2.50 per acre for the land entered by him. He must show the date of his settlement, the period of his actual occupation of the land, the character and value of his improvements, and any other facts tending to show his good faith, and in addition show that he is entitled to make a homestead entry.

6. Before patent shall issue on any such entry, the settler will be required to submit proof after due publication of notice of intention to do so, showing residence and cultivation of the lands settled on in the manner and for the length of time required by the homestead laws of the United States.

7. Each purchaser will be required to furnish a nonmineral affidavit and also evidence of citizenship.

8. Cash receipts and certificates, in the regular series, will be issued for these lands, the same to be marked "Gig Harbor Abandoned Military Reservation." You will not, however, issue a certificate until these regulations have been fully complied with. The certificate should bear the same number as the receipt, but be of current date.

9. A formal notice of the opening of these lands has been prepared and copies are herewith inclosed, together with blanks authorizing the publication thereof in two newspapers to be designated by you, said newspapers to have general circulation in the county or the section of the county where the lands to be sold are situated. You will at once report to this office the names of the newspapers designated by you. A copy of the notice will also be posted in your office until after the sale is closed.

10. At the close of the sale, you will make a full report in regard to the disposition of lands under these instructions.

Very respectfully,

FRED DENNETT,  
*Commissioner.*

Approved, May 4, 1908.

FRANK PIERCE,

*First Assistant Secretary of the Interior.*

## [PUBLIC—No. 216.]

An Act to provide for the subdivision and sale of certain lands in the State of Washington.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Secretary of the Interior may, if in his opinion the public interests so require, cause lots one, two, and three, and the northwest quarter of the northwest quarter of section four; and lots two, three, and four, and the northeast quarter of the southeast quarter, and all of the northeast quarter of section five; and the east half of the northeast quarter and the east half of the southeast quarter of section seven; and the northwest quarter of the southwest quarter and the south half of the southwest quarter of section eight, in township twenty-one north, and lot four of section thirty-three, in township twenty-two north, all in range two east of the Willamette meridian, in the State of Washington, or any part thereof, to be regularly surveyed or subdivided into tracts or lots of ten acres each, or less, and into town lots, or either, or both. He shall cause said lands to be so surveyed and subdivided and each tract thereof to be appraised by three competent disinterested men, to be appointed by him, and who shall, after having each been first duly sworn to impartially and faithfully execute the trust reposed in him, appraise said lands, subdivisions, and tracts, and each of them, and report their proceedings to the Secretary of the Interior for his action thereon. If such appraisal be disapproved, the Secretary of the Interior shall again cause the said lands to be appraised as before provided; and when the appraisal has been approved he shall cause the said lands, subdivisions, and lots to be sold at public sale to the highest bidder for cash, at not less than the appraised value thereof and not less than two dollars and fifty cents per acre, first having given not less than sixty days' public notice of the time, place, and terms of sale, immediately prior to such sale, by publication in at least two newspapers having general circulation in the county or the section of the county where the lands to be sold are situated; and any lands, subdivisions, or lots remaining unsold may be reoffered for sale at any subsequent time in the same manner, at the discretion of the Secretary of the Interior; and if unsold at such second offering for want of bidders then the Secretary of the Interior may sell the same at private sale for cash at not less than the appraised value nor less than two dollars and fifty cents per acre: *Provided*, That no date shall be fixed for the sale of any of said lands until at least ninety days after the Secretary of the Interior has approved said appraisal: *Provided further*, That any settler who is in actual occupation of any portion of such lands at the date of the passage of this Act who has settled thereon in good faith for the purpose of securing a home, and is by law entitled to make a homestead entry, shall be entitled to enter the land so occupied, not exceeding twenty acres in a body, according to the Government surveys and subdivisions thereof upon payment to the Government of the sum of two dollars and fifty cents per acre for each acre entered by him, and upon showing residence and cultivation of such lands in the manner and for the length of time required by the homestead laws of the United States.

Approved, June 9, 1906 (34 Stat., 229).

## RIGHT OF WAY—SURVEY OF ROUTE—ACT OF MARCH 3, 1875.

## GRAND CANYON SCENIC RAILWAY COMPANY.

No such right is acquired under the provisions of the act of March 3, 1875, by a mere survey of the route of a proposed line of railroad as will except the lands traversed by such surveyed route from reservation by the government.

*Secretary Garfield to the Commissioner of the General Land Office,*  
(G. W. W.) May 1, 1908. (E. O. P.)

The Grand Canyon Scenic Railway Company has appealed to the Department from your office decision of February 27, 1908, rejecting its applications for rights of way, under the provisions of the act of March 3, 1875 (18 Stat., 482), over lands reserved by the President's proclamation of January 11, 1908, on account of the creation of the Grand Canyon National Monument.

The reservation made by said proclamation is authorized by the act of June 8, 1906 (34 Stat., 225), and by the express terms of the proclamation all the lands covered thereby are—  
reserved from appropriation and use of all kinds under all of the public land laws, subject to all prior, valid adverse claims.

Unless, therefore, the railway company had, at the date of the creation of the Grand Canyon National Monument, initiated a prior, valid adverse claim, the Department is without authority to approve its applications for rights of way. It is clear also that the existence of such claim depends upon actual construction of the road for which right of way is sought and not upon the filing and approval of maps of definite location, as no maps were tendered for approval until after the reservation was made.

The claim of counsel that such a right has been acquired by construction of the road rests upon alleged survey of the route prior to the date of the President's proclamation. An examination of the cases cited and relied upon to sustain this contention does not disclose any intention of the court or the Department to announce such a principle. In the case of *Dakota Central Railroad Co. v. Downey* (8 L. D., 115), the acquisition of a right of way under the act of March 3, 1875, *supra*, either by actual construction or by the approval of maps of definite location, is recognized, but it is clear from the distinction drawn between the two methods of obtaining the benefits of said act, that when construction is relied upon, proof must be furnished that it is actual construction and sufficient of itself to fix the boundaries of the grant. Location of the line of the proposed right of way is a preliminary incident to the filing of a map for approval as well as to the actual construction of the road. A survey of the route is perhaps in all cases essential to such location, but until the line thus ascertained is actually constructed, or the maps based

thereon, accompanied by an application for right of way, are approved by the Department, no rights have been initiated under the act, for until the happening of one or the other of these events, the line of road has not been definitely located. This is the plain effect of the decision rendered in the case of *Jamestown and Northern R. R. Co. v. Jones* (177 U. S., 125, 130, 131).

In the present case it is manifest there had not been prior to the reservation of the tracts traversed by the proposed right of way, any definite location of the line of road, as by a supplemental showing filed with the appeal, an offer is made to adopt a different route than that covered by the original application. However, as the Department is convinced that a survey preliminary either to filing of maps for approval or the building of the road, is not actual construction thereof, as contemplated by the act under which the present application is presented, the contention of counsel must fail. It follows, therefore, that the company had not acquired any valid, adverse right as against the Government at the date of the creation of the Grand Canyon National Monument, and as no other rights are protected by the terms of the reservation made on account thereof, the Department can not, so long as said reservation continues unmodified, approve the applications of the railway company for rights of way over the land embraced in said reservation.

The decision appealed from is accordingly hereby affirmed.

DESERT LAND ENTRY—ANNUAL EXPENDITURE—PURCHASE OF STOCK  
IN IRRIGATION COMPANY.

CALDWELL *v.* HALVORSON.

An expenditure for stock in an irrigation company, by means of whose system a desert land entryman proposes to irrigate his land, each share of stock entitling him to a certain amount of water, is an expenditure for the "purchase of water rights" within the meaning of section 5 of the act of March 3, 1891, and he is entitled to credit therefor toward meeting the requirements of the statute with respect to annual expenditure, notwithstanding such stock may be transferable.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(G. W. W.) *Land Office, May 4, 1908.* (J. F. T.)

Samuel C. Caldwell has appealed to the Department from your decision of December 6, 1907, reversing the action of the local officers of January 24, 1907, and dismissing his contest against desert land entry number 556, made by Ed. Halvorson, May 20, 1905, for the NW.  $\frac{1}{4}$ , Sec. 10, T. 18 S., R. 12 E., W. M., 160 acres, The Dalles, Oregon, land district.

The contest affidavit was filed September 22, 1906, and charges failure to make the required annual expenditure of \$1.00 per acre per year, or to make any material expenditure whatever for the improvement, irrigation and reclamation of the said land as required by law.

Upon due proceeding therefor, both parties appearing in person and by counsel, the testimony was taken before a United States Commissioner at Bend, Oregon, in December, 1906.

There is practically no conflict of testimony. It appears from the record that claimant expended about \$55 in clearing and cutting trees upon the land, during the first year of his entry, which is the period in question, and that he bought two shares of stock in the Arnold Irrigation Company, paying therefor and thereon, in labor and cash, enough to raise his annual expenditure above the required sum of \$160.

It further appears that each share of this stock gives him the right to sufficient water to irrigate 32 acres of land.

The nearest approach of the ditch of said company to this land at the date of the entry was about two miles, but it is in process of further construction, and is the ditch shown upon the plat filed with claimant's application to make entry.

This stock is transferable, and the question presented in this case is whether this expenditure for stock in the irrigation company can properly be allowed as an expenditure required by the desert land law. The act of March 3, 1877, as amended by the act of March 3, 1891, section 5, provides:

That no lands shall be patented to any person under this act unless he or his assignors shall have expended in the necessary irrigation, reclamation, and cultivation thereof, by means of main canals and branch ditches, and in permanent improvements upon the land, and in the purchase of water rights for the irrigation of the same, at least three dollars per acre of whole tract reclaimed and patented in the manner following:

Within one year after making entry for such tract of desert land as aforesaid, the party so entering shall expend not less than one dollar per acre for the purpose aforesaid; and he shall in like manner expend the sum of one dollar per acre during the second and also during the third year thereafter, until the full sum of three dollars per acre is so expended.

You hold that the purchase of this stock is an expenditure "in the purchase of water rights for the irrigation," &c., as provided for in the above quoted act.

Your decision reverses the action of the local officers.

It is contended upon this appeal that because this stock in this irrigation company, concerning whose solvency and ability to deliver the water within the required time no question is raised, is transferable, and may be sold before water is actually used upon this land, the expenditure therefor cannot be properly allowed to this entryman. The same argument can be made as to allowance for fences, which can be sold and removed, also as to all ditches off

the land, the water from which can be sold and diverted to other land; also as to windmills, towers and other movable machinery, even if the same are actually in use upon the land.

The Department is of the opinion that this expenditure for stock in the irrigation company is an expenditure for the purchase of water rights, and properly allowed to this entryman under the statute.

Your decision is accordingly affirmed.

OKLAHOMA LANDS—QUALIFICATIONS OF HOMESTEADER—SEC. 20, ACT OF MAY 2, 1890.

KIELY *v.* MALONEY.

A remainderman in fee after a life estate is not, during the continuance of the life estate, "seized in fee simple" within the meaning of section 20 of the act of May 2, 1890, declaring any person "seized in fee simple of a hundred and sixty acres of land in any State or Territory" disqualified to enter land in Oklahoma.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(G. W. W.) *Land Office, May 6, 1908.* (G. A. W.)

Olif W. Kiely has appealed from your office decision of November 22, 1907, reversing the action of the local officers and holding intact the homestead entry of John D. Maloney, made April 22, 1901, for the SW.  $\frac{1}{4}$ , Sec. 32, T. 26 N., 9 W., Alva, Oklahoma, land district.

Maloney made entry April 22, 1901, and final certificate issued to him May 14, 1906. September 4, 1906, Kiely filed affidavit of contest against the entry, alleging that when it was made Maloney was the owner of more than 160 acres of land, and his affidavit to the contrary, upon application to enter said land, was knowingly false.

A hearing was had February 20, 1907, at which both parties appeared and submitted the issue upon an agreed statement of facts. The local officers found in favor of Kiely, holding that Maloney, at the time he made entry, was not qualified, by reason of his interest in more than 160 acres of land.

Upon appeal, your office reversed the decision of the local officers, and held the entry intact. The contestant has now appealed to the Department.

According to the agreed statement of facts, defendant's father died June 6, 1900, at which time he was the owner of 240 acres of land in the State of Nebraska. By his will he devised this real estate to defendant's mother during her life, and, upon her death, to defendant. The other provisions of the will do not appear to be material in the determination of this case.

In the stipulation of facts it was further recited that the mother of the defendant died August 10, 1906, and that defendant, after making final proof, disposed of the land embraced in the above entry and removed to Nebraska.

Defendant made entry under the provisions of the act of May 2, 1890 (26 Stat., 81), section 20 of which (see p. 91) contains the following:

and no person who shall at the time be seized in fee simple of a hundred and sixty acres of land in any State or Territory, shall hereafter be entitled to enter land in said Territory of Oklahoma.

It is contended by the plaintiff that, under the state of facts appearing in this case, defendant was disqualified to make entry of the lands involved, on the ground that he was at the time "seized in fee simple of a hundred and sixty acres of land."

While there appears to be authority for the view that there may be "seizin of a remainder or reversion expectant upon a freehold estate" (see 4 Kent's Com., 12th Ed., p. 387; *Vrooman v. Shepard*, 14 Barb., 451; *Cook v. Hammond*, 6 Fed. Cas., 399, 406, citing *Plowden*, 191; *Den v. Hillman*, 7 N. J. L., 187), the overwhelming weight of American judicial expression is to the effect that seizin, in this country, includes the element of possession, either actual or constructive, and is equivalent to ownership. See Vol. 7, "Words and Phrases Judicially Defined" (1905), title "Seizin," pp. 6396-6399, where the decisions of American courts are collated. Following this preponderance of authority, therefore, it could not be held that Maloney was, during any part of the lifetime of his mother, seized in fee simple of the lands devised to him under his father's will.

Relative to the case of *Perry v. Krotz* (21 L. D., 503), relied upon by appellant, it is sufficient to say that the decision in that case can have no controlling effect in the case under consideration.

In the case at bar, the mother of the entryman was seized of a prior life estate in the lands devised by his father, which life estate was beneficially enjoyed by her during the life of the homestead entry here involved and for some months thereafter, and, as urged by defendant's counsel, in his brief, might, in the course of nature, have been held by her until the death of the defendant and all his heirs.

The other Oklahoma cases cited by counsel for defendant have also been examined, and are found not to sustain the view that "the spirit of the homestead law prohibits an entry by one in Maloney's position."

For the reasons stated, the action of your office is affirmed.

## STATE SELECTION—CAREY ACT—ALLOWANCE OF SELECTIONS IN DISCRETION OF LAND DEPARTMENT.

## STATE OF WYOMING.

The allowance or rejection of an application by a State to select lands under the provisions of the act of August 18, 1894, commonly known as the Carey Act, is a matter wholly within the discretion of the land department; and where the lands sought to be selected by the State are embraced within a withdrawal made by the Secretary of the Interior under authority of law, they are not, so long as such withdrawal remains in force, subject to any claim of the State under that act.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(G. W. W.)                      *Land Office, May 7, 1908.*                      (E. O. P.)

The State of Wyoming has appealed to the Department from your office decision of December 12, 1907, rejecting its application, filed November 7, 1903, under the provisions of the act of August 18, 1894 (28 Stat., 372, 422), commonly known as the Carey Act, involving 26,936.03 acres in T. 22 N., R. 60 W., Tps. 23 and 24 N., Rgs. 60, 61, and 62 W., T. 25 N., Rgs. 62 and 64 W., 6th P. M., Cheyenne land district, Wyoming, proposed to be irrigated and reclaimed by the Fort Laramie Canal and Reservoir Company.

The land in question was withdrawn, prior to the filing of the State's application, under the provisions of the act of June 17, 1902 (32 Stat., 388).

The Reclamation Service reports that the approval of said application would interfere with its plans and recommends that the same be denied. The State contends that a hearing should be ordered and the Reclamation Service called upon to demonstrate the feasibility of the scheme on account of which the withdrawal was made and that it will be carried out immediately.

It is clear from the terms of the act of August 18, 1894, *supra*, under which the application of the State is filed, that the acceptance of the offer of the State is a matter wholly within the discretion of the Department. The filing of the application is preliminary to the formation of a contract between the State and the United States. It is manifest that the formation of such contract depends upon the acquiescence of both parties thereto without a right in either to insist upon a proffer or acceptance by the other. It is equally clear that when the lands made the subject-matter of the proposed contract have been set aside for other purposes, the Secretary of the Interior, as the authorized representative of the Government in such matters, is fully warranted in declining to enter into any contract with the State which would defeat the object for which the lands were set aside. The State has no right to insist that he should. As his discretion is

not subject to control by the State, a hearing for the purpose of determining whether or not that discretion has been properly exercised can not be demanded by the State. So long as a withdrawal made by him under authority of law remains unrevoked the presumption, so far as third persons having no interest in the land withdrawn are concerned, that his discretion was properly exercised is conclusive, and so long as such withdrawal remains in force the land covered thereby is not subject to any claim of the State under the Carey Act.

The decision of your office is accordingly hereby affirmed.

PRACTICE—APPEAL—PETITION FOR CERTIORARI—RULE 87.

PARKER *v.* KALDER.

Under Rule 87 of Practice, where notice of a decision of the General Land Office is given through the mails, seventy days are allowed from the day such notice is mailed within which to file appeal, irrespective of when the notice is actually received or whether the appeal is filed through the mails or otherwise.

A petition for certiorari will not be granted merely because the right of appeal was improperly denied, but it must further appear upon the face of the petition and exhibits that the decision complained of was erroneous.

Case of *Schmiedt v. Enderson*, 35 L. D., 307, cited and distinguished.

*First Assistant Secretary Pierce to the Commissioner of the General Land Office, May 7, 1908.* (G. W. W.) (E. F. B.)

Bertha E. Kalder complains of the action of your office refusing to transmit her appeal from your decision of January 3, 1908, holding for cancellation her homestead entry made January 21, 1902, for the NE.  $\frac{1}{4}$ , Sec. 31, T. 114 N., R. 78 W., Pierre, South Dakota, upon the contest of Charles R. Parker charging abandonment. She has filed a petition setting forth the material facts in the case and exhibiting therewith a copy of the decision of your office in which the grounds upon which her entry was held for cancellation are fully stated. She alleges that her appeal from said decision was filed within the time required by the rules, and prays that an order may issue requiring the record to be certified to the Department for its consideration.

It appears from the petition that notice of your decision was mailed January 10, 1908, and was received by counsel for petitioner January 11. The appeal of petitioner was filed March 19, 1908, sixty-nine days from the date of mailing of notice and one day less from date of actual receipt of notice. It is alleged that the refusal of your office to transmit the appeal is based upon your construction of the decision of the Department in the case of *Schmiedt v.*

Enderson (35 L. D., 307), in which it was held that where notice is given by registered mail the registry return receipt is the highest evidence of service thereof, and the date of delivery as shown by the receipt is the date of notice. That rule was intended to apply where the person to be served with notice fails to receive it within the usual five days allowed for transmission of notice, as in the case of John P. Drake (11 L. D., 574), where it was held he will be bound only from the time the letter was actually delivered as shown by the registry receipt.

It did not overrule or modify the previous decisions of the Department allowing seventy days from the mailing of the notice, where no question was made as to the date of actual receipt of notice. It was intended to protect an appellant when notice was not received within the five days allowed for transmission and not to curtail or impair rights protected under prevailing decisions.

The direct question was presented in the case of *Boggs v. West Las Animas Townsite* (5 L. D., 475), in which it was held that "the practical effect of this rule is [Rule 87] where notice of decision by your office is given through the mails by the register and receiver, to allow seventy days from the day when such notice is mailed within which to file appeal, and this whether appeal is filed through the mails or otherwise." The rule has been uniformly followed, thus giving to an appellant the sixty days allowed by the rule as well as the ten days allowed for transmission by mail of the notice and the appeal, irrespective of when notice is actually received, or in what manner the notice or the appeal is transmitted.

From the facts stated in the petition it appears that the appeal was filed within the time allowed by the rules and should have been transmitted. The remaining question is whether, although the right of appeal was improperly denied, such a case is presented by the petition as to warrant the certification of the record.

The practice is well established that a petition for certiorari will not be granted if the facts as set forth in the Commissioner's decision, which are not in any material respect controverted in the petition by reference to the record, do not show that an error was committed and that upon the face of the petition and exhibits the decision complained of should be reversed. *Whiteford v. Johnson* (14 L. D., 67); *Blackwell Townsite v. Miner* (20 L. D., 544). If no error in the decision complained of is shown by an inspection of it, or the finding of fact as to a material or controlling issue is not challenged in the petition and with reference to the testimony upon which such finding was based, or to testimony that is directly contrary to such finding, it would be futile to order up the record merely because a right of appeal was denied.

In the decision of your office holding this entry for cancellation, the decision of the local officers is incorporated. There is no material fact stated upon which their conclusions are drawn sustaining the validity of the entry. They seem to have been more impressed with the want of merit on the part of the contestant than the lack of evidence to support the entry. In your decision you state that not one of the conclusions reached by the local officers can be justified by the record, and from the statement of the testimony of petitioner quoted from the record the only reasonable conclusion that can be deduced therefrom is that the entryman never established an actual *bona fide* residence on the land and that her desultory visits were mere pretenses of compliance with the law and not the maintenance of an actual residence.

In view of the fact that the appeal was improperly denied, and as the decision of your office reverses the decision of the local office and finds that the entryman had not in good faith established a residence upon the land, the Department has informally withdrawn the record for examination, which sustains the finding of your office in every material respect as to the facts upon which your decision holding the entry for cancellation is based, and fails to show even from the entryman's own testimony that she ever established and maintained a *bona fide* residence on the land, and that her pretended residence consisted of mere visits of infrequent and short duration.

The petition is denied.

ADDITIONAL HOMESTEAD ENTRY—COMMUTATION—SEC. 3, ACT APRIL 28, 1904.

ALMON B. HARRIS.

Section 3 of the act of April 28, 1904, contemplates, as a condition precedent to the passing of title to an additional entry thereunder, residence upon and cultivation of the land embraced in the original entry, or upon the original and additional entry, for the full period of five years; and if both entries are concurrent, and the original is commuted, title will not pass for the additional until there has been five years' residence and cultivation upon the land included in the original or upon that and the additional entry.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(G. W. W.) *Land Office, May 9, 1908.* (J. R. W.)

Almon B. Harris appealed from your decision of January 21, 1908, ruling him to elect whether commutation cash entry for his homestead entry for the S.  $\frac{1}{2}$  SW.  $\frac{1}{4}$  and NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 5, T. 151 N., R. 65 W., 5th P. M., Devils Lake, North Dakota, should be canceled or additional entry for the NW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , same section, should be canceled.

October 2, 1905, he made the original homestead entry for the tracts first described, and December 19, 1906, he made additional entry for the other tract under section 2, act of April 28, 1904 (33 Stat., 527). July 22, 1907, upon due notice, he submitted commutation proof on both entries showing continuous residence from April 1, 1906, improvements of value of \$600, and sixty acres in cultivation.

Your decision ruled him to elect: (1) to withdraw commutation proof and submit to cancelation of the final cash certificate, leaving his entries intact, subject to compliance with the law as to residence and cultivation for remainder of the five-year period: or (2) to let his commutation proof and final certificate stand as to the tracts in his original entry, and to change his additional entry to be one made under section 6 of the act of March 2, 1889 (25 Stat., 854), and, after compliance with that act by residence thereon, and cultivation for fourteen months, or five years, and due notice, commute or consummate that entry. In default of election the additional entry was held for cancelation without further notice.

The appeal asserts error of your decision and asks that the commutation proof stand in entirety, or at least for the original entry, and on approval as to that entry that final certificate issue upon the additional entry without cash payment, under your office decision of May 21, 1907, in case of Edwin Lintz for land at the same local office.

The act of 1904, *supra*, section 2, under which this additional entry was made, provides that one who has theretofore entered or may enter less than a quarter section, which he yet owns and occupies, may enter land contiguous to his entry to make an area of not more than one hundred and sixty acres without proof of residence on or cultivation of the additional land; the final proof on the original entry, if previously made, to stand as proof on the additional. Section 3 expressly inhibits application of the commutation provisions of section 2301 of the Revised Statutes.

The benefit of section 2 was limited to those actually owning and occupying the original entry, and the acquiring of title through commutation being expressly forbidden, leaves room for no other conclusion than that the benefits of the act are available only to those who reside on the original or additional entry for the full period necessary to earn title under the homestead law.

Appellant contends the rule announced by your decision—

is contrary to the provisions and evident intent of the act and contrary to the departmental interpretation thereof in force at times of submission of commutation proof involved herein, as laid down in the decision . . . May 21, 1907, . . . in case of Edwin Lintz, H. E. 34498, Devils Lake, N. D., District.

This was a decision of your office in a case wherein Lintz had made an entry for one forty acre tract, which he commuted, July 20, 1905,

after which January 29, 1906, he made additional entry for three forty acre tracts, and submitted commutation proof thereon. The papers were sent by the local office to you for instructions, as the act provides that:

if final proof of settlement and cultivation has been made for the original entry when the additional entry is made, then the patent shall issue without further proof.

You instructed the local office that:

The law applies equally as well to commutation of the original entry, and therefore all that is required in cases of this kind is to show by affidavit that the party owned and resided upon the original entry at the date the additional entry was made, and that he was otherwise qualified. Circ. May 20, 1904 (32 L. D., 639). Sec. 3 of said act provides that no commutation of an entry made under the same shall be allowed. The commutation proof can not therefore be accepted and is herewith returned, and on filing the affidavit required and payment of the final commissions, issue the final homestead papers in the case.

This amounted, in substance, to a cash sale of one hundred and sixty acres of public land at a discount of seventy-five per cent from the minimum purchase price.

Lintz's original entry was made April 19, 1904, and necessarily was not made under the act of April 28, 1904, passed after the entry. Without holding that your decision in Lintz's case was or was not a correct interpretation of the law, it is clear that the case at bar does not rest on and is not controlled by the same principles. As the law of 1904 expressly inhibits commutation of entries made under it, such inhibition applies as well to the obtaining of title as incident to commutation of the original entry as by commutation of the additional one. Suppose one desire to obtain title to one hundred and sixty acres without compliance with the homestead law as to residence and for the most part without price—all that is necessary is to make homestead entry for the smallest legal subdivision; subsequently, perhaps next day, make additional entry for adjoining land under the act forbidding acquisition of title through commutation, then, as to the first entered tract, comply with the homestead law only sufficiently to obtain title by commutation, and receive title to the additional entry without complying with the homestead law as to residence on any tract and without any other consideration—a mere donation.

A construction capable of leading to such result is necessarily one calculated to defeat the purpose of the act, which was to grant the additional right only to those who had complied or should substantially comply with the requirements of the homestead law as to residence and cultivation. The Department therefore construes section 3 of the act as requiring, as condition precedent to passing of title to an additional entry thereunder, a five years' period of residence upon and cultivation of the land taken under the original entry, or upon

the original and additional entry for full five years. If both entries are concurrent, and the original is commuted, no title can be passed to the entryman for the additional entry until there is shown to have been a five year residence and cultivation of the land included in the original entry or upon that and the additional entry for the full period required by the homestead law.

This does not necessarily require cancelation of his additional entry because of commutation of the original one. After commutation of the original entry he may continue to reside upon and cultivate it, and on proof that he has done so, he will be entitled to final receipt upon his additional entry. The rule upon him is therefore modified that commutation proof, so far as relates to the additional tract, will be rejected and the final certificate canceled, leaving the entry intact, subject to future proof that he owns and has resided on and cultivated the land in his original entry for the full period of five years, or has resided on the land in his additional entry such time as, added to his residence on the original entry, makes the full five year period, failing to do which the entry will be canceled. (2) He may elect to withdraw his commutation proof as to his original entry and have his final cash certificate canceled in its entirety, reserving right to acquire title to the land in both entries by submission at proper time on due notice proof of compliance with the homestead law.

As so modified your decision is affirmed.

RELINQUISHMENT PENDING CONTEST—PREFERENCE RIGHT OF  
CONTESTANT.

JENNINGS *v.* STOW.

Upon the filing of a relinquishment of an entry against which a contest is pending, no preference right inures to the contestant where the contest is shown to be fraudulent.

*First Assistant Secretary Pierce to the Commissioner of the General  
(G. W. W.) Land Office, May 9, 1908. (P. E. W.)*

Alfaretta Jennings has appealed from your office decision of November 19, 1907, reversing that of the local officers and dismissing her contest against the homestead entry No. 21452 of Elva E. Stow for the E.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  and E.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$ , Sec. 12, T. 21 N., R. 21 W., Woodward, Oklahoma.

The record facts are, that on December 13, 1902, Chester A. Stow, the father of claimant, initiated contest against the then-existing homestead entry of Albert H. Minnick for the same land, which contest was dismissed for want of prosecution April 24, 1903, rein-

stated and set for hearing September 16, 1903, and withdrawn September 2, 1903, on which day claimant filed her contest against the same entry. Minnick made no appearance and on January 15, 1904, the local officers recommended that his entry be cancelled.

February 5, 1904, Jennings filed a relinquishment of the land in question by Minnick and tendered her own homestead application therefor. The local officers endorsed thereon "suspended pending preference right of Elva Stow gained by contest," and on February 18, 1904, they rejected Jennings's application "for the reason that Elva Stow on February 16, 1904, appeared and made H. E., No. 21,452."

In her homestead application Stow stated that she was the head of a family "by virtue of certain papers of adoption . . . hereto attached," the attached paper being an order of court allowing her adoption on February 13, 1904, of her younger brother, Clarence Stow.

March 5, 1904, Jennings filed her appeal from the suspension and rejection of her homestead application, and entered protest against, and asked for cancellation of, Stow's entry as being fraudulent, invalid, collusive and in conflict with Jennings's prior and superior right.

November 15, 1904, your office held that the validity of said adoption proceedings would not be inquired into; that a successful contestant's qualifications are to be determined as of the date when application is filed in the exercise of the preference right; and that "Stow having lawfully provided herself with a child became the head of a family and was entitled to make said entry," and rejected Jennings's application, holding Stow's entry intact.

Upon Jennings's appeal the Department, on June 27, 1905, held that "no valid reason appears for disturbing the action taken by your office," and affirmed the same.

February 7, 1906, Jennings initiated the present contest, claiming that she had procured the said Minnick's relinquishment and filed the same on February 5, 1904, together with her own application to enter this land, and charging that Stow's entry is fraudulent and invalid for the reason that subsequently to contestant's said application the claimant on February 13, 1904, collusively and fraudulently obtained a decree of court recognizing her adoption of her younger brother Clarence Stow, thereby pretending to qualify for homestead entry and thus fraudulently depriving contestant of her lawful right to enter this land. Contestant further charged that claimant had fraudulently and collusively begun and prosecuted her said contest against Minnick's entry with full knowledge that her father, the said Chester A. Stow, had previously obtained and then held a relinquishment of said entry for speculation therein; and

that said contest, adoption and entry by claimant were all collusive and fraudulent.

September 1, 1906, Jennings filed the additional contest charges that claimant had never established a *bona fide* residence on the land; that after said pretended adoption and after the entry in question was made and ever since both Elva Stow and her said brother, Clarence Stow, continued to reside as theretofore with their father, the said Chester A. Stow, upon other land than that in question, excepting for short visits to this land; and that claimant has never established a *bona fide* residence on the latter tract.

Upon a hearing the local officers, expressly refraining from making any finding or recommendation on the question of claimant's qualification to make this entry, held that she did not acquire such a preference right under and by virtue of her said contest against Minnick, as would defeat the prior application of Jennings, and that she had never established an actual *bona fide* residence on this land. On claimant's appeal, your office rendered the decision from which this appeal is taken.

In the view of the Department the disposition of this case might well be determined upon the single inquiry whether, at the date of Jennings's application to enter this land, February 5, 1904, at which time she also filed a relinquishment of the previously existing entry, Elva Stow had a superior right to enter the land. It is true that the latter had a contest pending against said former entry and that she had submitted testimony therein upon which, in the absence of any defense, the local officers had, on January 14, 1904, recommended the cancellation of said entry. But in Jennings's present contest the good faith of Stow's said contest and her rights thereunder are directly called in question. It is clearly shown that she brought her said contest with full knowledge that her father had previously contested the same entry, and had obtained, and was then in possession of the entryman's relinquishment. On this point she herself testifies as follows:

Q.—At the time you instituted the contest against Minnick you knew that your father then held a relinquishment to this land and which you were then contesting.

A.—Yes sir.

In the case of *Dayton v. Hause et al.* (9 L. D., 193) it was held that:

A contest secures no preference right under the act of May 14, 1880, unless the cancellation of the entry is caused by the contest.

In the case of *Parris v. Hunt* (9 L. D., 225) it was held that:

No rights can be acquired through a fraudulent or collusive contest, nor will the rights of others be defeated by such a contest.

In the case of *Weir v. Manning et al.* (13 L. D., 24) the Department said:

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

In the case before us Chester A. Stow, the father of this nineteen-year-old entrywoman, while himself holding a homestead claim and therefore unable to exercise the right of a successful contestant to enter the land, had since December 13, 1902, covered the land in question by a fraudulent contest against the entry of said Minnick, which contest he withdrew only two weeks before the date finally fixed for a hearing therein, after a dismissal for want of prosecution and a subsequent reinstatement. On the day her father withdrew his palpably *mala fide* contest, Elva E. Stow, although two years under the age required for entry, initiated her contest knowing that the entry assailed thereby was relinquished and that the relinquishment was in her father's possession and, therefore, knew that her contest could not result in securing a relinquishment of said entry.

Minnick's said entry was in fact cancelled upon a relinquishment procured and filed February 5, 1904, by Jennings, who at the time made application to enter the land.

The Department is clearly of the opinion that Elva Stow did not earn or become entitled to a preference right of entry for the land in question such as would defeat the prior application of Jennings. There can be no presumption that Minnick's relinquishment of his prior entry was the result of her contest which was filed long thereafter. Neither can there be a presumption that she in good faith sought to earn a preference right to this land by contesting an entry which she then knew to have been previously relinquished. The question here is not one of punishment or forfeiture for a collusive contest but whether she can be held to have acquired in such questionable manner a superior right to Jennings who was a prior legal applicant in good faith for the same land at a time when it was properly open to entry.

The evidence has further been carefully examined as to the *bona fides* of claimant's residence on the land in support of her said entry. It appears from the testimony of the claimant herself that her said brother Clarence, by whose adoption she sought to qualify herself for this entry as the head of a family, continued to make his home with their parents and that in consideration thereof her father was allowed the use and control of the land in question, while the claimant at a distance, and without any substantial compliance with the law requiring residence on the land, taught school and followed clerical employment.

Upon the entire case the Département is unable to find any sufficient grounds on which the entry may be held intact, and the same will be cancelled; your said decision being hereby reversed.

RESERVOIR SITES IN YOSEMITE VALLEY—ACT OF FEBRUARY 15, 1901.

CITY OF SAN FRANCISCO.

The term "public interest" as used in the act of February 15, 1901, authorizing the Secretary of the Interior to grant right-of-way privileges through the Yosemite and certain other national parks, for reservoir sites, etc., if "not incompatible with the public interest," contemplates not merely the public interest in the Yosemite National Park for use as a park only, but the broader public interest which requires such reservoir sites to be utilized for the highest good to the greatest number of people.

Under the provisions of the act of February 15, 1901, the Secretary of the Interior is authorized to permit the utilization of reservoir sites in the Yosemite National Park in connection with a municipal water-supply system for the city of San Francisco.

*Secretary Garfield to the Commissioner of the General Land Office,  
May 11, 1908.*

October 15, 1901, James D. Phelan, then mayor of the City of San Francisco, filed application for reservoir rights of way within the Yosemite National Park upon what are known as the Lake Eleanor and Hetch Hetchy Valley reservoir sites. This application was made under the act of February 15, 1901, and was in fact the application of the city made in the name of James D. Phelan to avoid the difficulties which beset a city if it must announce its business intentions to the public before securing options and rights necessary for its project. This is not disputed, and the fact is corroborated by his assigning to the City and County of San Francisco, on February 20, 1903, all his rights under the above application.

This application was considered by the Secretary of the Interior and, on December 22, 1903, rejected on the ground that he did not have the legal power to allow such a right of way within the Yosemite National Park. From that time to this the city has, with practical continuity, pressed its request for a permit to use these reservoir sites. The city failed, however, to take steps to reopen this case in the form prescribed by the Rules of Practice of this Department, and for that reason, technically had no application on file after December 22, 1903. On the other hand, the city's evident good faith and the strong evidence that it supposed its application was alive in the Department, is shown by the fact that at its request and solicitation the question of the power of the Secretary of the Interior to grant the rights of way applied for was referred to the Attorney-

General, who, on October 28, 1905, held definitely that the Secretary of the Interior had full discretionary power to grant rights of way for reservoir, irrigation, or hydro-electric purposes within the park.

When the Secretary's decision of December 22, 1903, was made final, the maps of location for the two reservoir sites were returned to the city, and unfortunately were destroyed by the fire which followed the earthquake of 1906. Fortunately, however, exact tracings of these maps had been made by the city engineer for use in court proceedings, and for that reason it has been possible to file exact reproductions of the original maps, certified by the city engineer. When the attention of the city's representative was called to the fact that technically the city had no application before the Department, he, on May 7, 1908, formally filed a petition requesting the Secretary of the Interior to exercise his supervisory authority and reopen the matter of the application of James D. Phelan for the reservoir rights in question, thus treating it as though it had never lapsed. I have given the most careful consideration to this petition, and have decided that the facts mentioned above are ample grounds for exercising my supervisory power and therefore reinstate the application of James D. Phelan, assigned to the city, as though the case had been technically kept alive since December 22, 1903, by specific compliance with the Rules of Practice of the Department. To this end the tracings of the original maps of location as recertified by Marsden Manson, city engineer, on April 22, 1908, will be accepted in lieu of the original and treated accordingly.

Congress, on February 15, 1901, provided specifically:

The Secretary of the Interior . . . is authorized . . . to permit the use of rights of way through . . . the *Yosemite*, *Sequoia*, and General Grant National Parks, California, for . . . water conduits and for water plants, dams, and reservoirs used to promote . . . the supply of water for domestic, public, or other beneficial uses . . . provided that such permits shall be allowed within or through any of said parks . . . only upon the approval of the chief officer of the Department under whose supervision such park or reservation falls, and upon a finding by him that the same is not incompatible with the public interest.

By these words Congress has given power to the Secretary of the Interior to grant the rights applied for by the City of San Francisco, if he finds that the permit "is not incompatible with the public interest." Therefore I need only consider the effect of granting the application upon "the public interest."

In construing the words of a statute, the evident and ordinary meaning should be taken, when such meaning is reasonable and not repugnant to the evident purpose of the law itself. On this broad principle the words "the public interest" should not be confined merely to the public interest in the Yosemite National Park for use as a park only, but rather the broader public interest which requires these

reservoir sites to be utilized for the highest good to the greatest number of people. If Congress had intended to restrict the meaning to the mere interest of the public in the park as such, it surely would have used specific words to show that intent. At the time the act was passed there was no authority of law for the granting of privileges of this character in the Yosemite National Park. Congress recognized the interest of the public in the utilization of the great water resources of the park and specifically gave power to the Secretary of the Interior to permit such use. The proviso was evidently added merely as a reminder that he should weigh well the public interest both in and out of the park before making his decision.

The present water supply of the City of San Francisco is both inadequate and unsatisfactory. This fact has been known for a number of years and has led to a very extensive consideration of the various possible sources of supply. The search for water for the city has been prosecuted from two diametrically opposite points of view. On the one side, the water companies, interested in supplying the city with water for their own profit, have taken advantage of the long delay since it was first proposed to bring water from the Yosemite to San Francisco, to look up and get control, so far as they could, of the available sources in order to sell them to the city. On the other hand, both the National Government and the City of San Francisco have made careful study of the possible sources of supply for the city. Four or five years ago, the hydrographic branch of the Geological Survey, after a careful examination by engineers of character and ability, reached the conclusion that the Tuolumne River offered a desirable and available supply for the city. The same conclusion was reached by the engineers of the City of San Francisco after years of exhaustive investigation.

I appreciate keenly the interest of the public in preserving the natural wonders of the park and am unwilling that the Hetch Hetchy Valley site should be developed until the needs of the city are greater than can be supplied from the Lake Eleanor site when developed to its full capacity. Domestic use, however, especially for a municipal supply, is the highest use to which water and available storage basins therefor can be put. Recognizing this, the city has expressed a willingness to regard the public interest in the Hetch Hetchy Valley and defer its use as long as possible.

The next great use of water and water resources is irrigation. There are in the San Joaquin Valley two large irrigation districts, the Turlock and Modesto, which have already appropriated under State law 2,350 second feet of the normal flow of water through Lake Eleanor and Hetch Hetchy. The representatives of these districts protested strongly against the granting of the permit to San Francisco, being fearful that the future complete development of

these irrigation communities would be materially hampered by the city's use of water. After repeated conferences, however, with the representatives of these irrigation districts I believe their rights can be fully safeguarded, provided certain definite stipulations to protect the irrigators are entered into by the city. Fortunately, the city can agree to this, and the interest of the two users will not conflict. On the contrary, the city in developing its water supply will to a considerable extent help the irrigation districts in their further development.

The only other source of objection, except that from persons and corporations who have no *rights* to protect but merely the hope of financial gain if the application of the city is denied, comes from those who have a special interest in our National Parks from the standpoint of scenic effects, natural wonders, and health and pleasure resort. I appreciate fully the feeling of these protestants and have considered their protests and arguments with great interest and sympathy. The use of these sites for reservoir purposes would interfere with the present condition of the park, and that consideration should be weighed carefully against the great use which the city can make of the permit. I am convinced, however, that "the public interest" will be much better conserved by granting the permit. Hetch Hetchy Valley is great and beautiful in its natural scenic effects. If it were also unique, sentiment for its preservation in an absolutely natural state would be far greater. In the near vicinity, however, much more accessible to the public and more wonderful and beautiful, is the Yosemite Valley itself. Furthermore, the reservoir will not destroy Hetch Hetchy. It will scarcely affect the canyon walls. It will not reach the foot of the various falls which descend from the sides of the canyon. The prime change will be that, instead of a beautiful but somewhat unusable "meadow" floor, the valley will be a lake of rare beauty.

As against this partial loss to the scenic effect of the park, the advantages to the public from the change are many and great: The City of San Francisco and probably the other cities on San Francisco Bay would have one of the finest and purest water supplies in the world; the irrigable land in the Tuolumne and San Joaquin valleys would be helped out by the use of the excess stored water and by using the electric power not needed by the city for municipal purposes, to pump subterranean water for the irrigation of additional areas; the city would have a cheap and bountiful supply of electric energy for pumping its water supply and lighting the city and its municipal buildings; the public would have a highway at its disposal to reach this beautiful region of the park heretofore practically inaccessible; this road would be built and maintained by the city without expense to the Government or the general public; the city has options on land held in private ownership within the Yosemite National Park, and would purchase

this land and make it available to the public for camping purposes; the settlers and entrymen who acquired this land naturally chose the finest localities, and at present have power to exclude the public from the best camping places; and further the city in protecting its water supply would furnish to the public a patrol to save this part of the park from destructive and disfiguring forest fires.

The floor of the Hetch Hetchy Valley, part of which is owned privately and used as a cattle ranch, would become a lake bordered by vertical granite walls or steep banks of broken granite. Therefore, when the water is drawn very low it will leave few muddy edges exposed. This lake, however, would be practically full during the greater part of the tourist season in each year, and there would be practically no difficulty in making trails and roads for the use of the tourists around the edges of the valley above high water mark. The City of San Francisco, through its regularly authorized representative, has, in order to protect the interests most directly involved, agreed to file with the Secretary of the Interior a stipulation approved by specific resolution of the Board of Supervisors and duly executed under the seal of the City of San Francisco, as follows:

1. The City of San Francisco practically owns all the patented land in the floor of the Hetch Hetchy reservoir site and sufficient adjacent areas in the Yosemite National Park and the Sierra National Forest to equal the remainder of that reservoir area. The city will surrender to the United States equivalent areas outside of the reservoir sites and within the National Park and adjacent reserves in exchange for the remaining land in the reservoir sites, for which authority from Congress will be obtained if necessary.

2. The City and County of San Francisco distinctly understands and agrees that all the rules and regulations for the government of the park, now or hereafter in force, shall be applicable to its holdings within the park and that except to the extent that the necessary use of its holdings for the exclusive purpose of storing and protecting water for the uses herein specified will be interfered with, the public may have the full enjoyment thereof, under regulations fixed by the Secretary of the Interior.

3. The City and County of San Francisco will develop the Lake Eleanor site to its full capacity before beginning the development of the Hetch Hetchy site, and the development of the latter will be begun only when the needs of the City and County of San Francisco and adjacent cities, which may join with it in obtaining a common water supply, may require such further development. As the drainage area tributary to Lake Eleanor will not yield, under the conditions herein imposed, sufficient run off in dry years to replenish the reservoir, a diverting dam and canal from Cherry Creek to Lake Eleanor reservoir for the conduct of waste flood or extra-seasonal waters to said reservoir, is essential for the development of the site to its full capacity, and will be constructed if permission is given by the Secretary of the Interior.

4. The City and County of San Francisco, and any other city or cities which may, with the approval of the municipal authorities, join with said City and County of San Francisco in obtaining a common water supply, will not interfere in the slightest particular with the right of the Modesto Irrigation District and the Turlock Irrigation District to use the natural flow of the Tuolumne

River and its branches to the full extent of their claims, as follows: Turlock Irrigation District, 1500 second feet; Modesto Irrigation District, 850 second feet; these districts having respectively appropriated the foregoing amounts of water under the laws of the State of California.

To the end that these rights may be fully protected, San Francisco will stipulate not to store nor cause to be stored, divert, nor cause to be diverted from the Tuolumne River or any of its branches, any of the natural flow of said river when desired for use by said districts, for any beneficial purpose, unless this natural flow of the river and tributaries above La Grange dam be in excess of the actual capacities of the canals of said districts, even when they shall have been brought up to the full volumes named, 1500 second feet for the Turlock Irrigation District and 850 second feet for the Modesto Irrigation District.

5. The City and County of San Francisco will in no way interfere with the storage of flood waters, in sites other than Hetch Hetchy and Lake Eleanor by the Modesto and Turlock Irrigation Districts or either of said districts for use in said districts, and will return to the Tuolumne River above the La Grange dam, for the use of said irrigation districts, all surplus or waste flow of the river which may be used for power.

6. The City of San Francisco will upon request sell to said Modesto and Turlock Irrigation Districts for the use of any land owner or owners therein for pumping sub-surface water for drainage or irrigation any excess of electric power which may be generated such as may not be used for the water supply herein provided and for the actual municipal purposes of the City and County of San Francisco (which purposes shall not include sale to private persons nor to corporations), at such price as will actually reimburse the said city and county for developing and transmitting the surplus electrical energy thus sold, the price in case of dispute to be fixed by the Secretary of the Interior, and no power plant shall be interposed on the line of flow except by the said city and county except for the purposes and under the limitations above set forth.

7. The City and County of San Francisco will agree that the Secretary of the Interior shall at his discretion, or when called upon by either the city or the districts to do so, direct the apportionment and measurement of the water in accordance with the terms of the preceding clauses of this stipulation.

8. The City and County of San Francisco, when it begins the development of the Hetch Hetchy site, will undertake and vigorously prosecute to completion a dam at least 150 feet high, with a foundation capable of supporting the dam when built to its greatest economic and safe height, and whenever in the opinion of the engineer in charge of the reservoirs on behalf of said city and county and of the municipalities sharing in this supply, the volume of water on storage in the reservoirs herein applied for is in excess of the seasonal requirements of said municipalities, and that it is safe to do so, that such excess will be liberated at such times and in such amounts as said districts may designate, at a price to said districts not to exceed the proportionate cost of storage and sinking fund chargeable to the volumes thus liberated, the price in case of dispute to be fixed by the Secretary of the Interior; provided that no prescriptive or other right shall ever inure or attach to said districts by user or otherwise to the water thus liberated.

9. The City and County of San Francisco will, within two years after the grant by the Secretary of the Interior of the rights hereby applied for, submit the question of said water supply to the vote of its citizens as required by its charter, and within three years thereafter, if such vote be affirmative, will commence the actual construction of the Lake Eleanor dam and will carry the same to completion with all reasonable diligence, so that said reservoir may be completed within five years after the commencement thereof, unless

such times hereinbefore specified shall be extended by the Secretary of the Interior for cause shown by the city, or the construction delayed by litigation; and unless the construction of said reservoir is authorized by a vote of the said city and county and said work is commenced, carried on and completed within the times herein specified, all rights granted hereunder shall revert to the Government.

In considering the reinstated application of the City of San Francisco I do not need to pass upon the claim that this is the only practical and reasonable source of water supply for the city. It is sufficient that after careful and competent study the officials of the city insist that such is the case. By granting the application opportunity will be given for the city, by obtaining the necessary two-thirds majority vote, to demonstrate the practical question as to whether or not this is the water supply desired and needed by the residents of San Francisco.

I therefore approve the maps of location for the Lake Eleanor and Hetch Hetchy reservoir sites as filed by James D. Phelan and assigned to the City of San Francisco, subject to the filing by the city of the formal stipulation set forth above, and the fulfillment of the conditions therein contained.

STATE SELECTIONS—PUBLICATION OF NOTICE—PARAGRAPH 9, REGULATIONS OF APRIL 25, 1907.

STATE OF FLORIDA.

Paragraph 9 of regulations of April 25, 1907, providing that notice of selections of lands by the several states under grants for educational and other purposes "must be given by publication once a week for five consecutive weeks in a newspaper of general circulation in the county where the lands are located," discussed and adhered to.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(G. W. W.) *Land Office, May 12, 1908.* (E. O. P.)

The State of Florida has appealed to the Department from the action of your office of July 12, 1907, declining to recommend the revocation or modification of paragraph 9 of the regulations approved April 25, 1907 (35 L. D., 537, 539), establishing a uniform method for the selection of lands by the several states under their respective grants for educational and other purposes. The language of said paragraph 9 is as follows:

Notice of selection of *all lands* must be given by publication once a week for five consecutive weeks in a newspaper of general circulation in the county where the lands are located, the paper to be designated by the register.

Your office holds that ample authority for the requirement embodied in this paragraph is found in section 441. Revised Statutes.

The State contends, first, that this finding is erroneous, and, second, that compliance with the requirement is not warranted by the end accomplished when considered in connection with the expense entailed, which counsel insists is burdensome.

The claim of the State that the Department is without authority to make such a regulation is apparently based upon the want of any specific statutory provision directing such procedure. In support of this it is urged that compliance with the regulation involves the payment of an additional fee in perfecting a selection and that such a payment can not be legally enforced unless specifically directed by statute.

The premise upon which this argument rests is unsound. While compliance with this particular regulation may involve additional expense, that expense is in no sense a fee the payment of which the Department may insist upon as a condition precedent to the perfection of a selection. This is no more a fee in the sense of the term as generally understood than is the expense incident to the examination of the land preliminary to furnishing satisfactory evidence that it is unoccupied and non-mineral and subject to selection. It needs no argument to refute the statement that before the Department can by regulation provide for a uniform and orderly administration of an act of Congress it must first ascertain whether compliance therewith involves expense and if so look further for specific statutory authority for requiring the expenditure. If this were the rule it would be necessary for Congress when enacting a law to anticipate the expense incident to a compliance therewith and authorize the executive department to administer it within the limit prescribed. As to payments made to and expenditures *by the Government*, a limit is generally imposed, but beyond this the matter is one with which the Government has no concern, other than the weight Congress might give to such matters in connection with the expediency of enacting the law.

The officer charged with administering a statute is not required to look to a specific authorization by Congress for his power to administer it in such manner as will effectuate its purpose in accordance with its spirit and intent. The rule is clearly stated in the case of *United States v. McDaniel* (7 Pet., 1, 14), in the following language:

A practical knowledge of the action of any one of the great departments of the government, must convince every person, that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law; but it does not follow, that he must show statutory provision for everything he does. No government could be administered on such principles. To attempt to regulate, by law, the minute movements of every part of the complicated machinery of government, would evince a most unpardonable ignorance on the subject. Whilst the great outlines of its movements may be marked out, and limitations

imposed on the exercise of its powers, there are numberless things which must be done that can neither be anticipated nor defined, and which are essential to the proper action of the Government. Hence, of necessity, usages have been established in every department of the Government which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits.

The law confers a right upon the State but makes no attempt to define the character or quality of evidence necessary to establish it nor the manner of its exercise. It is clear that the Department before recognizing the right must be satisfied of its existence, and the Secretary of the Interior must exercise discretion in determining the manner in which the right shall be established and also the manner in which it shall be exercised. This requires not only that he recognize the possessor of the right but all others whose rights may be affected by its exercise, as his duty is the same to all.

Counsel contends that ample protection may be afforded all adverse claimants by dispensing with the publication of notice required by said paragraph 9. To this it may be answered that this is a question the determination of which rests solely with the Department, and inasmuch as experience has demonstrated that the method of giving notice by publication is the best adapted to the end sought, it will not be abrogated merely because the expense of making selection is increased, it not being shown that such additional expense is unreasonable or destructive of the statutory right of the State.

The Department, after full consideration of the matters urged by counsel in support of the appeal, must decline to modify the paragraph of the instructions complained of, and the decision of your office in refusing to recommend such action is approved.

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**SOLDIERS' ADDITIONAL—APPROXIMATION—COMBINATION OF FRACTIONAL PORTIONS OF RIGHTS.**

GEORGE E. LEMMON.

In applying the rule of approximation in cases where the assignee of two or more fractional portions of different soldiers' additional rights combines and applies to locate them on one body of land, the rights will be severally considered, and where the excess amount applied for is less than the average of the rights sought to be used, the entry may be allowed.

Departmental decision in the case of George P. Wiley, 36 L. D., 305, modified in so far as in conflict herewith.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(G. W. W.) *Land Office, May 13, 1908.* (L. R. S.)

The Department has considered the appeal of George E. Lemmon, assignee of Cleo B. Hughes, widow of James W. Hughes, Franklin

H. Stallman, William Willard, and Elouise Patrick, widow of Robert Patrick, from your office decision of April 1, 1908, holding for rejection his application to enter, under sections 2306 and 2307 of the Revised Statutes of the United States, the NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$  (lot 3), Sec. 27, T. 23 N., R. 17 E., B. H. M., Rapid City, South Dakota, containing 39.65 acres.

The record shows that your office, January 10, 1908, advised the local land officers that said application, based on the soldiers' additional homestead rights of James W. Hughes for 6.51 acres; Franklin H. Stallman for 1.89 acres; William Willard, 5.78 acres, and Robert Patrick, 5.84 acres, aggregating 20.02 acres, was held for rejection because it did not appear that said Patrick was entitled to the claimed right, and also because the right of said William Willard could not exceed 4.78 acres, as his original homestead entry covered 155.22 acres, leaving a combined area of only 13.18 acres of soldiers' additional rights, which is insufficient base for the tract applied for.

January 13, 1908, the resident attorney for applicant advised your office that he would "file a substitute for the rejected homestead right of Robert Patrick at an early date," and also called attention to an error in the tract book as to the area of the homestead of said William Willard, and stated that the plat of survey shows the area to be 154.22 acres, which would entitle the soldier to an additional right of 5.78 acres.

March 17, 1908, said attorney transmitted to your office the purported assignment of soldiers' additional homestead right in the name of John Blundell for 5.71 acres, as a substitute for the rejected right of Robert Patrick, and stated that he had forwarded the amended application to said Lemmon to be filed in the local land office when notified of its allowance, also that the additional homestead proof in the case of said Blundell had been sent to the notary public for correction and when returned it would be filed in your office. April 1, 1908, your office modified its decision of January 10, on the authority of departmental decision in the case of George P. Wiley (36 L. D., 305), which your office states "held in effect that under the rule of approximation a trifling excess in area of the combined right over the half of the legal subdivision of the land applied for, which would enable the owner of such rights to purchase the remainder thereof, would be nullifying, to that extent, and defeating the purpose of the act of Congress which abolished private cash entries of public lands."

Your office accordingly held, without passing upon the validity of the claimed right of said Blundell for 5.71 acres, that if valid, together with the combined rights of said Hughes for 6.51 acres, Stallman for 1.89 acres, and Willard for 5.78 acres, aggregating only 19.89 acres, they are not sufficient bases for the land applied for covering 39.65 acres.

Your office accordingly held said application for rejection and allowed the applicant "to furnish valid and sufficient rights which will, when added to the valid rights originally filed, aggregate in area the full amount of land applied for," or to duly appeal from said decision of your office.

Counsel for applicant insists in the appeal that said decision is not supported by the decision in the Wiley case, *supra*, and is contrary to the previous interpretations of the Department concerning the rule of approximation.

The record, including the printed briefs, as well as the oral arguments of the attorney for applicant and other attorneys interested in similar cases, have received the careful consideration of the Department.

It is strenuously urged by counsel for applicant that the ruling of your office should not be sustained because the soldiers' additional rights are practically exhausted and the rule of approximation being a departmental regulation should not be changed so as to affect applications filed prior to some future date, suggesting June 1 next.

One of the attorneys present at the hearing has filed an alleged copy of your office letter dated December 16, 1905, addressed to him, referring to departmental decisions in the case of Ole B. Olsen (33 L. D., 225) and William C. Carrington (32 L. D., 203), also to departmental circular of August 7, 1903 (32 L. D., 206), and advising him that "under the Olsen decision above either you or your assignee have the right to use these two fractional portions in combination upon one tract of land and also have the privilege of invoking the rule of approximation to the extent authorized by the Secretary's decision in the Carrington case, *supra*, and in the case of Richard Dotson (13 L. D., 275)."

Counsel states that he has furnished to the purchaser of "each combination of fractions" a copy of said letter, which has always been satisfactory. Another attorney urges the Department to except from any change of ruling "all locations which were made in good faith in accordance with the settled rule of practice which has existed for several years."

Section 2306 of the Revised Statutes of the United States declares that each of the persons described therein "shall be permitted to enter so much land as, when added to the quantity previously entered, shall not exceed 160 acres," and section 2307 of the Revised Statutes of the United States declares who shall be entitled to the benefits of said section 2306 in case of the death of the soldier.

There does not appear to be any law or published departmental regulation expressly authorizing an assignee of several soldiers' additional homestead rights to combine and locate upon a tract of land

where the combined rights aggregate only a trifle more than half of the land applied for.

In the case of *Webster v. Luther* (163 U. S., 331, 341), the Supreme Court quoted with approval the statement of Judge Sanborn of the Supreme Court of Appeals for the 8th circuit, that "it [the soldier's right] was an unfettered gift in the nature of compensation for past services. It vested a property right in the donee. The presumption is that Congress intended to make this right as valuable as possible. The prohibition of its sale or disposition would have made it nearly, if not quite, valueless, to a beneficiary who had already established his home on the public domain. Any restriction upon its alienation must decrease its value," and the court held "that the right given by the statute in question to enter 'additional' lands was assignable and transferable."

In the case of *Richard Dotson*, *supra*, referred to in your office letter of December 16, 1905, it was said that the rule had been uniformly followed as announced by your office September 25, 1875, in the case of *Miles Schoolcraft*, namely, "that under said section 2306 a party is entitled to enter so much land as, added to his original entry, shall not exceed 160 acres, but where a party applies to enter a tract or tracts of land the area of which, added to that of his original entry, shall exceed 160 acres by a greater excess than the area it would require to make up the deficiency, the application should be rejected."

In the case of *William C. Carrington*, *supra*, it was held (citing the case of *Webster v. Luther*, *supra*), that a *bona fide* assignee of a soldier's additional right of homestead entry could lawfully assign the right in amounts differing from the quantity of land in legal subdivisions according to the public surveys, and it was said, "it being a property right in the hands of the donee he may dispose of it as he chooses just as he might dispose of any other property owned by him, and not being hampered with conditions that would lessen its value, he is not restricted in his right to dispose of it in such amounts as to him may seem most advantageous." Reference was also made to the survey of the public lands into sections of 640 acres, half sections of 320 acres, quarter sections of 160 acres, and quarters of quarter sections of 40 acres each, and it was said, "but the public lands are not always subdivided into tracts having these designations; it frequently happens that owing to excess of acreage in a given section, or for other cause, a portion of the section is subdivided into lots of irregular form and dimensions and containing widely different quantities of land, and such lots are legal subdivisions."

It was further held that the Department was authorized to "adopt such regulations with regard to the disposition of the public lands by such additional homestead entry as will tend to carry out the

purpose of the act granting the right and will not conflict with the general laws," and your office was directed to prepare, for the approval of the Department, circular of instructions "announcing that in all future entries made under sections 2306 and 2307 the rule of approximation will be applied only when the entire additional right originally due to the soldier, his widow, or orphan children, is offered as a basis for the entry."

Pursuant to said direction the circular of August 7, 1903 (32 L. D., 206), was issued, containing said provision, and also declaring that "if part of the right is located upon a tract of land agreeing in area with such right surrendered or located, then this circular will not prevent the application of the rule of approximation as to the remainder, if offered in its entirety as a basis for the entry. If the right has been divided, and a part located and entry allowed therefor, before the date of this circular, the rule of approximation may be applied as to the outstanding and unused portion of such right in the manner and to the extent above directed as to the additional right originally due."

In the case of Guy A. Eaton (32 L. D., 644), it was said:

The entire right originally due the soldier is offered as a basis for the entry applied for, but if . . . the soldier had still retained a portion of his right, the rule of approximation has never been applied to an entry made under said right and the circular referred to . . . contemplates and permits one application of said rule to each original right of additional homestead entry under said statute.

This ruling allowing only one approximation to each original right of soldiers' additional homestead entry was reaffirmed in the case of John S. Morton (34 L. D., 441).

In the case of George P. Wiley, *supra*, the Department considered the application of said Wiley to enter 80 acres upon bases of different soldiers' additional rights assigned to him, aggregating 40.04 acres, citing the circular and decisions above referred to, and said:

Thus while, as said in the case of Ole B. Olsen (33 L. D., 225), "where a number of such fractional portions of rights have been assigned to the same person he is entitled to enter an amount of public land equal to the aggregate amount of all such fractions owned by him," it is entirely clear from the foregoing that the applicant herein may not, by combining six fractional rights in two portions of 20.01 and 20.03 acres respectively, have two applications of the rule of approximation so as to permit him to purchase 39.60 acres upon a right of .04 acre. In this manner any and all soldiers' additional rights could be made the basis of purchase of many times 160 acres instead of a base limited to filling out the one original homestead right. . . . And if it were shown herein that there has been no previous application of the rule of approximation in the case of any of these six rights it must further be shown that the proportionate addition would not in any of these cases render the excess over 160 acres greater than the present deficiency (see the case of *Whitcher v. Southern Pacific R. R. Co.*, 3 L. D., 459), and still further that the present application tenders the entire remaining right of each soldier named and exhausts the same.

It will be observe that in the case of Ole B. Olsen, *supra*, the applicant made soldiers' additional entry for a tract of land in Alaska covered by survey No. 515, based upon two unused recertified rights, one for 9.80 acres, the other for 9.04 acres. No question of approximation was presented in this case. No more than the aggregate amount of the two rights was claimed. It might be said that the effect of this decision was to grant an additional privilege in the exercise of soldiers' additional rights, namely, the right to combine several rights or claims in one entry.

Moreover, in the Wiley case, *supra*, the application covered 80 acres, two quarters of a quarter section, and by relinquishing one of them the loss to the applicant would be far less than the excess would be if the other tract were also taken. While the decision in the Wiley case, *supra*, properly construed, does not warrant the conclusion that in every case the assignee of a soldiers' additional homestead right must file with his application to enter valid and sufficient rights to the full amount of the land included in his application, yet in view of the fact that the rule of approximation "is not statutory but is grounded in expediency amounting in some cases under the homestead law at least almost to a rule of necessity," as stated in the approved opinion of the Assistant Attorney-General for this Department of June 30, 1900 (30 L. D., 105), it is considered that as the necessity does not exist where the applicant assignee seeks to locate two or more fractional portions of different soldiers' additional rights upon one body of land, the reason for the rule in a measure ceases, and in applying the rule of approximation to such a case, the rights will be severally considered, and where the excess amount applied for is less than the average of the rights sought to be used the entry may be allowed.

In the case under consideration the excess is far greater than the average acreage of the rights tendered.

The oral argument in this case was broadened beyond the case upon appeal and it was said that final certificates heretofore issued under authority of ruling by your office were being canceled.

It is preferred not to give directions respecting such cases at this time, but, in event appeal is taken in any such case, it is requested that in forwarding the appeal, your office make a full and complete report as to the circumstances under which the certificate was originally allowed.

Any expressions in the Wiley case, *supra*, apparently in conflict with the views herein expressed will not be followed hereafter.

The decision of your office holding for rejection said application is affirmed.

## HENRY S. KLINE.

Motion for review of departmental decision of March 19, 1908, 36 L. D., 311, denied by First Assistant Secretary Pierce, May 13, 1908.

HOMESTEAD ENTRY—QUALIFICATION—320-ACRE LIMIT—ACT AUGUST 30, 1890.

## OLIVER v. BATES.

A homestead entry based upon settlement made in reliance upon the holding of the land department that land acquired under the timber and stone act was not contemplated by the act of August 30, 1890, limiting the amount of land that might be acquired by any one person under the agricultural public land laws to 320 acres, may be permitted to stand notwithstanding the land department had, subsequent to the settlement but prior to entry, changed its interpretation of the act, and at the date of the entry was holding that the limitation fixed by the act included land acquired under the timber and stone act.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(G. W. W.)                      *Land Office, May 15, 1908.*                      (A. W. P.)

November 27, 1905, Jesse Bates made homestead entry No. 19254, for the E.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$ , and SE.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$ , Sec. 10, T. 25 N., R. 13 W., Seattle, Washington, land district. In his homestead affidavit filed in support of the application for this tract, Bates alleged "that since August 30, 1890, I have not acquired title to, nor am I now claiming under any of the agricultural public land laws, an amount of land which, together with the land now applied for, will exceed in the aggregate 320 acres."

July 10, 1906, H. M. Oliver initiated a contest against said entry, alleging, substantially, that Bates had previously and since August 30, 1890, entered under the public land laws, other than mineral, public land aggregating three hundred and twenty acres, and was consequently disqualified from making the entry in question. On August 29, thereafter, Oliver filed an amended and supplemental affidavit, wherein he alleged, in effect, that Bates had abandoned and failed to establish or maintain residence on the land in controversy; that the tract is covered with a dense growth of valuable timber, and that when cleared of the timber the soil will be unfit for cultivation; that on or about March 8, 1895, he made homestead entry No. 1467 for one hundred and sixty acres of land, and that on or about November 15, 1901, he made a timber and stone entry for a tract of one hundred and sixty acres of land, on both of which entries patents had issued prior to the date of making the entry in question, and that Bates was therefore disqualified from making the said homestead

entry. Notice issued thereon and hearing was had before the local officers, both parties appearing with counsel. The evidence offered on behalf of the plaintiff consisted only of certified copies of the records of the entries and patents, above referred to, no testimony being offered by him in support of the other charges contained in his supplemental contest affidavit; and objection was also at that time made as to the introduction of any testimony in behalf of the entryman relative to his compliance with the requirements of the homestead law as to cultivation and improvement of and residence upon the tract in controversy, unless at the latter's expense. The hearing thereupon closed, as result of which the question presented for determination related solely to the qualification of Bates to make the said homestead entry, it being admitted by him that he had since August 30, 1890, filed upon and obtained title to three hundred and twenty acres of land, one hundred and sixty acres of which were by commuted homestead entry, upon which patent issued August 27, 1898, and one hundred and sixty acres under the timber and stone act of June 3, 1878 (20 Stat., 89), upon which patent issued September 27, 1904.

Considering the case upon the evidence thus adduced, the local officers found in favor of the contestant and recommended the cancellation of the homestead entry of Bates, which recommendation was concurred in by your office decision of June 11, 1907. Upon appeal therefrom the Department, by unreported decision of November 23, 1907, affirmed your said decision, it being held therein that:

The qualifications requisite to make homestead entry must exist at the date of entry, and if a party who is thus qualified makes settlement, but afterwards and prior to entry, for any reason becomes disqualified, the privilege gained by settlement is lost. *Brown v. Cagle* (30 L. D., 8), and *Gourley v. Countryman* (27 L. D., 702), and other cases.

Review thereof was denied by unreported departmental decision of February 19, 1908. On the following day, however, your office was directed to withhold promulgation of said decision until further orders, because of the consideration by the Committee on Public Lands of the House of Representatives of a bill for the relief of said Bates. Shortly thereafter the Department again examined the record in this case, as well as a further showing made on behalf of the entryman in support of a so-called motion for re-review. Because of certain matters alleged therein relative to the placing of valuable improvements on the tract—the erection of a commodious house thereon several years prior to the filing of the approved plat of survey in the local office—the fact that at the time of making such settlement the claimant, under the construction then placed upon the act of August 30, 1890, was possessed of all the necessary qualifications for making entry of the land in question, but was prevented from so doing because of the fact that it was then unsurveyed, the question

was presented as to whether Bates's entry, allowed under the circumstances detailed, should not be permitted to stand, notwithstanding the change in ruling under which he was disqualified, occurring as it did long after he had settled upon and improved a tract of vacant public land in reliance upon the prior departmental ruling. On this question the Department invited argument, as result of which counsel for both the contestant and the entryman appeared and were orally heard.

In order that the question at issue may be properly considered, it will be first observed that by the act of August 30, 1890 (26 Stat., 391), heretofore referred to, it was provided that:

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.

Construing the said act, the Department, by instructions of December 29, 1890 (12 L. D., 81), held that the limitation of acreage therein prescribed extended equally to all the land laws which provided for the disposition of the public domain, and restricts the applicant thereunder to three hundred and twenty acres in the aggregate, but that as the said act was prospective in its operation, the right of such an applicant was not affected by the fact that he had acquired a like amount of public land prior to the passage of the said act, if he was otherwise qualified to enter such an amount. But by an act approved March 3, 1891 (26 Stat., 1095), entitled "An act to repeal the timber-culture laws, and for other purposes," it was declared in section 17 thereof that the above cited provision of the act of August 30, 1890—

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 to include lands entered or sought to be entered under mineral land laws.

Following this, the Department on October 12, 1894, in the case of W. R. Harrison (19 L. D., 299), held that an entry of land valuable only for the timber and stone thereon should not be included in the maximum amount of lands that may be acquired under the limitation imposed by the said act of August 30, 1890, as construed by the above-cited act of March 3, 1891. This holding was based on the ground that agricultural lands were not subject to entry under the timber and stone act, and therefore such an entry should not be included in the maximum amount of agricultural lands that could be acquired by one person. The principle announced therein was uniformly followed by the land department thereafter and until May 4, 1905, when the question was again considered, and by departmen-

tal instructions (33 L. D., 539), the case of W. R. Harrison, *supra*, was overruled, and it was held that (syllabus)—

The provision in the act of August 30, 1890, limiting the amount of land to which title may be acquired under the land laws by any one person to three hundred and twenty acres in the aggregate, as construed by the act of March 3, 1891, applies to all lands acquired under any of the land laws except those relating to mineral lands.

It will thus be noted that under this holding, which has since remained in force, entries under the timber and stone act are included in the maximum amount of land allowed under the said act of August 30, 1890.

But it will be also observed that at the time Bates is alleged to have made settlement upon the tract in question—to wit: in the spring of 1902—the doctrine announced in the said case of W. R. Harrison was then and had been for a long period in force. Thereunder the making of a timber and stone entry did not enter into the equation in determining his qualifications for making a homestead entry, as prescribed by the limitations of the act of August 30, 1890, *supra*. It is true that he had theretofore also made a prior homestead entry, in support of which he had offered commutation proof, and upon which patent had issued, but, as he alleges and as is shown by the record, shortly after making settlement on the tract in controversy he addressed a communication to your office, setting out the fact that he had commuted a prior homestead entry in 1898, but had been advised that in view of the fact that he had paid one dollar and twenty-five cents per acre therefor, he was entitled to make a second homestead entry. In response thereto it appears that your office, by letter of March 11, 1902, enclosed him a marked copy of the circular of June 27, 1900, issued under the second homestead act of June 5, 1900 (31 Stat., 267), with the suggestion that it would without doubt give the information desired. Under this act, and the holding of the Department in the case of W. R. Harrison, *supra*, there is no question but that Bates was then possessed of all the necessary qualifications for making homestead entry of the land in question. As the land was then unsurveyed, however, he with others joined in petition for such survey, and immediately after the filing of the approved plat thereof in the local land office tendered his application for the tract in question, which was accepted and his homestead entry allowed on November 27, 1905. But, as heretofore recited, the Department prior thereto had issued the said instructions of May 4, 1905, overruling the principle announced in the case of W. R. Harrison, *supra*, and placing a construction upon the said act of March 3, 1891, under which this entryman would be held to have exhausted his homestead right—hence, not entitled to make further entry of agricultural land.

In view of the fact, however, that under the holding of the Department at the time this settlement was made, and long thereafter, Bates was entitled to make the homestead entry, but was prevented because of the fact that the said tract was unsurveyed, and having in mind also the further fact that at the time of making such settlement he communicated with your office and in response thereto was, in effect, advised that he was entitled to make further entry under the homestead laws, it would seem that his right initiated under such circumstances should now be protected.

In the administration of the public land laws it has occurred that constructions placed upon those laws by this Department have in some instances, upon further consideration or because of decisions of the court occurring in the meantime, been changed and questions necessarily have arisen as to the right and protection to be accorded those acting under the earlier construction. In the case of Roy McDonald (36 L. D., 205, 209), a condition of this sort was presented and therein it was said, after a review of the authorities—

The decisions clearly show that sudden changes in the construction of statutes, by those charged with their enforcement, are looked upon with disfavor, especially where a construction favorable to the individual has been acted upon and the change is made in such manner as to become retroactive.

From what has been said heretofore it is clear that Bates at the time of his settlement was, under the construction then prevailing, qualified to initiate a claim under the homestead laws, and under the provisions of the act of May 14, 1880 (21 Stat., 140), such a claim might be initiated by a settlement made upon unsurveyed lands.

In *Ard v. Brandon* (156 U. S., 537, 543), it was said:

The law deals tenderly with one who, in good faith, goes upon the public lands with a view of making a home thereon.

Again, in *Tarpey v. Madsen* (178 U. S., 215, 219), it was said:

The right of one who has actually occupied, with intent to make a homestead or preemption entry, can not be defeated by the mere lack of a place in which to make a record of his intention.

Can it be doubted therefore that Bates, having settled as he did upon this land in 1902, and having continued this assertion of right until after the plat was filed, three years later, had "acted upon" the construction of the said act of August 30, 1890, holding that one in his position was qualified to initiate a claim under the homestead law, and is he not by his continued settlement and cultivation of the land entitled to greater consideration than one whose claim rested merely upon the location of a military bounty land warrant or other scrip?

It is the opinion of this Department upon a full and careful consideration of the matter that the decisions of November 23, 1907, and

February 19, 1908, heretofore rendered in this case, were in error in applying the later ruling under which Bates was disqualified from further asserting claim under the public land laws, and said decisions are hereby recalled and vacated and Bates's entry left intact subject to compliance with the homestead law. It follows that your office decision of June 11, 1907, holding Bates's entry for cancellation must be, and is accordingly, hereby reversed.

In conclusion it may be said that the cases of *Brown v. Cagle* and *Gourley v. Countryman*, cited by the Department in its decision of November 22, 1907, have no application to the facts as presented in this case.

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REPAYMENT—HOMESTEAD ENTRY—FEE AND COMMISSIONS.

JOHN H. WOLFF.

Where one made homestead entry of land covered by a pre-emption declaratory statement which was subsequently carried to entry, and with a view to avoiding litigation on account of such adverse claim, and prior to any default on the part of the pre-emption claimant, in good faith relinquished his entry, without receiving any consideration therefor, such entry was "canceled for conflict" within the meaning of the act of June 16, 1880, and the entryman is entitled to repayment of the fee and commissions paid thereon.

*First Assistant Secretary Pierce to the Commissioner of the General Land Office, May 15, 1908.* (G. W. W.) (C. J. G.)

A motion has been filed by John H. Wolff for review in the matter of his application for repayment of the fee and commissions paid by him on soldiers' homestead entry for the SE.  $\frac{1}{4}$  of Sec. 34, T. 9 N., R. 9 E., M. D. M., Sacramento, California.

The entry was made September 9, 1878, and canceled on relinquishment November 23, 1878. The records of your office show that one Philip Lee filed preemption declaratory statement for this land February 8, 1878. It is alleged that after making entry Wolff went to the land where he found another man in possession who threatened to kill Wolff if he did not leave. Thereupon he filed a relinquishment wherein he stated that he abandoned the land for the reason "that there are adverse claims thereto which will cause litigation." Lee made cash entry May 24, 1879, based on his preemption declaratory statement. Wolff subsequently made application for repayment of the fee and commissions paid by him on his homestead entry, which was recommended for approval by your office on the ground that his entry was canceled for conflict with Lee's preemption declaratory statement which was carried into cash entry. The recommendation of your office was approved by the Department and the claim

was submitted to the Treasury Department for settlement under the provisions of the repayment act of June 16, 1880 (21 Stat., 287). Before payment was actually made, however, your office requested return of the account for reconsideration. Upon resubmitting the case to the Department your office recommended that repayment be denied on the ground that Wolff's entry was *not* canceled for conflict with Lee's cash entry as the latter was made May 24, 1879, while Wolff's entry was relinquished November 23, 1878, citing the case of John C. Angell (24 L. D., 575).

The Department concurred in this view, it being held under the case cited that a conflict intervenes only when the preemptor makes proof and payment before the relinquishment of the other party. The Treasury Department was accordingly requested to cancel the certificate which had been drawn in Wolff's favor and this was done. It is for review of that request that the present motion is filed.

The act of June 16, 1880, *supra*, provides for repayment "in all cases where homestead . . . . entries . . . . have heretofore or shall hereafter be canceled for conflict, or where, from any cause, the entry has been erroneously allowed and can not be confirmed." It is well settled that the filing of a preemption declaratory statement is not an entry of the land nor does it constitute a bar to the allowance of a homestead entry for the same land; hence, the entry of Wolff was properly and not erroneously allowed. This subject is fully discussed in decision in the case of John C. Angell, *supra*. The facts of that case are that Angell made desert entry for land which was at the time included in two preemption declaratory statements. Neither of the preemptors made proof and payment within the time required by law but cash certificate was issued to one of them and Angell filed affidavit and application for cancellation of the cash entry. No action was taken on the affidavit and application for the reason that Angell filed a withdrawal thereof stating that he had abandoned his right and interest to the land embraced in the cash entry and to the whole of the desert entry, and that he had sold his interest and claim to the preemptor. He, on the same day, filed a formal relinquishment of his desert land entry. The preemptors subsequently made homestead entries of the land covered by said desert land entry. It was held in that case that by reason of the failure of the preemptors to make proof and payment within the time required by law they thereby lost their preference right under their declaratory statements, and the better right to the land passed to Angell; that his desert entry could have been completed if he had not acquiesced in the land going to other parties. It was stated:

After having obtained the better right to the land he should not be permitted to sell that better right, thereby making it a matter of pecuniary bene-

fit to himself, and at the same time obtain repayment from the government on the theory that he paid for the land and obtained no right thereto.

It was further said:

Angell's desert entry was not "canceled for conflict" but was canceled because of his voluntary relinquishment. Had either of the preemption claims rightfully proceeded to final proof, payment, and entry before Angell's relinquishment, then, and not until then, there would have been a conflict between such preemption entry and the desert entry of Angell. The conflict so resulting would have required the cancellation of the desert entry to the extent that the same included land embraced within the preemption entry, and upon such cancellation the right to repayment would have accrued under the statute.

The facts of this case are obviously distinguishable from those in the case of John C. Angell. There the better right to the land involved was in Angell at the time of his relinquishment which therefore could not be regarded otherwise than voluntary; while here Wolff relinquished at a time when the superior right to the land was in the preemptor, Lee. The two cases are similar only in the respect that Lee failed to complete his claim within the time required by the preemption law and it might therefore be urged that if Wolff had not relinquished when he did the better right to the land would have passed to him on such failure. But his relinquishment was prior to any default on the part of the preemptor and at a time when Wolff was merely a conditional homestead entryman. At that time the preemption claim of Lee was of record and the latter was in possession of the land. His period for making proof and payment had not expired and he did in fact carry his preemption declaratory statement into cash entry. Even if Wolff had not relinquished litigation would have been necessary to defeat the preemption claim. The principle involved here is similar to that in the case of Monroe Morrow (36 L. D., 155), and allied cases, where homestead entries were allowed for conflict with the grant to a railroad company. There was relief legislation for such entrymen in cases where their entries had not been abandoned. It is plain that such entries could have been confirmed provided the entrymen had held on to their claims. But it was held that confirmation, possible only under such circumstances, was not the confirmation contemplated by the act of June 16, 1880, *supra*, so as to preclude repayment.

The status of persons who have made entries of land covered by preemption declaratory statements and relinquished the same has frequently been discussed in passing upon the applications of such persons for second entries. Such applications have invariably been allowed where it was apparent that the parties had acted in good faith. See in this connection cases of Thurlow Weed (8 L. D., 100); Charles Wolters (8 L. D., 131); James A. Forward (8 L. D., 528); and James M. Frost *et al.* (18 L. D., 145).

In the case of Charles Wolters, *supra*, it appears that he made homestead entry for land covered by a preemption declaratory statement which had not been carried into entry within the time allowed under the law. Upon learning the facts as to the preemption claimant's settlement Wolters relinquished his entry within a short time after it was made, notwithstanding said preemption claimant's failure to prove up within the required time, left the land subject to filing or entry by the next settler, and was allowed to make second entry.

In the case of Anna Lee (24 L. D., 531, 533), it was held that—

A homestead right is not exhausted by an entry which through no fault of the entryman can not be perfected, and this rule should, in my judgment, be held to embrace all cases in which the entryman believes, and has reasonable ground to believe, that the entry can never ripen into a perfect title, such belief being founded on information acquired after the entry is made.

The foregoing cases also make it clear that the fact that a homestead entryman may have had knowledge of the prior preemption claim ought not necessarily to defeat an application either for second entry or repayment on the first. It was said in the case of William H. Conley (30 L. D., 255):

As to the fact of Ashley's preemption declaratory statement being of record at the time Conley made his homestead entry and that the latter also had knowledge of the former's residence and improvements on the land in controversy, the Department has held that "an entry that on contest is canceled on account of the superior right of a *bona fide* settler is canceled for conflict" within the meaning of the repayment act of June 16, 1880. Nils N. Ydsti (27 L. D., 616) and George D. Cloninger (28 L. D., 21). It might with equal force and propriety have been held in those cases that the entrymen were chargeable with notice of the prior settlers' claims, as to hold Conley responsible in the present instance.

In the present case Philip Lee's preemption declaratory statement of record was no bar to the allowance of Wolff's homestead entry. It does not appear that the latter had knowledge of this filing, but it is alleged that after making entry and going upon the land he found another person in possession; that he thereupon relinquished, the reason given therefor being the desire to avoid litigation on account of this adverse claim. It was held in the case of George D. Cloninger, *supra*, that an entry that on contest is canceled on account of a superior right of a *bona fide* settler is "canceled for conflict" within the meaning of the repayment act of June 16, 1880.

A hearing was not had in the present case but the records show that Lee's preemption declaratory statement was in fact of record at the time Wolff made his entry and that such declaratory statement was substantially carried into entry; that Wolff acted in entire good faith, received no money or other benefit from his relinquishment, and was fully justified in abandoning his claim under the circumstances.

The facts and circumstances herein make a case of a homestead entry "canceled for conflict" within the meaning of the repayment statute. The prior action adverse to Wolff's application for return of the fee and commissions paid upon his homestead entry is hereby recalled and vacated and if there be no other objection repayment of such fee and commissions will be allowed as applied for.

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HUSTON *v.* NORTHERN PACIFIC RY. CO.

Motion for review of departmental decision of March 4, 1908, 36 L. D., 299, denied by First Assistant Secretary Pierce, May 19, 1908.

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SCHOOL LANDS—INDEMNITY SELECTIONS—INCUMBERED BASE LANDS.

STATE OF CALIFORNIA.

Indemnity selections in lieu of school lands will not be allowed where the offered base lands are covered by outstanding patents issued by the State, notwithstanding the lands were known to be mineral at the date of survey and therefore excepted from the grant.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(G. W. W.)                      *Land Office, May 20, 1908.*                      (E. O. P.)

The State of California has appealed to the Department from your office decision of December 6, 1907, holding for cancellation its amendatory school land indemnity selection, per list No. 376, of the W.  $\frac{1}{2}$ , Sec. 34, T. 43 N., R. 3 W., M. D. M., Redding land district, California, in lieu of the S.  $\frac{1}{2}$ , Sec. 16, T. 10 N., R. 11 E., M. D. M., for failure of the State to furnish proper proof of the non-incumbrance of the base land.

The land on account of which lieu selection is sought to be made is alleged to be mineral, and it appears that the State, prior to selection, issued its patents for all of the S.  $\frac{1}{2}$  of said Sec. 16, which patents are still outstanding.

It is insisted on appeal that the base land being mineral and known to be such at date of survey, the subsequent patents of the State were ineffectual so far as passing any interest in the land is concerned and that the State may now properly contend that it has not sold or encumbered said land and that the Department would be justified in accepting such showing and in the absence of other objection be warranted in approving a selection of indemnity therefor.

To this the Department will not for a moment accede. The effect of the State's patent it will not attempt to determine. The State,

having clouded the title, can not reasonably expect the United States to remove the cloud or to accept the land offered in exchange unless the title thereto is undisputed. The only difficulty to the exchange arises out of the action of the State, and before the Department will consent to the completion thereof on the part of the United States, the State will be expected to remove the obstructions of its own creation.

The action of your office is hereby affirmed.

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HAGMAN *v.* KLAMMER.

Motion for review of departmental decision of November 15, 1907, 36 L. D., 168, denied by First Assistant Secretary Pierce, May 21, 1908.

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HOMESTEADS IN ALASKA—ACT OF MARCH 3, 1903.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

*Washington, D. C., May 21, 1908.*

REGISTERS AND RECEIVERS,

*United States Land Offices,*

*Nome, Juneau, and Fairbanks, Alaska.*

SIRS: The following instructions are issued for your information and guidance in cases involving homestead locations in your respective districts.

1. Every person who initiates a claim to a homestead and records his location thereof, under act of March 3, 1903 (32 Stat., 1028), must within six months after the date of his location establish his *bona fide* residence on the land covered thereby to the exclusion of a home elsewhere, and thereafter he must continuously reside upon the land and cultivate and improve it, as required by the general provisions of the homestead laws, to such an extent and in such manner as will show that he is honestly seeking title in order to secure a home for himself and not for the purpose of speculating in the land or the timber thereon, and his failure to do this may result in the cancellation of his location or entry, or the rejection of his application for a patent.

2. The making and recording of one homestead location exhausts all the locator's rights to acquire title to other lands under that act, and he cannot thereafter make another location or entry in the District of Alaska, or elsewhere, under the homestead laws.

3. A homestead locator's right to cut and remove timber from the lands covered by his location within the District of Alaska, or to per-

form any other act affecting them, is no greater than the rights possessed by persons who make homestead entry of land elsewhere, under section 2289, R. S., and if he cuts or removes such timber for any other than for purposes necessary and incident to his residence upon the land and to the cultivation and improvement of it, he does so illegally, and not only subjects his location to cancellation but renders himself liable to be proceeded against both civilly and criminally by the Government.

4. Homestead locations of lands in the District of Alaska may be contested and canceled upon any ground which would warrant the cancellation of a homestead entry of land elsewhere, made under section 2289, R. S., and contests of this character may be initiated in your offices by either the Government or any private person, and should be proceeded with in the same manner and given the same effect as contests against homestead entries made elsewhere.

Very respectfully,

FRED DENNETT,  
*Commissioner.*

Approved:

FRANK PIERCE,  
*First Assistant Secretary.*

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LONGYEAR *v.* FRANK.

Petition for reconsideration of departmental decision of December 10, 1903, 32 L. D., 348, denied by First Assistant Secretary Pierce, May 22, 1908.

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SOLDIERS' ADDITIONAL RIGHTS—CERTIFICATION—ACT AUGUST 18,  
1894.

JOHN M. RANKIN.

The act of August 18, 1894, validated all soldiers' additional certificates outstanding at its date and all transfers thereof, whether past or subsequent, in the hands of *bona fide* innocent purchasers, but does not require or contemplate the issuance of new certificates, in the name of subsequent assignees, for any remaining portions of rights formerly evidenced by certificates which have been surrendered and canceled as satisfied, which remaining portions can only be asserted, established, and allowed as personal rights and without reference to the provisions of said act.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(G. W. W.) *Land Office, May 22, 1908.* (P. E. W.)

John M. Rankin has filed a motion for a review of the unreported departmental decision of November 8, 1907, affirming your office de-

cision of July 8, 1907, wherein you rejected his application for a recertification to him and in his name, under act of August 18, 1894 (28 Stat., 397), of the unused 40-acre portion of the 80-acre certificate of right, issued August 4, 1880, to Isaac Warren.

It appears that said Isaac Warren and wife, on January 26, 1875, executed in favor of T. B. Walker a power to sell any land to which they might be entitled under section 2306 of the Revised Statutes, which power, for the sum of \$5,200, the receipt of which was acknowledged, was made irrevocable.

March 12, 1879, and before said certificate of right issued to Warren, homestead entry, No. 2685, was made in his name, as a soldiers' additional homestead entry, for 80 acres of land in the Taylors Falls, Minnesota, district. This entry was canceled May 21, 1879, as made contrary to the orders of the Department, for the reason that the land involved was part of the former Mille Lac Indian Reservation, and thereupon the said certificate of right for 80 acres was issued in the name of Isaac Warren in accordance with the then practice of certifying the additional right to a soldier whose additional entry had been canceled for any reason which prevented patent thereon. After said certificate issued, the rulings of the Department as to said Mille Lac Indian land were modified and said entry, No. 2685, was reinstated, but on June 23, 1891, it was canceled for conflict, as to 40 acres, with the patented claim of a Mille Lac Indian. By your office letter of October 29, 1891, the history of this entry was set out, the entry was reinstated, the said certificate of right for 80 acres which had been filed therewith was revoked and canceled in view of such reinstatement, and the entry was approved for patent as to the portion not in conflict, in all of which Warren and Walker acquiesced. Thus it was with said certificate revoked and canceled *in toto*, and with the right itself exhausted as to 40 acres, that Walker on February 7, 1907, by bill of sale, conveyed to the movant herein "all his right, title, and interest in and to the unused 40 acres of the aforesaid certificate."

The act invoked by movant provides:

That all soldiers' additional homestead certificates heretofore issued. . . shall be, and are hereby declared, 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.

Thereunder, and by reason of the foregoing facts, there exists in favor of movant an unimpaired additional right to make entry for 40 acres of land.

But the Department does not find therein or elsewhere direction for the recertification of such right in the name of the movant as herein requested. The certification of soldiers' additional rights has

never been directed or authorized by statute, but has been done under departmental regulations, and the practice was discontinued by circular of February 13, 1883. Such certificate was only the evidence of the soldier's right and not the right itself. The act in question merely declares that such evidential certificates are not invalidated by "any attempted sale or transfer thereof" and adds that "the same [certificates] shall be good and valid in the hands of *bona fide* purchasers for value." In this case such certificate is not in the hands of the purchaser of that portion of the right which remains, but is shown to have been revoked and canceled before the passage of the act invoked. In the precisely similar case of F. W. McReynolds (33 L. D., 112) it was held that—

The provision in the act of August 18, 1894, validating certain soldiers' additional homestead certificates therein described, applies only to such certificates in existence at the date of the passage of the act.

It is insisted in the present motion that in said case of McReynolds and in the case before us the certificate issued to the soldier "was, in law and in fact, in existence and outstanding on the 18th day of August, 1894, and was, therefore, validated by the remedial act of that date." In support of this contention movant cites the cases of J. S. Pillsbury *et al.* (22 L. D., 699); John H. Howell (24 L. D., 35), and Herman C. Ilfeld (34 L. D., 685).

Upon a comparative examination thereof it is at once apparent that the facts and conditions shown therein were such that they afford no reason or precedent for the recertification asked herein. In the present case the additional right was used by making a personal entry for 80 acres. Thereafter said entry was erroneously canceled but the cancellation was at a later date rescinded and the entry reinstated. During the period of its cancellation a certificate of additional right for 80 acres was issued to the soldier under the practice then prevailing of issuing certificates of right, a practice long since discontinued. But before said personal entry, made prior to the issue of said certificate, was reinstated it was required that the certificate should be surrendered for cancellation. Had it not been for the mistake made in first canceling the additional entry no certificate of additional right would have been issued. All parties acquiesced in the surrender and cancellation of the certificate preliminary to the reinstatement of the additional entry, and it was only because of the subsequent cancellation of said additional entry as to a part in conflict with an Indian allotment, that the soldier's right was not fully satisfied by the approval and patenting of the additional entry. It results, because of said cancellation, that there is a right to an additional entry yet remaining unsatisfied, for 40 acres.

This is conceded in the decision sought to be reviewed, but it denied the claim for a reissue and recertification of the certificate, issued, and

canceled, under the circumstances stated, to one whose sole connection with this right is based upon a purchase made long after the surrender and cancellation of the certificate, and not until six years after the passage of the act of 1894 under which the recertification is requested. This remedial statute is to be liberally construed but only within its manifest purpose and scope, that of validating certificates in the hands of those who purchased them in good faith while in legal existence and force. Thus the Department said in the case of John M. Rankin (21 L. D., 404), in which the history and purpose of the act are fully stated:

Thus it will be seen that both houses of Congress acted upon the idea that the bill was intended to and would validate all outstanding soldiers' additional homestead certificates in the hands of *bona fide* holders.

Subsequently, in the case of Henry N. Copp (23 L. D., 123, 126), the Department, quoting the foregoing language, defined an "outstanding" certificate to be "one that has been issued and has not been located, canceled or surrendered." In this case the certificate was issued only because the entry made upon the personal right had been erroneously canceled, and it was surrendered and canceled upon, and as a condition of, the reinstatement of said personal entry. When that personal entry was reinstated it was in the use and exercise of the additional right itself and all parties recognized the fact that such user of the right could not leave "outstanding" a certificate of the same right. There is here no question of a merger of the personal right in a certificate of right but an agreed user of the personal right upon surrender and cancellation of the certificate which for a time evidenced that personal right. And when it developed that only 40 acres of the entry thus made could be patented to him, this did not revive the canceled certificate, but restored the personal right, to the extent of 40 acres.

The Department is clearly of the opinion that while the remedial and curative act invoked herein validated all certificates outstanding at its date and all transfers, whether past or subsequent, of such certificates found in the hands of a *bona fide* purchaser, it does not direct or contemplate the issuance of a new certificate, in the name of the subsequent assignee, for the remaining portion of the right formerly evidenced by a certificate which has been surrendered and canceled as satisfied under the circumstances disclosed herein. Neither do the regulations nor the decisions of the Department relating to said act. Like any such additional right for which no certificate ever issued, any portion of such right, restored after the surrender and cancellation of a certificate which for a time evidenced the right but had not been transferred, is to be asserted, established, and allowed as a personal right and without reference to the act herein invoked.

The application thereunder was properly rejected and the Department adheres to its said decision.

The motion is accordingly overruled.

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CAIN *v.* CARRIER.

Petition for modification of departmental decision of April 20, 1908, 36 L. D., 356, denied by First Assistant Secretary Pierce, May 22, 1908.

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PROCEEDINGS BY GOVERNMENT—RIGHTS ACQUIRED BY ASSISTING GOVERNMENT IN PROSECUTION.

MILROY *v.* JONES.

Proceedings against the validity of an entry commenced by the government within two years from the issuance of final receipt do not suspend the running of the confirmatory provisions of section 7 of the act of March 3, 1891, so as to subject it to new and independent proceedings not initiated within the period of limitation.

The government may avail itself of the services of an individual in the prosecution of proceedings commenced by it within the statutory period, but no right is acquired or conferred by reason of such assistance except such as accrues to the public generally by the restoration of public lands to entry.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(G. W. W.)                      *Land Office, May 22, 1908.*                      (E. F. B.)

By decision of February 1, 1908, you rejected the application of Walter J. Milroy to contest the homestead entry of Josiah Jones, made July 23, 1902, alleging settlement September 25, 1900, for the NE.  $\frac{1}{4}$ , Sec. 36, T. 34 N., R. 6 E., Seattle, Washington, upon which commutation proof was submitted and final certificate issued November 24, 1902.

Milroy's affidavit of contest was filed December 12, 1904, alleging abandonment between date of original entry and date of final certificate and failure to comply with the homestead law as to residence and cultivation. You rejected it for the reason that the right of Milroy to prosecute his contest was barred by the confirmatory provisions of section 7 of the act of March 3, 1891 (26 Stat., 1095), although the entry had been suspended by your office upon the report of a special agent prior to the expiration of two years from date of final certificate and was under suspension at the time of the filing of said affidavit.

You thereupon dismissed the contest and directed that a hearing be had upon the charges preferred by the special agent, and that

Milroy may, if he so desires, file his petition to be made a party plaintiff in the case initiated by the Government.

Independently of the period of limitation fixed by the 7th section of the act of March 3, 1891, the granting or refusal of an application to contest a final entry rests in the sound discretion of your office, and your decision thereon will not be controlled by the Department unless there is manifestly an improper exercise of it.

The proceeding commenced by the Government against the entry did not suspend the running of the statute so as to allow new and independent proceedings to be initiated after the expiration of two years from date of final certificate. While your office has no right to allow new and independent proceedings to be instituted against an entry after the expiration of the time fixed by the statute, it is not prohibited from accepting the offer of any one to aid in the prosecution of proceedings against an entry that had been commenced by the Government within the statutory period, or to avail itself of any service that may tend to the ends of justice. (John N. Dickerson, 35 L. D., 67).

In this case a hearing had been improperly allowed by your office upon this contest and it is urged by appellant that as his application had been favorably acted upon and as he had been allowed to proceed against the entry to final judgment, he should not be deprived of the fruits of his contest and the Government should now be estopped from nullifying the proceedings.

Your action dismissing this contest is made imperative by the statute, irrespective of any direction that you may have given for a hearing upon it. Your office had no authority to allow a hearing upon appellant's contest and, while it is to be regretted that through the erroneous action of your office appellant has been put to expense and inconvenience in prosecuting his contest, your office has no authority whatever to enter up and approve any judgment looking to the cancellation of this entry upon those proceedings, and your action thereon was void and of no effect.

While the Government may avail itself of the services of anyone in the prosecution of an entry under proceedings commenced by the Government, it does not follow that any right is acquired or conferred by reason of such assistance except such as may be acquired by the public generally in the restoration of public lands to entry. If appellant is interested in having this land restored to entry, he may render any assistance within his power and if he desires to enter the land after its restoration his application will receive consideration if he is qualified and is the first legal applicant.

Your decision dismissing the contest, vacating the judgment of cancellation of the entry upon the proceedings had under appellant's contest and ordering a hearing upon the proceedings commenced by the Government, is affirmed.

## TIMBER AND STONE ENTRY--RELINQUISHMENT--SEC. 1, ACT MAY 14, 1880.

NEWCOMB *v.* FOSTER.

While section 1 of the act of May 14, 1880, providing that upon the filing of a relinquishment of a "preemption, homestead, or timber culture" claim the land shall be at once open to settlement and entry, does not specifically embrace timber and stone entries, the land department has adopted a rule of procedure with respect to relinquishments thereof similar to that outlined therein.

No such rights are acquired by an application to intervene in proceedings instituted by the government against a final entry as will prevent the acceptance of a relinquishment of the entry and the allowance of another application for the same land.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(G. W. W.) *Land Office, May 22, 1908.* (A. W. P.)

June 2, 1883, Albert Foster made timber and stone cash entry No. 5343 (Humboldt series) for the N.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 9, and W.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$ , Sec. 1, T. 8 N., R. 1 E., Eureka, California, land district.

April 13, 1888, said entry was held for cancellation upon the adverse report of a special agent charging, in effect, that the entry was made in the interest of one David Evans. Notice thereof was given the entryman and also, subsequently, it appears, to Charles A. King and Catherine F. Evans, record transferees of the entryman. On proper applications hearing thereon was ordered February 16, 1902. On January 13, 1905, however, the local officers reported that the special agent had been notified that such hearing had been ordered, but that he had taken no action thereon, as a result of which your office on February 21, 1905, directed the local officers to confer with special agent Wade and proceed with the hearing. Shortly thereafter separate applications to intervene were filed at the local office by Frank Morganroth, Frederick A. Hanson, and J. H. G. Weaver. Upon consideration of same your office by decision of October 6, 1905, held that except as to the government proceedings then pending the entry was confirmed under the proviso to section 7 of the act of March 3, 1891 (26 Stat., 1095). After having been subsequently considered by the Department on appeal and motion for review, the above-mentioned applications were by your office, on June 29, 1907, referred to the chief of field division Glavis, for investigation. As a result of his report thereon the same were rejected. On September 12, 1907, your office also denied the application of J. J. Van Hovenburg to intervene, subject to his right of appeal, and by the same letter referred the application of Otto E. Newcomb to intervene to the chief of field division for investigation and report.

Shortly thereafter and prior to any report on said application, to wit, on November 11, 1907, the local officers transmitted to your office relinquishments executed by the entryman and also by the record transferees, with report that same were filed in their office on November 9, 1907, accompanied by timber and stone applications for the land in question by Esther La Boyteaux and Rosetta Coleman. Accordingly, your office by letter of January 7, 1908, directed the local officers to notify the several applicants to intervene whose cases had not been formally closed, that the cancellation of said entry had been duly noted by your office and that the matter of their applications was considered as finally disposed of. Motion for review of your said decision was filed in behalf of Newcomb, in support of which it was urged, in effect, that Foster's entry being a final entry, not coming within the first section of the act of May 14, 1880 (21 Stat., 140), the relinquishments by entryman and his transferees should not have been noted on the records of the local office, and other filings allowed, but should have been forwarded to your office for consideration; that the local officers had no authority to accept such relinquishments while the entry was under suspension; and that Newcomb having secured sufficient evidence should have been permitted to proceed with his contest and secure the cancellation of the entry. Upon full consideration thereof, however, the said motion for review was denied by your office decision of April 14, 1908.

The case is now before the Department upon appeal, filed in behalf of Newcomb, from the judgment of your office. The matters urged in support thereof are in all material respects a repetition of those heretofore set out upon which the said motion for review was based.

As to the first ground suggested it will be noted that by section 1 of the act of May 14, 1880, it is provided:

That when a preemption, homestead, or timber-culture claimant shall file a written relinquishment of his claim in the local land office, the land covered by such claim shall be held as open to settlement and entry without further action on the part of the Commissioner of the General Land Office.

In respect thereto counsel for the appellant strongly contends that as timber and stone entries are not mentioned in said section they are not governed thereby and that accordingly the local officers were without authority to accept such relinquishments but should have transmitted the same for the consideration of your office.

As to this contention it might be suggested that even if said act did not include such entries, it affords no obstacle to the adoption of a rule of procedure with respect to the relinquishment thereof similar to that outlined therein, and appellant is in no position to question this rule. Further, while it does not appear from an examination of the reported departmental decisions that this section has ever been

directly held as applicable to timber and stone entries, yet a broad construction has uniformly been given to the second section of the said act awarding a preference right of entry to the successful contestant of "any preemption, homestead, or timber-culture entry." Said section has been construed to include a desert land entry (*Fraser v. Ringgold*, 3 L. D., 69; *Jefferson v. Winter*, 5 L. D., 694; and *Mary Stanton*, 7 L. D., 227); Kansas Indian trust land entries (*Bunger v. Dawes*, 9 L. D., 329); mineral claims (*Dornen v. Vaughn*, 16 L. D., 8); Sioux half-breed scrip locations (*McGee et al. v. Ortleby et al.*, 14 L. D., 523); coal land entries (*Garner et al. v. Mulvane et al.*, 12 L. D., 336); townsite entries (*Brummett v. Winfield*, 28 L. D., 530); as well as timber and stone entries (*Olmstead v. Johnson*, 17 L. D., 151).

In addition to this it will also be noted that while the confirmatory provision of the act of March 3, 1891, *supra*, refers only to entries made under homestead, timber-culture, desert land, and preemption laws, yet, among others not specifically named, timber and stone entries have been held to be within the contemplation of said act. See departmental instructions of June 3, 1904 (33 L. D., 10).

By analogy of reasoning, and especially in view of the approval given to such action by your office, the acceptance of the relinquishments of Foster and his transferees, and accompanying timber and stone applications, was proper, for, as was said in the case of *O'Shee v. La Croix* (34 L. D., 437) :

Where proceedings are instituted on behalf of the government solely for the purpose of clearing the record of an existing entry, no question of a preference right is involved, and where a relinquishment is subsequently filed and there are no valid adverse rights outstanding, the rule that no application to enter shall be received until proper notation of the cancellation of the entry is made upon the records of the local office, has no application.

Relative to the status of Newcomb, based on his pending application to be permitted to intervene, it will be observed that the government proceeding against the entry of Foster had been long pending, but for which said entry would have been confirmed under the act of March 3, 1891, *supra*, and it has been repeatedly held by this Department, that such governmental proceeding does not suspend the running of the statute so as to allow an independent contest proceeding to be initiated after the expiration of two years from the date of issuance of final certificate.

In the case of *John N. Dickerson* (35 L. D., 67), however, the Department held, in effect, that while your office had no right to allow a new contest or independent proceeding to be initiated against such an entry after the expiration of the period fixed by statute, you were not prohibited from accepting the offer of anyone to aid in the prosecution of the governmental proceedings. But it will be observed that at the time of the cancellation of this entry Newcomb had not been

allowed to intervene. His petition had been transmitted by your office to the special agent for investigation and report, and no further action appears to have been taken thereon. At most, therefore, he occupied only the position of one seeking to be permitted to intervene, thus affording the government the opportunity to avail itself of his services should it be found necessary to continue the prosecution of the pending proceeding against the suspended timber and stone entry. As was said by your office, he was at most only "an applicant for a privilege, and had nothing in the nature of a vested right or equity," and can not therefore be in any sense considered as in the position of a contestant where, after the filing of his affidavit against an entry, the relinquishment of the same is filed with the local officers.

While the Department has held that one so desiring might be permitted to intervene and aid the government in the prosecution of a pending governmental proceeding against an entry otherwise confirmed, yet it has never in any of the cases heretofore reported, held that in the event of the cancellation of the entry such intervener would be entitled to the preferred right of entry accorded by section 2 of said act of May 14, 1880. In this connection, also, attention is especially directed to the case of *Walter J. Milroy v. Josiah Jones*, this day decided, wherein it was said [36 L. D., 438]:

While the government may avail itself of the services of anyone in the prosecution of an entry under proceedings commenced by the government, it does not follow that any right is acquired or conferred by reason of such assistance except such as may be acquired by the public generally in the restoration of public lands to entry. If appellant is interested in having this land restored to entry, he may render any assistance within his power and if he desires to enter the land after its restoration his application will receive consideration if he is qualified and is the first legal applicant.

From review of the matter therefore the decision appealed from must be, and is accordingly, hereby affirmed.

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CONTEST—NOTICE—AFFIDAVIT FOR PUBLICATION.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., May 23, 1908.*

REGISTERS AND RECEIVERS,  
*United States Land Offices.*

SIRS: No affidavit for service by publication in a contest case will be received or made the basis for such service unless it shows that it has been sworn to within thirty days of the time of its presentation at your office, and except where it is specifically alleged that the

entryman is a nonresident of the State, contains a statement showing that the person executing the affidavit has, within fifteen days immediately prior to the date of the affidavit and with a view of obtaining service of the notice, made a diligent search for the defendant by making inquiry as to his whereabouts of the postmasters of the post-office given as the record address of the defendant, and of the post-office nearest the land involved, and also by making inquiry of persons named in the affidavit, who reside in the immediate neighborhood of the land; but it will not be necessary that notice of contest should have issued prior to the time such search and inquiry was made.

When an affidavit for service by publication in a contest case is filed in your office, you will act immediately thereon, even though, owing to the press of business, it may be necessary to set the case for hearing at some time more or less remote.

When for any reason you fail to act promptly in the disposition of such applications for service by publication, and more than thirty days will have elapsed from the date of filing such affidavits for service and the day when the contest notice can be reasonably first published, you will thereupon require a new showing in support of the application before taking action thereon.

You are enjoined to strictly observe these requirements, in order that the further remanding of contest cases on account of the defect mentioned may be avoided, and you will be expected to personally defray the expense of republication for all notices when due to your failure to comply with these instructions.

These instructions supersede those of November 14, 1902 (36 L. D., 294), but are not intended to abrogate the use of the form of affidavit prescribed in the instructions of May 27, 1905 (33 L. D., 578).

FRED DENNETT,  
*Commissioner.*

Approved:

FRANK PIERCE,  
*First Assistant Secretary.*

## SECOND CONTEST—PREFERENCE RIGHT.

DALEY ET AL. *v.* ANTONELLI.

A second contestant will not be allowed to proceed with a hearing where a prior pending contest is attacked on the ground of fraud, and such issue will not be determined until after the final disposition of the prior contest and cancellation of the entry; nor is a second contestant entitled to a preference right of entry where the entry is canceled as a result of the first contest, even though the first contestant may not be entitled to such right.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(G. W. W.) *Land Office, May 23, 1908.* (E. F. B.)

This appeal is by George Daley from the decision of your office of December 21, 1907, affirming the decision of the local officers awarding to Walter A. Bolton the prior right to proceed upon his contest against the homestead entry of Peter A. Antonelli, made July 6, 1904, for the S.  $\frac{1}{2}$ , lots 3 and 4 and N.  $\frac{1}{2}$  lots 9 and 10, Sec. 19, T. 11 N., R. 13 W., Oakland, California.

The error alleged in said appeal is in not holding that Bolton's contest was speculative and fraudulent and not made in good faith.

It is admitted by appellant that the contest filed by Bolton was first in point of time, but it is alleged that Bolton and his brother, A. L. Bolton, are engaged in the business of filing contests, not for the purpose of entering the land, but by waiving their supposed preference right, to secure for their clients entries of lands within the time allowed successful contestants a preference right of entry.

The question thus presented is whether a second contestant will be entitled to proceed against an entry upon a charge that the first contest is fraudulent.

The uniform ruling of the Department has been that no rights are acquired by fraudulent and speculative contests (*Neilson v. Shaw*, 5 L. D., 358, on review, 387; *Van Ostrum v. Young*, 6 L. D., 25; *Harrington v. Stockham*, 10 L. D., 402); but it does not follow that a second contestant will be allowed to proceed with a hearing where a prior pending contest is attacked on the ground of fraud. Such issue will not be determined until after the final disposition of the prior contest and after the cancellation of the entry. (*Davisson v. Gabus*, 10 L. D., 114; *Ludwig v. Faulkner*, 11 L. D., 315; *Gregg et al. v. Lakey*, 17 L. D., 60; *Engbard v. Runge*, 28 L. D., 147.)

Nor is a second contestant entitled to a preference right of entry if the entry is canceled upon the first contest, although the first contestant may not be entitled to a preference right. The land would in that event be restored to entry by the first legal applicant. *Gotebo Townsite v. Jones* (35 L. D., 18).

Your decision is affirmed.

## DESERT LAND ENTRY—AMENDMENT.

WILLIAM A. CALDERHEAD.

There is no express statutory authority for the amendment of entries where final certificate has not issued, but amendment may be allowed by the Secretary of the Interior in such cases, on equitable grounds, by virtue of the general authority vested in him by section 441 of the Revised Statutes to supervise the disposal of the public lands.

An assignee of a desert land entry who subsequently makes a like entry of adjoining land in his own right will not be permitted to amend his entry so as to take in the land covered by the assigned entry, with a view to thereby extending the life of the latter to correspond to the lifetime of his own entry.

*First Assistant Secretary Pierce to the Commissioner of the General Land Office, May 27, 1908.* (G. W. W.) (G. A. W.)

William A. Calderhead has appealed from your office decision of December 12, 1907, denying his application to amend desert land entry No. 4153, made January 15, 1906, for the unsurveyed S.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  of Sec. 8 and the N.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  of Sec. 17, T. 7 N., R. 45 E., Blackfoot, Idaho, land district, so as to include, substantially, the land contained in desert land entry No. 3801, made, April 9, 1904, by Thomas D. Osborne, for 160 acres of unsurveyed land described by metes and bounds and supposed to be in Secs. 17 and 18, T. 7 N., R. 45 E., same land district.

The facts of the case, as they appear in the record, are as follows:

Thomas D. Osborne, of Rigby, Idaho, on April 9, 1904, made desert land entry No. 3801, for 160 acres of unsurveyed land, supposed to be in Secs. 17 and 18, above township and range. By mesne conveyances, this tract was assigned to the plaintiff, Calderhead, December 14, 1905.

January 15, 1906, William A. Calderhead, of St. Anthony, Idaho, made desert land entry No. 4153, for the unsurveyed S.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  of Sec. 8, and the N.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  of Sec. 17, above township and range.

June 10, 1907, Calderhead filed relinquishment of the tract which had been assigned to him, executed June 6. On the same day that he filed relinquishment he made application, duly executed and corroborated, to amend entry No. 4153 by including therein the "supposed to be" NE.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  and the S.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  of Sec. 17, and the SE.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of Sec. 18, alleging—

That it was his purpose at the time of becoming assignee of entry No. 3801 to have made proof of irrigation and reclamation thereof, but owing to unforeseen difficulty in the construction of dams and ditches it will not be possible for the affiant to offer final proof . . . herein he relinquishes and prays to be allowed to add thereto the land above described and being substantially the

same tract that was described in the unsurveyed entry of Thomas D. Osborne. That the tract prayed for is essentially desert land, . . . and that all of the statements made as to the character of the land described in the entry No. 4153 will apply with equal force to the tract now applied for. That the affiant has not acquired title nor am I claiming under any of the agricultural public land laws an amount of land, which together with the land applied for will exceed in the aggregate more than 320 acres.

Your office, by decision rendered December 12, 1907, denied Calderhead's application, on the ground that, under Department instructions of July 26, 1907 (36 L. D., 44), the enlargement of the area covered by a desert land entry is to be authorized only where, on account of an existing appropriation of adjacent lands, the entryman was precluded, at date of entry, from taking the full area allowed by law and at once took steps to procure the cancellation of such entry, and already indicated, in making his entry, such to be his intention.

Calderhead has appealed to the Department from your office decision, alleging, as ground therefor, that the departmental instructions of July 26, 1907, were not in existence at the time he filed his application for amendment (June 10, 1907), but that at such date the rule of the Department was as follows:

Where a desert land entryman does not include in his entry the full area allowed by law, for the reason that there is no vacant land adjoining that entered which is susceptible of irrigation and reclamation, he may, if adjoining land of the character subject to desert land entry thereafter becomes vacant, enlarge his original entry so as to include therein the full area allowed by law.

This language constitutes the syllabus to the case of Ella Pollard (33 L. D., 110), and correctly epitomizes the decision rendered.

That under departmental regulations of July 26, 1907, the plaintiff would be precluded from amending his entry there would appear to be no doubt. The reasons therefor fully appear in the decision of your office in this case. In the opinion of the Department, however, the plaintiff would as truly be precluded from the desired amendment of his entry did the decision in the Pollard case, above quoted, control. There are essential features in that case which do not appear in the case at bar. (1) In the Pollard case, at the time the entryman made entry (which was for 120 acres), there was *no* vacant desert land adjoining that comprised in her entry, and it was only after the relinquishment of an adjoining entry that her entry could be amended. In the case at bar, it is nowhere shown that Calderhead could not have entered, had he possessed the right, the maximum acreage of 320 acres. (2) In the Pollard case, absence of intent to amend in order to include further land may readily be believed, since, as soon as opportunity was afforded, the entryman applied to amend her entry so as to include additional contiguous desert land. In the case at bar the

entryman took, directly and by assignment, the utmost acreage permitted under the desert land law, and his act in so doing precludes the idea of possible intent to acquire further land by way of amendment of entry.

Upon fundamental grounds, however, the Department must reject Calderhead's application.

Amendment of entries where final certificate has not issued is allowed by the Secretary, not upon any express statutory authority governing particular classes of cases, but by virtue of the inherent power and authority vested in him by section 441, Revised Statutes, which charges him with supervision in the disposal of the public lands (see Circular of Instructions, 33 L. D., 251, 253; Christoph Nitschka, 7 L. D., 155). This power has been exercised in a manner analogous to the practice of courts of equity in granting relief in cases of accident and mistake in the making of contracts. Amendment has been permitted where, through ignorance or misinformation, an entryman, acting in good faith, has been misled to his prejudice. However, as stated in the case of Green Piggott (34 L. D., 573), "in none of the cases where amendment has been allowed was there . . . legal objection to the allowance of the application other than that the entryman had previously exhausted his right of entry."

The allowance of Calderhead's application to amend would, in the opinion of the Department, abrogate an express term of a statute, *i. e.*, the requirement in section 7 of the act approved March 3, 1891 (26 Stat., 1095), limiting the lifetime of a desert land entry to four years. Calderhead admits that he desires to have his entry amended because, "owing to unforeseen difficulties in the construction of dams and ditches, it will not be possible . . . to offer final proof." The granting of his application would extend the lifetime of the entry he obtained by assignment nearly two years. Had the dates of the entries been farther apart, the period of extension would be correspondingly greater, reaching its utmost limit, in any possible case, in an extension of four years lacking a few days. Apart from other considerations, a practice fraught with such possibilities is inconsistent with good administration, and on this ground, if for no other, should not be permitted. Your office decision is affirmed.

## ADDITIONAL HOMESTEAD ENTRY—LANDS WITHIN RECLAMATION PROJECT.

CHARLES O. HANNA.

An entry of lands subject to the provisions of the reclamation act will not be allowed as additional to a prior entry subject only to the provisions of the general homestead law.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(G.W.W.) *Land Office, May 29, 1908.* (E.O.P.)

With your office letter of May 18, 1908, you transmit departmental decision rendered June 8, 1907, in the case of Charles O. Hanna, and request further instructions with respect thereto.

The decision in question affirmed the action of your office rejecting Hanna's application to make additional homestead entry of the SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 17, T. 155 N., R. 100 W., Minot land district, North Dakota, because of a temporary withdrawal of the land under the provisions of the act of June 17, 1902 (32 Stat., 388), from all forms of disposition, made prior to the filing of said application.

It was decided, however, in said decision that, in the event said tracts were not required for use in the construction of irrigation works and were later included in a permanent withdrawal of lands irrigable under the project, the additional entry of Hanna be allowed subject to his compliance with all the terms and conditions of the reclamation act.

It now appears that a withdrawal of the character last mentioned is contemplated covering the tracts in question, which are noted on the approved plat as farm unit "B" of Sec. 17. Attention is called to unreported departmental decision of April 17, 1908, rendered in the case of Alonzo Durell, holding that an entry subject to the provisions of the act of June 17, 1902, *supra*, could not be allowed as additional to a prior entry subject only to the provisions of the general homestead law.

It is at once apparent that if the rule announced in the Durell case is to obtain, the direction made with reference to the application of Hanna to make additional entry can not be carried out.

An entry of land within a reclamation project, whether original or additional, can only be allowed subject to all the limitations and conditions of the reclamation act. In so far as those limitations and conditions impose additional burdens or are inconsistent with the general homestead law, they operate as a modification or repeal thereof. The additional entry of Hanna can be allowed only under the provisions of section 2 of the act of April 28, 1904 (33 Stat., 527), which, so far as compliance with the law is concerned, requires only that the entryman shall complete his original entry in the prescribed

manner, the performance of the conditions necessary to accomplish this end operating in the same degree upon the additional entry. In other words, the additional entry becomes for all purposes a part of the original entry and can not be carried to completion independently of or in a different manner from the perfection of it. The same proof which perfects the original entry completes the additional. Manifestly the proof required on an original entry under the general homestead law falls far short of that required by the reclamation act, and to allow an entry of lands within a reclamation project as additional to an ordinary homestead must result either in a waiver of the added conditions and limitations or a departure from the theory that an original and additional entry are not to be carried to completion independently and under different conditions. Neither of the courses mentioned is feasible, and the Department, after careful consideration of the question presented, is of opinion its decision in the Durell case correctly states the rule in such cases.

The direction contained in the case of Charles O. Hanna, inconsistent with this rule, is hereby rescinded, and his application to make additional entry of farm unit "B" of said section 17 will stand rejected.

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**SECOND HOMESTEAD—DISQUALIFICATION—ACT OF FEBRUARY 8, 1908.**

**MORITZ v. HINZ.**

No such rights are acquired by an application to make a second homestead entry while the first is still of record and not actually abandoned as will prevent the allowance of the subsequent application of another for the same land; and the provisions of the second homestead act of February 8, 1908, can not be invoked in such case to the prejudice of the adverse applicant.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(G. W. W.)                      *Land Office, June 1, 1908.*                      (E. J. H.)

The above-entitled case is before the Department upon the appeal of Fred Hinz, jr., from your office decision of March 14, 1908, dismissing his protest against the application of Andreas Moritz for second homestead entry upon the N.  $\frac{1}{2}$  of SE.  $\frac{1}{4}$ , the S.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$ , Sec. 20, T. 130 N., R. 69 W., Bismarck, North Dakota, land district, and allowing Moritz 60 days within which to make entry thereof.

It appears that the application of Moritz was filed in the local office November 13, 1906, and that it was alleged in his corroborated affidavit accompanying the same that on July 29, 1905, he made homestead entry for the NW.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$  of Sec. 27, the N.  $\frac{1}{2}$  of SE.  $\frac{1}{4}$  and NE.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$ , Sec. 28, T. 130 N., R. 69 W.; that he made entry of

said land in good faith believing that it could be cultivated, having prior thereto made examination of the same; that he has since discovered that said land is a lake-bed and only free from water and capable of cultivation in dry seasons; that it was under water during the whole of the preceding year; that he never made any improvements on the land as it was impossible to live there and cultivate the same; that he had not sold or relinquished his entry thereon or agreed to do so. He asked that he be permitted to relinquish said entry and to enter in lieu thereof the land applied for, therewith tendering his relinquishment. His application was forwarded to your office.

On April 17, 1907, while Moritz's application was pending in your office, Hinz filed in the local office a protest against its allowance, accompanied by his corroborated affidavit stating that he was well acquainted with the land embraced in Moritz's homestead entry; that the same was not worthless for agricultural purposes; that the statements made to that effect in the affidavit of Moritz were false, and he asked a hearing thereon that he might have an opportunity to prove said allegations. He also filed his own application to make homestead entry of the same land applied for by Moritz. Said papers were forwarded to your office.

May 21, 1907, Moritz filed an answer to the protest and affidavit of Hinz, denying the allegations made therein as to the character of the land covered by his entry, and asking a hearing. He also filed the affidavits of five other parties stating that they had examined said land and found that all but about 30 acres was under water and could not be cultivated; that the same was an alkali lake and that a team would mire there in the wet season. Accompanying the same was his own affidavit alleging that the father of Fred Hinz, jr., had offered him \$600 to withdraw his application for second homestead entry on the land in order that the son might secure the same, as it adjoins land owned by the father.

March 14, 1908, your office decision found from the records in said office that the homestead entry of Moritz had been canceled on January 25, 1908, upon the contest of Margaret Christilaw, for abandonment. It was held that Moritz was entitled to the benefits of the act of February 8, 1908 (Public—No. 18). The protest of Hinz was therefore dismissed and Moritz allowed 60 days within which to perfect his entry.

The act of February 8, 1908, *supra*, provides—

That any person who, prior to the passage of this act, has made entry under the homestead laws, but from any cause has lost, forfeited, or abandoned the same, shall be entitled to the benefits of the homestead law as though such former entry had not been made, and any person applying for second homestead under this act shall furnish the description and date of his former entry: *Provided*, That the provisions of this act shall not apply to any person whose for-

mer entry was canceled for fraud, or who relinquished the former entry for a valuable consideration.

Upon careful examination and consideration of the case the Department fails to concur in the finding of your office that Moritz is entitled to make entry under the act of 1908. In the quite similar case of *Short v. Bowman* (35 L. D., 70), it was held that:

One who at the time he performed an act of settlement upon which he relies as entitling him to a prior right of entry is disqualified as an entryman by reason of having an entry not actually abandoned, then of record, is disqualified to make a valid settlement and can therefore gain nothing thereby as against the valid adverse right of another, asserted prior to the removal of such disqualification.

It is believed that said rule should apply in the case of an application to make entry as well as to a settlement. It is evident that while Moritz was the prior applicant for the land in question, he was not qualified to make second entry thereof until subsequent to April 17, 1907, when Hinz tendered his application therefor. In the first place Moritz was not qualified to make such entry under the act of April 28, 1904 (33 Stat., 527), his original entry having been made and abandoned since the date of the passage of said act; and second, because said entry does not appear to have been finally canceled of record until January 25, 1908, at which time the application of Hinz was pending. Had action been taken upon Moritz's application at any time prior to the passage of the act of February 8, 1908, the same must necessarily have been rejected even in the absence of the Hinz protest and application. Such action should have been taken and Hinz allowed to make entry if shown to be qualified. The passage of said act of 1908 can not so change the situation as to give Moritz the better right to the land.

Your office decision is reversed and Moritz's application rejected with a view to allowing Hinz, whose application is still pending, to make entry of the land.

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**ALLOTMENTS OF PUBLIC LANDS TO MEMBERS OF THE TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS—ACT OF APRIL 21, 1904.**

**INSTRUCTIONS.**

Commissioner of General Land Office directed to instruct the proper local officers to consider applications of members of the Turtle Mountain band of Chippewa Indians for allotment of public lands under the provisions of the act of April 21, 1904, in two or more noncontiguous tracts, only when favorably recommended by the superintendent of the Fort Totten Indian school.

*Acting Commissioner of Indian Affairs Larrabee to the Secretary of the Interior, June 2, 1908.*

The office is in receipt of a communication from the superintendent of the Fort Totten school, North Dakota, in which he requests to

be informed if the 160 acres of public lands selected by members of the Turtle Mountain band of Chippewa Indians under the provisions of the act of April 21, 1904 (33 Stat., 189), must be in one contiguous tract.

The superintendent says that a number of Indians have complained to him that they have had some difficulty with the local land officers in Montana, who, it seems, have objected to selections made by them of 80 acres in the State of North Dakota and an additional 80 acres in the State of Montana, but that he has received no official notice from any of the local land officers that such selections have been rejected.

The superintendent says further that owing to the limited area of the Turtle Mountain reservation, in North Dakota, it was impossible for all of the members of this band to secure allotments thereon, and prior to the passage of said act of April 21, 1904, *supra*, many of these Indians settled on and occupied 40 and 80-acre tracts of vacant public land outside of the reservation; that they have occupied their selections for a number of years; that all of the vacant lands in the vicinity of their selections have long since been taken up by whites; that these Indians want to retain their present selections, but also wish to secure the additional quantity of land to which they are entitled under the act of April 21, 1904. The superintendent says, also, that he has a number of applications of this nature on file but will hold them pending instructions from the office. He requests that the local land officers in North Dakota and Montana receive instructions on this subject.

If it is held that the 160 acres selected by members of this band must be in one contiguous tract it will be necessary for them to give up their present holdings. Manifestly this would be an injustice to some of the Indians in question, as they will be compelled to abandon any improvements they may have placed on their present selections.

The construction to be placed on a number of provisions of the act of April 21, 1904, has been outlined in an opinion by the Assistant Attorney-General for the Department of the Interior in a letter addressed to the Department under date of January 24, 1905.

Your attention is especially invited to a part of this opinion, pages 5, 7, 8, and 9, reading as follows:

All members of the band unable to secure land on the reservation are allowed to take their homesteads upon any vacant land belonging to the United States.

An unusual and in many respects unfortunate condition exists here, due in large part to the long delay in acting upon the agreement negotiated in 1892, and not ratified by Congress until 1904. In the meantime many of the Indians having, perhaps, in mind the provision allowing any who could not secure land on the reservation to make selections from the public domain, and influenced by the fact that the public domain was being rapidly appropriated, asserted claims

to public lands under the general homestead laws, the Indian homestead laws and the Indian allotment law. Such Indians should not be made or allowed to suffer injury by reason of having asserted such claims. These claims should now be held and treated as selections under the agreement. The superintendent should be so advised in reply to his fourth question. Whatever evidence of selection is given to others taking land under this agreement outside the reservation should be given to those of the band who have heretofore asserted a claim to a portion of the public domain under other laws and such change or notation as may be necessary should be made in the records of the proper local land offices.

The Indian Office, in response to the Superintendent's fifth question, expresses the opinion that a member of the band taking land on the reservation and unable to secure the full amount he is entitled to, will not be allowed to fill up the quantity by selecting the additional amount outside the reservation. If any Indian be unable to secure within the reservation all the land he is entitled to, in one body, he may take it in separate tracts. The same reason for allowing one who selects his land on the public domain to take it in separate tracts does not exist and such a one should be required to take his land in one body. If, however, an Indian has made improvements within the reservation upon a tract containing less land than he is entitled to take and is unable to secure land adjoining thereto, or elsewhere in the reservation, it would seem but just to allow him to go outside for the quantity to make up his full selection. If he may not do this he must suffer injury either by abandoning his improvements or by accepting the smaller quantity. The provision is that any member of the band 'who may be unable to secure land upon the reservation' may take vacant land of the United States. This clearly means the quantity of land to which he is entitled. Thus read and taken in connection with the provision that 'the selections shall be so made as to include in each case, as far as possible, the residence and improvements of the Indians making selections' justifies the conclusion that an Indian living on the reservation who is unable to secure on the reservation the quantity to which he is entitled, may take additional land outside to make up the full amount to which he would be entitled were there sufficient land on the reservation. Such cases must be exceptional and all should be carefully scrutinized and applications to take additional lands outside the reservation should be refused unless shown to be absolutely necessary.

From the foregoing it appears that the privilege should be extended to members of this tribe to hold their present selections and take the additional quantity of land to which they are entitled under the agreement, where it can be shown that substantial injury will result to them by being required either to give up their present holdings in order to secure the allotment to which they are entitled in one contiguous tract, or hold their present selections of a lesser quantity of land than that to which they are entitled under the agreement.

It is not the intention of this office to encourage any individual of this band to select his homestead or allotment in two or more non-contiguous tracts simply through whim or caprice. On the other hand, where it can be shown that material injury will result to any individual Indian in this tribe the office feels constrained to suggest that this privilege should be extended to them.

It is respectfully recommended therefore that the General Land Office be directed to instruct its local land officers that applications from members of the Turtle Mountain band of Indians for allotments of 160 acres in two or more non-contiguous tracts of vacant land be considered only in those cases where such application is accompanied by a certificate from the superintendent in charge of the Fort Totten school, North Dakota, that material injury will result to such applicant should he be required to give up his present holdings in order to secure the quantity of land to which he is entitled under the agreement.

Should the recommendation contained in the foregoing meet with your approval the superintendent in charge of the Fort Totten school, North Dakota, will be instructed to cooperate with the local land officials to see that the privilege herein mentioned is not abused. He will be requested to scrutinize closely every application for allotment of this character, recommending to them only those applications in which it can be satisfactorily shown that substantial injury will result to the applicant where he is denied this privilege.

Approved, June 3, 1908:

FRANK PIERCE,  
*First Assistant Secretary.*

PRIVATE CLAIM—PASSAGE OF TITLE—EXCLUDED LANDS.

BACA FLOAT NO. 3.

The final act by which title passes under the grant made by section 6 of the act of June 21, 1860, is the acceptance by the Department, and the filing of approved plat and field notes, of a survey whereby the surveyor-general made location of the selection of lands affirmatively shown to have been vacant and nonmineral at the date of selection, so far as was then known by the selectors.

Lands which at the date of the selection of Baca Float No. 3 were embraced within the Tumacacori, Calabazas, and San Jose de Sonoita claims were not "vacant land" within the meaning of section 6 of the act of June 21, 1860, and were therefore not subject to such selection.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(G. W. W.) *Land Office, June 2, 1908.* (C. E. W.)

This is an appeal from your office decision of May 13, 1907, affirming the report and recommendation of the surveyor-general of Arizona, dated November 5, 1906, in the above-entitled case, involving title to nearly one hundred thousand acres of land situated in the Gadsden Purchase, and being a third of a series of five locations, in square form, each containing 99,289.39 acres, of land in lieu of certain

claims to a tract also claimed by the town of Las Vegas, authorized to the heirs of Luis Maria Cabeza de Baca by the 6th section of the act of June 21, 1860 (12 Stat., 71).

Said section is as follows:

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

Four of these tracts have been selected and surveyed, and are not in dispute: Nos. 1 and 2 being located in what is now New Mexico; No. 4 in what is now Colorado; and No. 5 within the confines of Arizona.

The situs of float No. 3 was selected by the heirs of Baca on June 17, 1863, but no survey thereof was made until 1905, when the surveyor-general reported, among other things, that the lands within the grant were notoriously mineral in character on June 17, 1863; that the Tumacacori, Calabazas, and San Jose de Sonoita grants, as well as the townsite of Tubac, fell partly within the exterior lines of the selected tract; and that the land was neither shown to have been non-mineral nor vacant at the time of selection. Hence he recommended that the selection be rejected in its entirety. Whereupon you directed said officer to allow the claimants sixty days after notice within which to apply for a hearing and to present evidence rebutting the findings of the surveyor-general; in default whereof, or of an appeal from said order, the entire selection would be finally rejected.

It is from this order that the present appeal lies. It is contended:

1. The Department is without jurisdiction in the premises;
2. That its construction of section 8, act of July 22, 1854, in Baca Float No. 3 (30 L. D., 97 and 497), is erroneous;
3. That its present construction of section 6, act of June 21, 1860, is erroneous; and
4. That the Commissioner erred in not approving the survey of said location as the survey of the grant to the Baca heirs made by Congress on said June 21, 1860.

In one form or another this case has been before the Department a number of times. Six reported decisions present various aspects of this remarkable litigation: 5 L. D., 705; 12 L. D., 676; 13 L. D., 624; 29 L. D., 44; 30 L. D., 97 and 497. Commenced not so many years after the establishment of this Department, it has grown in importance and in intricacy until now, aside from title to a tract of land more than twice the area of this District of Columbia, vast mineral

wealth and the rights of a multitude of settlers, adversely claiming, are involved, dependent upon the final decision of this controversy.

The effectiveness of appellants' contention depends upon whether or not the Department has exhausted its jurisdiction *in rem*; whether or not the rights of the locators have vested and the legal title to the land covered by this float has passed out of the United States. If it is true that at some stage in the proceedings, the initial act of which was the selection of June 17, 1863, the complete *requirements* of the granting act were met, then the Department has not the power to issue the order from which the appeal lies.

Three propositions are advanced by appellants:

1. That the grant made by the act of June 21, 1860, was completely effectuated when the selection was made and notified to the surveyor-general; or
2. That, if the above be not the last act required, the approval of the surveyor-general vested the legal title in the claimants; or, finally, if more is required by the implied terms of the act,
3. That the action of the Commissioner of the General Land Office, on April 9, 1864, was an adjudication of title in the grantees.

The action of April 9, 1864, was an order issued to the surveyor-general by your office, directing the survey of the tract—later to be discussed in this decision.

The fourth and last possible act would be the survey, the certification of the plat, and the filing of the same in the General Land Office. Whether this is an act required in the investiture of title is the crux of the present controversy. If title does not pass until there is a survey, a plat certified, returned, and approved, then the Secretary still has jurisdiction to enquire into all matters involved in the passing of title, including the known character of the land at the time of its selection.

There can be little merit in appellants' contention that title passed at the conclusion of the first or second steps, *i. e.*, upon selection by the claimants or upon the approval of that selection by the surveyor-general. For if that be true, then these grantees have no claim and never have had a lawful claim to the land selected on June 17, 1863, because the selection on that date was not the first attempt to locate float No. 3. It appears from the record that on October 31, 1862, John S. Watts, in behalf of the Baca heirs, filed the third of the series of selections, on land on the River Pecos, a place known as Bosque Redondo, situated in New Mexico. The surveyor-general certified that the tract was vacant and non-mineral and approved the selection. Further evidence of its vacant and non-mineral character was afforded by the certificate of the register and receiver. The Commissioner of the General Land Office was duly notified of the selection. But before any action was taken by the Commissioner, or order for its sur-

vey issued, the agent of the heirs, with permission from your office, withdrew the selection. Permission was thus given because the application had not "ripened into a specific location." Now if the "last act" required by the terms of the grant, expressed or implied, was the approval of selection by the surveyor-general, it is quite clear that the only location of float No. 3 to which the heirs or assigns of the grantees now have any legal claim, is that of October 31, 1862—the Bosque Redondo land; that is, their rights were exhausted prior to the selection of June 17, 1863, and the selection of that date was consequently ineffective for any purpose.

It is quite clear that something more was required to invest title. The terms of the act itself confer a right in the heirs "to select vacant land, not mineral," to be located by them in square bodies, within three years from the passage of the act. The act furthermore lays a duty on the surveyor-general "to make survey and location of the lands so selected by said heirs of Baca." No limitation in time was imposed for the performance of this duty.

It is plain that the statute cannot be confined to its express terms. As in other cases, Congress did not descend into the *minutiae* of detail. The officer charged with the execution of the legislative mandate, perforce by regulations properly derivative and within the scope of the act, was bound to supply the administrative details. The grantees were not empowered to take any land with merely the limitation of area. The land, so the expressed terms of the act required, was to be vacant and non-mineral. Somewhere there was, by necessary implication, a power to decide whether the land so selected was vacant and non-mineral; somehow, and this again by implication rather than expression, the character of the land was to be determined. It was the duty of the surveyor-general, "in the first instance at least" (*Shaw v. Kellogg*, 170 U. S., 312), to say whether the land thus selected was within the terms of the grant.

Thus we find that on July 26, 1860, your office issued instructions to the surveyor-general of New Mexico, calling attention to the act in favor of the Baca heirs and directing:

Should they select in square bodies according to the existing line of surveys, the matter may be properly disposed of by their application duly endorsed and signed with your certificate designating the parts selected by legal division or subdivision, and so selected as to form five separate bodies in square form. Then the certificate thus endorsed is to be noted on the records of the register and receiver of Santa Fe and sent on here by these officers for approval. Should the Baca claimants select outside of the existing surveys, they must give such distinct descriptions and connection with natural objects in their applications to be filed in your office, as will enable the deputy surveyor when he may reach the vicinity of such selections in the regular progress of surveys, to have the selections adjusted as near as may be to the lines of the public surveys, which may hereafter be established in the region of those selections.

In either case the final conditions of the certificate to this office must be accompanied by a statement from yourself and register and receiver that the land is vacant and not mineral.

This was a necessary and reasonable regulation in no way restrictive of the terms of the grant and in every way derivative from the act itself, and essential in its execution. As such, it clearly had the force of law.

What is allowed to be done is anything within the law that is in execution of it; what is forbidden to be done is anything without the law that is in execution of it. [Wyman on Administrative Law, Sec. 99; U. S. v. Eaton, 144 U. S., 677; *In re Kollock*, 165 U. S., 535.]

Whether the location was upon surveyed land or unsurveyed land, the certificate of selection, in either case, after notation on the records of the local land office, was to be sent to the General Land Office for approval, accompanied by a statement from the surveyor-general, the register and the receiver that the land was vacant and not mineral. The selection was to be *certified* locally and afterwards *approved* in Washington; if unsurveyed, a survey was evidently to follow the approval; if surveyed, it would seem that no further action was necessary, neither the act nor the regulations so providing.

John S. Watts, attorney for the Baca heirs, filed his selection of the land in controversy June 17, 1863, describing it by courses and distances from an initial point definitely located with reference to a natural object, Salero Mountain. On the same day, the surveyor-general certified the selection, concluding his certificate with the sentence: "Said location is hereby approved." Under date of June 18, he forwarded a copy of the application and certificate to your office, stating:

As this location is far beyond any of the public surveys, I have not deemed it necessary to procure any certificate from the register and receiver of the Land Office, as from the nature of the case, they cannot officially know anything concerning it.

A month later, he was notified that his "approval of the location . . . . ignored the imperative condition that the land selected . . . . is vacant land and not mineral." Therefore, "before the application . . . . can be approved by this office, it is necessary that our instructions of the 26th of July, 1860, should be complied with by furnishing a statement from yourself and register and receiver that the land thus selected . . . . is vacant and not mineral."

To this the surveyor-general, then in Washington, replied (April 2, 1864) that there was no evidence in his office that said selected tract "contains any mineral or that it is occupied." As he was personally unacquainted with that region of the country, he could not "certify that the land in question is vacant and not mineral or otherwise." "Those facts," he added, could "only be determined by *actual examination and survey*."

The register and receiver were not so unwilling to certify to the character of the land. On March 25, 1864, the former certified that the lands "from all information in this office are vacant and not mineral." The latter said that they were "vacant and not mineral so far as the records of this office shows (not having been surveyed)." The surveyor-general, however, did not pass upon the character of the land. If he, "in the first instance at least," was bound to decide whether the land was vacant and nonmineral, such a decision is entirely lacking in this case.

Arizona, in the meantime, had been set apart from New Mexico as a separate Territory. On April 9, 1864, the Commissioner of the General Land Office issued the following instructions to the surveyor-general of the new Territory:

By an examination of the papers herewith inclosed relating to the third of the series of the Luis Maria Baca grants . . . you will perceive that the location of the one-fifth part of said grant as set forth by the claimants has been approved by the surveyor-general of New Mexico, under whose jurisdiction the application properly came at the date of the approval.

After speaking of the statute and the duty therein imposed upon the surveyor-general to survey the tract "when required by said heirs," and of the effect of the act of June 2, 1862, requiring surveys to be at the expense of the claimants, the Commissioner, "in order to avoid delay," authorized the surveyor-general to contract with a competent deputy whenever the claimants deposited a sum sufficient to cover the expense, "and have the claim numbered 3 of the series surveyed as described in the inclosed application."

Transcripts of the field notes and plats certified in accordance with the requirements of the law will be transmitted to this office and will constitute the muniments of title, the law not requiring the issue of patents on these claims.

Specific instructions as to the erection of proper monuments follow.

In conclusion the Commissioner said:

The foregoing statement and the certificate of Surveyor-General Clark having been submitted to this Department, and having undergone a careful examination, the location being approved by him to perfect title under the authority of the act approved June 21, 1860, application for survey having been made, instructions (copy herewith attached) have been given to Surveyor-General Levi Bashford, of Arizona, in which Territory the lands located now are, to run the lines indicated and forward complete survey and plat to be placed on file for future reference as required by law.

But the survey was not made for over forty years. A number of causes account for it. Mr. Watts, soon after the order for survey as aforesaid, attempted to amend the application by changing the initial point. Subsequently others, claiming as heirs of Baca, also attempted to re-locate the claim, attacking their own title for this purpose by alleging that it had been discovered that the Salero location (June 17, 1863) covered minerals. An attempt to secure legislation in the

early '80's failed. Former decisions in this case detail sufficiently this part of its history, which need not be repeated. It is now recognized and so held that the heirs and their assigns are held to the location of June 17, 1863. One application for re-location, however, does not appear in the printed record of this litigation—that of the son of Mr. Watts, who, in 1877, requested permission to re-locate because his father's "location was disapproved by your office on account of its being mineral or for absence of proof that it was not mineral."

To this the Commissioner replied:

Some correspondence has been had by this office relative to the character of the land embraced in said location whether the same was non-mineral as required by the 6th section of the act of June 21, 1860, but I do not find that said location was disapproved by this office, but on the contrary, instructions were subsequently given, May 21, 1866, for the survey according to the amended application of Mr. Watts of April 30, 1866.

If the action of April 9, 1864, were a finality, and title to the location of June 17, 1863, then and there passed to the locators, what authority existed for the allowance of the modification of the application by changing the initial point of the location? If the "location" by the grantees alone sufficed, the location would have ceased then and there to be a "float;" the "initial point" would have ceased to be movable at the caprice of the grantees, with the indulgence of the General Land Office, and the selection itself would have become more than a mere geographical expression—a known, delimited tract, segregated from the public domain and removed from the jurisdiction of this Department.

Bearing upon the general question, the proceure with reference to the other "floats" is pertinent.

On December 8, 1860, Surveyor-General Wilbur certified the selection covered by float No. 1, on land near Valles Grandes, N. M., "which I believe is not mineral and which is vacant." He approved the selection. The register and receiver stated that the surveyed portion was "vacant and not mineral according to the plats on file in this office," but a portion being unsurveyed, "consequently we can give no certificate concerning it." On May 24, 1871, survey was ordered "to be made in accordance with said application for location." Survey was duly made, the certified plats and field notes filed as required by the regulation, and accepted, and title to this tract has long since passed to the claimants. But, it will be noted, prior to the survey there were not in the case, as to a portion of the selected tracts, the certificates required by the regulations regarding the character of the land or the vacancy of the same, and hence there could have been no final adjudication there or at Washington, at any time *before the survey*, that the selected tract was, as to its entirety, within the terms of the grant.

Float No. 2 was selected December 15, 1860. The surveyor-general certified that from the best information he could obtain the land was vacant and nonmineral. He approved the selection save as to two sections released by the heirs to the Government. The register and receiver certified that the surveyed portion was vacant and nonmineral with certain exceptions (land preempted prior to location) and that from the best obtainable information the unsurveyed portion was also vacant land not mineral. Survey was ordered, the land was surveyed and the plats certified and filed September 27, 1861. This tract has never since been in dispute. Here was also a complete adjudication on all points.

Float No. 5 was first located near the Fort Sumner reservation in New Mexico. By act of Congress of June 11, 1864 (13 Stat., 125), the heirs were authorized "to raise and withdraw the selection and location" and "to select and re-locate the same, in the manner provided by said act," at any time prior to June 21, 1865, "upon any of the public land, unoccupied and not mineral" within New Mexico. Upon such "selection and relocation," the title "shall be, and is hereby, confirmed to said heirs . . . as fully and perfectly as if the same had been selected and located" prior to June 21, 1863. Section 2 of the act provided that upon such selection and relocation "all right, title, and interest" in the land previously selected near the Fort Sumner reservation, was to be thereby "divested and declared null and void, and the same shall revert in the Government of the United States." The new selection thus authorized was notified to the surveyor-general, May 6, 1865. It included land at Francis creek, between Fort Mojave and Prescott, which Mr. Watts represented to be "vacant and not mineral." Under date of June 7, 1865, Surveyor-General Clark approved the location, and wrote as follows to your office:

The tract of land described in the application is far beyond any of the public surveys and I know personally nothing whatever about it, nor have I any information concerning it except the statement in the application of Judge Watts, a copy of which is enclosed. There is no evidence in this office that the tract located as above is mineral or that it is occupied nor any record relating to it of any character whatever.

The Commissioner notified him, August 14, 1865, that no survey could be authorized until evidence was obtained by him showing the land to be non-mineral and unoccupied. To this, September 14, 1865, the surveyor-general replied as follows:

On the 17th of June, 1863, Judge Watts as attorney for the heirs of Baca located one-fifth of the claim confirmed to them, at the Salero Mountain in Arizona (No. 3). A certified copy of the application to locate, with my approval, was transmitted to your office with my letter of 18th of June, 1863. In reply to your letter of July 18, 1863, requesting a statement from myself and the register and receiver of the land office, that the land located (No. 3)

was vacant and not mineral, I stated, in substance, (in my letter of April 2, 1864) that there was no evidence in this office that the land in question was occupied or mineral or otherwise and that I had no personal knowledge concerning it. Upon receipt of that statement, and without any proof concerning the occupancy or character of the land (as I understood at the time), Mr. Bashford, the survey-general of Arizona, was instructed to cause the location to be surveyed upon receipt by him of the estimated cost of the survey, etc.

It having been decided by your office that no patents are to be issued in these cases, and you having ordered the survey of location No. 3 as above, I supposed that the rule requiring proof of the character of the land, and as to whether it is occupied or not, had been rescinded, and therefore have not required of the parties (No. 5) any proof whatever.

He then called attention to the following certificate, a copy of which is enclosed:

We hereby certify that we are well acquainted with the land described in the foregoing boundary located in the name of the heirs of Luis Maria Baca and that the same is unoccupied and not mineral.

New York, 1 May, 1865.

CHARLES D. POSTON.

JOHN MOSS.

These gentlemen were agents of the Baca heirs. On November 10, 1865, the Commissioner refused to accept this as sufficient "to enable us to base our official action thereon, and therefore no definite proceeding in reference to the survey of the claim is indicated to you." But on May 23, 1866, the Commissioner wrote that the views of his office "respecting the final proceedings on your part in causing the survey to be made of the aforesaid claim, are hereby modified and you are authorized to have the claim surveyed."

The authority thus given you for the survey of the fifth location of the claim is accompanied with the proviso that the out-boundaries of the grant will embrace vacant land, not mineral, as provided in the 6th section of the act, etc.

Authority was given for the survey, but no adjudication as to the availability of the land for selection was made. On the contrary, the vacant, non-mineral character of the land was expressly left open, apparently to be determined, so far as local officers were concerned, upon survey; for the authority given was subject to the proviso that the "fifth location" should not embrace the occupied or mineral land. In 1877 the selection was surveyed, and in certifying the field notes the statement that the land "is entirely of a non-mineral character" was expressly made. In 1898 a patent was issued—the General Land Office receding from its position that no patent could be issued because the act did not specifically so require. The adjudication of the character of the land could not have been made prior to survey in this case.

It is unnecessary to repeat in detail the proceedings in relation to Baca Float No. 4, for the decision in *Shaw v. Kellogg*, 170 U. S., 312, contains a very full statement of the facts. Briefly: The selection was filed December 12, 1862, in the office of the surveyor-general of New Mexico, who forwarded a copy to Washington and to the surveyor-general of Colorado, within whose district the land was located. The latter, February 24, 1863, wrote the Commissioner that he supposed this location was one made by ex-Gov. Gilpin, who told him "last summer" that he would locate one of these "floats," "as this is located for the reason that, in his opinion, it would cover rich minerals in the mountains." This officer was very promptly informed that before "the application can be approved by this office" certificates from him and the register and receiver to the effect that the land was vacant and not mineral must be furnished. Especial care was to be exercised in ascertaining the facts in view of the "important statement of ex-Governor Gilpin." Later, the last-mentioned gentleman applied to the surveyor-general for a survey. The latter made a contract with a deputy surveyor and forwarded the same to your office for approval. On November 2, 1863, the contract was disapproved and the surveyor-general notified that the certificates aforesaid must be furnished. Whereupon (December 12, 1863) he and the local land officers certified "that from good and sufficient evidence" they were "perfectly satisfied that the land . . . located . . . and marked out by a survey made by . . . Sheldon in November, 1863, is not mineral and is vacant." This was not accepted as sufficient (Jan. 16, 1864). But on February 12, 1864, the General Land Office reconsidered the matter. Criticising the surveyor-general for refunding the deposit of Mr. Gilpin (for cost of survey) and allowing him to pay for the Sheldon survey as a "private survey," the Commissioner stated that the difficulty might be avoided by pursuing this course: The original field notes, duly verified and authenticated, were to be filed in the surveyor-general's office, and were then to be brought "to the usual satisfactory tests;" if regular and correct, the surveyor-general was "authorized in virtue of the aforesaid sixth section of the said act of 21st of June, 1860, to approve the said survey." He was further instructed to make his approval subject to the condition that the land should be non-mineral and vacant—a condition which the court held was beyond the power of executive officers to impose. The field notes were thus approved by the surveyor-general and forwarded to your office March 29, 1864. No action whatever was taken in relation to the field notes, etc., beyond the bare acknowledgment, May 4, 1864, that they had been "received at this office."

The court held that the title had passed to the grantees. The main thing in controversy in that case was not at what particular

point in the proceedings title actually passed, but whether or not when it did pass the land department had any authority to impose any condition or limitation. It was therefore not essential to decide exactly at what point the Government lost its title to the land. The court dwells more especially upon the evidence of the fact that at some point in the proceedings title flowed from the Government to the grantees. The filing of the approved field notes of survey was certainly final as an evidential fact; but was it the final act, of statutory requirement, short of which there was no divestiture of title? Was it more than the counsel for appellants claim and than the Commissioner intimated in his letter to the surveyor-general—that his “plat approved in the manner indicated will therefore constitute the *evidence* of title,” or, as he said in relation to Baca Float No. 3, the “*muniments*” of title?

Certainly, so far as the express terms of the act are concerned, there was no other way of evincing the passing of title and of definitely delimiting and publishing to the world exactly where and what the granted land was. A fair construction to be placed upon the language of the Commissioner is that he was merely reciting a fact and not pronouncing judgment as to the exclusive effect that the return of the certified plat and field notes would produce.

In Baca Float No. 4, the survey was made in November, 1863; the certificates concerning the character of the land, etc., in December, 1863; the action of the Commissioner in directing the manner of final disposition of the case, in February, 1864; and the final act of the surveyor-general in approving the plat and field notes and in forwarding them to the General Land Office in March, 1864. These dates are of significance in acquiring a correct understanding of what the Supreme Court had in mind in speaking of the duty and action the surveyor-general:

How was the character of the land to be determined, and by whom? The surveyor-general of New Mexico was directed to make survey and location of the lands selected. Upon that particular officer was cast the specific duty of seeing that the lands selected were such as the Baca heirs were entitled to select. . . . We do not mean that Congress thereby created an independent tribunal outside of and apart from the general land department of the Government. On the contrary, the act of 1854 provided that he should act under instructions from the Secretary of the Interior, and so undoubtedly in proceeding to make survey and location as required by section 6 of the act of 1860, he was still subject to the control and direction of the land department; but while he was not authorized by this section to act in defiance or independently of the land department he was the particular officer charged with the duty of making survey and location, and it was for him to say, *in the first instance at least*, whether the lands so selected, and *by him surveyed and located*, were lands vacant and non-mineral. This is in accord with the views of the land department, as appears from the official letter of June 28, 1884, . . . “You will see by the foregoing that the land in question was determined, *in 1864*,

by the surveyor-general, whose province and duty it was, to be non-mineral; the location was then perfected and the title passed."

\*            \*            \*            \*            \*            \*

It will also be perceived that the surveyor-general, as well as the register and receiver of the land office, each certified that the land was non-mineral. These certificates were their decision to that effect. They were made in accordance with the original instructions sent out by the land department in July, 1860, and in this respect they were all that was required by those instructions, which were "in either case (that is, whether the selection is either within or without the existing surveys) the final condition of the certificate to this office must be accompanied by a statement from yourself and the register and receiver that the land is vacant and not mineral." Thus the proper officer decided that the land was non-mineral, and accompanied the report of the survey and location with all the certificates and statements required by the original instructions from the land department.

The certificates required by the regulations constituted a decision on the part of the local officers, on the strength of which a survey might be ordered. That is, before the land department would be justified in taking or authorizing any final steps, a *prima facie* showing as to the character of the land and its availability for selection was required. Apparent contradictions in the course of the decision in *Shaw v. Kellogg* are to be explained in the light of the peculiar conditions in that case—a survey preceding any certification by the local officers. There is no escape from this conclusion, however: it was the action of the surveyor-general in 1864, and not his action of 1863, that amounted to an adjudication that the land selected was within the terms of the grant. However unsatisfactory his preliminary certification was, the court notes (p. 336) that when he "proceeded to approve the survey, his certificate of approval" was "absolute and unconditional," and the plat and field notes were duly filed.

But one conclusion can be deduced from the proceedings, and that is that the land department, perceiving that its original instructions had been strictly complied with; that no money had been appropriated by Congress for actual exploration of the lands; that no way was open for securing further evidence as to their character; that the time within which any other location could be made had passed; that it was the right of the locators to have the question settled and *the title confirmed or rejected*, ordered the closing of the matter, *the passage of the title*, etc.

Still bearing in mind that the court was dealing with a case where there had been a survey and an approval thereof by the party who in the first instance was charged with the adjudication of the questions initiated by the act of selection, the following excerpt from the opinion, rightly understood, is helpful:

Congress had made a grant, authorized a selection within three years, and directed the surveyor-general to make survey *and location*, and within the general powers of the Land Department it was its duty to see that such grant was carried into effect and that a *full title* to the *proper land* was made. Undoubtedly it could refuse to approve a location on the ground that the land was mineral. It was its duty to decide the question—a duty which it could not

avoid or evade. It could not say to the locator that it approved the location provided no mineral should ever thereafter be discovered, and disapproved it if mineral were discovered; in other words, that the locator must take the chances of future discovery of minerals. It was a question for its action and its action at the time.

What time? Manifestly, in the light of the facts with which the court was dealing, at the time when all that was directed to be done had been done—selection, survey and location by the surveyor-general. No attempt was made in Baca Float No. 4 to attach any string to the grant until a survey had been made; and the qualifying terms, possibly in the future to effect a defeasance of title, were incorporated in the approval of the plat and field notes of the survey. This, the court held, was beyond the power of the Department: it was its duty finally to settle the question *at that time*, the time when the sole remaining thing to be done in passing title was the filing of the approved plat and field notes of survey. “Undoubtedly it could refuse to approve a location on the ground that the land was mineral.” What, then, if the plat and field notes showed that fact?

Take the case of Baca Float No. 5: Assume that the survey of 1877 had disclosed the fact that the surface of the enclosed area was encrusted with mineral wealth—and counsel in oral argument submitted that would make no difference—would the land department be destitute of power to “refuse to approve the location on the ground that the land was mineral” in the face of its letter of May 23, 1866, when in giving directions for the “final proceedings” on the part of the surveyor-general it directed that the “authority thus given” was “accompanied with the proviso that the outboundaries of the grant will embrace vacant land not mineral”? Did this cautious direction render the land department *functus officio*, and would any court compel it to receive and deposit as a “muniment of title” the certified plat and field notes showing that the land was not only partly occupied but notoriously mineral at the date of selection, and thus precisely the land which Congress in empowering the grantees to select excluded from selection by them and therefore from location by the surveyor-general?

Adverting to the act of June 21, 1860, in this connection, it is noted that Congress not only made it the duty of the surveyor-general to survey the land “so selected” but to “make . . . location” thereof as well. The expression is significant. In the first part of the act, the heirs are authorized to “select” vacant land not mineral “to be *located* by them in square bodies,” etc. In the next sentence it is made the duty of the surveyor-general to survey and make “*location*.” Why the recurrence in expression of this idea of location? If to the selector’s act—his “location”—a perfunctory survey is merely to follow in order to furnish “muniment of title” (and this is appellants’ case), the duty to “make . . . location” is a direction

to perform a meaningless task: technical location has already been effected. But "located" was used by Congress in another sense—in its usual colloquial meaning as a pointing out, a designation, of the tracts wanted—selected by the grantees. "Location," as an act of a government officer, in this statute, has a different meaning—a technical import, signifying the action by which the selected tract is segregated from the public domain and appropriated to the use of the grantee. In this sense the duty of making location is placed upon the surveyor-general and not upon the beneficiaries of the grant. It would be anomalous were it otherwise. If their act of selection, designating a certain tract and describing it by courses and distances from a known initial point, were sufficient to change the character of the enclosed area from public to private land—the survey later to be made merely for their convenience and to afford a muniment of a title already passed—there would indeed be some foundation for the contention of counsel, *i. e.*, that it would make no difference even if the surface of the enclosed tract were rich with minerals; for legal title then passed and could only revest in the United States upon suit to recover the same on the ground that the location covered land excluded from selection by the terms of the grant. Congress certainly never intended that legal title should pass until there had been a determination by the proper authorities that the land selected was such as the granting act contemplated. Until then there could not be an official "location" effecting, if not disapproved by the superior officers of the surveyor-general, a segregation from the public domain and an investiture of title in the grantees. The act does not state exactly when this determination is to be made. The evidence upon which the land department is to adjudicate the question may be presented through certificates and by endorsement on a certified plat and field notes of a survey already made, as in Baca Float No. 4, or left for determination, as in Baca Float No. 5, at the time of survey and location—the instructions for the making of which containing the proviso that the outboundaries should not include mineral land.

In 1863 or 1864, there had been no determination of the non-mineral character of float No. 3. The surveyor-general refused to certify that the land selected was unoccupied or non-mineral and definitely stated that those questions could only be determined by a survey; whereupon survey was ordered. Nothing was said, it is true, by your office as to such an investigation. But it is evident none of the parties regarded the order for survey a final and conclusive act, passing title from the Government to the claimants. For, as hereinbefore shown, the latter almost immediately sought permission to amend their application by changing the initial point of the selected tract, and when (and improperly) that was permitted, the letter of instructions for the survey of the amended selection (dated May 21,

1866) contained the same proviso noted in the case of Baca Float No. 5, *viz.*, that the outboundaries indicated by the amended application should embrace vacant lands not mineral.

So far were the steps then taken regarded generally as inconclusive by the land department and by the claimants that the latter repeatedly sought in divers ways, through legislation and without, to avoid the selection of June 17, 1863, even going to the extent of alleging that the land then selected was mineral and not within the terms of the grant. Yet there was the order of survey upon their deposit of the necessary sum of money to cover the cost thereof—a survey which if the land was properly selected would long since have resulted in a location and passing of title to the claimants. That no survey was made until after forty years had passed is not the fault of the Government.

In striking contrast are the facts in respect to float No. 4 as summed up by the court (p. 342):

Congress in 1860 made a grant of a certain number of acres, authorized the grantees to select the land within three years anywhere in the Territory of New Mexico, and directed the surveyor-general of that Territory to make survey and location of the land selected, thus casting upon that officer the primary duty of deciding whether the land selected was such as the grantees might select. They selected this tract. Obeying the statute and the instructions issued by the land department, that officer approved the selection and made the survey and location. The land department, at first suspending action, finally directed him to close up the matter, to approve the field notes, survey and plat, and notified the parties through him that such field notes, survey and plat, together with the act of Congress, should constitute the evidence of title. All was done as directed. Congress made no provision for a patent and the land department refused to issue one. *All having been done that was prescribed by the statute, the title passed.* The land department has repeatedly ruled that the action then taken was a finality. It has noted on all maps and its report that this tract had been segregated from the public domain and become private property. It made report of this to Congress, and that body has never questioned the validity of its action. The grantees entered into actual possession and fenced the entire tract. They have paid the taxes levied by the State upon it as private property, amounting to at least \$66,000.

During all these years, the land selected on June 17, 1863, has been retained on maps and records as a part of the public lands; the grantees have never been in possession and have never paid a cent of taxes upon it as private property, but, on the contrary, until recent years have treated it as a piece of land unwisely selected but happily not so far appropriated by them in settlement of their claim as to prevent, if the Government would permit, a new selection elsewhere. All has not been done "that was prescribed by the statute," and hence title has not passed.

The Department holds that the final act by which title passes under the grant of June 21, 1860, is the acceptance by the Department

and the filing of approved plat and field notes of a survey whereby the surveyor-general made location of the selection of lands affirmatively shown to have been vacant and non-mineral at the date of application so far as was then known by the selectors.

It is contended that the Department has erred in its construction of section 8 of the act of July 22, 1854, in holding (30 L. D., 97, id., 497) that the portion of the selected tract in controversy covered by the Tumacacori, Calabazas, and San Jose de Sonoita claims, were by operation of said section 8 in a state of reservation at the time of the selection of June 17, 1863, and thus not "vacant land" within the meaning of the act of June 21, 1860, although the claimants did not file their claims with the surveyor-general until after the filing of the application by the Baca heirs. Appellant urges that there could be no "claim" initiated until such was preferred to the surveyor-general and that until such action was taken the land was public land; in other words, that through operation of said section 8 no land became "reserved" and therefore inappropriable while *sub judice*, until there had been a *demand* made therefor upon the proper officer—not, in this case, made until after the Baca claimants had acted.

The position taken by the Department (30 L. D., 97 and 497) is that the act of July 22, 1854, did not require any affirmative action on the part of those claiming under alleged Spanish or Mexican grants to place the land covered by these claims in reservation; that the statute, silent as to any demand being made on the part of the claimants, of its own vigor reserved such land from any appropriation until the validity of the Spanish or Mexican claims had been adjudicated.

The position thus taken, the Department is convinced, is sound. By virtue of the articles of the treaty of Guadalupe Hidalgo, alone, no land contained within the claimed limits of any Mexican grant was reserved. Lockhart v. Johnson, 181 U. S., 516.) Withdrawals or reservations depended entirely upon legislative action—and the terms or conditions of said reservations necessarily upon the terms of the statute by which they were created. Thus, in respect to certain claims within the territorial limits of California, Congress, on March 3, 1851, provided that all lands the claims to which should not be presented within two years therefrom should "be deemed, held, and considered to be a part of the public domain of the United States." This was notice to all claiming under a Mexican or Spanish grant to assert and maintain their claims within a certain time, before a commission for that purpose appointed, else the land claimed would become part of the public domain and consequently subject to other appropriation. A failure thus to assert or present the

claim, or to prosecute, terminated the reservation; to perpetuate the reservation until there had been a final adjudication of the claim, the statute creating the reservation imposed a duty on the claimant to make a demand. (*Newhall v. Sanger*, 92 U. S., 761.) But in the case at bar, the lands affected by the Tumacacori, Calabazas, and San Jose de Sonoita claims were subject to another statute (Act of July 22, 1854), the terms of which, in creating the reservation, did not impose the duty of presenting a demand on the part of the claimants to the surveyor-general. It was the latter's duty "to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico." On him, apparently, was placed the initiative. And so from 1854 until the establishment of the Court of Private Land Claims by act of March 3, 1891 (26 Stat., 854), the tracts embraced by the Tumacacori, Calabazas, and San Jose claims, irrespective of the validity of those claims, were not open for disposition by donation or otherwise as a part of the public domain. (*Lockhart v. Johnson*, 181 U. S. 516, 526.) *A fortiori*, they were not subject to selection under an act which expressly excluded land that was occupied, such as the act of June 21, 1860. It follows that such portions of the selection of June 17, 1863, as fall within the claimed area of these grants were, on the date mentioned, excluded from consideration in the passing of title to the location as a whole.

The plat and field notes of the survey of Baca Float No. 3 recently made do not contain the approval of the surveyor-general. On the contrary, he refuses his approval on the ground that the area included in the selection of June 17, 1863, was at the date of said selection known to be occupied in part and mineral in character.

The order remanding the case for a hearing before the surveyor-general, if after notice appellants request the same, for the purpose of affording them an opportunity to present evidence in rebuttal of the adverse *prima facie* showing, will not be disturbed. If they default in applying for hearing within sixty days from notice of this order (and it will be the duty of the surveyor-general so to give notice to all parties in interest as required in your decision of May 13, 1907), the return of the said officer will be accepted as correct and the entire selection finally rejected.

In the event of a hearing, the land covered by the Tumacacori, Calabazas, and San Jose de Sonoita claims will, as aforesaid, be excluded from consideration, and whatever may have been the known character (as to minerals and vacancy) in 1863 of said claims will not be given evidential weight, for or against the claimants, in determining the availability of the rest of the float for selection.

If as a result of the hearing the land department is satisfied that the land, excluding the reserved portions thereof, was not known to have

been mineral or occupied at the time of selection, the surveyor-general, as in Baca Float No. 4, may be ordered to approve the survey and to file the plat and field notes, to effect the passing of title to the claimants as well as to afford muniment of that title. Or, if the hearing develop as a fact that portions only of said float were not available for selection in 1863, on account of having been then known as mineral in character or as occupied land, such portions may be so segregated by survey as to exclude them from the effect of an approval of the survey of the float as a whole.

Certain other appeals by parties claiming interest in portions of the land embraced by the outboundaries of the float are dismissed, as the issues therein raised are herein determined.

The action below is affirmed.

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SECOND DESERT LAND ENTRIES—ACT OF MARCH 26, 1908.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
Washington, D. C., March 27, 1908.

*Registers and Receivers,  
United States Land Offices.*

GENTLEMEN: Your attention is called to the act of March 26, 1908 [Public—No. 67], which reads as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That any person who prior to the passage of this act has made entry under the desert-land laws, but from any cause has lost, forfeited, or abandoned the same, shall be entitled to the benefits of the desert-land law as though such former entry had not been made, and any person applying for a second desert-land entry under this act shall furnish the description and date of his former entry: *Provided,* That the provisions of this act shall not apply to any person whose former entry was assigned in whole or in part or canceled for fraud, or who relinquished the former entry for a valuable consideration.

This law is enacted in the same words used in the act of February 8, 1908 [Public—No. 18], authorizing second homestead entries, except that this law relates entirely to second desert entries. Applications for second desert entries should, therefore, be presented and allowed in the manner provided in paragraph 2 of instructions of February 29, 1908 [36 L. D., 291], issued under the act of February 8, 1908, and affidavits prescribed in those instructions may with the necessary change be used in support of applications for desert land entries under this act.

Very respectfully,

FRED DENNETT,  
*Commissioner.*

## WITNESSES—FEES AND MILEAGE—ACT OF MAY 27, 1908.

## CIRCULAR.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,

Washington, D. C.; June 1, 1908.

*Registers and Receivers, and Chiefs of Field Divisions.  
General Land Office.*

GENTLEMEN: Witnesses will hereafter be entitled to the following fees and mileage, allowed by the act approved May 27, 1908 (Public—No: 141), which reads as follows:

Jurors and witnesses in the United States Courts in the States of Wyoming, Montana, Washington, Oregon, California, Nevada, Idaho, Colorado, and Utah, and in the Territories of New Mexico and Arizona shall be entitled to receive for actual attendance at any court or courts and for the time necessarily occupied in going to and returning from the same, three dollars a day, and fifteen cents for each mile necessarily traveled over any stage line, or by private conveyance; and five cents for each mile by any railway or steamship in going to and returning from said courts: *Provided*, That no constructive or double mileage fees shall be allowed by reason of any person being summoned as both a witness and a juror, or as a witness in two or more cases pending in the same court and triable at the same term thereof.

So much of office circular of June 27, 1904 (33 L. D., 58), as conflicts with the foregoing is hereby revoked.

Very respectfully,

FRED DENNETT,  
*Commissioner.*

Approved:

FRANK PIERCE,  
*First Assistant Secretary.*

SECOND HOMESTEAD—CREDIT FOR FEES, COMMISSIONS, AND PURCHASE MONEY—ACT OF FEBRUARY 8, 1908.

ZELMER R. MOSES.

In making second homestead entry under the provisions of the act of February 8, 1908, credit can not be allowed for the fees and commissions paid upon the original abandoned entry.

Credit for instalments paid upon the Indian price for the land embraced in the original abandoned entry may be allowed in the second entry where it embraces land of the same class for which like payments are required.

*First Assistant Secretary Pierce to the Commissioner of the General  
(G. W. W.) Land Office, June 3, 1908. (P. E. W.)*

Zelmer R. Moses has appealed to the Department from that portion of your office decision of April 20, 1908, which disallows his alternative application either to have his second homestead entry, for

the W.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$ , the W.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$ , Sec. 29, T. 5 N., R. 6 E., Lander, Wyoming, which was allowed February 26, 1908, as a second entry under the act of February 8, 1908 (Public—No. 18), treated as an amendment of his former homestead entry, No. 387, Shoshone series, for the NW.  $\frac{1}{4}$  of the same section, so that the fees and commissions paid on the former may apply on the latter, or, if the latter must be held as a second entry, then that he may have credit for said fees and commissions and for the several installment payments of the Indian price paid in connection with said entry No. 387.

It appears that the present entry was allowed as a second entry under special and new legislation after a final determination by the Department that it could not be allowed as an amended entry. As a second entry it is charged with its own fees and commissions, as was also the former entry, and the money paid in the one case can not be transferred and held as if paid in the second. (See the case of Jens C. Hansen, 21 L. D., 209.)

With regard to the installment payments upon the Indian price for the land, however, a different question is presented. Here \$120 have been paid upon land which claimant has been allowed to abandon and in lieu of which he has been allowed to take other land of the same class for which like payments are required; \$40 of this amount has been paid since application was made to amend such entry.

In the opinion of the Department the applicant may properly be allowed credit on the land now entered for the amount of the Indian price paid upon the land embraced in the former abandoned entry.

With this modification your said decision is hereby affirmed.

**DEFRAUDED ENTRYMAN—REINSTATEMENT—JURISDICTION OF LAND DEPARTMENT.**

**HEIRS OF EWING v. CAYTON.**

Where one has been defrauded of an entry of public lands, the land department has jurisdiction, so long as the title remains in the United States and the sole parties concerned or claiming right to the land are the person defrauded and the person guilty of the fraud, or one taking benefit of the fraud with notice of it, to grant full and specific relief by reinstatement of the entry of the defrauded party.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(G. W. W.) *Land Office, June 3, 1908.* (J. R. W.)

Lawrence M. Cayton appealed from your decision of January 21, 1907, canceling his homestead entry and reinstating homestead entry of Samuel Ewing for the NW.  $\frac{1}{4}$ , Sec. 15, T. 4 N., R. 19 E., C. M., Woodward, Oklahoma.

February 23, 1905, Samuel Ewing made homestead entry of the tract, against which Lawrence M. Cayton, December 4, 1905, filed

contest, charging abandonment and failure to establish residence. December 7, 1906, James G. Cayton filed Ewing's relinquishment, together with application for homestead entry, which was suspended, and Lawrence M. Cayton notified of preference right, which he exercised, January 3, 1906, and made homestead entry. December 15, 1905, Samuel Ewing filed in the local office his corroborated affidavit that he established residence on the land August 4, 1905, improved, and continuously resided on the land thereafter; that he was seventy-one years old, feeble, and alone, and James G. Cayton learning such fact deposited money in a bank, to be paid Ewing if James got a "straight filing," and November 20, 1905, Ewing made and delivered to James Cayton his relinquishment, whereupon James and Lawrence Cayton agreed that Lawrence should file a contest, so that when the relinquishment was filed Lawrence should be allowed to make entry so as to "beat affiant out of the land and at least a part of the purchase price agreed upon." No action seems to have been taken on this affidavit.

February 20, 1906, John S. Ewing filed his corroborated affidavit that Samuel Ewing died January 24, 1906, leaving him (John S.), a son, one of his heirs; that November 20, 1905, Samuel was seventy-one years old, very feeble, and it was unsafe for him to live alone, and learning such facts, Lawrence M. and James G. Cayton conspired to defraud Samuel Ewing out of his homestead, obtained his relinquishment, and, in the manner hereinabove stated, Lawrence M. Cayton obtained entry here in question; and John S. Ewing applied for cancellation of Lawrence M. Cayton's entry and reinstatement of Samuel Ewing's entry for benefit of his heirs.

September 5, 1906, hearing was had at the local office, in which both parties participated, aided by counsel. August 21, 1907, the local office found:

While it is apparent that James G. and Lawrence M. Cayton entered into a conspiracy to defraud Samuel Ewing out of the price agreed upon for relinquishment, the land department of the government would not be warranted, because of such fraud and deceit, to cancel the entry now of record. Entryman Ewing . . . did execute and deliver a relinquishment. The Caytons thereafter, by sharp practice, made it possible for Lawrence M. to make entry for the land and thus avoided paying the price agreed upon. In our opinion, this Department is without authority, under the facts developed, to grant the relief asked. We therefore recommend that the contest be dismissed.

You found and held that:

It is seldom that such a willful conspiracy to defraud is brought to attention of this office. Words are not strong enough to stigmatize the nefarious conduct on part of James and Lawrence Cayton, nor will the office be party to furtherance of their unlawful gain . . . The entry of Lawrence M. Cayton having been procured through an unlawful conspiracy, I am of opinion it should not be allowed to stand. The entry of defendant is accordingly held for cancellation, and in event this decision becomes final, the entry of Samuel Ewing will be reinstated for benefit of the heirs.

The concurring fact findings of your office and of the local office are so conclusively established by the evidence in the record as not to require restatement and review of the evidence in detail. In that respect the Department is well satisfied of the accuracy of the conclusions reached, and the same are in all respects affirmed.

By his 6th assignment of error counsel for Cayton contends your office erred—

In not sustaining defendant's demurrer to the evidence when the plaintiff's charge, at most, amounts to a claim that defendant and his brother conspired together to defraud Samuel Ewing out of the purchase price of his relinquishment, this department having no jurisdiction whatever over a controversy of this nature, the plaintiff's remedy, if any, being in the local courts.

It may be conceded, for all purposes of this decision, that Samuel Ewing, or his heirs, had remedy for this fraud in the local courts, and could have sued and recovered the consideration. The contest was merely a device whereby a contestant's preference right was set up, founded on a perjured charge of failure to establish residence and an abandonment for more than six months, made contrary to the fact, knowingly, but trial of the fact was avoided by filing of the relinquishment. There would seem little room to doubt that any court of justice would strip such fraud bare to the light and give redress to the person defrauded.

But the arm of the land department is not for that reason shortened so that it can not give specific relief to one defrauded of an entry of public lands by restoring the entry. So long as title to the land remains in the United States, and the sole parties concerned, or claiming right to the land, are the person defrauded and the person guilty of the fraud, or one taking benefit of the fraud with notice of it, there is ample jurisdiction in the land department to grant full and specific relief by reinstatement of the entry of the defrauded party. A fraud affecting rights claimed in public lands is not sanctified beyond scrutiny and redress of the land department so long as legal title remains in the United States. *Orchard v. Alexander* (157 U. S., 372, 381-2); *Williams v. United States* (138 U. S., 514, 524); *Oregon v. Hitchcock* (202 U. S., 60, 70). If by inadvertence and mistake title passes from the United States before final decision of any question that the land department should decide, the courts will for that reason alone annul the title and restore the jurisdiction of the land department. *Germania Iron Co. v. United States* (165 U. S., 379, 384).

Your decision is affirmed.

DRAINAGE OF SWAMP AND OVERFLOWED LANDS IN MINNESOTA—  
ACT OF MAY 20, 1908.

## CIRCULAR.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
Washington, D. C., June 3, 1908.

REGISTERS AND RECEIVERS,

*Cass Lake, Crookston, and Duluth, Minnesota.*

GENTLEMEN: Your attention is directed to the subjoined act, approved May 20, 1908 (Public—No. 125), which makes all lands in the State of Minnesota when subject to entry, and all entered lands for which no final certificates have issued, subject to the drainage laws of that State. You are directed to control your actions by the provisions of that act, and in all cases where you have any doubt as to the proper action to be taken thereunder, you will call the matter to the attention of this office for specific instructions.

Section 8 of the act provides that entries and proofs may be made and patents issued for all ceded Chippewa lands (except in the Red Lake reservation), which were withdrawn under the act of June 21, 1906 (34 Stat., 325), in the same manner in which entries, proofs and patents for other lands are made and issued under the homestead laws subject to the payment of the purchase price fixed by law for such lands.

Persons making final proofs on entries in the Red Lake reservation, will be required to pay three cents per acre in addition to the purchase price originally fixed by law, except in cases where entry was made prior to November 10, 1906, the date of the withdrawal under said act of June 21, 1906.

The instructions of March 27, 1907 (35 L. D., 481), are hereby revoked. You will note on the application and receipt, in all entries hereafter made the following: "Subject to act of May 20, 1908."

Very respectfully,

FRED DENNETT,  
*Commissioner.*

Approved:

FRANK PIERCE,  
*First Assistant Secretary.*

(PUBLIC—No. 125.)

AN ACT To authorize the drainage of certain lands in the State of Minnesota.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That all lands in the State of Minnesota, when subject to entry, and all entered lands for which no final certificates have issued, are hereby made and declared to be subject to all of the

provisions of the laws of said State relating to the drainage of swamp or overflowed lands for agricultural purposes to the same extent and in the same manner in which lands of a like character held in private ownership are or may be subject to said laws: *Provided*, That the United States and all persons legally holding unpatented lands under entries made under the public-land laws of the United States are accorded all the rights, privileges, and benefits given by said laws to persons holding lands of a like character in private ownership.

Sec. 2. That the cost of constructing canals, ditches, and other drainage works incurred in connection with any drainage project under said laws shall be equitably apportioned among all lands held in private ownership, all lands covered by unpatented entries, and all unentered public lands affected by such project; and officially certified lists showing the amount of the charges assessed against each smallest legal subdivision of such lands shall be furnished to the register and receiver of the land district in which the lands affected are located as soon as said charges are assessed, but nothing in this act shall be construed as creating any obligation on the United States to pay any of said charges.

Sec. 3. That all charges legally assessed may be enforced against any unentered lands, or against any lands covered by an unpatented entry, by the sale of such lands subject to the same manner and under the same proceedings under which such charges would be enforced against lands held in private ownership.

Sec. 4. That when any unentered lands, or any lands covered by an unpatented entry, have been sold in the manner mentioned in this act, a statement of such sale showing the price at which each legal subdivision was sold shall be officially certified to the register and receiver immediately after the completion of such sale.

Sec. 5. That at any time after any sale of unentered lands has been made in the manner and for the purposes mentioned in this act patent shall issue to the purchaser thereof upon payment to the receiver of the minimum price of one dollar and twenty-five cents per acre, or such other price as may have been fixed by law for such lands, together with the usual fees and commissions charged in entry of like lands under the homestead laws. But purchasers at a sale of unentered lands shall have the qualification of homestead entrymen and not more than one hundred and sixty acres of such lands shall be sold to any one purchaser under the provisions of this act. This limitation shall not apply to sales to the State but shall apply to purchases from the State of unentered lands bid in for the State. Any part of the purchase money arising from the sale of any lands in the manner and for the purposes provided in this act which shall be in excess of the payments herein required and of the total drainage charges assessed against such lands shall also be paid to the receiver before patent is issued.

Sec. 6. That any unpatented lands sold in the manner and for the purposes mentioned in this act may be patented to the purchaser thereof at any time after the expiration of the period of redemption provided for in the drainage laws under which it may be sold (there having been no redemption) upon the payment to the receiver of the fees and commissions and the price mentioned in the preceding section, or so much thereof as has not already been paid by the entryman; and if the sum received at any such sale shall be in excess of the payments herein required and of the drainage assessments and cost of the sale, such excess shall be paid to the proper county officer for the benefit of and payment to the entryman. That unless the purchasers of unentered lands shall within ninety days after the sale provided for in section three, pay to

the proper receiver the fees, commissions and purchase price to which the United States may be entitled as provided in section five, and unless the purchasers of entered lands shall within ninety days after the right of redemption has expired make like payments as provided for in this section, any person having the qualifications of a homestead entryman may pay to the proper receiver for not more than one hundred and sixty acres of land for which such payment has not been made: First, the unpaid fees, commissions and purchase price to which the United States may then be entitled: and, second, the sum at which the land was sold at the sale for drainage charges, and in addition thereto, if bid in by the State, interest on the amount bid by the State at the rate of seven per centum per annum from the date of such sale, and thereupon the person making such payment shall become subrogated to the rights of such purchaser to receive a patent for said land. When any payment is made to effect such subrogation the receiver shall transmit to the treasurer of the county where the land is situated the amount at which the land was sold at the sale for drainage charges together with the interest paid thereon, if any, less any sum in excess of what may be due for such drainage charge, if the land when sold was unentered.

SEC. 7. That a copy of all notices required by the drainage laws mentioned in this act to be given to the owners or occupants of lands held in private ownership shall, as soon as such notices issue, be delivered to the register and receiver of the proper district land office in cases where unentered lands are affected thereby and to the entrymen whose unpatented lands are included therein, and the United States and such entrymen shall be given the same rights to be heard by petition, answer, remonstrance, appeal, or otherwise as are given to persons holding lands in private ownership; and all entrymen shall be given the same rights of redemption as are given to the owners of lands held in private ownership.

SEC. 8. That hereafter homestead entries and final proofs may be made upon all ceded Chippewa Indian lands in Minnesota embraced in the withdrawal under the act of June twenty-first, nineteen hundred and six, entitled "An act making appropriations for the current and contingent expenses of the Indian Department" (Thirty-fourth Statutes at Large, page three hundred and twenty-five), and patents may issue thereon as in other homestead cases, upon the payment by the entryman of the price prescribed by law for such land and on entries on the ceded Red Lake Reservation in addition thereto the sum of three cents per acre to repay the cost of the drainage survey thereof, which addition shall be disposed of the same as the other proceeds of said land.

Approved, May 20, 1908.

#### STATE SELECTION—WITHDRAWAL—ACT OF AUGUST 18, 1894.

#### THORPE ET AL. v. STATE OF IDAHO (ON REVIEW).

The right of a State to the withdrawal authorized by the act of August 18, 1894, is not limited to the exact area necessary to supply the deficiency in its grant existing at the time of the filing of the application for survey. The provisions of the act of August 18, 1894, authorizing the withdrawal of lands "with a view to satisfying the public land grants" of the several States therein named, contemplates withdrawals in aid of both original and indemnity selections.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(G.W. W.) *Land Office, June 4, 1908.* (E. O. P.)

Joint motion for review of departmental decision rendered June 27, 1907 (35 L. D., 640), in the above entitled case has been filed on behalf of numerous homestead claimants whose entries were held for cancellation because of conflict with the school indemnity selection of the lands covered thereby, situated in T. 44 N., R. 2 E., B. M., Coeur d'Alene land district, Idaho, by the State of Idaho within the preferred-right period granted by the act of August 18, 1894 (26 Stat., 372, 394).

A stay of proceedings is also requested by the movants to the end that they may take steps looking to the adjustment of their claims with the State.

All of the matters made the basis of the motion for review, except those assigned on the fourth and fifth specifications of error, were considered by the Department when the case was before it on appeal and then decided adversely to the contention of the movants, and no sufficient reasons appear from anything contained in said motion for disturbing the findings heretofore made.

It is urged on the fourth specification of error that, because the State had previously applied for a survey and withdrawal of a larger quantity of land than was necessary to fill the grants made to it, the application under which it was held that the withdrawal of the land in dispute resulted, should have been disallowed and rejected. The Department is however clearly of opinion the right of the State to a withdrawal authorized by the act of August 18, 1894, *supra*, is not limited to the exact area necessary to supply a deficiency in its grant existing at the time of the filing of the application for survey. Under the circumstances of the case it is at once apparent that it is impossible in withdrawing any given area to determine in advance of a final adjudication upon the selections made by the State within such area to what extent its grant can be satisfied therefrom. Within the limits of any withdrawal thus made it is probable that numerous claims to portions of the land embraced therein have been initiated and by the express terms of the statute the perfection of such prior claims will to that extent defeat the right of the State to make selections of the area withdrawn. The existence of claims cannot be determined in advance of survey and the opening of the lands to entry, and it follows that the State would be unable to ascertain the exact area it would be necessary to include in an application for withdrawal made with a view to satisfying its grants. In order therefore to give the statute the operation necessary to accomplish the end it was intended to effect, the State should not be required to limit its application for a survey and withdrawal to an area equal to the unsatisfied portion of its grant.

The question presented by the fifth specification of error is to the effect that the act of August 18, 1894, *supra*, applied only to original grants to the State and could not be invoked in aid of indemnity selections made on account of a loss to the grant in aid of common schools. The plain language of the statute is opposed to this contention. The act contains no restrictive words but authorizes a withdrawal "with a view to satisfying the public land grants" to the several states therein named. The right to select indemnity for loss resulting to the grant made in aid of common schools by reason of any of the enumerated causes is not open to question and the exercise of that right is absolutely essential to the satisfaction of the grant, in favor of which all statutes are liberally and not strictly construed.

With respect to the application for stay of proceedings no facts are set forth which disclose any basis for the conclusion that the State of Idaho is disposed to recognize the claims of the applicants, and the other matters alleged afford no sufficient reason for taking such action. Further, the State has filed a protest against the granting of the application, and in view of the fact that the State has never evinced any disposition to waive its claim, but on the contrary has and is at this time persistently asserting it, the application for stay of proceedings is denied.

For the reasons heretofore given, similar action must be taken upon the motion for review, which is also hereby denied.

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STATE OF IDAHO *v.* WILLIAMS ET AL.

Motion for re-review of departmental decision of July 17, 1907, 36 L. D., 20, denied by First Assistant Secretary Pierce, June 4, 1908.

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FEES OF LOCAL OFFICERS FOR REDUCING TESTIMONY TO WRITING.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., June 5, 1908.

REGISTERS AND RECEIVERS,

*United States Land Offices.*

GENTLEMEN: Your attention is directed to section 14 of the act of Congress approved May 29, 1908 [Public—No. 160], as follows:

SEC. 14. That subdivision ten of section twenty-two hundred and thirty-eight of the Revised Statutes of the United States be, and the same is hereby, amended so as to read as follows:

"Tenth. Registers and receivers are allowed jointly at the rate of fifteen cents per hundred words for testimony reduced by them to writing for claimants in establishing preemption, desert-land, and homestead rights."

So much of office circulars of May 20, 1905 (33 L. D., 629 and 633), as conflicts with the foregoing is hereby revoked.

Very respectfully,

FRED DENNETT,  
*Commissioner.*

Approved:

FRANK PIERCE,  
*Acting Secretary.*

**RIGHT OF WAY—CANALS AND DITCHES—ACTS OF AUGUST 30, 1890, AND  
JUNE 17, 1902.**

**INSTRUCTIONS.**

Under the provision in the act of August 30, 1890, directing a reservation in all patents for lands west of the one-hundredth meridian for a "right of way thereon for ditches or canals constructed by authority of the United States," the government has full authority to construct canals or ditches over any such lands in connection with reclamation projects under the act of June 17, 1902.

The grant of a right of way to a railroad company under the act of March 3, 1875, after the passage of the act of August 30, 1890, is burdened with the reservation for right of way for canals and ditches provided by the latter act, which right of way may be utilized by the government without compensation, except for actual loss or damage, provided such use will not impair or defeat the use of the railroad right of way for the legitimate corporate purposes of the company.

*Acting Secretary Pierce to the Director of the Reclamation Service,*  
(G. W. W.) *June 6, 1908.* (E. F. B.)

Your letter of March 31, 1908, submits the question as to whether lands covered by a right of way, approved to a railroad company under the act of March 3, 1875 (18 Stat., 482), subsequent to October 2, 1888, are subject to right of way for canals and ditches constructed by authority of the Government, and whether, in view of a previous withdrawal of lands covered by such right of way, under the reclamation act of June 17, 1902, for irrigation, the grant of the right of way is not subject to the right of the Government "to build all necessary laterals, ditches, roadways, etc., across the railroad right of way for the proper utilization of the land for the purpose for which they were reserved, without additional cost to the United States or the settlers."

The grant of the right of way in question was acquired by the Minidoka and Southwestern Railroad Company, under the act of March 3, 1875, and became effective by the approval of its plats August 10, 1904. At the date of the approval of said plats part of the land included in said right of way was covered by a withdrawal

made under the act of June 17, 1902, for irrigation, and it is with special reference to said lands that the inquiry is made.

It is not contemplated that any part of the right of way shall be taken by the Reclamation Service, except for joint use of the same to the extent of crossing it with canals, ditches and laterals necessary to the successful operation of the scheme for which the withdrawal was made, upon condition that it shall be so used as not to defeat or impair in any manner the grant to the railroad company and that compensation shall be made in the event that any damage be sustained by the railroad company by reason of such joint use. The question therefore arises whether the approval of the railroad company's right of way over the lands then subject to withdrawal may, for the purposes contemplated by the act of June 17, 1902, operate to vacate the withdrawal as to the land covered by the right of way and to that extent defeat the purpose of the withdrawal.

The appropriation of waters for the irrigation of arid lands is a public use for which private property may be taken by condemnation in the exercise of the right of eminent domain. *Fallbrook Irrigation Co. v. Bradley* (164 U. S., 112), *Clark v. Nash* (198 U. S., 361).

In the case last cited it was sought to condemn a right of way by enlarging a ditch belonging to defendant and upon his land in order to convey water to land of the plaintiff. The court sustained the action upon the ground of the necessity for such use and because of the peculiar conditions existing in the arid region and the laws and customs that control with reference to the appropriation and use of water for irrigation in those States.

It would seem from the reasoning in that opinion that a joint use of the right of way may be permitted for construction of canals and ditches for the irrigation of arid land where such joint use will not defeat or impair prior vested rights, if proceedings are undertaken in the usual manner by which private property may be subjected to public use. But the question is whether the approval of the railroad company's maps of right of way under a general law was not burdened with the reserve rights of the Government existing at the date of such approval, thus avoiding the necessity for resort to the usual condemnation proceedings in the courts as were titles acquired after the act of July 26, 1866, which by that act were made subject to vested and accrued water rights or rights to ditches recognized by local customs and laws.

The doctrine of the right to the use of water by prior appropriation and of the right of way for canals and ditches incident to the enjoyment of such use in its application to public lands was sanctioned by the acts of July 26, 1866, and July 9, 1870 (Rev. Stat., Secs. 2339-2340).

With a view to the reclamation of public land and for the purpose of investigating the extent to which the arid region of the United States can be reclaimed by irrigation, Congress by the act of October 2, 1888 (25 Stat., 505, 526), provided for the selection of sites for reservoirs, ditches and canals for the storage and utilization of water for irrigation and for the reservation of all lands made susceptible of irrigation from such reservoirs, ditches and canals until further provided by law.

The act of August 30, 1890 (26 Stat., 371, 391), repealed so much of the act of October 2, 1888, as reserves from entry lands susceptible of irrigation from such contemplated reservoirs, and validated *bona fide* entries of such lands that had been allowed after withdrawal, but it continued to hold in reservation the reservoir sites then located and provided for the location of other sites and, in order that the purpose of the reservation of such sites might remain effective, it provided:

That in all patents for lands hereafter taken up under any of the land laws of the United States or 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.

While no legislation has been enacted by Congress for the special utilization of the reservoir sites selected under the authority of said acts, the provision above quoted is general in its application and still in force as to all lands west of the one-hundredth meridian, the title to which has been or may be acquired under any of the land laws of the United States since the passage of the act.

The purpose of this provision was to reserve to and retain in the United States a right of way over all lands within the territory mentioned which may be disposed of under any of the land laws of the United States after the passage of said act, and although it is declared that such reservation shall be expressed in the patent it does not follow that the reservation is less effective as to lands which are disposed of under land laws not requiring or authorizing the issuance of patents as evidence of the right of the grantee.

This provision was construed in the letter of instructions of June 4, 1903 (32 L. D., 147), as applying only to entries under the public or general land laws. That opinion cannot be confined to entries under land laws by which individuals alone acquire rights, but to all land laws general in their operation under which inchoate and vested rights may be acquired under executive supervision by following the mode of procedure provided by the act. It was intended to apply to the general land laws as distinguished from grants or other special acts of Congress.

The act of March 3, 1875, is one of the land laws of the United States general in its operation. It is not a grant to a particular corporation but to any corporation duly organized which shall comply with the conditions prescribed by the act. Under this act "a railroad company becomes specifically a grantee by filing its articles of incorporation and due proofs of its organization with the Secretary of the Interior." *Jamestown and Northern Railroad Co. v. Jones* (177 U. S., 125, 130).

It is true Congress has not specifically provided for the utilization of the sites selected under the act of 1888, but it has, by the act of June 17, 1902, devised a scheme for the reclamation of arid lands in furtherance of the same purpose for which reservoir sites were selected under the act of 1888 and the right of way retained over lands disposed of by the United States after the act of 1890. The act of June 17, 1902, authorizes the Secretary of the Interior to construct works for the storage, diversion and development of waters; to appropriate lands required for the construction and operation of such works, and to withdraw from all form of entry and disposal, except under the homestead law, lands believed to be susceptible of irrigation from such works.

The construction of canals and ditches by the United States over any of the public lands for the conveyance of water under authority of this act would cause the after-acquired title from the United States to be burdened with such reservation to the same extent that such preexisting rights would be protected when acquired by private persons under the acts of 1866 and 1870, either in their individual or corporate capacity, without a formal withdrawal. But the act of 1890 expressly reserves to the United States from all public lands west of the one hundredth meridian disposed of under any of the land laws of the United States after the passage of said act, "a right of way for ditches, or canals constructed by authority of the United States."

Under such reservation the authority of the United States to construct canals or ditches over all such lands in the administration of the act of June 17, 1902, is as ample as if it were written in and expressly made a part of the act of June 17, 1902, and it must be so construed.

As the grant of the right of way in question was made to the railroad company under one of the land laws of the United States after the passage of the act of August 30, 1890, it was burdened with the reservation in the title made by that act, independently of the fact that at the time of the approval of the railroad company's maps of right of way, the lands over which such right was granted had been

expressly reserved for the use and purpose contemplated by such reservation from the title.

The Department is therefore of the opinion that the grant of the right of way to the railroad company is subject to the right of the United States to build all necessary laterals, ditches, roadways, etc., across such right of way, for the proper utilization of the lands for the purpose for which they were reserved, without payment to the railway company, except so far as to compensate for actual loss or damage to the railroad company, provided it will not impair or defeat the use by the railroad company of such right of way for its legitimate corporate purposes.

**SOLDIERS' ADDITIONAL—PRIOR EXERCISE OF RIGHT—ABANDONMENT.**

**PRICE FRUIT.**

Where one entitled to a soldiers' additional right under section 2306 of the Revised Statutes, based upon an original entry canceled for abandonment, was permitted to make a second homestead entry for not exceeding the area of the right, at a time when there was no law authorizing second homestead entries, the second entry might properly have been treated as made in the exercise of the additional right and title permitted to be perfected under that section; but where the title was never so perfected, the second entry having also been abandoned, at a time when the land department erroneously required residence and cultivation upon soldiers' additional entries in instances where the original entry had been abandoned, the entryman can not be held to have exhausted or in anywise affected his soldiers' additional right by making the second entry.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(G. W. W.) *Land Office, June 6, 1908.* (G. B. G.)

This is the appeal of Price Fruit, assignee of Clare D. Moll, administrator of the estate of Benjamin Husselton, deceased, from your office decision of March 2, 1908, rejecting his application under section 2306 of the Revised Statutes to enter the SW.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of Sec. 32, T. 38 N., R. 28 E., and the NW.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of Sec. 23, T. 39 N., R. 27 E., aggregating eighty acres of land, in the Waterville land district, Washington.

Section 2306 of the Revised Statutes 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, when added to the quantity previously entered, shall not exceed one hundred and sixty acres.

No question is made that Benjamin Husselton, the deceased soldier, was within the descriptive clause of this section—that is, that he was

a person entitled under the provisions of section 2304 of the Revised Statutes to enter a homestead, and that he had prior to the adoption of the Revised Statutes, to wit, on May 3, 1865, made an original homestead entry, at Minneapolis, Minnesota, land office, for eighty acres of land. He was therefore entitled to enter as an additional homestead eighty acres of land, and that right is still in his estate, or in the assignee thereof—the said Price Fruit—unless the right has been satisfied.

It appears, however, that the Minneapolis entry was canceled for abandonment April 23, 1867, and further that the said Husselton, January 21, 1879, made a homestead entry for 78.81 acres of land at the Worthington land office, Minnesota, which was also canceled for abandonment June 5, 1888; and your office holds that these two entries, amounting to 158.81 acres of land, exhausted Husselton's homestead right, with the exception of 1.20 acres, the difference between the aggregate amount entered and 160 acres.

The Department can not concur in this view. At the date of Husselton's second entry there was no law authorizing the making of such an entry, except in the exercise of an additional homestead right. He therefore had no right to make the Worthington entry, except in the exercise of such right. If it was made as a second homestead entry, without reference to his soldiers' additional right, it was improperly and illegally allowed, and he could not have been permitted to complete title thereto. In that view, therefore, it can not be well said that a right is exhausted by an entry which in law could never have been completed, and it is not material for what reason it was canceled. Royal B. Shute (31 L. D., 26). But, assuming for the sake of argument, that this second entry was made, as in law it might have been made, as a soldiers' additional entry, notwithstanding the then erroneous ruling of the Department that a soldiers' additional entry could not be unconditionally allowed upon the basis of an original entry which had been abandoned, then in that event he had the right to complete title to the same under section 2306 of the Revised Statutes, because it is a well-settled rule of administration of the land department that an entry allowed under any law may be perfected under another law, if it be ascertained the law under which it was allowed does not permit it, but there is other law under which it may be sustained.

Treating this Worthington entry, therefore, as a soldiers' additional entry, he (Husselton) might have perfected title; but under the law governing such entries, however, he was entitled to complete title to said land without settlement, residence, or cultivation, and, if he had been properly advised as to his rights in the premises, it may be he would have done so, instead of abandoning the land.

Under such circumstances, it may not be well said that he has exhausted his homestead right, or that his soldiers' additional right has been satisfied. It may be true that at the date of the cancellation of the Worthington entry he might have completed title to the land covered by it under section 2 of the act of June 15, 1880 (21 Stat., 237), but no obligation rested upon him to do so, and the fact that he did not invoke the provisions of that act is neither controlling nor important upon the merits of this case.

The decision appealed from is reversed, and your office is directed to allow the application, unless objections appear other than those herein considered.

RIGHT OF WAY—ARTICLES OF INCORPORATION—DESIGNATION OF  
TERMINI OF ROAD.

MILNER AND NORTH SIDE R. R. Co.

It is not essential that the articles of incorporation required to be filed by section 1 of the act of March 3, 1875, in connection with applications for right of way under that act, shall designate the termini of the road, where the laws of the State under which the company was organized do not require it.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(G. W. W.) *Land Office, June 6, 1908.* (E. O. P.)

The Milner & North Side Railroad Company has appealed to the Department from your office decision of November 19, 1907, refusing to accept for filing under the provisions of section 1 of the act of March 3, 1875 (18 Stat., 482), its articles of incorporation, for the reason that the termini of the line of road are not set forth therein.

It appears that said articles are in conformity with the laws of the State of Idaho under which the company was organized and incorporated.

The action of your office is apparently based upon the sole ground that such information is essential to a determination of the extent of the grant and that until it is furnished the company cannot become qualified as a beneficiary under the act. In support of this two unreported decisions of the Department are cited and relied upon. The first of these, rendered February 27, 1900, in the case of the Great Republic Gold Mining Company, involved other questions than the one here presented, and while it was stated in said decision that the articles of incorporation should disclose the location of the line of road, the refusal of the Department to accept the articles for filing was principally if not entirely upon the ground that the

company was not organized as a common carrier and not entitled to claim the benefits of the act. The same is true with respect to the decision rendered March 15, 1902, in the case of the Chelan Transportation and Smelting Company, though greater weight may possibly have been given to the failure of the articles to designate the termini of the proposed line of road.

The language used by the Supreme Court in the case of Washington and Idaho Railroad Company *v.* Coeur d'Alene Railway and Navigation Company (160 U. S., 77, 99), and quoted in your office decision, would, standing alone, tend to support the view that the line of road should be defined in the charter or articles of incorporation. However, the only matter before the court concerned the acquisition of a right of way by the approval of a map of definite location in a case where the company relied upon a survey made prior to its organization, and the real question involved was as to the time the company became entitled to receive the benefit of the act of March 3, 1875. That before a company which has filed its articles and proofs of organization can actually acquire a vested interest in a *particular* right of way the location thereof must be clearly defined either by actual construction of the road or approved maps of survey is not open to argument, but it is not believed that the necessities of the case demand that the location of the road need be definitely fixed by the charter of the company by reason of anything contained in the federal statute, and unless such requirement is imposed by the law of the state granting the charter it need not be observed in order to entitle the company to the right to file its articles and thereby assume the position of a prospective grantee of a right of way.

The language of the act is clear and the Supreme Court in the case of Railway Co. *v.* Alling (99 U. S., 463, 479) held that a company duly organized under the laws of the state granting its corporate charter was "embraced by the very letter of the act of March 3, 1875." Indeed no good reason appears why the Department should require the designation of the termini of the road in the articles of incorporation tendered for filing when this is not the recognized method of definite location nor the proper source for defining or determining the extent of the grant. Inasmuch therefore as this requirement is not essential to the incorporation of the company under the laws of the State of Idaho, the Department would be unwarranted in imposing it as a condition precedent to the acceptance of the articles for filing. If, therefore, the articles of incorporation tendered are in other respects regular and sufficient they will be approved.

The decision appealed from is hereby reversed.

## CONFLICTING RIGHTS OF WAY—JURISDICTION OF LAND DEPARTMENT—ACT OF MARCH 3, 1891.

ALLEN ET AL. v. DENVER POWER AND IRRIGATION CO. ET AL.

The land department has jurisdiction to approve an application for right of way under the act of March 3, 1891, covering, with other public land, a tract included in a prior approval, subject to prior existing rights, but is not bound to do so; and where it appears that the enjoyment of the right sought depends upon the destruction of the prior right, the granting of the later right may be withheld until such prior approval is set aside or the applicant is shown to be entitled to make use of the right sought.

*First Assistant Secretary Pierce to the Commissioner of the General  
(G. W. W.) Land Office, June 6, 1908. (E. O. P.)*

Counsel for the High Line reservoir, whose application for right of way under the act of March 3, 1891 (26 Stat., 1095), over lands along the South Fork of the South Platte river in the State of Colorado, is now under consideration by your office, has requested the Department to define the extent of its authority to approve applications of a like character subject to outstanding rights acquired under prior approvals.

The following facts were furnished by your office, June 2, 1908, in response to the verbal request of this Department:

July 3, 1905, C. P. Allen and J. E. Maloney filed in the land office at Denver, Colorado, application for right of way for the Two Forks reservoir. The application for the High Line reservoir was filed June 17, 1907. June 20, 1901, the Department approved the application of the Denver Power and Irrigation Company for a similar right of way, which company has filed a protest against the approval of the Two Forks reservoir application, and in response to a direction of your office has made a showing opposing the institution of proceedings to forfeit its rights under its approved application. The pending applications of the Two Forks and High Line reservoirs present a conflict between themselves, and both are more or less in conflict with the approved right of way of the Denver Power and Irrigation Company. The rights of the claimants under the pending applications have not been determined by your office nor has the sufficiency of the showing made by the Denver Power and Irrigation Company been considered.

The necessity, at this time, for defining the scope of the Department's jurisdiction to approve applications for rights of way, subject to previously acquired conflicting rights, grows out of the peculiar situation here presented, the adjustment of which in such manner as to fully protect the valid claims of all, counsel contends is practically impossible if the practice now obtaining, based upon departmental

decision in the case of the Deseret Irrigation Company (33 L. D., 469), is to be strictly followed.

It is insisted that the decision cited does not warrant a construction so narrow as to deprive the Department of power to approve an application for right of way under the act of March 3, 1891, *supra*, subject to all existing rights, though it is admitted the Department is without jurisdiction to declare a forfeiture of rights acquired through its approval. Unless the Department in its decision in the Deseret Irrigation Company case assumed that the approval of a conflicting application under the act of March 3, 1891, *supra*, was equivalent to a declaration of forfeiture of all outstanding conflicting rights acquired under the same act, that decision does not hold that the Department is without jurisdiction to approve an application covering, with other public land, a tract included in a prior approval, subject, of course, to prior existing rights. Manifestly such approval does not operate as a declaration of forfeiture as to the tract in common. It does not follow, however, that the Department is bound to give approval in every case where there is only a partial conflict. On the contrary, it may, in its discretion, controlled only by the facts before it, withhold its approval altogether, and where it appears that the enjoyment of the right sought depends upon the destruction of a prior right the granting of the later right may be withheld until such prior approval is set aside or the applicant is shown to be entitled to make use of the right sought.

In the case under consideration the sufficiency of the showing made by the Denver Power and Irrigation Company in opposition to the proposed suit to forfeit its outstanding right of way has not been considered by your office. Should this showing be held sufficient, the Department would in all probability refuse to entertain either of these applications. Should, however, this showing be considered insufficient, the question of the granting of a request for the right to use the name of the United States in a suit to set aside such outstanding right of way might then be considered. In the present case, there are pending applications on account of the Two Forks reservoir and the High Line reservoir, between which there is a serious conflict which should be harmonized or settled by the final decision of this Department to the end that their rights in the premises might be so far fixed as to justify the necessary expenditure incident to the prosecution of the suit looking to the forfeiture of the prior outstanding right of way. It may be that these conflicting interests can be so far harmonized as to admit of their joint prosecution of such a suit. Be this as it may, the difficulties herein presented are such that the Department deems it unwise to give further directions in the premises at this time than as herein indicated, and therefore remands the

matter to your office for consideration and decision upon the entire record.

It is perhaps proper to say that in addition to the conflicts between the several reservoir sites hereinbefore referred to, there are certain outstanding railroad rights of way necessarily involved which are not considered by the Department at this time but which will, of course, be reckoned with in your final determination.

FOREST RESERVE LIEU SELECTION—CHARACTER OF LAND—JURISDICTION OF LAND DEPARTMENT.

◦ MILLER *v.* THOMPSON.

Until the land department shall have determined the questions of law and fact involved in a proffered lieu selection under the act of June 4, 1897, and a formal approval has been given, the equitable title to the lieu lands does not pass from the government, and the question of their mineral or non-mineral character, and the consequent exclusion of such as are ascertained to be mineral, is open.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(G. W. W.)                      *Land Office, June 6, 1908.*                      (F. H. B.)

March 13, 1902, G. Howard Thompson proffered forest lieu selection (No. 5088), under the act of June 4, 1897 (30 Stat., 11, 36), together with other lands, for certain portions of Sec. 20, T. 27 N., R. 7 E., M. D. M., Susanville, California, land district, which has not yet received official approval.

Upon a subsequent protest by Frank L. Miller, alleging the known mineral character of the S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$  and W.  $\frac{1}{2}$  SE.  $\frac{1}{4}$  of the section at the date of the selection, in which both tracts are included, and the location thereafter of a placer claim thereon, a hearing was had May 19, 1904, at which both parties appeared and submitted testimony.

From the evidence the local officers found part of the land in controversy to be mineral in character and recommended the rejection of the lieu selection as to so much. The local officers were, however, reversed by your office decision of October 27, 1906, in which it was held that for at least a year prior to the selection the land was unoccupied, at which time it was evidently not considered of sufficient value to justify its location as mineral, and that the evidence relative to the existence of an ancient auriferous-gravel channel was not such as to warrant a conclusion that the land involved was of known mineral character at the date of the forest lieu selection. That decision was affirmed by departmental decision of August 15,

1907 (unreported), holding that "it is not shown that the land has any appreciable value for mining purposes."

The protestant has petitioned the Department for a further hearing, and in support thereof has submitted a report by a geologist upon the conditions exhibited within the area in conflict, based upon an examination made by him a few months ago. From the report the following is taken.

Within the area a tunnel has been driven for a distance of 354 feet, the last 59 feet of which penetrates gravel. Such development of the property as has been attained has followed the location of protestant's claim, April 18, 1902. The claim is located upon a tertiary gravel deposit, partly overlaid by a nearly isolated mass of basaltic lava, connected through a narrow neck of basalt with the great flows of neocene lavas, basalts, and andesites which, emanating from Lassen Peak and adjacent vents, cover all the country to the north and northwest for more than a hundred miles. The geology of the region is described in the Lassen Peak Folio (Folio 15, Geologic Atlas) prepared by the United States Geological Survey, a copy of which accompanies the petition and is referred to in the above-mentioned report.

Omitting the elaborate details of the report as to the geography, topography, geology, economic features, etc., of the protestant's claim (the Dreadnaught), it may be observed that the tunnel now penetrates the upper portion of the gravel, which has also a considerable surface exposure and from which gold colors were secured by panning, alleged upon lithological grounds to demonstrate the presence at a lower elevation of an ancient channel of auriferous gravel, the correlation of which with like deposits of proven value but a few miles distant is indicated in the same connection. From the matters thus set forth at length, as illustrated by an appended diagram, the report recites that—

it appears fully demonstrated that the Dreadnaught location largely covers a well-defined, deep auriferous-gravel deposit, divided by the throw of a fault into two bodies of gravel, now lying at different elevations; that these gravel beds lie within well-defined rims, especially the upper bed, and must be considered as parts of one river channel; that gravel underlies most of the basaltic capping within the claim; and that this entire gravel deposit within and adjacent to the Dreadnaught mine is the final remnant of one of the great tertiary river channels once traversing this region.

It would seem, though it is not entirely clear, that the former hearing proceeded upon the theory that no mineral developments subsequent to the date of the proffered lieu selection could avail to defeat the latter, the approval of which, even if no other objection has interposed, has been prevented by the pendency of the proceedings upon Miller's protest. In the pioneer cases the Department entertained

the opinion that, under the act of 1897, questions respecting the class and character of selected lands were to be determined by conditions existing at the time when all the requirements laid upon the selector had been satisfied, as of which time by relation he would be regarded as the equitable owner, and that no changes in such conditions, subsequently occurring, could affect his rights. The Supreme Court, however, when the question was presented in the case of *Cosmos Co. v. Gray Eagle Co.* (190 U. S., 301), enunciated the rule which controls in respect of this matter. The view borne by the weight of authority is that until the land department shall have determined the questions of law and fact involved in the proffered selection and a formal approval has been given, the equitable title to the land selected does not pass from the government. *Clearwater Timber Co. v. Shoshone County* (155 Fed. Rep., 612) and authorities cited in the opinion. Until such approval there is, indeed, in legal contemplation, no selection in fact, but only an application to select. Among the authorities cited in the *Clearwater-Shoshone* case, and therein quoted at some length, is *Wisconsin Central Railroad Co. v. Price County* (133 U. S., 496), in which, speaking of a State selection of indemnity lands in aid of the construction of a railroad in accordance with the purpose of the Congressional grant, the court said (pp. 511-2):

The approval of the Secretary was essential to the efficacy of the selections, and to give to the company any title to the lands selected. His action in that matter was not ministerial but judicial. He was required to determine, in the first place, whether there were any deficiencies in the land granted to the company which were to be supplied from indemnity lands; and, in the second place, whether the particular indemnity lands selected could be properly taken for those deficiencies. In order to reach a proper conclusion on these two questions he had also to inquire and determine whether any lands in the place limits had been previously disposed of by the government, or whether any preemption or homestead rights had attached before the line of the road was definitely fixed. There could be no indemnity unless a loss was established. And in determining whether a particular selection could be taken as indemnity for the losses sustained, he was obliged to inquire into the condition of those indemnity lands, and determine whether or not any portion of them had been appropriated for any other purpose, and if so, what portion had been thus appropriated, and what portion still remained. This action of the Secretary was required, not merely as supervisory of the action of the agent of the State, but for the protection of the United States against an improper appropriation of their lands. Until the selections were approved, there were no selections in fact, only preliminary proceedings taken for that purpose; and the indemnity lands remained unaffected in their title.

It may well be, agreeably with the interpretation by the Attorney-General (25 Op. A. G., 632; 35 L. D., 77) of the decision in *Sjoli v. Dreschel* (199 U. S., 564)—an interpretation which, however, the Circuit Court of Appeals for the Eighth Circuit, in a very recent decision, in the case of *Hoyt v. Weyerhaeuser and Humbird*, declined

to approve or follow—that this doctrine does not expose a proffered selection to defeat by a subsequent settlement or occupancy, which would effect an obvious *change* of the *actual condition* of the land after the initiation of the selector's claim. But it does follow, as it has been too often decided in analogous cases to necessitate discussion or citations, that while the equitable and legal title to the lieu land remain in the United States, a disclosure that the land is mineral in character, and therefore was and is not subject to selection, must require the land department to reject the proffered exchange, limited by the act to the acquisition of vacant, surveyed, non-mineral public land. This distinguishment of settlement or the like, on the one hand, and the mineral character of the land, on the other, is exemplified in the case of *Barden v. Northern Pacific Railroad Co.* (154 U. S., 288), which recognizes the date of definite location, with respect to lands within the place or granted limits, as the date of the attachment of the company's right so far as to cut off intervening homestead, pre-emption, or other like claims, but holds that the question of the mineral or non-mineral character of the lands, and the consequent exclusion of such as are ascertained to be mineral, is open until, pursuant to the act, a title passes.

The *prima facie* showing submitted by the petitioner, and the circumstances which the case involves, are deemed to justify an order for a further hearing, under the supervisory authority of the Department, agreeably to the petition, to determine the question presented.

The petition and accompanying papers are therefore returned to your office, with the direction that a further hearing be had accordingly, under the rules, and that the case be thereafter regularly adjudicated in accordance with the showing which shall be made, if any, and in conformity with the views above expressed.

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**FOREST RESERVE LIEU SELECTION—CHARACTER OF LAND—JURISDICTION OF LAND DEPARTMENT.**

THOMAS B. WALKER.

Until an application to make lieu selection under the provisions of the act of June 4, 1897, has been approved, the land department has jurisdiction to determine whether the proposed exchange should be consummated.

The presentation of an application to make lieu selection under said act prevents the assertion of a subsequent claim, but does not preclude inquiry by the government as to the character of the land applied for, which question remains open for investigation and determination until the equitable title passes.

*First Assistant Secretary Pierce to the Commissioner of the General Land Office, June 6, 1908.* (W. C. P.)

Thomas B. Walker appealed from your order to October 10, 1907, directing a hearing to determine the character of the NE.  $\frac{1}{4}$  of the

NW.  $\frac{1}{4}$ , Sec. 10, T. 27 N., R. 10 E., M. D. M., Susanville, California, land district.

August 22, 1902, Walker applied to select said tract, with others, in lieu of lands relinquished to the United States under the act of June 4, 1897 (30 Stat., 11, 34-6). This application was suspended by your office order of October 27, 1902, which suspension was revoked by order of June 3, 1907, to take effect September 1, 1907. A special agent of your office reported August 4, 1907, that said tract was mineral in character. Thereupon you ordered a hearing. The applicant contends that the known character of the land "at the date when the lieu selection of applicant was filed" controls, and that subsequent discovery of mineral can not be taken into consideration.

Transmitting the appeal you say:

Owing to the importance of the question involved—there being a number of other cases pending before the office in which proceedings have been ordered on the same charges—and the trend of departmental opinion in support of appellant's contention, prior to the decision of the Supreme Court in the case of *Cosmos Exploration Company v. Gray Eagle Oil Company* (190 U. S., 301), the office has waived the question of appellant's right, under the rules, to appeal.

By the amendatory act of June 6, 1900 (31 Stat., 588, 614), it is declared that selections under the act of June 4, 1897, *supra*, "shall be confined to vacant surveyed non-mineral public lands which are subject to homestead entry."

The mineral lands of the United States are reserved from sale except as otherwise expressly provided by law (Sec. 2318, Revised Statutes). The rule under this general reservation is "that no title from the United States to land known at the time of sale to be valuable for its minerals" can be obtained in any way other than as prescribed by the laws especially authorizing the sale of such lands (*Deffeback v. Hawke*, 115 U. S., 392, 404). Ordinarily it is not difficult to fix with exactness the point of time at which a sale or disposal of a tract of the public lands is effectuated. That point is usually, if not always, determined by some action of an authorized officer of the government in issuing a certificate, approving a list, approving a survey, or in some way definitely declaring recognition of the claim of the applicant as a perfect and complete right. Until that point is reached in respect of an application for a portion of the public domain, jurisdiction remains in the land department to inquire and determine whether all the essentials of a claim of the character thus presented exist in respect of that particular application. One of the essentials of a claim under the act of June 4, 1897, is that the land shall be of the character prescribed by the declaration that selections "shall be confined to vacant surveyed non-mineral public lands which are subject to homestead entry."

Jurisdiction of the land department over an application under this law does not cease until at least an equitable title has vested in the applicant. Such a title is not created by the mere filing of the application. In *Cosmos Co. v. Gray Eagle Co.* (190 U. S., 301, 312), the Supreme Court, discussing this question, said:

There must be a decision made somewhere regarding the rights asserted by the selector of land under the act, before a complete equitable title to the land can exist. The mere filing of papers can not comply with and conform to the statute, and the selector can not decide the question for himself.

And after further discussion it is said (p. 313):

It is certain, as we have already remarked, that there must be some decision upon that question before any equitable title can be claimed—some decision by an officer authorized to make it. Under the rule above cited that decision has not been made. The General Land Office has (so far as this record shows) come to no conclusion in regard to it.

The rule referred to is rule 18 of Rules and Regulations Governing Forest Reserves, approved June 30, 1897 (24 L. D., 589, 592), which reads:

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

Here your office has come to no conclusion as to the rights of the applicant, and hence equitable title has not vested in him.

One of the essentials of an application under this act is that the applicant must show a good title to the land relinquished. Speaking of this feature this Department, in the case of *C. W. Clarke* (32 L. D., 233, 235), after citing *Cosmos Company v. Gray Eagle Company*, *supra*, said:

It is a necessary deduction from this decision that all equitable right of property in the land relinquished remains in the proponent until the title is examined, approved, and accepted by the land department.

To the same effect is the decision in *William E. Moses* (33 L. D., 333) and in *George Austin* (33 L. D., 589). If the applicant retains equitable title to the relinquished land until the title is examined, approved, and accepted, it necessarily follows that he does not acquire title to the land attempted to be selected until that time.

An exhaustive discussion of the question as to when equitable title vests in an applicant under the act of 1897, with comprehensive citations of authorities, is found in the decision in the case of *Clearwater Timber Co. v. Shoshone County* (155 Fed. Rep., 612). The reasoning there, supported as it is by apposite authorities, conclusively sustains the proposition that a transaction under this act of 1897 has not progressed to the point of vesting in the applicant a

title to the land applied for so as to oust the land department of jurisdiction to inquire whether it is one that should be consummated, until it has been approved in behalf of the United States. Until then it is *in fieri*, subject to rejection if found lacking in any essential element. One essential feature of all such transactions is that the land sought to be acquired from the United States must be non-mineral in character. No officer of the government has any authority to accept or approve an application under this law if he be advised before consummation of the transaction that the land applied for is mineral in character.

It has been contended that the presentation of a perfect application under the act of 1897 for land not then known to contain valuable minerals, and otherwise within the class described in the law, fixed the applicant's rights, and that consequently all subsequent action by government officials must be had with reference to that date. This contention finds support in some expressions in the earlier decisions of the Department. The later decisions, however, and the decisions of the courts, in no uncertain way declared the correct rule as hereinbefore shown. It is true, the presentation of such an application prevents the assertion of a subsequent claim, but it does not preclude inquiry as to the character of the land applied for. That matter remains open for investigation and determination until the equitable title passes. The doctrine of relation is properly invoked in the one case to protect rights as against other applicants for the public lands, but it can not be invoked in the other case to defeat the plain provisions of the law.

The doctrine of relation is a fiction of law introduced for the sake of justice, and "its proper operation is to prevent a mischief or remedy an inconvenience which might result from applying some general rule of law." (Broom's Legal Maxims, p. 128.) The same author says:

"Fictions of law," as observed by Lord Mansfield, "hold only in respect of the ends and purposes for which they were invented. When they are urged to an intent and purpose not within the reason and policy of the fiction, the other party may show the truth."

To apply the doctrine to applications under the act of 1897 would be to foreclose the officer clothed with authority to examine, pass upon, and approve such applications, from making any inquiry or investigation to determine whether the land is of the character that may be taken under that law. It would thus afford protection to an illegal claim to the public lands. This is clearly carrying the doctrine beyond "the reason and policy of the fiction" and it can not be evoked to that end.

The matters presented by the appeal have been considered aside from any question as to the right of an appeal, and upon such con-

sideration it is concluded that the contentions in support thereof can not be sustained and that no good reason is presented for interfering with the action of your office directing a hearing in this case. The appeal is dismissed.

CONTESTANT—PREFERENCE RIGHT—WITHDRAWAL AND SUBSEQUENT RESTORATION OF LANDS.

WRIGHT *v.* FRANCIS ET AL.

Where before a successful contestant exercises his preference right the land is withdrawn under the reclamation act, and the withdrawal subsequently revoked, such right may be exercised any time within thirty days after the restoration of the land to entry.

Where a successful contestant in the exercise of his preference right applies to locate separate soldiers' additional rights on the different legal subdivisions constituting the contested entry, such applications may be treated as one application for the entire body of land involved.

*First Assistant Secretary Pierce to the Commissioner of the General Land Office, June 6, 1908.* (G. W. W.) (J. F. T.)

July 30, 1903, Robert Wright instituted contest proceedings against the homestead entry of John M. Armstrong, for lots 1, 2 and 3 and SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 4, T. 163 N., R. 82 W., 5th P. M., Minot, North Dakota, land district.

April 24, 1905, as a result of said contest proceedings, the entry of Armstrong was canceled, giving Wright a preference right to enter said tract. May 27 and June 3, 1905, Wright, in the exercise of his preference right, filed separate applications for each government subdivision to enter the land in controversy, under sections 2306 and 2307, R. S., based upon assignments to him of the soldiers' additional homestead rights claimed by George S. Torrance, 40 acres; Gustavus A. Hesse, 40 acres; George Simon, 28.26 acres; Lydia J. Sherman (widow of Zeri H. Sherman), 11.81 acres; Martha A. Cheney, administratrix of the estate of Frederic S. Cheney, 9.13 acres.

These additional rights and assignments are all valid except the Martha A. Cheney claim of 9.13 acres, which is wholly invalid, and in lieu of which Wright seeks to substitute, by his application filed May 9, 1907, a soldiers' additional right for 9.22 acres, obtained by him from James H. Schouten.

June 13, 1904, the Department withdrew this land from entry, filing or selection under the second form of the reclamation act of June 17, 1902.

March 8, 1905, the Department released the land from such withdrawal, restoring same to settlement on that date, and to entry June 20, 1905.

April 24, 1905, Robert L. Francis filed application to enter said land as a homestead, which application was by the local officers held in abeyance pending the exercise of the preference right awarded to Robert Wright.

You have rejected the application of Francis because presented at a time when the land was not subject to entry, citing the case of *Smith v. Malone* (18 L. D., 482). Your decision is clearly correct on this point, and no further attention will be given in this decision to the appeal of Robert L. Francis.

June 3, 1905, the local officers rejected all of Wright's said applications, "for the reason that the land embraced therein was withdrawn," and from this action an appeal was taken to your office.

March 27, 1907, Julia Sweitzer filed an application to enter said land as a homestead, which application was held in abeyance pending action upon the prior filings of Francis and Wright.

You hold that Wright, in view of the withdrawal and restoration to entry of the land in controversy, made valid use of his preference right and sustain his application for all of said land except lot 3, which you allow to Julia Sweitzer under her homestead application. Both Wright and Sweitzer have appealed to the Department from your decision of date January 29, 1908.

Wright's application was made in the form of four separate applications, but as he was seeking to use one preference right to make entry for the land subject thereto by reason of his previously successful contest therefor, no reason is perceived why his proceeding may not be considered as an application to make one entry for the entire tract of land in controversy, containing 159.55 acres, as follows: Lot 1, 39.87 acres; lot 2, 39.85 acres; lot 3, 39.83 acres, and SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , 40 acres.

In view of the reasons underlying section 7 of the circular of June 6, 1905 (33 L. D., 607), and the fact that no valid application to make homestead entry for this tract was then pending, it is held that the time within which Wright could use his preference right did not expire until thirty days after June 20, 1905, the date upon which said land was subject to entry, and that his applications were submitted in time for consideration. This is clearly in accord with departmental action in the unreported case of Edwin P. Marshall, assignee, of date September 12, 1907, and under the circumstances shown by the record, the unreported case of *Hufford v. Waugh*, of June 26, 1906, will not be followed.

It is noticed that Wright's application was filed before the date fixed upon which this land was to become subject to entry, but the time allowed him to use his preference right as then understood was about to expire, no ruling having been made allowing such right to

be exercised within thirty days after the date of restoration of the lands to entry. Under these circumstances his application will be considered as made in due and proper time.

This leaves only the question as to sufficiency of the consideration submitted, and this will be viewed as a whole and as applying to the entire tract. The four valid additional rights at first submitted by Wright amount to 120.07 acres, and are insufficient under any proper rule of approximation. He, however, asks to submit additional consideration in lieu of the invalid right erroneously, at first, submitted. This request was made before decision against him, but after the homestead application of Sweitzer.

In the opinion of the Department the application of Sweitzer does not preclude the granting of Wright's request, and as Sweitzer's application for the entire tract should be considered as a whole it must be rejected for conflict with the application of Wright, provided Wright completes his application by furnishing sufficient consideration for the entire tract under the rule established in the case of George E. Lemmon, of date May 13, 1908 (36 L. D., 417), whereupon he will be allowed to complete his entry.

As thus modified, your decision is affirmed.

BOUNTY LAND WARRANT AND SCRIP LOCATIONS—SEC. 12, ACT OF  
MAY 29, 1908.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
Washington, D. C., June 9, 1908.

REGISTERS AND RECEIVERS,  
*United States Land Offices.*

GENTLEMEN: Your attention is called to section 12 of the act of May 29, 1908 (Public—No. 160), which provides:

That all patents heretofore issued on applications made for title to public lands between June fifth, nineteen hundred and one, and June twentieth, nineteen hundred and seven, with either military bounty land warrants, agricultural college land scrip, or surveyor-general's certificates, be, and the same are hereby, declared valid; and that all such locations, where the applications to locate were made between June fifth, nineteen hundred and one, and June twentieth, nineteen hundred and seven, with either military bounty land warrants, agricultural college land scrip, or surveyor-general's certificates, and upon which patents have not been issued, but which may hereafter be approved for patent by the Department under the ruling in the case of Roy McDonald, December twenty-first, nineteen hundred and seven, are hereby declared legal, and the Commissioner of the General Land Office is hereby authorized and directed to issue patents on all such locations which may be approved by him for patent as above provided: *Provided*, That they are otherwise in accordance with the rules and regulations in such cases made and provided.

As the cases referred to in this provision of law are presumably all pending either in this office or in the Department, it is not deemed necessary to give you any instructions herein under said section. Attention, however, is called to the decisions of the Department of January 31, 1907 (35 L. D., 399), and June 20, 1907 (35 L. D., 609), in the Lawrence W. Simpson case, and December 21, 1907 (36 L. D., 205), in the Roy McDonald case.

Under the rulings in such cases military bounty land warrants, agricultural college scrip, Supreme Court scrip, and certificates issued under the act of June 2, 1858 (11 Stat., 294), surveyor-general scrip, can not now be *located* upon public lands without previous entry, filing, or settlement, unless an application to locate was filed prior to June 20, 1907. Supreme Court scrip and agricultural college scrip, however, may be used in payment for pre-emption claims and in commutation of homestead entries as heretofore. Military bounty land warrants and surveyor-general scrip may be used as heretofore in payment for pre-emption claims, in commutation of homestead entries, and in payment for lands entered under the desert land, timber culture, and timber and stone laws, and for lands that may be sold at public auction, except lands ceded by any Indian tribe, the proceeds of which are by law required to be paid to the Indian. See act of December 13, 1894 (28 Stat., 594).

Very respectfully,

FRED DENNETT, *Commissioner*.

Approved:

FRANK PIERCE, *Acting Secretary*.

HOMESTEAD—TRANSFEREE—NOTICE OF INTEREST—RESIDENCE.

E. N. MCGLOTHLIN.

Where the transferee of an entry fails to notify the local officers of his interest, he is not entitled to notice of action by the land department affecting the entry.

The title of a transferee acquired subsequent to final certificate and prior to patent is in no wise superior to that of the entryman, and if for any good reason the entry be canceled, the transferee loses whatever interest he may have in the land.

Absence in prison under judicial restraint will not be considered residence toward making up the period of eight months required by section 9 of the act of May 29, 1908.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(F. W. C.) *Land Office, June 9, 1908.* (L. R. S.)

The Department has considered the appeal of E. N. McGlothlin, transferee, from the decision of your office rendered July 20, 1907, rejecting the final commutation proof of Sam K. Harmon, made

February 26, 1906, on his homestead entry No. 25181, Kingfisher series, for the SW.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$ , Sec. 26, T. 15 N., R. 25 W., I. M., made October 10, 1903, upon which cash certificate No. 2515 issued at the Guthrie land office, Oklahoma, March 9, 1906, and also from your office decision of January 7, 1908, refusing to vacate its decision of November 12, 1907, canceling said cash certificate and holding said homestead entry for cancellation.

The record shows that your office rejected said commutation proof because it did not show continuous residence of claimant as required by law, and held said cash certificate for cancellation, but allowed claimant to submit new proof within the lifetime of the entry showing compliance with the law for a full period of twelve months under the act of October 20, 1893 (28 Stat., 3), relative to the commutation of homestead entries of certain Indian lands in Oklahoma.

October 14, 1907, the local land officers reported that the entryman was duly notified of said decision and had taken no action thereon, and your office November 12, 1907, canceled said cash certificate but allowed said homestead entry to remain intact, subject to future compliance with law.

November 23, 1907, the local land officers reported that October 24, 1907, said McGlothlin advised them that he was the present owner of said land and they notified him of said decisions of your office of July 20, 1907, and November 12, 1907.

There was also transmitted the motion of said transferee to set aside said decision of November 12, 1907, on the ground that the records of the local land office showed that he had acquired title to said land from the entryman after the issuance of final receipt.

January 7, 1908, your office overruled said motion for the reason that the action in the case appeared to be regular, and held the original entry for cancellation because the entryman had transferred the land. The entryman and transferee were allowed the right of appeal within sixty days from notice.

February 15, 1908, the register transmitted the appeal of transferee, McGlothlin, filed the same day, alleging that your office erred in "holding said entry for cancellation," and that the commutation proof of claimant did not show "continuous residence" as required by law.

It does not appear that the transferee notified the local land officers of his interest in the land prior to October 24, 1907, and in the absence of such information he was not entitled to notice of the decision of your office rejecting the commutation proof of the entryman. *Robinson v. Knowles* (12 L. D., 462); *John J. Dean* (10 L. D., 446).

It has been repeatedly held by this Department that the title of a transferee secured after the issuance of final certificate and prior to

the date of patent is in nowise superior to that of the entryman and if for any good cause the entry must be canceled the transferee loses whatever interest he may have had in the land covered by the canceled entry. *Mary M. Shields et al.* (35 L. D., 227).

The final proof of claimant shows that he established residence on the land in December, 1903, and continued to reside thereon until May 1, 1904, when he was absent under judicial restraint, being imprisoned in Lansing, Kansas, until October 1, 1905, and since then claimant has been upon his claim about one-third of the time. It thus appears that the claimant has actually resided upon his claim less than eight months within the year immediately preceding the submission of his final communication proof, and hence his case does not come within the provisions of section 9 of the act of May 29, 1908 (Public—160), entitled "An act authorizing a resurvey of certain townships in the State of Wyoming, and for other purposes."

Absence in prison under judicial restraint will not be considered residence upon the land covered by claimant's commutation proof.

No error appearing in said decisions of your office they are accordingly affirmed.

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TAYLOR ET AL. *v.* STATE OF CALIFORNIA.

Motion for review of departmental decision of March 20, 1908, 36 L. D., 315, denied by First Assistant Secretary Pierce, June 9, 1908.

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SETTLERS UPON WISCONSIN RAILROAD LANDS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., June 9, 1908.*

REGISTERS AND RECEIVERS,  
*United States Land Offices.*

GENTLEMEN: Section six of the act of May 29, 1908 [Public—No. 160], reads as follows:

Sec. 6. That all qualified homesteaders who, under an order issued by the land department bearing date October twenty-second, eighteen hundred and ninety-one, and taking effect November second, eighteen hundred and ninety-one, made settlement upon and improved any portion of an odd-numbered section within the conflicting limits of the grants made in aid of the construction of the Chicago, Saint Paul, Minneapolis and Omaha Railway and the Wisconsin Central Railroad, and were thereafter prevented from completing title to the land so settled upon and improved by reason of the decision of the Supreme Court in the case of Wisconsin Central Railroad Company against Forsythe

(One hundred and fifty-ninth United States, page forty-six), shall, in making final proof upon homestead entries made for other lands, be given credit for the period of their *bona fide* residence upon and the amount of their improvements made on the lands for which they were unable to complete title. In the event that any entryman entitled to the benefits of this act shall have died, the right to make such second entry shall inure to his surviving widow, and if there be no widow living then to his minor child or children, if any, in the manner hereinbefore provided: *Provided*, That no such person shall be entitled to the benefits of this act who shall fail to make entry within two years after the passage of this act: *And provided further*, That this act shall not be considered as entitling any person to make another homestead entry who shall have received the benefits of the homestead law since being prevented, as aforesaid, from completing title to the lands as aforesaid settled upon and improved by him.

A homestead claimant to be entitled to the benefits of this act must have been a qualified homesteader at the time of his settlement and residence upon the original claim, and his second entry must be made within two years from the date of approval of the act, namely, on or before May 29, 1910. Those persons who have received the benefit of the homestead law since being prevented from completing title to the lands settled upon and improved by them, within the limits of the grant named, are excluded from its operation.

Upon proof of the death of any entryman entitled to the benefits of the act, the second entry may be made by his widow, or if there be no widow surviving, by the *minor* child or children only.

In cases where the original claim has been carried to final entry and certificate, or to the submission of final proof entitling claimant to final entry and certificate, no further proof will be required, except that evidence of the nonmineral character of the land embraced in the second entry must be submitted, and the usual published and posted notices of intention to make the second entry must be given.

Where the original claim has not been carried to final entry or to the submission of proof entitling the claimant to final entry and certificate, the claimant, if he has completed residence and improvements required by law, may submit proof thereof, in the usual manner, without publication, whereupon the second entry may be made as in other completed cases.

Where the residence and improvements upon the original claim have not been completed, claimant will be required to make his second homestead entry in the usual manner, to reside upon, cultivate and improve the land entered, for such period as, added to the period of residence and improvement upon the original claim, equals the full period required by the homestead law, and thereafter to make proof covering both the original tract and that embraced in the second entry.

Should the original claim and second entry be situate in different land districts, the proof of settlement, residence and improvement

thereon may consist of the affidavit of the claimant, corroborated by the affidavits of at least two witnesses having knowledge of the facts. Such affidavits may be executed before any officer authorized to administer oaths in homestead cases, and must state facts which satisfactorily show compliance with the law to the extent claimed.

Claimants, in all cases coming within the purview of this act, must submit affidavits that they have not received the benefits of the homestead law since being prevented from completing title to the land originally settled upon and claimed.

Very respectfully,

Approved:

FRANK PIERCE,  
*Acting Secretary.*

FRED DENNETT,  
*Commissioner.*

ABANDONED MILITARY RESERVATIONS—FORT SHERIDAN AND FORT  
M'PHERSON.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., June 12, 1908.*

REGISTERS AND RECEIVERS,

*Valentine and North Platte, Nebraska.*

SIRS: Your attention is invited to the provisions of section 8 of the act of May 29, 1908 (Public—No. 160), which reads as follows:

Sec. 8. That such portions of the lands of the abandoned Fort Sheridan military reservation, and of the abandoned Fort McPherson military reservation which were added to the original Fort McPherson military reservation by executive order dated April 19th, 1878, title to which remains in the Government and have become subject to homestead entry, be, and the same are hereby, exempted from the payment of the appraised values imposed by the act of Congress approved July 5th, 1884, and this provision shall include existing unperfected entries.

Both of the reservations mentioned are subject to disposal in accordance with the provisions of the act of August 23, 1894 (28 Stat., 491).

Instructions in regard to Fort Sheridan were sent to the local officers at Alliance, Nebraska, in office circular dated March 20, 1896, which was approved by the Department on April 15, 1896.

The lands added to the Fort McPherson reservation by executive order of April 19, 1878, are Secs. 2, 4, 6, 8, 10, T. 11 N., R. 28 W., and Secs. 20, 22, 26, 28, 30, 32, 34, T. 12 N., R. 28 W. Instructions in regard to these lands were contained in office circular dated March 12, 1896, which was approved by the Department April 14, 1896.

The provisions of said Sec. 8, quoted above, modify the existing law and regulations as to the lands affected thereby only to the extent of exempting settlers from paying the appraised price for the land entered. Therefore, you will no longer require such payment. You will follow the instructions mentioned in other particulars, and will require payment of the appraised value of other portions of the Fort McPherson reservation than those described in said executive order of April 19, 1878.

Very respectfully,

Approved:

FRANK PIERCE,

*Acting Secretary.*

S. V. PROUDFIT,  
*Acting Commissioner.*

ADDITIONAL HOMESTEAD—KINKAID ACT—AMENDMENT.

JOHN GASSELING.

One who makes additional entry for the full quantity of land to which he is entitled under the Kinkaid act, will not be permitted to subsequently amend his entry by eliminating a portion thereof and substituting other contiguous lands which have since become vacant, merely because the lands desired are of better quality, where the proposed amendment is not shown to be in accordance with his original intention.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(F. W. C.) *Land Office, June 13, 1908.* (C. J. G.)

An appeal has been filed by John Gasseling from the decisions of your office of October 28, 1907, and February 14, 1908, denying application to amend his additional homestead entry No. 7295, under the Kinkaid act of April 28, 1904 (33 Stat., 547), for the NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$ , Sec. 22, SW.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 15, T. 29 N., R. 49 W., containing 480 acres, so as to embrace therein the N.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 22, in lieu of the SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$  and SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 15, Alliance, Nebraska.

The entry was made July 20, 1904, as additional to Gasseling's homestead entry of March 17, 1888, for the S.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 22, and N.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 27, T. 29 N., R. 49 W., containing 160 acres, upon which final certificate issued July 21, 1894.

In support of his application to amend Gasseling alleges that when he came to make entry No. 7295 he found that the land embraced therein was all the land subject to entry in that locality, the N.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 22, being at the time covered by another entry of record; that he was informed that this tract is now subject to entry and as it is desirable land and close to his house and other improvements and makes his entry more compact he now asks that he be allowed to

amend his entry so as to include said tract therein, and exclude therefrom the SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$  and SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 15, which is sandy land and of little value.

The records of your office show that on February 10, 1900, Ann Shindler made homestead entry covering, with other tracts, the land now applied for by Gasseling, which entry was canceled on relinquishment February 23, 1907, and said land is therefore now subject to entry. Your office holds, however, that additional entry No. 7295, as made by Gasseling, was his deliberate choice and does not deem the reason assigned sufficient to justify amendment of the same.

The regulations under the Kinkaid act provide, among other things:

In accepting entries under this act the compliance thereof with the requirements as to compactness of form should be determined by the relative location of the vacant and unappropriated lands, rather than by the quality and desirability of the desired tracts.

Therefore, the fact that the land Gasseling applies for may be of better quality than that which he desires to eliminate from his entry does not constitute sufficient ground for allowing his application to amend. The Department has held that an entryman under the Kinkaid act who fails to secure the full quantity of land to which he is entitled for the reason that there are at the time no other unappropriated lands subject to entry, may, in the event that contiguous lands subsequently become vacant, enlarge his former entry to the full area allowed by said act. But the cases which announced such ruling are distinguished from the present one in that there were no vacant lands the entryman could have taken and the entry was in fact for a less area than the entryman was entitled to take under the act. In these cases the intention of the entryman was manifest, either from his seasonably contesting the invalid entry of record or by announcing his intention to amend his additional entry to include the lands desired by him when the same should become vacant, or it was satisfactorily shown that the entryman did not intend at the time of making original entry to exhaust his right under the act. Here there was sufficient vacant land at the time Gasseling made entry, he entered the full area to which he was entitled under the act, and not until the expiration of nearly three years thereafter did he give any indication that he did not obtain the land he desired or intended to enter. Clearly his case is not on all fours with those in which the rule referred to was announced and it does not come within the ordinary rules otherwise governing amendments.

The judgment of your office was proper and is hereby affirmed.

Attention is invited to the application of one Peter Annen for the land in question, which accompanies the papers in this case.

## DESERT LAND—CAREY ACT—"ACTUAL SETTLERS."

## STATE OF OREGON.

The term "actual settlers" in the Carey act contemplates persons actually residing on the land.

Under the Carey act as originally enacted occupancy by an actual settler was one of the conditions precedent to the acquirement of legal title by the State; but under the act as amended by the act of June 11, 1896, an actual settler prior to patent is not necessary, though the State can legally dispose of the land, after acquiring title, only to actual settlers; and where it attempts to dispose of the land to other than actual settlers, it subjects the grant to liability to forfeiture for condition broken.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(G. W. W.) *Land Office, June 13, 1908.* (C. E. W.)

The Department has considered your letter and recommendation of December 14, 1907, in the above-entitled matter, as well as those of the Acting Director of the U. S. Reclamation Service, under date of November 20, 1907, transmitting the report of Inspector Neuhausen, who in company with an engineer of said service and a special agent, made a very full investigation of the segregated tracts under the Carey Act (28 Stat., 422), included in list No. 13, State of Oregon, involving 27,004.83 acres, within The Dalles land district. This selection was favorably recommended July 21, 1903, by A. R. Greene, special inspector, he reporting the land to be desert in character, although noting that a little timber (not exceeding 100,000 feet B. M.) stood on parts of the segregated area. The list was approved by the Department January 12, 1904. The contract for reclamation was originally undertaken by the Three Sisters Irrigation Company, but later assumed (by assignment) by the Columbia Southern Irrigating Company, against which proceedings have been instituted by the State to cancel the contract.

The report of Special Inspector Neuhausen, with its exhibits accompanying your letter, shows that several hundred acres of the segregated tract is covered with timber (over 15,000,000 feet B. M.); that the irrigating plan is probably not practical; that of the 11,659 acres already patented to the State (patent No. 1 issued January 19, 1905), the completed irrigation works are inadequate to reclaim more than half the acreage patented; and that deeds have been issued to people who are not actual settlers.

He recommends:

1. That the Department of the Interior notify the State of Oregon that the tracts described on page 54 of [his] report under the heading "Timber land included in this segregation" are timber lands, and that proper steps will be taken to secure the elimination of the same from the segregation.

2. That the State be required to furnish maps showing the dimensions and capacity of all constructed canals and laterals on the project and the proposed storage system.

3. That the Department of Justice be requested to instruct the United States Attorney for Oregon to report as to the advisability of initiating procedure to cancel the patent issued for lands not reclaimed, and to report on the alleged illegality of the issues of bonds by the company for \$170,000.

4. That the Department of Justice be requested to direct the United States Attorney for Oregon to collaborate with the Attorney-General of the State of Oregon in the prosecution of the suit brought by the State on August 20, 1907, to effect a cancellation of the company's contract.

In all of these recommendations the Reclamation Service concurs; but you approve only the first and second.

So far as the fourth recommendation is concerned, the Department fails to see in what manner active collaboration can be rendered. The suit is between the State and its contractor. The United States is concerned with but one party—the State of Oregon. While the fullest approval may be given to the action of the State in instituting this suit, there is no practical way in which the federal government, through its Department of Justice, may collaborate with the State. In any event, the State has not requested intervention by or aid from the United States, and it is not pointed out in what manner federal assistance can be given.

Respecting the main issue, *i. e.*, the character and present status of the segregated area, the situation and outgrowing questions may be classified as follows:

Land segregated: 27,004.83 acres.

I. Unpatented area: 15,345.35 acres.

A. What is its character?

B. Sufficiency of scheme.

II. Patented area: 11,659.48 acres.

A. Unsold portion: 7,965.26 acres.

1. Character—desert or otherwise.

2. Extent of reclamation.

B. Sold portion: 3,694.22 acres.

1. Character—timber or desert.

2. Extent of reclamation.

3. Qualifications of purchasers.

4. To what extent should the United States act.

I. As to the unpatented area, the solution is not difficult. (A) It appears from the Neuhausen report that 1,280 acres, the specific tracts being definitely described, are covered with 13,580,000 feet of timber. Such tracts are clearly not desert lands and consequently are not within the operation of the Carey act. Doubtless the State, as well as the United States, was misled by such reports as were made concerning their character, including that made by Col. Greene. It is not unlikely that the State, upon request, after being apprised of the real condition, will relinquish its claim to such lands. If its

representatives do not concur with Inspector Neuhausen as to the character of any one of these tracts, a hearing may be ordered as directed in State of Oregon, 34 L. D., 589.

(B) As to the sufficiency of the scheme of irrigation of the desert portion of the land heretofore segregated, the Department has once passed upon that feature of the case and gave its sanction to the proposed plan. It may or may not be feasible in the light of existing conditions. Inspector Neuhausen thinks not, although Engineer Whistler thinks that a proposed storage reservoir will aid—a reservoir feasible but very expensive. However, that is a matter of interest to the State. The government has already passed upon its scheme; it remains for the State, within the time fixed by the statutes, to carry its scheme into effective operation. If it does not, then will be the time for the federal government to act. The Department feels that the State should not now be harassed by bringing into controversy the practicability of its scheme. The State is now endeavoring to relieve itself of a contract with a company that is not doing its duty.

II. As to that part of the segregated area which has already been patented to the State, the situation involves many questions, including the rights of alleged *bona fide* purchasers as well as the rights of the State and the nation.

(A) The unsold portion comprises 7,965.26 acres of land covered by patent No. 1 (11,659.48 acres). (1) Two quarter sections of this land are clearly not desert in character and are particularly valuable for timber—containing 1,765,000 ft. B. M. These tracts are the SE.  $\frac{1}{4}$  and SW.  $\frac{1}{4}$  of Sec. 4, T. 17 S., R. 11 E. The State should be asked to reconvey these tracts to the Government; or, if not satisfied with the Neuhausen report in regard to these tracts, to submit the matter for hearing as hereinbefore noted. Should it then refuse or fail to submit the question to a hearing, or if the tracts are shown not to be desert in character, you will take steps, in the usual way, to secure, through the courts, a cancellation of the patent as to these tracts. (2) Again, it is claimed a number of these patented, unsold tracts have never been properly reclaimed and should never have been passed to patent. There is no definite information before this Department as to which of the tracts have not been reclaimed; and, in the absence thereof, no definite direction can now be given. But this matter should be carefully investigated, and a specific report obtained; not necessarily to effect an immediate restoration of such lands from the segregation, but to see that there is no imposition upon the Government.

(B) The sold portion of the patented lands embraces some 3,694.22 acres. Of this acreage, 2,874.72 acres are farmed by actual settlers; the remaining 829.5 acres are farmed by tenants. (1) None of these

tracts is timber land or non-desert in character according to Neuhausen's report; but (2) some of the tracts are not reclaimed and should not have been patented; and (3), as shown above, some tracts have been sold (829.5 acres) to people who are not actual settlers, under representations by the company that actual residence is not required by law. None holds an acreage exceeding 160 acres.

The Carey Act contemplated the ultimate appropriation of the segregated land by actual settlers. In the original act irrigation, reclamation, and occupancy by "actual settlers" were conditions precedent to the issue of patent to the State. The act was in aid of "the settlement, cultivation and sale . . . in small tracts to actual settlers" as well as the reclamation of the land. The State's right to alienate was limited to 160 acres to any one person.

The amendatory act of June 11, 1896 (29 Stat., 413, 434), changed the conditions precedent to patent to the State, eliminating the condition of occupancy and allowing patent to issue, under the circumstances therein set forth, "without regard to settlement or cultivation." State of Washington (26 L. D., 74).

The phrase "actual settlers" so often used in the federal and State laws regarding the disposal of public lands has a well defined meaning, involving the idea of actual residence. (*Gavitt v. Mohr*, 68 Cal., 506; *Mosely v. Torrence*, 71 Cal., 318; *Baker v. Millman*, 77 Tex., 46; *Bratton v. Cross*, 22 Kans., 673; *Turner v. Ferguson*, 58 Tex., 6; *Rene v. Prendergast*, 17 L. D., 385; *U. S. v. Atterbury et al.*, 10 L. D., 36, 8 L. D., 173; *Samuel M. Frank*, 2 L. D., 628.)

Under the act of August 18, 1894 (the Carey act), an actual settler was essential to the acquiring of legal title by the State: the land prior to patent, must have been occupied by an actual settler. The rights of the settler were conserved by the limitation of the States' power to alienate after patent; the land was to be sold in small tracts to actual settlers. The actual settler was perforce the man in residence on the tract.

Under the amended act the presence of the actual settler prior to patent is not necessary. Complete title may pass to the State before there is an actual settler on the ground. But the requirement that the State must sell the land thus acquired only to an actual settler is still in force. The amendatory act, in addition to changing the conditions precedent to patent, authorized the State to create a lien on reclaimed lands for the actual cost, etc., of reclamation, "until disposed of to *actual settlers*." The statute of Oregon, whereby the benefits of the Carey act were accepted, authorized the disposal of said land to actual settlers only.

Purchasers of reclaimed, patented tracts apparently deal primarily with the irrigating company. The company's claim must

be satisfied by them before the State board issues a deed. The State board according to the laws of the State, must not deed to the purchaser until it is satisfied that the latter is a qualified person—a citizen (or one who has declared his intention so to become) and an actual settler.

The condition, then, as to the qualifications of the purchaser, *viz.*, that he must be an actual settler, is, so far as the federal government is concerned, one subsequent to patent and in the nature of a restriction upon the State's right to alienate. As affecting the purchaser's right to a deed from the State, the condition, from the State's point of view, is still precedent to the acquisition of title.

If the State violates its own law and ignores the federal restriction upon its power to alienate, the State potentially divests itself of title; at least, subjects the grant to liability to forfeiture for condition broken.

Now, of the land reported aforesaid as sold, deeds have passed from the State to the purchaser in but nine instances, involving 754.96 acres. Of these nine grantees, only one is shown by the exhibits accompanying Mr. Neuhausen's report (Exhibits Y and Z) to be a non-resident—Mr. Henry Fruechtenicht, who is the grantee of the NW.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  of Sec. 8, T. 16 S., R. 12 E.

The attention of the State authorities should be called to this deed, as well as to those contracts already made by the company with other non-resident purchasers who have apparently not yet received deeds from the State. It would seem to be the duty of the State rather than of the United States to notify these people that under federal and local laws actual settlement, involving residence, is required of them as a condition to the execution of a deed.

In any event, the federal government is concerned to the extent of action only in such cases where the State has attempted to pass title to unqualified grantees; and in this respect the State is, or should be, as greatly concerned as the federal government. If there be any persistent evasion of the law in this or in any other respect, it will be the duty of this Department to recommend to Congress such legislation as will effect a forfeiture of the grant—at least as far as the tracts thus sold are concerned—as well as to institute proceedings in the courts to enforce the conditions of the grant. And (4) this course of action may be advisable regardless of any attempted defense on the part of purchasers based on their alleged good faith. Considering the recitals in the patent to the State, showing the source and nature of the State's title, the purchasers were charged with knowledge of the law and were bound to know whether in fact the purchased lands were such as, under the terms of the Carey act,

the State properly had title to convey. If *bona fide* purchasers there be, their protection may be afforded by such provisions as Congress sees fit to make if legislation such as above indicated becomes necessary.

The case is remanded for the several actions herein suggested.

HOMESTEAD—COMMUTATION—SECTIONS 9 AND 10, ACT MAY 29, 1908.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
Washington, D. C., June 13, 1908.

REGISTERS AND RECEIVERS,  
*United States Land Offices.*

SIRS: Your attention is called to sections 9 and 10 of the act of Congress approved May 29, 1908 (Public—No. 160), which read as follows:

Sec. 9. That no final certificate issued upon proof offered under the commutation provisions of the homestead laws prior to the passage of this act shall be canceled solely upon the ground of insufficient residence in any case where such proof shows that the entryman had in good faith resided upon and improved the lands covered by his entry for at least eight months within the year immediately preceding the submission of such proof, and in all such cases where the final certificate has been canceled because of insufficient residence such certificate shall, upon application made therefor by the entryman, his heirs or assigns, within one year from the passage of this act, be reinstated and confirmed if no fraud was practiced by the entryman and no valid adverse rights have attached to the land affected thereby at the date of the filing of such application.

Sec. 10. That no homestead entry heretofore made under the provisions of section two of the act of Congress entitled "An act for the relief of the Colorado Cooperative Colony, to permit homestead entries in certain cases, and for other purposes," approved June fifth, nineteen hundred, shall be canceled for the reason that the former entry made by the entryman was commuted under the provisions of an act entitled "An act relating to the public lands of the United States," approved June fifteenth, eighteen hundred and eighty (Twenty-first Statutes, page two hundred and thirty-seven). And all entries heretofore canceled on the ground that an entryman who commuted under the provisions of said act of June fifteenth, eighteen hundred and eighty, is not entitled to the benefits of the act of June fifth, nineteen hundred, shall be reinstated upon a showing by the entryman or his heirs, within one year from the approval of this act, that there were no valid grounds for the cancellation of such entries except that a former entry was perfected under the act of June fifteenth, eighteen hundred and eighty, in all cases where valid adverse rights have not attached to the lands covered by such second entries since the date of their cancellation.

2. Section 9 requires the acceptance and approval of all homestead commutation proofs upon which final certificates issued prior

to May 29, 1908, and have not been canceled, wherein it is shown that the entryman had in good faith actually resided upon and cultivated the land covered by their entries for at least eight months during the twelve months immediately preceding the date on which the proof was offered, if there are no other good reasons to the contrary, and directs the reinstatement of canceled final certificates based upon such proofs in all cases where no fraud was practiced and no valid adverse rights have attached at the date of the application for such reinstatement.

3. The residence referred to in this section need not have been continuous, and it is immaterial whether it began within six months after date of the entry, but it must in all cases be *bona fide* and actual and of such duration as to amount in the aggregate to eight months during the preceding twelve months.

4. In all cases where contests or protests have been initiated, or hearings or investigations ordered, under proofs and certificates affected by section 9, final action on such proof and certificate will await and be controlled by the result of such contests, protests, hearing, or investigation.

5. In all cases where certificates affected by section 9 have not been canceled, they will be considered and acted upon without further action by the entrymen, except in cases where entrymen are called upon to furnish supplemental proof, or to defend against protests or contests.

6. In all cases where certificates affected by section 9 have been canceled because of insufficient residence, the entryman, or his heirs or assigns, must, before May 29, 1909, file with the proper register and receiver his application for reinstatement, specifically setting forth the grounds therefor, and showing that no fraud was practiced in connection with such final certificate. As soon as an application of this kind has been filed, the register and receiver will at once forward it to this office, with their report as to the status of the land affected, and their recommendation as to its allowance. This section does not authorize the reinstatement and approval of rejected final proof upon which no final certificate has issued.

7. Section 10 validates all uncanceled entries made prior to May 29, 1908, under section 2, act of June 5, 1900 (31 Stat., 267), by persons who had purchased under section 2 of the act of June 15, 1880 (21 Stat., 237), and authorizes the reinstatement of canceled entries of that kind in cases where valid adverse rights have not attached; but this act will not prevent the cancellation of such entries on any other proper grounds.

8. Entrymen, or their heirs, seeking the reinstatement of canceled entries affected by section 10, must, before May 29, 1909, file with

the proper register and receiver a sworn application for such reinstatement, setting forth the fact that no valid adverse rights have attached prior to the presentation of their application. As soon as an application of this kind has been filed, the register and receiver will at once forward it to this office, with their report as to the status of the land affected and their recommendation as to its allowance.

Very respectfully,

S. V. PROUDFIT,  
*Acting Commissioner.*

Approved:

FRANK PIERCE, *Acting Secretary.*

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HOMESTEAD—RIGHT TO MAKE NEW ENTRY—ACT OF MARCH 3, 1879.

CURTIS M. FULLER.

The right to make new or additional homestead entry under the act of March 3, 1879, is limited to those who prior thereto had taken a homestead of eighty acres upon an even-numbered section within the limits of a railroad grant, and remained in possession thereof, residing upon and cultivating the same, at the date of the passage of said act.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(F. W. C.) *Land Office, June 15, 1908.* (C. J. G.)

An appeal has been filed by Curtis M. Fuller from the decision of your office of April 6, 1908, affirming the action of the local officers in rejecting the proof submitted on his homestead entry No. 8561 for the W.  $\frac{1}{2}$  NW.  $\frac{1}{4}$  and W.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 21, T. 161 N., R. 35 W., Crookston, Minnesota, but holding the entry intact subject to the provisions of the act of April 28, 1904 (33 Stat., 527).

The foregoing entry was made by Fuller January 6, 1906, under the act of March 3, 1879 (20 Stat., 472), entitled "An act to grant additional rights to homestead settlers on public lands within railroad limits," reference being had to homestead entry No. 6433 made by him October 10, 1870, for the S.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 24, T. 102 N., R. 33 W., which was relinquished May 20, 1874. Said act provides:

That from and after the passage of this act, the even sections within the limits of any grant of public lands to any railroad company, or to any military road company, or to any State in aid of any railroad or military road, shall be open to settlers under the homestead laws to the extent of one hundred and sixty acres to each settler, and any person who has, under existing laws, taken a homestead on any even section within the limits of any railroad or military road land-grant, and who, by existing laws shall have been restricted to eighty acres, may enter under the homestead laws an additional eighty acres adjoining the land embraced in his original entry, if such additional land be subject to entry; or if such person so elect he may surrender his entry to the United States for cancellation and thereupon be entitled to enter lands under the

homestead laws the same as if the surrendered entry had not been made. And any person so making additional entry of eighty acres, or new entry after the surrender and cancellation of the original entry, shall be permitted so to do without payment of fees and commissions; and the residence and cultivation of such person upon and of the land embraced in his original entry shall be considered residence and cultivation for the same length of time upon and of the land embraced in his additional or new entry, and shall be deducted from the five years' residence and cultivation required by law: *Provided*, That in no case shall patent issue upon an additional or new homestead entry under this act until the person has actually, and in conformity with the homestead laws, occupied, resided upon, and cultivated the land embraced therein at least one year.

The local officers rejected Fuller's proof, which was submitted May 21, 1907, for the reason that said proof shows residence only from January 12, 1906, to date of submission thereof, and no residence upon other lands is shown. He subsequently filed affidavit setting forth that he established residence on the land embraced in entry No. 6433 within six months from the date of said entry and continued to reside upon and cultivate his land to date of its relinquishment; that he was compelled to give up his claim and leave the land by reason of an invasion of grasshoppers which came into the country and devastated it, destroying all manner of crops and rendering it impossible for him to make a living there; that the improvements upon the land embraced in his former entry consisted of a good substantial frame dwelling house, 12 by 16 feet, frame barn large enough for stabling two horses and a cow, a good well, three or four acres of cuttings set out for a grove, twenty acres in cultivation, which were cultivated to crops for three seasons but which were entirely destroyed by grasshoppers. The statements of Fuller with respect to residence on the land embraced in his former entry and for which he claims credit in connection with his present proof, were afterwards corroborated by the affidavits of two other persons claiming to have personal knowledge of the facts.

The proof submitted by Fuller on his present entry shows that he established residence on the land January 12, 1906, his improvements consisting of a frame house, 12 by 16 feet, log barn 12 by 16 feet, curbed well, about three acres cleared, one-half an acre broken and cultivated, and that he was only absent from the land about two months during the summer of 1906, due to the sickness and death of a brother.

Your office rejected the proof for the reason that the instructions under the act of March 3, 1879 (6 C. L. O., 28, 29), contemplate that the original entry must be intact when application under said act is made, reference also being had to the case of Joseph Birchfield (1 L. D., 92), in view of which your office held that Fuller's entry was erroneously allowed; but, as stated, allowed his entry to stand under the act of April 28, 1904.

In the appeal here it is urged that there is a distinction between Fuller's case and the case of Joseph Birchfield which your office fails to recognize, in that the latter case involves application for an additional entry under the act of March 3, 1879, which, in the language of the decision, "contemplates an existing original entry on land which that embraced in the entry shall adjoin;" whereas Fuller is applying for an entirely new entry, which circumstance does not require that the original entry must be intact, for if it must be, a new entry of 160 acres could not be made. The language of the act, however, which is, "or if such person so elects, he may surrender his entry to the United States for cancellation, and thereupon be entitled to enter lands under the homestead laws the same as if the surrendered entry had not been made," leaves no doubt that the original entry must be intact at the date of the act whether the application be for an additional or a new entry thereunder. It was held in the case of Joshua Welch (6 L. D., 575), that the right to make a new or additional entry under said act is limited to those who had taken eighty acres and remained in possession thereof, residing upon and cultivating the same at the date of the passage of the act. Welch claimed that having "taken a homestead on an even section within the limits of a railroad grant," and having "surrendered his entry to the United States for cancellation," he came within the letter and spirit of the statute and was entitled under the act to enter 160 acres of land "the same as if the surrendered entry had not been made." But it was held in said decision:

Upon a careful reading of the entire act, nothing can be more clear than that Congress in passing the act of March 3, 1879, had in view only those who had taken eighty acres, and who remained in possession thereof, residing upon and cultivating the same, at the date of the passage of the act. Welch having, when this statute was enacted, no homestead claim in existence, there was no foundation for a claim of an additional homestead.

It will be observed that although Welch's claim is referred to above as "additional" he had in fact applied to enter 160 acres, his original entry, which was canceled on relinquishment prior to the act of 1879, being for eighty acres.

The decision of your office herein is affirmed.

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**SECOND HOMESTEAD APPLICATION—INTERVENING ADVERSE CLAIM—  
ACT OF FEBRUARY 8, 1908.**

**BAILEY v. GEORGE.**

An application to make second homestead entry which could not legally have been allowed under existing law and which was denied by the land department and pending on motion for review at the date of the passage of the act of February 8, 1908, can not be allowed under that act, to the prejudice of the rights of another under a *bona fide* application for the same land made prior to said act.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(F. W. C.) *Land Office, June 15, 1908.* (J. R. W.)

William A. George moved review of departmental decision of September 12, 1907 (unreported), rejecting his application for second homestead entry for the N.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  and SE.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$ , and SW.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$ , Sec. 27, T. 1 S., R. 20 E., B. H. M., Chamberlain, South Dakota, for which land George A. Bailey filed a junior application and protest against George's application.

May 24, 1906, George made his original entry of land covered by a soldiers' declaratory, unexpired. November 7, 1906, he relinquished, and November 30 applied for second entry for the land here involved, filing his corroborated affidavit that he intended to make the land first entered his home, believing on reliable information that a soldiers' declaratory held only thirty days, but later found held six months, so that he could not safely settle on and improve his land. Meantime he accepted proposal to engage in business, relinquished without consideration, and Emmor B. Maris entered the land.

April 9, 1907, Bailey filed homestead application for the land involved and corroborated sworn protest against George's application, alleging that George at time of his first entry knew the effect of the soldiers' declaratory, and then held or controlled relinquishment of it; that about August 1, 1906, George bought of George B. Redman relinquishment of Redman's entry of the land involved, and August 23, 1906, by his own attorney caused one Mitchel to file contest on Redman's entry, and October 17, 1906, himself filed contest on it, all the time holding Redman's relinquishment; that November 7, 1906, George filed relinquishments of his first entry and of the soldiers' declaratory, and got his brother-in-law Maris to enter and hold that land for use and benefit of George, who, November 30, 1906, filed Redman's relinquishment, withheld since August 1st, and Mitchel's waiver of preference, and then filed his application for second entry. He asked a hearing.

May 17, 1907, you denied George's application and denied a hearing as unnecessary. After proceedings here immaterial, September 12, 1907, your decision was affirmed, for review of which this motion was filed.

February 14, 1908, without passing on the motion, the case, with many others pending on appeal, was inadvertently returned to you "to be considered under act of February 8, 1908 (18 Public)." Under such direction you reconsidered the case, as if presented in first instance, apparently regarding the former decision annulled by the direction for reconsideration. You held that George's application was validated by the act and awarded right of entry to him. Bailey appealed. On examination of the record here on this appeal, the

error of the Department in remanding the case to you appears. The former decisions herein were not vacated, the motion for review was not disposed of, the remand was purely inadvertent and is annulled and recalled, and all proceedings under it are vacated. The case will be disposed of, as it is in fact pending on motion for review of the departmental decision of September 12, 1907.

The sole grounds for review, presented by the motion, are that: (1) the Department misconstrued the act of April 28, 1904 (33 Stat., 527); (2) reversing former rulings and construction generally obtaining and relied upon. Counsel argue:

While a strict construction of the language would doubtless warrant holding that a second entry could be made only where the first was forfeited prior to April 28, 1904, still the administration of this act by the land department heretofore has not been in compliance with this strict construction, and the result is that all over the West the belief is wide-spread that a person who for satisfactory reasons relinquishes his homestead entry without receiving any consideration may make a new entry, if he can show a satisfactory reason for failure to perfect his first entry. . . . The impression has become general . . . that a second entry may be allowed where the party applying can show satisfactory excuse for failure to complete his original entry, though he has forfeited it since passage of the act of April 28, 1904.

The first point of the motion is substantially conceded by the argument, which admits that only by aid of liberal construction, extending the words beyond their plain import, can the act benefit one whose entry was made after April 28, 1904. George's original entry was made May 24, 1906. Nor is the second contention borne out by the fact. June 3, 1904, soon after the passage of the act, instructions (33 L. D., 9) construed the act as benefiting only—

any person who prior to April 28, 1904, made homestead entry, but was unable to perfect the entry on account of some unavoidable complication of his personal or business affairs, or on account of an honest mistake as to the character of the land, provided he made a *bona fide* attempt to comply with the homestead law and did not relinquish his entry for a consideration.

This construction has ever since been uniformly adhered to. Cox *v.* Wells (33 L. D., 657, 659); Circular (34 L. D., 8); David H. Briggs (34 L. D., 60, 61); Circulars (34 L. D., 114, 639, 647); Cox *v.* Wells, review (34 L. D., 435, 436); Instructions (34 L. D., 701); Frank Dolph (35 L. D., 273, 276). Neither contention is well founded in law or fact.

The land department under act of April 28, 1904, had discretion to grant a second right of homestead entry to one who prior thereto had made entry and "was unable to perfect it on account of some unavoidable complication of his personal or business affairs." Had George's entry been made prior to the act, he showed no cause for loss of his entry entitling him to grant of a second right. He says: "I accepted a business proposition which made it impossible to make

a home upon said land." This was no unavoidable complication of his affairs, but his own choice of courses solely with view to his own profit. It was not mischance, but election, not entitling him to grant of another right had this occurred prior to the act.

Of Bailey's protest it suffices to say it charges facts sufficient to require an order for hearing when asked by a rival applicant for the same land, if George had been then entitled to a second entry, or to allowance of one in grace of the land department. If Bailey's charge was true, George held relinquishment of the soldiers' declaratory on the land in his original entry at the time he claimed to be deterred by it from establishing residence or making improvement. If this was true, it negatived his claim of ignorance and mistake as to duration of the declaratory right and showed him excusing himself from compliance with the law under a feigned fear of a right of which he held a relinquishment. If Bailey's charge is true, George while holding the land under his first entry was also holding the tracts here involved from other appropriation by means of a collusive contest, filed by himself against a former entry by Redman, of which he held Redman's relinquishment. If such charges were true, George was not entitled to allowance of a second right of entry, if within discretion of the land department to grant, until after a hearing, but a hearing was properly denied, as under the act of April 28, 1904, he was not entitled to a second right of entry, irrespective of his guilt or not of the reprehensible conduct charged.

But the act of February 8, 1908, gives a second right of entry where the former one was abandoned "for any cause," and was not canceled for fraud nor relinquished for a valuable consideration. Under this liberal act George is entitled to a second entry, regardless of his former acts, as to his first entry, save those not condoned by the statute, and no such acts are charged. The act reads:

That any person who prior to the passage of this act has made entry under the homestead laws, but for any cause has lost, forfeited, or abandoned the same, shall be entitled to the benefits of the homestead laws as though such former entry had not been made . . . . *Provided*, That the provisions of this act shall not apply to any person whose former entry was canceled for fraud or who relinquished the former entry for a valuable consideration.

The question now is, not whether George now has right to make a second homestead entry, but whether his application, utterly without merit when made, once denied, and pending on review when the present right was granted, will defeat another *bona fide* application by a competent person made prior to origin of George's present right.

The Department construes the act of February 8, 1908, as granting a right then originating, not retroactively operative, to give life as of earlier date to an application without merit or right, to defeat a meritorious prior application. Prior to February 8, 1908, Bailey

was applicant to enter the land. It was free of Redman's entry and subject to entry by the first legal applicant. There was no obstacle to Bailey's entry, but the meritless application of George, who was disqualified and not entitled to make application. His invalid application can not be cured by a grant afterward made to take priority over a lawful application by one qualified. A settlement right is allowed priority only from date when the settler is qualified. *Short v. Bowman* (35 L. D., 70). A pending application is no bar to another application, and on rejection of the first, the second is to be considered and disposed of in the order of filing, and the applications must be determined by the law governing the applicants' rights at the time of filing their respective applications. *Miller v. Robertson* (35 L. D., 134). With Bailey's application was his protest against George's entry, and the issue was made whether George then had right to make a second entry. It being determined that George had no right, Bailey stands as the first legal applicant, and his entry should be allowed.

The motion therefore presents no reason to vacate, recall, or modify the decision of September 12, 1907, and it is adhered to.

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**LOCATION OF WARRANTS, SCRIP, CERTIFICATES, SOLDIERS' ADDITIONAL RIGHTS, ETC.**

JOHN M. RANKIN.

Circular of February 21, 1908, requiring publication and posting of notice of applications to make location of scrip, warrants, certificates, soldiers' additional rights, and lieu selections, discussed, particularly with respect to the provisions thereof relating to soldiers' additional rights, and adhered to.

*Acting Secretary Pierce to the Commissioner of the General Land*  
(F. W. C.) *Office, June 16, 1908.* (E. F. B.)

A petition has been presented by John M. Rankin for modification of circular of February 21, 1908 (36 L. D., 278), requiring publication and posting of notice in respect to scrip entries, so far as the same relates to recertified soldiers' additional homestead certificates.

The circular referred to requires the "locator or selector, within twenty days from the filing of his location or selection, to begin publication of notice thereof at his own expense, in a newspaper to be designated by the register as of general circulation in the vicinity of the land, and to be nearest thereto."

The object of this notice is to advise occupants of the land applied for of the intention to locate or select the land, in order that they may have an opportunity to file objection to such location or selec-

tion and to establish and protect any interest or claim they may have to the land.

Under the general power of supervision conferred by the organic act, the Secretary of the Interior would be authorized to establish such rules and regulations as may in his judgment be essential to the proper and efficient administration of the laws relating to the disposal of the public lands, whether such power is given by any particular statute or not, provided such rule and regulation is not in violation of statutory right.

There is, however, direct authority for the exercise of such power given by section 2478, Revised Statutes, which with reference to the various laws and systems for the disposal of the public lands provides that—

The Commissioner of the General Land Office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this title not otherwise specifically provided for.

The regulations complained of violate no statutory right and the requirements imposed upon applicants who seek to enter lands under scrip or certificate location are not so onerous or burdensome as to amount to a deprivation of any right or privilege, but, on the contrary, when considered with reference to the welfare of the general public, are wise and salutary.

The petition is denied.

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NORTHERN PACIFIC—ADJUSTMENT—SETTLED CONTROVERSIES—ACT  
JULY 1, 1898.

NORTHERN PACIFIC RY. CO. *v.* MAHER.

The act of July 1, 1898, providing for the adjustment of conflicting claims between the Northern Pacific Railway Company and individuals to lands within the limits of the company's grant, contemplates only such conflicting claims as had an actual or potential existence at the date of its passage, and can not be invoked for the purpose of reviving claims which had theretofore been finally determined and the adjudication accepted by the parties as settling the controversy.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(F. W. C.) *Land Office, June 16, 1908.* (E. O. P.)

The Northern Pacific Railway Company has appealed to the Department from your office decision of June 1, 1907, denying its application for adjustment under the act of July 1, 1898 (30 Stat., 597, 620), of its claim to the SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 33, T. 31 N., R. 40 E., Spokane land district, Washington.

The right to the tracts described was formerly in dispute between the railway company and John T. Maher, who made preemption cash entry thereof June 22, 1889. The proof offered by Maher established that he made settlement on the land in June, 1883, and though a hearing was subsequently ordered and had to determine the status of the land at the date notice of withdrawal thereof on account of the grant to the railway company was received at the local land office, no testimony was introduced to overcome the showing made as to settlement. The notice of withdrawal above referred to was received at the local office June 16, 1884. June 26, 1895, your office decided that the land was, by the provisions of the act of April 21, 1876, excepted from the grant to the railway company, by virtue of Maher's settlement and awarded the land to him. This action was affirmed by the Department August 12, 1896, and nothing appears in the record to indicate that the controversy was thereafter renewed, unless the filing of the application under consideration, bearing date of September 25, 1905, is to be regarded as a continuation thereof.

Counsel for the railway company contend at the outset that it is immaterial whether the original controversy touching these tracts was correctly or erroneously decided, though much of the argument on appeal is directed to a discussion of the merits of that controversy, and it is strongly insisted that decisions of the Department upon which its award of the land to Maher is based are erroneous. It is also contended that there is no warrant in the act of July 1, 1898, *supra*, for holding that the claims subject to adjustment thereunder should have been in dispute at the date of the passage of the act.

The first proposition advanced is in harmony with the views of the Department. It is therefore unnecessary to consider anything connected with the former contest between Maher and the railway company in order to determine the questions here presented, which involve only the right of adjustment under the act of July 1, 1898, *supra*.

The Department is not, however, willing to admit that the disputes which it was the purpose of the act to adjust need not have existed at the date of the passage of the act. The holding of the courts that the statute applies equally to patented as to unpatented lands is not authority for the contention that the disputes arising after the passage of the act may be adjusted thereunder. It is true the Supreme Court in the case of *Humbird v. Avery* (195 U. S., 480, 506), in speaking of patented lands falling within the operation of the act, employed the terms "*are in dispute*"—words of the present tense. This language must, however, be read in connection with the particular feature of the case then under consideration by the court

and in the light of the purpose of the act as declared by it in the same case, in the following language (p. 499) :

Obviously, the first inquiry should be as to the object and scope of the act of 1898. Upon that point we do not think any doubt can be entertained, if the words of the act be interpreted in the light of the situation, as it actually was at the date of its passage. Here were vast bodies of land, the right and title to which was in dispute between a railroad company holding a grant of public lands, and occupants and purchasers, both sides claiming under the United States. The disputes had arisen out of conflicting orders or rulings of the land department, and it became the duty of the Government to remove the difficulties which had come upon the parties in consequence of such orders. The settlement of those disputes was, therefore, as the Circuit Court said, a matter of public concern. If the disputes were not accommodated, the litigation in relation to the lands would become vexatious, extending over many years and causing great embarrassment. In the light of that situation Congress passed the act of 1898, which opened up a way for an adjustment upon principles that it deemed just and consistent with the rights of all concerned—the Government, the railroad grantee, and individual claimants.

It is clear from this definition of the object and scope of the act that only those disputes which had an actual or potential existence at the date of its passage were subject to adjustment thereunder, and it is not to be extended for the purpose of reviving stale claims which had already been determined and the adjudication thereof accepted by the parties as final. As was stated in the decision of the Circuit Court in the case cited (110 Fed., 465, 468), which was affirmed on appeal, "the act refers to conditions existing at the time of its passage."

So far as the Department is concerned, the original dispute between Maher and the railway company was finally settled more than nine years prior to the filing of the application of the company now under consideration, which action constitutes the only evidence that any controversy existed at the time of the passage of the adjustment act. Congress never intended that the act should operate to revive matters then in repose, though they might have been the subject of former disputes.

All *actual* controversies growing out of any of the causes specified are properly subject to adjustment under the act, provided only they existed at the date of its passage, even though not then evidenced by active litigation either before the land department or the courts. But the controversy must have had substantial basis in fact in order to bring it within the operation of the statute. Herein lies the distinction between the case mentioned in the argument of counsel and the one under consideration. That case was, at the date of the passage of the adjustment act, the subject of litigation in the courts and was a live subsisting controversy, while this one appears to have been settled by the Department prior to the passage of the act and no at-

tempt made to continue it in the courts. It is doubtful if there existed any real foundation for the assertion of any claim to the land by the company at the time its application for adjustment was filed, even though the original decision of the Department were held to be erroneous, as the record shows that final certificate was issued July 22, 1889; from which date the homestead entryman and his grantees appear to have held adversely to the railway company. Adverse possession, if continuous for such a period, would be sufficient to defeat the setting up and successful assertion of any right claimed by the company under its grant. (Sec. 1158, Pierce's Washington Code, 1905.) It is not urged in argument that the final disposition of the present case was in any manner involved in the decision of the court in the case to which the Department's attention is directed, nor is any showing made that the railway company intended or expected, at the time that suit was instituted, to obtain a decision therein that would be controlling in this or other similar cases. The circumstances tend to destroy the foundation for any such presumption, as that decision was rendered in August, 1898, and the company has rested for seven years before attempting to invoke it. Under such circumstances, and in the absence of any affirmative proof that the settlement of the dispute prior to July 1, 1898, was not accepted as final, the conclusion that the company had, prior thereto, abandoned its claim to the land is fully warranted.

It would appear, therefore, that the company had no claim properly subject to adjustment under the act of July 1, 1898, *supra*. The case presented falls within the rule announced by the Department in the case of Northern Pacific Railway Company *v.* Peone *et al.* (35 L. D., 359), wherein the right to reopen a settled controversy for the sole purpose of future adjustment was denied. The decision appealed from is hereby affirmed.

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NORTHERN PACIFIC—ADJUSTMENT—ACT OF JULY 1, 1898.

MILLER *v.* NORTHERN PACIFIC RY. CO.

Title to the odd-numbered sections within the primary limits, and subject to the operation, of the grant to the Northern Pacific Railway Company, vests at the time of definite location of the line of road, and thereafter the company has full power to sell any such lands, regardless of whether they are surveyed or unsurveyed.

While under the third proviso to the act of July 1, 1898, the company is accorded the privilege to relinquish its claim to any lands within the primary limits of its grant, in favor of a settler thereon after the passage of said act and subsequent to the vesting of title in the company by definite location, and to select other lands in lieu thereof, it is not required to do so, and the land department is without authority to compel such relinquishment.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(F. W. C.) *Land Office, June 17, 1908.* (E. O. P.)

John Wesley Miller has appealed to the Department from your office decision of July 18, 1907, rejecting his application to make homestead entry of the NW.  $\frac{1}{4}$ , Sec. 11, T. 20 N., R. 24 E., Waterville land district, Washington.

The tract described lies within the primary limits of the grant to the Northern Pacific Railroad Company on definite location of its branch line, May 24, 1884. Miller alleges settlement on the land December 7, 1904, prior to survey. His homestead application was presented January 9, 1906, the same day the township plat of survey was filed in the local office, and was held pending the result of a request made of the railway company to relinquish its claim to the land. The company having sold the tract August 12, 1901, was unable to comply with the request and the application of Miller was accordingly rejected.

The statement contained in your decision that had the sale of the land by the company been made after instead of before settlement thereon by Miller "another question would be presented" affords some foundation for holding that a relinquishment by the railway company of its claim to the land might, under certain conditions, be insisted upon. This is evidently the construction placed by Miller upon said decision, the effect of which the Department is asked to extend by holding either that the company is without authority to sell its granted lands prior to survey or that any attempted sale thereof after the passage of the act of July 1, 1898, must be made subject to the right of a settler before survey to retain the land.

The right of the railway company to sell the odd-numbered sections falling within the primary limits and subject to the operation of its grant at the time of definite location, is in no manner conditioned upon a survey thereof. Definite location fixed the time of the vesting of title in the company and, coincident therewith, the right to transfer that title passed to the company unless restricted by the conditions of the grant. Though a survey is necessary to identify the grant, it has nothing to do with the vesting of title to the land falling within the grant as thus identified. (St. Paul & Pacific *v.* Northern Pacific, 139 U. S., 1, 5.)

The contention of counsel that any sale by the company prior to survey is subject to the rights of a settler is well founded, but it still remains to determine the extent of the settler's claim. The company having definitely located its road long prior to the settlement of Miller, its rights are paramount, unless by its acceptance of the provisions of the act of July 1, 1898, *supra*, it waived its superior claim. Miller did not, however, attempt the initiation of any claim to the land prior to the passage of said act, and his rights thereunder

are limited to those conferred by the third proviso thereof, which reads as follows:

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.

There is nothing in this proviso which indicates an intention to require the railroad grantee to relinquish lands embraced in settlements of the character therein mentioned. The railroad grantee can not and should not be compelled to do more than its acceptance of the provisions of the act reasonably require, and, in the absence of language clearly evidencing an intent on its part to waive its claim to lands to which its title had already vested and about which there was then no dispute, there is no ground for holding that its contract bound it to recognize a superior right in one who thereafter attempted to initiate a claim thereto. The Department, in the case of Northern Pacific Ry. Co. *v.* Violette (36 L. D., 182, 186), held that, under said proviso, the railway company *might* relinquish its claim to such lands to the end that the claim of the settler might be respected by the land department, but that the company could not be required to relinquish. It is clear, therefore, that a sale of the land the claim to which might be relinquished by the railway company under said proviso, whether made before or after the settlement on account of which relinquishment is sought, is immaterial, as the railway is not bound to relinquish and for its refusal to do so it need offer no justification.

In the present case the railway company has been requested to relinquish its claim to the tract applied for by Miller and has declined to do so. This action the Department cannot control and it is therefore powerless to recognize the claim asserted by Miller by permitting him to make entry of the land.

The decision of your office rejecting the application is, for the reasons herein given, affirmed.

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CONFIRMATION—QUALIFICATION OF ENTRYMAN—PROVISO TO SECTION 7, ACT OF MARCH 3, 1891.

EDWARD JENNESS.

Where no contest, protest, or proceeding was initiated against an entry within two years after the issuance of certificate, and the entryman's qualification is affirmatively shown by the record and the entry appears to be in all respects regular, the land department is bound to issue patent, under the proviso to section 7 of the act of March 3, 1891, notwithstanding a subsequent charge that the entryman was disqualified to make the entry.

*First Assistant Secretary Pierce to the Commissioner of the General  
(F. W. C.) Land Office, June 17, 1908. (E. F. B.)*

With your letter of June 9, 1908, you transmit the record in the homestead entry of Edward Jenness, made March 27, 1899, for the W.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$ , the NE.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$ , Sec. 7, and the SE.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$ , Sec. 6, T. 3 N., R. 18 E., Stockton, California, upon which final certificate issued May 27, 1905.

This land being within the Stanislaus national forest, the Forest Service was requested to report thereon.

December 19, 1906, your office was requested by the Forest Service to suspend action upon this entry until a forest officer was able to examine it and report thereon. June 3, 1907, a deputy forest ranger reported upon the entry and upon that report the Acting Forester by letter of August 9, 1907, recommended that the entry be canceled.

The entry was recommended for cancellation for the reason that the land is strictly timber land and not suitable for agriculture, but your office held that while the report of the forest ranger showed that claimant's improvements and cultivation are meagre, there is no denial that he lived on the land continuously, and as, in your judgment, the facts reported were not sufficient to furnish a basis for ordering a hearing with a view to the cancellation of the entry, the Forest Service was advised, by letter of October 30, 1907, that unless further adverse report was offered against said entry within thirty days, the entry will be considered with a view to the final disposition thereof.

December 26, 1907, the Acting Forester submitted for consideration a further report upon said entry, to the effect that claimant and his brother were the owners of a large amount of land at the time the entry was made.

Upon this report your office by letter of January 18, 1908, held that as no adverse report or protest against the validity of the entry was made within two years from the date of final certificate, and as a mere request for suspension of action on an entry not based upon a charge affecting its validity is not sufficient to prevent the confirmation of an entry under the proviso to the seventh section of the act of March 3, 1891, the case was closed.

The charge now made against the entry is the disqualification of the entryman, because of his ownership of more than 160 acres of land at date of entry. That involves the question as to whether an entry is void if made by a person not qualified to take, and if void whether the Department may withhold the issuance of a patent, notwithstanding no protest or contest against the validity of the entry was pending within two years of the issuance of the final receipt.

In *Montana Implement Co.* (35 L. D.; 576) the entryman, a corporation, had submitted the usual proofs of qualification under the regulations of your office in force at the time when final proofs were submitted, but as those proofs did not affirmatively show that each individual member had not received by assignment or otherwise the quantity of land which in the aggregate with the land applied for will exceed 320 acres, your office, after two years from date of final certificate, required the entryman to submit such affidavit.

Upon appeal it was held that the certificate having issued upon proof made in full compliance with the regulations in force at that time, your office was without jurisdiction to initiate any proceeding by requiring additional proof of qualification, except for causes which would prevent confirmation irrespective of the lapse of time from the date of entry. It also cited cases holding that an entry made by one disqualified from making entry was nevertheless confirmed, the entry appearing upon the face of the record to be regular in all respects.

No decision is herein made as to whether the act requires the issuance of a patent upon an entry which is shown upon the face of the record to be void, but where, as in this case, the qualification of the entryman is affirmatively shown and the entry appears to be regular in every respect, and as no such protest or proceeding had been commenced against the entry within two years from the date of final certificate, your decision holding that you have no power to withhold the issuance of patent is affirmed.

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#### SOLDIERS' ADDITIONAL—COMBINATION OF RIGHTS—APPROXIMATION.

WILLIAM C. STAYT.

While the rule of approximation is permitted in the location of combinations of soldiers' additional rights, it has never been held by the Department that such rights might be so combined and located as by aid of the rule to acquire areas largely in excess of the aggregate acreage of the combined rights; and the allowance of entry by the Commissioner of the General Land Office, on such a location, prior to the decision of the Department that the rule could be invoked in the location of combinations only where the excess is less than the average of the combined rights, conferred no such vested right upon the entryman as would entitle him to equitable consideration on the ground that the entry was made under authorized existing practice.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(F. W. C.) *Land Office, June 19, 1908.* (P. E. W.)

The Department has considered the appeal of William C. Stayt from your office decision of April 13, 1908, holding for cancellation

his entry, as assignee of James Hines, Rascelas S. McClain, Hiram Welling, and Sarah A. Slater, widow of Sanford Slater, under sections 2306 and 2307 of the Revised Statutes, for lot 3, Sec. 20, T. 33 N., R. 37<sup>3</sup>E., Spokane, Washington, containing 34.75 acres of land, upon which final certificate No. 8968 issued January 3, 1908, together with excess receipt No. 6947 for \$21.33 as payment for 17.06 acres.

Claimant was allowed in the alternative to furnish additional, valid, and sufficient rights aggregating, with those already furnished, the full acreage of the land embraced in said entry.

The entry is based on the soldiers' additional homestead rights, apparently valid and duly assigned to the entryman, of James Hines for 4.41 acres; Rascelas S. McClain for 2.24 acres; Sarah A. Slater, widow of Sanford Slater, 3.36 acres; and Hiram Welling for 7.68 acres—aggregating 17.69 acres.

It appears that the local officers allowed said entry in accordance with directions contained in your office letter of April 12, 1907.

In the decision appealed from your office held that in view of the departmental decisions in the cases of Ole B. Olsen (33 L. D., 225), and George P. Wiley (36 L. D., 305), it had erred in authorizing the allowance of the entry in question.

It is contended in the appeal that the said case of Wiley, *supra*, "followed precedent and affirmed the settled rule of approximation," while the decision appealed from "violates and overturns the rule of approximation in so far as it relates to consolidation of soldiers' additional rights in one applicant," and it is further urged that this case is within the rule and reason of the case of Roy McDonald (36 L. D., 205), in that it presents a completed location and entry which was "made in good faith in accordance with the settled rule of practice which has existed for several years."

In the said case of Olsen, *supra*, the Department, in reversing your office decision that each soldier's right must be located upon a separate tract of land, said:

There seems to be no statute or departmental regulation prohibiting the assignee of two or more soldiers' rights of additional entry from locating them upon the same tract of land, provided their aggregate amount is equal to the amount of land located upon. The Department has held that the owner of a soldier's right of additional entry may sell and assign it in such quantities as he may choose . . . where a number of such fractional portions of rights have been assigned to the same person, he is entitled to enter an amount of public land equal to the aggregate amount of all such fractions owned by him.

In that case the application of the rule of approximation was not in question. Thereafter, in the case of George P. Wiley, *supra*, the

rule of approximation was invoked in connection with such aggregation of rights, and it was held that:

The holder of a number of fractional portions of different soldiers' additional rights may combine and locate them upon one body of land of their aggregate quantity; but the rule of approximation can not be invoked in such case unless the excess area of the combined rights be less than the deficiency would be if the smallest legal subdivision of the location were eliminated and unless all other prerequisites to the application of the rule exist as to each separate fractional portion of right involved in the location.

The Department said therein that the case—

involves the right of combining such fractional rights in such manner as that, under the rule of approximation, any trifling excess over the half of the smallest legal subdivision of land, 40 acres, will entitle the owner to purchase the remainder thereof, thus nullifying, to that extent, and defeating the purpose of, the act of Congress which abolished private cash entries of public lands.

It can not be reasonably urged that the act granting soldiers' additional rights contemplated such an extension of the right. The act expressly limits the right to enter "so much land as when added to the quantity previously entered shall not exceed one hundred and sixty acres." Conceding the utmost liberty in the disposal of this "unfettered gift," it is still the duty of the Department to provide means for preventing its use in a manner evasive of other statutes relating to the disposal of public lands. Thus while recognizing the soldier's privilege to assign his additional right in as many different fractions as he may see fit, it was seen that this presented a different case from all other classes to which the rule of approximation was applicable, since in all others there was but one entire right, one entry, and one application of the rule, while in this case many entries may be made under one original right. And if with each entry there might be an application of the rule of approximation, it is apparent that the various assignees of the fractional rights would, in the aggregate, obtain a much larger quantity of land than the soldier himself could have obtained under the act which expressly limits the gift to only enough land to eke out the 160 acres granted by the general homestead law.

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Thus while, as said in the case of Ole B. Olsen (33 L. D., 225), "where a number of such fractional portions of rights have been assigned to the same person, he is entitled to enter an amount of public land equal to the aggregate amount of all such fractions owned by him," it is entirely clear from the foregoing that the applicant herein may not, by combining six fractional rights in two portions of 20.01 and 20.03 acres, respectively, have two applications of the rule of approximation so as to permit him to purchase 39.60 acres upon a right of .04 acres. In this manner any and all soldiers' additional rights could be made the basis of purchase of many times 160 acres instead of a base limited to filling out the one original homestead right.

Subsequently, in the case of George E. Lemmon, assignee (36 L. D., 417), the Department said:

In view of the fact that the rule of approximation "is not statutory, but is granted in expediency, amounting in some cases under the homestead law at least almost to a rule of necessity," as stated in the approved opinion of the Assistant Attorney-General for this Department of June 30, 1900 (30 L. D., 105), it is considered that as the necessity does not exist where the applicant

assignee seeks to locate two or more fractional portions of different soldiers' additional rights upon one body of land, the reason for the rule, in a measure, ceases, and in applying the rule of approximation to such a case, the rights will be severally considered, and where the excess amount applied for is less than the average of the rights sought to be used the entry may be allowed.

Applying this rule to the case under consideration, the excess is found to be more than four times the average of the rights tendered, and the entry should not have been allowed.

It remains to consider whether by reason of the fact that this entry has been allowed, and the fees, commission, and price of excess acreage have been paid, this case is controlled by that of Roy McDonald, *supra*, cited by the appellant. In that case by a chain of assignments a military bounty land warrant had come into possession of and had been located by the appellant, on land without the State limits of Missouri, in which State alone the private cash entry of lands was then allowable. Many such locations had previously gone to patent, but it was held in the case of Lawrence W. Simpson (35 L. D., 399), as modified on review (35 L. D., 609), that such warrants "may be located only upon lands subject to private cash entry at the date of the location," and thereupon McDonald's location was canceled.

Thereupon it was urged on appeal—

that as the location was made in good faith, relying upon long-established rules and clear adjudications of the Department, the rights initiated thereunder should, in equity and justice, be protected, notwithstanding the change of ruling in the Simpson case.

The Department said:

Upon what reasonable ground can all possible protection be denied those similarly situated—that is, those who perfected location under the previous decision prior to the change in construction of the statutes, but whose claims by mere chance had not been reached for patent at the date of the Simpson decision. . . .

I am fully impressed that my plain duty under the circumstances presented requires that recognition be given to all locations completed under the faith of and in the light of the holding of this Department, where the lands located had not been at the time of said locations reserved or appropriated to any particular purpose and in which no question as to the right under the location is raised, except that the land located is without the limits of the State of Missouri.

Thus, it clearly appears, the warrant there in question had been acquired and located in reliance upon a long-standing and departmentally-adjudicated construction of the statute, and upon the fact that patents had been and were being issued upon similar locations.

In the case under consideration, on the contrary, there has never been any law or published departmental regulation or decision expressly authorizing the combination of several soldiers' additional

homestead rights in a location upon a tract of land nearly twice as large as the aggregate acreage of such rights, by aid of the rule of approximation. Neither have the progressive steps in the history of this right given warrant for the claim sought to be asserted herein.

Following the case of *Webster v. Luther* (163 U. S., 331), such right has been held assignable and transferable, then divisible, then combinable with other such rights, and finally, in the case of *George E. Lemmon*, assignee, *supra*, it has been given the aid of one application of the rule of approximation and that to the extent of the average acreage of the rights tendered.

But it has nowhere been held and the Department finds no warrant for holding, that there may be an application of the rule of approximation for each one of the combined rights. Such right and the rule in question are not akin nor logically connected. The right is one to eke out the partially used homestead right of the soldier to the full extent of 160 acres. The rule is one which grew out of the necessity to render the existing subdivisions of land available for the nearest, in extent, adaptable right, not necessarily a soldiers' additional right, and is invoked for the purpose of adjustment where the necessity for its application exists. But that necessity is not to be created by such selection and combination of rights as was considered in the case of *George P. Wiley*, *supra*. The right was never intended to provide an unearned increment but only to aid in completion of the homestead right, and the proper limitation upon its exercise is found in its manifest reason and purpose.

It is believed that by means of their permitted division and combination, and by aid of the rule of approximation, as announced in the case of *George E. Lemmon*, *supra*, it will be found possible to satisfy all remaining soldiers' additional rights. There appears no reason and no warrant for such an extension of the rule as is asked herein.

In this conclusion there is no denial or impairment of any existing right or of any well-founded claim. It is as if the consideration for a tract of land had not been fully paid and the purchaser were called upon to complete payment before receiving conveyance.

The decision appealed from allows the entry to stand subject to tender of additional rights to the full extent of the acreage entered. With the modification herein, which gives claimant the benefit of the average acreage represented by the additional rights tendered, the Department is affording claimant all the relief to which he is entitled under proper construction of the legislation bestowing such rights.

As modified, your decision is hereby affirmed.

## FOREST RESERVE—PROCEEDINGS ON CHARGES BY FOREST OFFICERS.

## CIRCULAR.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
Washington, D. C., June 23, 1908.

*Registers and Receivers and Special Agents of the General Land Office.*

The following circular is substituted for the circulars of May 3, 1907 (35 L. D., 547), and June 26, 1907 (35 L. D., 632) :

1. A government officer in charge of any national forest may initiate a contest or other proceeding before the land department respecting the unlawful occupation or use of land within a national forest by reason of a claim made thereto under any of the public land laws.

2. As a basis for such proceeding such officer shall file in the local land office for the district in which the lands involved are located a complaint signed by him in his official capacity, but not under oath or corroborated, setting forth facts respecting the alleged unlawful occupation or use of the public lands.

3. Upon the filing of a sufficient complaint in any case in which final certificate has not issued, the register and receiver will issue a notice with a copy of such complaint attached thereto to the defendant, notifying him that unless he within thirty days from the receipt of such notice files in their office a denial or answer to such charges in writing and under oath, the truth of such charges will be taken as confessed by him and any entry, filing or claim asserted to such land, under the land laws by such party may be declared forfeited or canceled without further notice to him.

4. When a complaint has been filed respecting any claim upon which final certificate has issued, or where denial under oath is filed in answer to a notice issued under the preceding paragraph, the same will be at once forwarded to the Commissioner of the General Land Office and the further progress of the matter will be in accordance with the circular of September 30, 1907 (36 L. D., 112), as amended November 25, 1907 (36 L. D., 178), defining the manner of proceeding upon special agents' reports.

Very respectfully,

S. V. PROUDFIT,  
*Acting Commissioner.*

Approved:

FRANK PIERCE,  
*Acting Secretary.*

## SALE AND USE OF TIMBER ON UNRESERVED PUBLIC LANDS IN DISTRICT OF ALASKA.

## REGULATIONS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,*Washington, D. C., June 24, 1908.*

Section 11 of the act of May 14, 1898 (30 Stat., 414), provides:

SEC. 11. That the Secretary of the Interior, under such rules and regulations as he may prescribe, may cause to be appraised the timber or any part thereof upon public lands in the District of Alaska, and may from time to time sell so much thereof as he may deem proper for not less than the appraised value thereof, in such quantities to each purchaser as he shall prescribe, to be used in the District of Alaska, but not for export therefrom. And such sales shall at all times be limited to actual necessities for consumption in the District from year to year, and payments for such timber shall be made to the receiver of public moneys of the local land office of the land district in which said timber may be sold, under such rules and regulations as the Secretary of the Interior may prescribe, and the moneys arising therefrom shall be accounted for by the receiver of such land office to the Commissioner of the General Land Office in a separate account, and shall be covered into the Treasury. The Secretary of the Interior may permit, under regulations to be prescribed by him, the use of timber found upon the public lands in said District of Alaska by actual settlers, residents, individual miners, and prospectors for minerals, for firewood, fencing, buildings, mining, prospecting, and for domestic purposes, as may actually be needed by such persons for such purposes.

2. LIMITATIONS UPON SALES.—Timber upon the public lands in Alaska will be sold only in such quantities as are actually needed and will be used from year to year in the District of Alaska, and not for export therefrom.

3. APPLICATIONS FOR SALE—PLACE TO FILE—CONTENTS.—Applicants to purchase must file with the receiver of the United States land office for the district wherein the lands to be cut over are situated, a petition subscribed and under oath setting forth (a) the name or names, postoffice address, residence and business occupation of the petitioners who apply to purchase timber; (b) the amount, in board-feet or other proper unit of measurement, of timber it is desired to purchase; (c) the place in Alaska where such timber is to be used, and the proposed use; (d) the necessity for taking said timber, and that the use contemplated will consume the whole thereof within twelve months from the date of authorization to cut; (e) a description, by reference to survey, or other natural boundaries, and courses and distances, of the vacant, unoccupied, non-reserved Alaska public lands from which it is proposed to cut, sufficient to properly identify such land; (f) a statement that the petitioners will pay a reasonable stumpage for said timber or for the appraisal thereof, and that there is to said petition attached a draft or postoffice money order payable

to the above receiver of the local land office, in the sum of \$50, as an evidence of good faith, to be applied to the purchase price of said timber, or its appraisal cost if purchase is not made; (g) that no trees will be cut under said petition other than those of the size, kind, and maturity, or in excess of the total amount which shall be designated by the person making the appraisal for the Government; that each tree cut will be used to a diameter in the top specified by the person making the appraisal, or to a smaller diameter; that all lops, tops, and necessarily cut underbrush made in taking said timber will be piled in small compact piles or otherwise disposed of as required by the person making the appraisal, in a manner to prevent danger of forest fires.

4. ACTION UPON APPLICATIONS, BY RECEIVER.—Upon the first business day following the filing of any such petition, the receiver of the local land office (retaining the remittance attached) will mail said petition to the special agent of the General Land Office designated as Chief of the Field Division including said District of Alaska, with a request that the truth of the petition be inquired into and an appraisal of the timber made. Where such Chief of Division has designated a special agent near the land to make appraisements, the receiver will forward the petition to said agent direct, giving due notice thereof to the Chief of Field Division.

5. ACTION UPON APPLICATIONS, BY SPECIAL AGENTS.—The special agent designated shall at once investigate as to the truth of said petition, and thereupon go upon the lands therein described and estimate and appraise the timber trees petitioned to be sold. If the said agent finds true the facts in said petition recited, he will proceed as follows: (a) survey and properly mark on the ground the lines bounding the land described in the petition; (b) determine the kind, estimate the quantity, and appraise the stumpage price of timber to be sold under said petition; (c) prepare, in triplicate, a report addressed to the Commissioner of the General Land Office, referring to said petition and setting forth the agent's field notes of survey and markings of lands to be cut over, the kind, estimate and appraisal of the timber trees to be cut; that petitioners accept such description of land in lieu of the description in the petition (if in anywise different), as well as the kind, estimate and price as fixed by the agent; that petitioners will take and use the timber trees within twelve months from date of authorization to cut for the purposes in the petition stated; that petitioners have delivered to the said special agent postoffice money orders or bank drafts or certified checks for said appraised amount, made payable to the receiver of the proper local land office; that said money orders, drafts, or checks shall not be held payment for said timber until same are converted into cash by said receiver and finally paid by the office or bank upon which

drawn; that the Commissioner of the General Land Office reserves the right to reject said sale and prevent further cutting under said petition and report. The special agent shall deliver one copy of said report to the petitioner; on the other two copies he will require the petitioner's signature under proper date and indorsement: "Within amounts and conditions hereby accepted."

6. **WHEN CUTTING AND REMOVAL MAY BEGIN.**—As soon as the special agent shall accept said money order, draft, or certified check and shall secure the petitioner's signature and indorsement as above required, petitioners may commence taking timber under said petition and sale.

7. **APPRAISAL—MINIMUM PRICE.**—No special agent or other officer shall in any event appraise any timber suitable for saw timber or mine timbers at less than one dollar per thousand feet board measure, nor any poles 30-foot or less, at less than one-fourth cent per linear foot, nor any poles or piling 50-foot or over at less than one-half cent per linear foot, nor any shingle bolts at less than fifty cents per cord, nor any wood suitable only for fuel or mine lagging at less than twenty-five cents per cord. Subject to such minimum price, the agent will, in the absence of a competitive market, determine stumpage value by deducting from the manufactured-article price for like material, the cost of manufacture plus a fair profit upon the time and capital required to manufacture.

8. **DISPOSITION OF MONEYS—RECEIPTS.**—When a petition, accompanied by the remittance mentioned in section (f) of paragraph 3, is received by the receiver of public moneys, he will immediately issue and forward to the petitioner the new form of receipts (4-131) for the amount transmitted. The receipt must contain a full description of the money order, bank-draft, or certified check, with the words "Subject to Collection." Such money orders, drafts, and checks must be immediately deposited in the receiver's depository for collection, to be placed to his official credit, as "Unearned Fees and other Trust Funds." When the appraised amount mentioned in paragraph 5 is received, the receiver will immediately issue an additional receipt therefor, with a similar notation as to the form of remittance, and the words "Subject to Collection." This remittance must also be immediately deposited for collection, to be placed to the receiver's official credit, as "Unearned Fees and other Trust Funds." When the receiver is notified by the Commissioner of the General Land Office that the sale is approved, he will immediately deposit the full amount to the credit of the Treasurer of the United States as "Sales of Timber, Act of May 14, 1898," and report such amounts as a special fund, in the monthly and quarterly accounts current, rendering a separate abstract of collections (form 4-105) therefor. Further receipts will not issue for the amounts when they

are reported collected by the depository, but the petitioner will be notified that the amount has been collected and he is credited therewith.

9. EXAMINATIONS AFTER CUTTING.—At convenient times during cutting, or after any sale, the special agent will examine the lands cut over, and submit report as to compliance with the terms of the sale; or if cutting is being conducted in violation of the terms of sale, will immediately stop the cutting and report the matter for action.

10. LIMITED FREE USE BY SETTLERS, ETC.—Persons designated in the last sentence of section 11, act of May 14, 1898, may take, in amount not exceeding \$50 in value in any one calendar year, free of charge and without application or previous permit, timber for their own actual needs for firewood, fencing, buildings, mining, prospecting, or other domestic purpose, but not for sale, or use by others. Where such persons are unable to take such timber in person, they may employ a servant or agent to cut and deliver the timber so taken. No person, servant, or agent shall in any calendar year take hereunder, either for himself, or as agent for another or others, timber of the stumpage value of more than \$50. Attention is directed to the fact that the law extends the foregoing *free* use of timber to settlers, residents, individual miners and prospectors *only*, and not to associations or corporations.

Very respectfully,

S. V. PROUDFIT,  
*Acting Commissioner.*

Approved:

FRANK PIERCE,  
*Acting Secretary.*

TIMBER CUTTING—FORT HALL IRRIGATION PROJECT—SECTION 4, ACT OF JUNE 3, 1878.

INSTRUCTIONS.

The provision in section 4 of the act of June 3, 1878, that nothing contained in said act shall prevent "the taking of timber for the use of the United States," furnishes no authority to permit the cutting of timber from the public lands for construction work in connection with the Fort Hall Indian reservation irrigation project, provided for by the act of March 1, 1907.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(F. W. C.) *Land Office, June 25, 1908.* (C. J. G.)

The Department is in receipt of your office letter of June 13, 1908, submitting two separate applications by John J. Granville, superintendent of irrigation, Fort Hall, Idaho, to cut timber on certain de-

scribed public lands for use in connection with the Fort Hall Indian reservation irrigation project, as follows:

1st. To cut, through Edward Reese, of Chesterfield, Idaho, as agent, at the price of \$24.50 per thousand feet, 40,000 feet of red pine timber, to be taken from the public lands in sections 23 and 26 in T. 5 S., R. 39 E., B. M., Blackfoot Land District, Idaho, to be used in the construction of bridges, buildings, etc., at proposed dam-site on Blackfoot River, Idaho, in Sec. 12, T. 5 S., R. 40 E., B. M., said dam to be a part of the Fort Hall irrigation project.

2nd. To cut, through Wm. Winchell, of Henry, Idaho, as agent, at the price of \$10 for each 40-foot log, \$5 for each 18-foot log, \$2.50 for each 10-foot log, and \$6.75 for each cord of wood, 12 forty-foot logs, 30 18-foot logs, thirty 10-foot logs, all average 12 inches in diameter at the top, 500 cords of wood, thirty 60-foot logs, 12 inches at the top, 3 fifty-foot logs, 10 inches at the top, to be taken from the vacant public lands of Ts. 4 and 5 S., R. 42 E., B. M., said timber to be used in connection with construction work required in connection with Fort Hall irrigation project.

It appears that some of the lands embraced in the area covered by these applications are segregated by entry and selections and that townships 4 and 5 south, range 42 east, were withdrawn by departmental orders of March 2 and 25, 1907, in connection with the foregoing irrigation project. The question presented is whether authority exists for allowing these applications and reference is made to section four of the act of June 3, 1878 (20 Stat., 89), providing for the sale of timber lands. That section, after enumerating instances in which it is unlawful to cut timber from the government lands and prescribing penalties for such unlawful cutting, provides:

That nothing herein contained shall prevent any miner or agriculturist from clearing his land in the ordinary working of his mining claim, or preparing his farm for tillage, or from taking the timber necessary to support his improvements, or the taking of timber for the use of the United States.

In an opinion by the Assistant Attorney-General for this Department, approved March 12, 1904 (32 L. D., 495), it was held that there was no authority under then existing legislation to permit the cutting of timber from the public lands for use in the construction of irrigation works under the provisions of the act of June 17, 1902 (32 Stat., 388), which, among other things, authorizes the Secretary of the Interior "to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this act into full force and effect." That opinion had under consideration the act of March 3, 1891 (26 Stat., 1093), which provides that in the States and Territory named, in any criminal or civil proceedings by the United States for trespass on the public lands it shall be a defense if the defendant shall show that the timber was cut or removed "for use in such State or Territory by a resident thereof, for agricultural, mining, manufacturing, or domestic purposes, under rules and regulations prescribed by the Secretary of the Interior . . . . *Provided*, That the Secretary of the

Interior may make suitable rules and regulations to carry out the provisions of this act, and he may designate the sections, or tracts of land where timber may be cut." No reference was made in said opinion to the proviso to section four of the act of June 3, 1878, which authorized among other things, "the taking of timber for the use of the United States," but it was held, and correctly so, that no authority was contained in either the act of March 3, 1891, or that of June 17, 1902, for the cutting of timber from the public lands for use in the construction of irrigation works under the latter act. By the act of February 8, 1905 (33 Stat., 706), Congress specifically authorized the use of earth, stone, and timber on the public lands and forest reserves in the construction of irrigation works under the act of June 17, 1902.

The portion of the proviso to section four of the act of June 3, 1878, in question has apparently never been construed, the regulations and reported decisions having reference merely to the cutting of timber from the public lands for private uses. The act of March 3, 1891, specifically stated that it was not to operate as a repeal of the act of June 3, 1878, authorizing the cutting of timber on *mineral lands*. If the proviso to section four of the latter act authorizing "the taking of timber for the use of the United States," was repealed by the act of March 3, 1891, or any other act now recalled, it was by implication merely and as such repeals are not favored, said proviso must be construed as still being in full force and effect in proper cases. Therefore, the only question to be determined here is whether the cutting of timber from the public lands, as proposed, for use in connection with the Fort Hall irrigation project would be for the use of the United States.

By act of March 1, 1907 (34 Stat., 1015, 1024-5), the Secretary of the Interior is authorized to acquire by purchase or condemnation, on behalf of the United States, all land necessary in constructing a reservoir for storing water for the purpose of irrigating lands on the Fort Hall Indian reservation, and those ceded by the Indians of said reservation, and also the lands, rights, and property determined to be necessary to the success of the project. The Secretary is also authorized to have the project constructed by contract or otherwise, in sections or as a whole, as he may determine. The act provides for the sale of water rights, the money paid therefor to be applied to reimbursing the United States for its expenditures. The water required to irrigate the lands owned by the Indians is to be without cost to them so long as they retain title, and upon the extinguishment of their title the lands are to bear their pro rata cost of maintenance. It was further provided:

When the payments required by this act are made for the major part of the lands that can be irrigated from the system, the management and oper-

ation of such irrigation work shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior, in accordance with the statutes of the State of Idaho. The title to and management and operation of the reservoir and the works necessary to its protection and operation shall remain in the government until otherwise provided by Congress. The government institutions established for the administration of the affairs of the Fort Hall reservation, including the school plant and farm, shall have sufficient water for their needs without cost, and any town or city embraced within the project may acquire water rights sufficient for its needs on such terms and conditions as the Secretary of the Interior may impose.

The act also provides that the water rights acquired or provided for in the act shall be appurtenant to the lands irrigated and the sum of \$350,000 is appropriated for carrying out the provisions of the act, "which shall be reimbursed the United States from the moneys obtained from the sale of water rights, and the Secretary of the Interior shall have full power to do all acts or make all rules and regulations necessary to carry out the provisions of this act relating to the foregoing irrigation system."

It will be observed that the only benefits, if they may be denominated such, accruing to the United States from this irrigation project, is the free use of water in the government institutions for the administration of affairs on the Fort Hall reservation. The irrigation works are to pass ultimately to the owners of the lands to be irrigated thereby. Besides, the act provides that the United States shall be reimbursed for its expenditures in connection with the project, which would surely not be the case were it one strictly for the use of the government. The government naturally would not be reimbursed for any saving which might result from allowing timber to be cut from the public lands for use in the construction of the irrigation project. The saving would result to those whom the act provides must reimburse the government for the cost of the project and not to the government itself. In no true sense can it be said that the cutting of timber from the public lands, as proposed, could be for the use of the United States, and it is therefore not believed that the proviso in question contains authority for allowing these applications.

The same authority exists in the act of June 3, 1878, for permitting the cutting of timber from the public lands for use in the construction of irrigation works under the act of June 17, 1902, as exists for cutting such timber for use in the construction of the Fort Hall irrigation project, nevertheless Congress saw fit to pass the act of February 8, 1905, containing specific authorization in the premises.

It has been held that cutting timber from the public lands to supply a military post in fulfillment of a contract for wood is not such

a depredation as is contemplated by law and could be allowed. The distinction between such a case as that and the one under consideration can readily be seen.

In addition to the above it may be stated that from figures informally obtained from the Indian Office in connection with the Fort Hall irrigation project, and from the Reclamation Service in connection with similar projects by that Bureau under the act of February 8, 1905, it appears that the prices named in the applications now submitted are comparatively, if not excessively, high, indicating that in any event there would be very little, if any, saving by cutting the timber from the public lands for use in connection with the project, if such cutting were even permissible.

For the foregoing reasons the Department is not disposed, and in fact is not authorized, to approve the applications in question, and the papers are accordingly herewith returned without approval.

SOLDIERS' ADDITIONAL-COMBINATION OF RIGHTS-APPROXIMATION-  
ABUSE OF RULE.

GEORGE E. LEMMON.

The rule of approximation permitted in the location of soldiers' additional rights is a purely administrative equitable rule, not founded upon any law, and can not be insisted upon as an absolute right; and where the privilege is abused to accomplish an evasion of positive law, the land department has full power to change the rule to prevent the abuse; and entries procured through such abuse of the rule are not entitled to equitable consideration on the ground that they were made under authorized existing practice.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(F. W. C.) *Land Office, June 25, 1908.* (J. R. W.)

George E. Lemmon, assignee of soldiers' additional homestead rights of Edward R. Jones, John S. Porter, John D. Rouse, and John W. Willis, appealed from your decision of April 10, 1908, canceling his location of combined additional rights for the SW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 33, T. 129 N., R. 91 W., Dickinson, North Dakota.

The tract contained forty acres. The combined four additional rights aggregated 20.02 acres. May 18, 1906, the application was transmitted to you by the local office, and April 30, 1907, you found the several assignors were entitled to the amount of land each claimed, and that no right of approximation had been granted or exercised in any former location of any part of either of these rights. You returned the application and accompanying papers to the local office—  
with direction that on payment of the legal fee and commissions and price for the excess in area of the tract applied for over that carried by the rights . . . you will allow the entry in name of George E. Lemmon, assignee.

April 30, 1907, the local office pursuant to such direction allowed the entry, received payment, and issued excess receipt. April 10, 1908, upon examination of the entry for patent, you held that your former action was in error in view of departmental decision in George P. Wiley (36 L. D.; 305), and ruled Lemmon within sixty days to furnish valid and sufficient rights with those filed to equal at least forty acres.

The ruling is claimed to be erroneous, and counsel assert that:

A case adjudicated under rules and interpretations in force at the time should not be disturbed by reason of new rules and interpretations.

A homestead entry allowed by the Commissioner of the General Land Office, in absence of fraud or illegality, confers a vested interest that can not be disturbed by the land department.

In argument, after portrayal of the racking anxieties of his client during the delay necessary for ascertainment of validity of the rights claimed, counsel says:

After many months of weary, impatient waiting he may be notified his application is allowed. Whereupon he pays the required fees and commissions, receives the final entry papers and breathes a sigh of content. But to his astonishment, after some more months have elapsed, he is informed his entry is held for cancellation because of a recent ruling changing the practice of years. He sends a postal howl to his attorney, who is compelled to assure him it is the great privilege of the Hon. Land Officials to change their rules and regulations whenever deemed desirable. The reply received by the attorney is frequently biblical in terms, but not religious in meaning.

The party, however, ought not to be punished for indiscretion and levity of counsel, and due consideration of his asserted and supposed right will be given.

In general it is true that rules of practice and interpretations of statutes of long standing ought not to be changed without careful consideration and for cogent reason. That rule rests not only in decisions of the courts and the land department, but in the clearest ground of sound reason requiring no citation in its support, because necessarily assented to by all right-reasoning minds. Yet it is the consequence of human infirmity that even the highest and wisest tribunal known to man sometimes finds its interpretations of laws not well reasoned and its long-established rules of practice not such as most certain to attain justice, the ultimate object of all law and all rules of practice, and that a change is necessary in furtherance of justice and to suppress fraud.

It is also to be remembered that the rule permitting approximation of entries rests on no law and was never, in legal sense, the *right* of one seeking to appropriate public lands. It is, as it has always been, an administrative invention, of equitable purpose. Various acts of Congress gave to persons rights limited by particular specified areas, as not more than, or not to exceed, forty, one hundred

and sixty, or three hundred and twenty acres. It also arose from irregularity of surveys, and must result of necessity from the mere sphericity of the earth, if from no other cause, and from occurrence of meandered waters, that governmental surveys do not always result in regular tracts of such area as is specified by the law.

It would be practicable to administer laws granting such rights if they were not permitted to be exercised or fixed to the earth by settlement or location until after surveys. The claimant could then be held to select only regular tracts of specified quantity or irregular tracts of less quantity, waiving excess of his right. He would thus be narrowed in exercise of his right from locating it upon irregular tracts, exceeding its area. But Congress desired development of the public domain and authorized pre-emption and homestead settlement on unsurveyed lands and some classes of scrip to be located on land not surveyed. In such cases, when the surveys resulted in excessive area of the tract on which the right had been located, there was necessity for the rule of approximation as equitable for preservation of rights. Literal execution of the law in such cases was impossible without denial to the entryman of part of his right. In case of exercise of rights limited in area on surveyed land, though practicable to administer the law by requiring location only on tracts regular in area, it would narrow the right and was inconvenient. The government was then permitting cash sales of public land and the convenient manner of adjustment was found to allow cash purchase of the excess.

By act of March 2, 1889 (25 Stat., 854), the policy of private cash entry was definitely abandoned in all States, but one; yet since that time the rule of approximation has continued without inhibition of Congress. It has since stood purely on administrative authority as convenient and necessary to equitable adjustment of rights of limited area to irregularity of surveys. But it is well settled that a purely equitable rule or doctrine will not be allowed to work a fraud or injustice. *Bear Lake Irrigation Company v. Garland* (164 U. S., 1, 23).

The land department has now and has had before it the following soldiers' additional rights location cases:

	For acres.	Rights acres.	Excess.
George P. Wiley.....	80	40.04	39.96
John D. Taylor.....	40	20.10	19.90
David Dickie.....	40	20.29	19.71
John C. Bloms.....	40	20.26	19.74
George E. Lemmon.....	40	20.02	19.98
George E. Lemmon.....	40	20.11	19.89
George E. Lemmon.....	40	20.02	19.98
George E. Lemmon.....	40	20.32	19.68
	360	181.16	178.84

The excess sought to be acquired under the rule or privilege of approximation is over ninety-eight per cent of the rights located, and in Lemmon's cases is near ninety-nine per cent.

It is well known these residues of additional rights are vended and procurable on the market, and can be obtained to actually approximate the area of the tract sought. The Lemmon cases show that having twelve small residual rights, aggregating 80.47 acres, he seeks by four locations to purchase 79.53 acres, whereas he has but forty-seven one-hundredths of an acre excess were he content to take two tracts of forty acres. It is too obvious for argument that this is a studious attempt to evade the act of March 3, 1889, inhibiting private cash entry.

There is, as above shown, no *right* involved. The land department is authorized and competent, at any stage of a proceeding, to protect itself against studious fraudulent abuse of the purely administrative equitable rule for approximation, or its prostitution to evasion of an act of Congress. If, in consequence counsel receive from the disappointed client a letter "biblical in terms, but not religious in meaning," it presents only a question between them as to responsibility for hatching the scheme for evasion of the law of 1889.

Your decision is affirmed.

#### APPLICATIONS AND CHARGES FOR WATER RIGHTS ON TRUCKEE-CARSON PROJECT.

##### REGULATIONS.

By order of November 1, 1907, the building charges for water rights on the Truckee-Carson project, both on public land under homestead entries and on land in private ownership, for which water-right applications were filed after January 1, 1908, were increased from \$22 to \$30 per acre. The increased rate will not be required in the cases described in the following paragraphs:

1. Where a homestead entryman filed an application for a water right prior to January 1, 1908, and made the accrued payments thereon at the lower rate, or was not in default so as to render the entry and water right subject to cancellation for non-payment, and relinquished his entry, the new homestead entryman, taking up the land relinquished, will be required to file a supplementary application asking to be substituted to the rights of the prior entryman under the former application and to be allowed credit for the payments made and assigned to him, and will be entitled to complete the payments for the building charges at the rate of \$22 per acre,

subject to the provisions of General Land Office circular of January 18, 1908 [36 L. D., 256].

2. Where a private land owner filed an application for a water right prior to January 1, 1908, and made the accrued payments thereon at the lower rate, or was not in default so as to render the water right subject to cancellation for non-payment, and sold all or a part of his land, the purchaser of all or any part of this land will be required to file a supplementary application asking to be substituted to the rights of the prior land owner under the former application and to be allowed credit for the payments made and assigned to him, and will be entitled to complete the payments for the building charges at the rate of \$22 per acre.

3. Where a homestead entryman did not file an application for a water right prior to January 1, 1908, for lands entered prior thereto, and on which an application could have been filed, such homestead entryman may, after January 1, 1908, and within 30 days after notice by the engineer of the Reclamation Service that the irrigation system is prepared to furnish water as needed for the irrigation of the land, file an application and make payments of the building charges at the rate of \$22 per acre.

4. Where a private land owner did not file an application for a water right prior to January 1, 1908, for lands on which an application could have been filed, but for which the Government was not ready to furnish water for the season of 1907, such private land owner, if he had prior to January 1, 1908, adjusted his claim to any vested water right, may, after January 1, 1908, and within 30 days after notice by the engineer of the Reclamation Service that the irrigation system is prepared to furnish water as needed for the irrigation of the land, file an application and make payment of the building charges at the rate of \$22 per acre.

This order cancels the regulations approved June 5, 1908, which did not provide for a supplementary water right application in the first and second cases.

C. H. FITCH, *Acting Director.*

Approved June 25, 1908:

FRANK PIERCE,  
*Acting Secretary.*

STATE OF FLORIDA.

Motion for review of departmental decision of May 19, 1908, 36 L. D., 415, denied by First Assistant Secretary Pierce, June 26, 1908.

COAL LANDS IN ALASKA—TIME WITHIN WHICH APPLICATIONS MUST  
BE PERFECTED.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., June 27, 1908.*

REGISTERS AND RECEIVERS,

*United States Land Offices, Alaska.*

SIRS: The instructions of the General Land Office dated March 3, 1908,<sup>a</sup> relative to the time within which applications to purchase coal lands in Alaska under the act of April 28, 1904 (33 Stat., 525), must be perfected, is amended to read as follows:

Your attention is called to the fact that the coal land law of April 28, 1904 (33 Stat., 525), provides that locators or their assigns may, at any time within three years after filing the notice prescribed by the first section of the act, make application for patent for the land claimed.

This does not mean that if the application is filed at an earlier time than that allowed, the claimant may defer payment for his

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<sup>a</sup> DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., March 3, 1908.*

REGISTERS AND RECEIVERS,

*United States Land Offices, Alaska.*

SIRS: Your attention is called to the fact that the coal land law of April 28, 1904 (33 Stat., 525), provides that locators or their assigns may, at any time within three years after filing the notice prescribed by the first section of the act, make application for patent for the land claimed.

This does not mean that if the application is filed at an earlier time than that allowed, the claimant may defer payment for his claim and making entry for a period of time which added to the time between filing the location notice and submitting the application for patent, will equal three years.

When the claimant files his application for patent he waives the unexpired portion of the three years fixed by the statute and must thereafter proceed diligently to make publication and submit the proofs prescribed by the statute and the regulations.

Paragraph 16 of the regulations provides that payment and entry may be made not earlier than six months after the expiration of the period of publication. The law does not contemplate that this time be extended an unreasonable period at the option of the claimant, but that after the filing of the application, the case proceed regularly to entry. Accordingly, should the specified proofs and purchase price be not furnished and tendered within ninety days from the expiration of the six months within which adverse claims may be filed, you will thereupon reject the application, subject to appeal, unless an adverse claim is pending.

This is not intended in any way to modify the circular instructions of May 16, 1907, copy enclosed herewith.

Very respectfully,

R. A. BALLINGER,  
*Commissioner.*

claim and making entry for a period of time which added to the time between filing the location notice and submitting the application for patent, will equal three years.

When the claimant files his application for patent he waives the unexpired portion of the three years fixed by the statute and must, thereafter, diligently proceed to make publication and submit the proofs prescribed by the statute and the regulations.

Paragraph 16 of the regulations of April 12, 1907 (35 L. D., 673), provides that payment and entry may be made not earlier than six months after the expiration of the period of publication. The law does not contemplate that this time be extended an unreasonable period at the option of the claimant, but that after the filing of the application the case proceed regularly to entry. Accordingly, should the specified proofs and purchase price be not furnished and tendered within six months from the expiration of the six months within which adverse claims may be filed, or within six months after the final termination of adverse proceedings instituted under section 3 of the act, you will reject the application subject to appeal: *Provided*, that the period of six months herein fixed within which to perfect entry shall be allowed in case of pending applications which have not been perfected within the ninety days specified by the instructions of March 3, 1908, the time to run from date hereof.

This is not intended in any way to modify the circular instructions of May 16, 1907 (35 L. D., 572), copy enclosed herewith.

Very respectfully.

S. V. PROUDFIT,  
*Acting Commissioner.*

Approved:

FRANK PIERCE,  
*Acting Secretary.*

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ABANDONED MILITARY RESERVATIONS—HORN, ROUND, AND PETIT  
BOIS ISLANDS.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., June 29, 1908.*

REGISTER AND RECEIVER,  
*Jackson, Mississippi, and Montgomery, Alabama.*

SIRS: The lands in the abandoned military reservations on Horn, Round, and Petit Bois Islands, in the Gulf of Mexico, not reserved for lighthouse purposes, having been duly appraised in accordance with the provisions of the act of July 5, 1884 (23 Stat., 103), which

appraisal has been approved by the Secretary of the Interior, I have mailed you separately, so much of said appraised list as describes lands in your respective districts.

2. That part of Petit Bois Island which embraces fractional sections 28, 29, and 32, T. 9 S., R. 3 W., situated in the State of Alabama, will be offered at the district land office at Montgomery, Alabama, commencing at 10 o'clock, A. M., on September 17, 1908.

3. That part of Petit Bois Island which embraces fractional sections 35 and 36, T. 9 S., R. 5 W., fractional sections 1 and 2, T. 10 S., R. 5 W., east of Pearl River; that part of Round Island embracing fractional sections 33 and 34, T. 8 S., R. 6 W., including the old hospital and shop on said Sec. 34, which shall be sold with the land, and that part of Horn Island, embracing fractional sections 26, 35, T. 9 S., R. 5 W., fractional sections 16, 17, 18, 19, 20, 21, T. 9 S., R. 7 W., all east of Pearl River, and all in the State of Mississippi, will be offered at the district land office at Jackson, Mississippi, commencing at 10 o'clock, A. M., on September 24, 1908.

4. The lands will be offered at public sale by smallest legal subdivision, in the order in which they appear in the list furnished you, and will be sold to the highest bidders for cash at not less than the appraised price, and in no case at less than \$1.25 per acre.

5. The purchaser will be required to furnish evidence of his citizenship, but the usual non-mineral or non-saline affidavit will not be required, inasmuch as the appraiser in charge of the appraisement of said abandoned military reservations states that there are no indications of minerals on either of the inlands, and the appraised list gives the character of nearly all the tracts as sandy.

6. Upon payment by the purchaser of the amount of his bid, the receiver will issue a receipt (form 4-131) and the register will issue a cash certificate, noting thereon the name of the reservation in which the land sold is located.

7. Upon the conclusion of the sale, you will make a report to this office of the result thereof, and return the appraised list.

8. Further instructions will be given you in regard to your monthly and quarterly reports, and your disbursing and other accounts in connection therewith.

9. T. 9 S., R. 7 W., contains but 1,223 acres, and on September 1, 1890, there were certified to the State of Mississippi 160 acres in Sec. 34, T. 5 S., R. 15 W., St. S. M., on account of the claimed loss of 160 acres by reason of the fractional character of T. 9 S., R. 7 W. Sec. 16, T. 9 S., R. 7 W., contains 2.38 acres, and was included in the military reservation on Horn Island, which was established on August 30, 1847. The plat of survey of said township was approved February 4, 1847. The selection of lieu lands operated as a waiver

of all claim of the State to the land in said section, and the tract will be sold with the other lands. (30 L. D., 83.)

10. Notice of the offering, with authority for the publication thereof, has been sent to the Chronicle and Pascagoula Democrat-Star, of Scranton, Mississippi, the Clarion-Ledger of Jackson, Mississippi, and the Item and Register of Mobile, Alabama. A copy of said notice will also be posted in each local land office.

Very respectfully,

S. V. PROUDFIT,  
*Acting Commissioner.*

Approved:

FRANK PIERCE,  
*Acting Secretary.*

#### MINING CLAIM—EXPENDITURE—COMMON IMPROVEMENT.

##### ALDEBARAN MINING CO.

A common improvement or system, offered for patent purposes, although of sufficient aggregate value and of the requisite benefit to all the mining claims of a group, can not be accepted as it then stands in full satisfaction of the statutory requirement as to such of the claims the location of which it preceded, the law requiring that an expenditure of at least \$500 shall *succeed* the location of every claim.

If the requisite benefit to the group is shown, or to the extent of such of the claims as are so benefited, and the elements of contiguity and common interest in the claims concerned appear; if the improvement represents a total value sufficient for patent purposes for the number of claims so involved; if for each claim located after the partial construction of the improvement the latter has been subsequently extended so as to represent an added value of not less than \$500, each is entitled under the law to a share of the value of the common improvement in its entirety, no claim receiving more or less than another from that source, participating therein without distinction or difference, and as to each the statutory requirement is satisfied.

Mountain Chief case, 36 L. D., 100, in part overruled.

*First Assistant Secretary Pierce to the Commissioner of the General (G. B. G.) Land Office, June 30, 1908. (F. H. B.)*

The Aldebaran Mining Company has appealed from the order by your office of September 17, 1907, citing it to show cause why it should not suffer a partial cancellation of its entry (No. 3,829, December 28, 1906), which embraces fourteen contiguous lode mining claims, survey No. 5,397, Salt Lake City, Utah, land district.

In the sequence of their location the fourteen claims which compose the entered group are as follows: Maid of Erin, Mountain Beauty, Volcano, Last Dollar, Maid of Erin No. 2, Victor Amended, Missouri, Lucy Lee, Aldebaran, Sunset, Victor Fraction, Iowa, Last Dollar No. 2, and Maid of Erin No. 3. For the purposes of this

case it is sufficient to say that the first six were located in the latter part of 1899, the Missouri in 1901, and the Lucy Lee in 1902. The remainder were located in 1905; the Aldebaran on January 9, the Sunset and Victor Fraction on June 5, the Iowa on June 6, and the Last Dollar No. 2 and Maid of Erin No. 3 on June 7, of that year.

The order is directed primarily against the six claims last above named, on the ground that they were not located and in existence at the time the system of common improvements was commenced and until after an expenditure of more than \$7,000 of the value thereof had been made, and is further directed against the Last Dollar claim on the ground that by the elimination of the six in question, should such cancellation be made, the contiguity between the Last Dollar and the remaining entered claims would be destroyed.

No question is raised by your office, or appears from the record, with respect to other than the six claims as to which the company has been cited to show cause. As is shown by the following further statement of the case, the location of the first eight claims of the group respectively antedated the development of the common improvement system by ample margins under a strict rule in that behalf.

The total value of the certified improvements is given at \$11,000. Of this amount the certified report assigned \$3,500 as the value of a shaft, two inclined winzes, and two drifts. The shaft, valued at \$200, appears to have no communication with and to be independent of the remaining improvements. The winzes and drifts, however, are ramifications of a tunnel, as the principal artery of the system, over 700 feet in length and valued at \$7,500.

The objection by your office is taken upon an affidavit by the secretary and treasurer of the company, included among the proofs, in which he sets forth the periods and amounts of the payments made for labor and materials in the progression of the improvement system, as follows: In 1900, \$364.00; in 1901, \$1,331.85; in 1902, \$1,370.50; in 1903, \$3,268.62; in 1904, \$1,219.26; in 1905, \$5,204.82. From this showing your office notes the prosecution of more than \$7,000 worth of the work prior to 1905 and to the location of the six claims in question. The portion so represented is held to be unavailable as to those claims, under the decision of the Department in the case of James Carretto and Other Lode Claims (35 L. D., 361), which your office cites and construes as holding that to entitle mining claims to credits from a system of improvements "it is necessary that the claims be in existence at the time the system of improvements is begun;" and the further necessary effect of the rule laid by your office, though not stated, is that in the subsequent extension of the common improvement system, distinctly considered, all the claims of the group must share equally, the shares of the last six claims thus falling short of the requisite \$500 each in value.

As the appeal and the accompanying briefs of counsel contest generally and broadly the propositions so expressed and implied by your office, but proceed in argument more or less upon the dual lines of legal and equitable considerations, it is not wholly convenient, nor is it necessary, to state and specifically discuss the contentions submitted. And as preliminary to a review of the merits some consideration of the light in which the case now presents itself will be of advantage.

In its full effect, as applied upon the facts of this case, the principle drawn by your office from its interpretation of the Carretto decision (though stated, as above, in rather extreme terms in their literal sense) is this: That no portion of a common improvement, or system, can be regarded as sustaining any relation under the statute to the claim or claims located after the construction of that portion, notwithstanding the subsequent extension of the improvement project so far as to represent an added value of not less than \$500 for every such additional claim and upon such lines that the project as a whole is of the requisite benefit to all the claims of the group, and, at the same time, that that subsequent extension must in itself be held to be common for all purposes to the prior as well as the later locations.

The Carretto case involved an entry for six lode claims of a group of twenty-three, held in common ownership. Among the credits marshaled in behalf of the entry were assignments of \$300 to each claim out of the cost of a central shaft, an improvement of the value of \$4,600 and common to the group. Fourteen of the claims had theretofore received their appropriate aliquot shares of \$200 each, and in order to increase the assignments to the six claims in question to \$300 each (as their needs required) the remaining three claims of the group were omitted from participation altogether. This in brief was the case, and upon it the Department held (syllabus):

Each of a group of contiguous mining claims held in common and developed by a common improvement has an equal, undivided interest in such improvement, which is to be determined by a calculation based upon the number of claims in the group and the value of the common improvement.

There is no authority in the law for an unequal assignment of credits out of the cost of an improvement made for the common benefit of a number of mining claims, or the apportionment of a physical segment of an improvement of that character to any particular claim or claims of the number, such an arbitrary adjustment of credits, as the exigencies of the case may seem to require, being utterly at variance with the essential idea inherent in the term, a common improvement.

That case presented, therefore, the question of the lawful distribution of credits out of a common improvement, the relation in time of the creation of which to the location of the several claims of the group was not inquired of or considered; and beyond what is epitom-

ized in the syllabus the decision did not have occasion to go and was not carried. What else was said was only incident to what was so decided. This much made clear, further consideration of that case may be passed for the present.

However, a few days after the date of the citation by your office in the case at bar, the Department decided the case of the Mountain Chief claims (36 L. D., 100), in which three questions were considered. The case involved an entry for two claims of a contiguous group of ten, eight of which had already passed to patent at intervals and by three proceedings. Within the group (among other improvements) the "Rosa tunnel" had been constructed for the common development of all the claims, except perhaps the Mountain Chief. At the time the entry in question was made the tunnel had reached a total length of 921.7 feet, of which but the last 167.4 feet had been driven after the location of the two claims embraced in that entry. The former patent proceedings, for the eight claims, had been supported by assignments of individual improvements to two of those claims (Rosa and Mountain Chief), the apportionment of the initial and successive 60-foot sections of the Rosa tunnel respectively to five of the claims (together with the Mountain Chief, embraced in the second patent proceeding), and the apportionment of 83 feet of the same tunnel, commencing at a point 671.3 feet from the portal, to the last of the eight so patented. Between the first 300 feet, valued at \$3,000, and the 83-foot section, valued at \$800, so designated and assigned, there remained an interval of 371.3 feet, which was represented as "unapplied on any claim."

The case came before the Department on an appeal from your office decision which had held for cancellation the entry there in question on the ground of insufficient showing in the matter of improvements for the benefit of the two claims involved, based upon the fact that at the date of the application for patent thereto the company was without full title to one of the patented claims of the group. Upon this, the first question considered, it was here said (*supra*, pp. 101-2) :

In the opinion of the Department, this fact of itself furnishes no warrant for the cancellation of the entry. The patented claims of the group are no longer within the jurisdiction of the land department, and there is nothing in the law, nor does there seem to be any reason, to require that common ownership as to such claims and the remaining or unpatented claims of the group shall continue until patent for such remaining claims shall be also obtained, or applied for. There is no reason why an owner of a group of contiguous mining claims and of an improvement constructed for their common development and effective to that end, and of sufficient value for patent purposes as to the entire group, may not, instead of embracing all the claims in one application for patent, apply for and obtain patent to a portion of such claims, based upon their due share or interest in the common improvement (Zephyr and Other Lode Mining Claims, 30 L. D., 510) ; and a subsequent break in the

common ownership by a sale or other disposition of one or more of the patented claims, or of any interest therein, would furnish no bar to later patent proceedings for the remaining claims of the group based upon their due share or interest in the same common improvement. If the right to a patent for the entire group be in fact earned by the construction of a common improvement of a character and value effective and sufficient for that purpose, it can make no difference that patent for all the claims is not applied for at one time, or that a part may be patented and disposed of before patent to the remainder is applied for.

The second question which was considered in the case arose upon an assignment, as a credit to support the entry, of the last 167.4 feet of the Rosa tunnel, above mentioned, valued at \$1,600 and constructed after the location of the two claims involved, but as the enlargement of an improvement common to and for the development of all the claims. In its disposition the Department invoked the principles suggested in the case of Copper Glance Lode (29 L. D., 542, 550) and formulated and applied in the Carretto case, as embodied in the foregoing quotation from the syllabus of the latter, and in that connection said (p. 103):

Judged in the light of the principles thus stated the entry here in question is clearly subject to the objection that a physical segment or fractional portion of an improvement constructed for the common development of a group of mining claims may not be arbitrarily applied, for patent purposes, to any particular claim or claims of the group. The portion of the Rosa tunnel here relied on is just as much common to the other claims of the group as is any and every other portion of said tunnel. The tunnel as a common improvement is to be treated in its entirety, not in separate sections or parts; and so treating it the 167.4 feet can not be set apart and apportioned as is here sought to be done.

The third question, which was not involved in the Carretto case, but which is related to the second question, was presented by reason of the construction, as indicated by the record, of 754.3 feet of the tunnel prior to the location of the two claims concerned and of but the remaining 167.4 feet of that common improvement, so assigned to them, thereafter. Adverting to the disposition of credits under the prior patent proceedings in which the tunnel was so employed, by the like apportionment of segments, but in which connection the record disclosed, as following the first 300 feet assigned to the five claims involved and preceding the 83-foot section assigned to the one claim embraced in the ensuing patent proceeding, a section 371.3 feet in length and at the same rate of valuation representing upwards of \$3,000, the Department said:

This same erroneous method of apportionment seems to have been employed with respect to said tunnel in the earlier patent proceedings aforesaid, but it may be fairly assumed from the record of those proceedings that the value of the tunnel as a whole was at that time sufficient, for patent purposes, to embrace all the claims covered by such proceedings. It would seem therefore, that, based upon the tunnel as far as then completed, the patents heretofore

issued were fully earned, in so far as concerns the matter of improvements, and that the error consisted only in the attempted apportionment of the tunnel to the several claims instead of applying the same as a whole to the group of claims; an error of form rather than of substance.

With this preliminary statement, passing to the further consideration of the pending entry, the Department added (p. 104) :

Such is not the situation, however, with respect to the two claims embraced in the entry here in question. As already stated, these claims were not located until November 8 and December 13, 1902, respectively, and, so far as the record shows, not until after the tunnel had been completed up to the point of the beginning of the last 167.4 feet thereof. To the extent that the tunnel was constructed prior to the location of these claims it cannot be said that the work of construction was in any sense intended for their benefit. And the said 167.4 feet of the tunnel being simply the extension of an improvement common to all the claims of the group, as well those already patented as those for which patent is here sought, the share or interest in the stated cost or value of such extension to which these two claims are entitled, is far less than the required expenditure for patent purposes of \$500 for each claim.

The doctrine of the cited cases is based upon sound principle, and for this reason, as well as for purely administrative considerations, should be strictly enforced in the absence of controlling equitable conditions to the contrary. If applied here the entry in question would have to be canceled, and the question arises, therefore, whether the facts are such as to justify sustaining the entry on equitable grounds.

And in conclusion of the opinion, equitable grounds upon which the entry might be sustained were found in the entrymen's procedure upon faith of the approval by your office of the like apportionment and application of credits in their earlier patent proceedings; but this upon condition that the tunnel as a whole should be expressly shown to be of sufficient value to have embraced for patent purposes the entire group of ten claims (treated as if constructed after the location of all) and that no undisclosed claims depended upon the "unapplied" portion, the tunnel in its entirety, except the portion (167.4 feet) assigned under the entry, to "be regarded as having been applied and exhausted for patent purposes in behalf of the eight claims covered by the former proceedings."

The devotion of labor or improvements to a number of claims in common has been the subject of repeated judicial and departmental decision; and in the case of Copper Glance Lode, *supra*, upon a review of authorities and with some further discussion, a series of established principles of general application was deduced and enumerated. See, also, Zephyr and Other Lode Mining Claims (30 L. D., 510) and cases cited in the opinion.

Congress has dealt particularly with the subject of a tunnel run for the benefit of one or more lode claims, by adding to the general mining laws the act of February 11, 1875 (18 Stat., 315), which provides—

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 com-

pany 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.

In *Chambers v. Harrington* (111 U. S., 350, 355) the Supreme Court said that this statute does not affect the character of other work to be done or improvements to be made according to the law as it stood before, except as it gives a special value to making a tunnel. See *Book v. Justice Mining Co.* (58 Fed. Rep., 106, 117).

In response to a call upon the company, by your office, for evidence touching the relation in time between the advancement of the system of improvements and the location of the several claims, and touching the effectiveness of the system for the benefit of the entered group, the affidavit of a mining engineer, who was also the mineral surveyor who made the official survey, was submitted upon the latter question, which was at once accepted as satisfactory. The Department, in turn, finds as a fact that that feature is established by the record. The group is quite compact in form, the general direction of the entire body being north and south, with an average extent of about 4,500, and an extreme extent on a diagonal of about 6,300, feet. In the heart of the group is projected the system of improvements, composed of the tunnel and its radiating winzes and drifts and comprising upwards of 1,000 feet of connected underground workings, of a value largely in excess of the statutory minimum. In this situation, and as covered by the certified report and the affidavit of the engineer-surveyor, that element of the case will be passed with approval.

A cognate question, however, arises at this point, upon the present record. Whilst giving, as it seems, a special value to a tunnel as an improvement, whether run for the benefit of one lode claim or for the common benefit of a number, the act of 1875, *supra*, nevertheless makes no exceptional provision with respect to the application of credits from the cost of the tunnel improvement. Whatever would be the rule where, as provided by section 2323, Revised Statutes, a tunnel has been run "for the discovery of mines," and the claims are predicated upon blind veins or lodes discovered in the tunnel (upon which no opinion is ventured), the Department believes it neither consistent with the letter or spirit of the statutory provisions governing expenditures for annual representation and patent purposes, nor permissible from the standpoint of administrative considerations, that a purely development project, albeit of the necessary aggregate value, if wholly preceding the location of a claim or any portion of a group, should be accepted as it then stands in full satisfaction of the requirement as to the subsequent location or locations. However effective, in that situation, as an improvement benefiting the

latter, and though common in that respect to the full group, not only do the terms of the law in themselves imply, but those considerations which inhere in the policy and purpose of the law require, that an expenditure of at least the value of \$500 shall *succeed* the location of every claim, having, of course, its development in view and contributing sufficiently to that end. This may be considered to contemplate a check to that extent upon aimless or indiscriminate appropriations under the law, but more immediately perhaps a direct and definite earnest of good faith. And by an analogy which the Department has heretofore considered (Copper Glance Lode, *supra*, p. 548), this is in evident harmony with the view of the court in the case of *Chambers v. Harrington*, *supra*, where it was said of the requirement of an annual expenditure of \$100 worth of labor or improvements for every claim, that the purpose of its enactment clearly was—

to require every person who asserted an exclusive right to his discovery or claim to expend something of labor or value on it as evidence of his good faith, and to show that he was not acting on the principle of the dog in the manger.

In the matter of the expenditures shown to have been made in this case in the prosecution of the common improvement system (which appears therefrom to have been conservatively valued), whilst the outlay of more than \$5,000 in 1905 can leave no reasonable question as to the Aldebaran claim, located on January 9 of that year, and may easily be conceived to have embraced the requisite ensuing expenditure with respect to the five claims located in the following June, the latter nevertheless does not as a fact affirmatively appear from the record. But for present purposes this will be assumed, subject to ascertainment as hereinafter indicated; and with this assumption, from the foregoing review of the Mountain Chief case it is to be observed that with respect to the question now presented it is essentially on all fours with the case at bar. Here, as there, an efficient common improvement system has followed and kept pace, step by step, with the location of the several claims or smaller groups which compose the present group of fourteen, each successive portion of the improvement of a value equal to, and even in excess of, the statutory amount as to the particular claims to the location of which it succeeded. That case differs only in that when the question arose some of the claims of the group had already gone to patent, respectively upon express applications of definite segments of the common improvement as then existing; but to those facts no consequence attaches, as is disclosed by the Department's decision therein.

Under that decision, therefore, as a matter of law, the statutory requirement in that respect considered, it would become necessary to cancel the entry in the case at bar to the extent of the six claims located in 1905. In the view taken by the Department in the Moun-

tain Chief case, the two claims involved were not entitled to share in any relation in so much of the tunnel improvement as was constructed prior to their location, which was to be regarded as applied equally and exhausted for patent purposes in behalf of the eight senior and patented claims of the group; and in the subsequent extension of that improvement, as common to all the claims, all were entitled to share equally, the shares of the two claims in question thus falling far short of the requisite value under the statute.

So, in the present case, if the six claims aforesaid (having no individual improvements) are eliminated from participation in so much of the common improvement system as was created prior to their location and must at the same time share on equal terms with the other claims of the group in the subsequent extension of the system, their resulting credits will fail to satisfy the statute; and the only refuge from the threatened cancellation must be found in a recourse to special considerations, if any, of a purely equitable nature.

Upon the further consideration of that question which is thus compelled, the Department is convinced that the conclusion reached in the Mountain Chief case does not voice the correct interpretation of the law, and that the entry now pending finds full support in that regard upon strictly legal grounds, needing no resort to equitable considerations. Viewed in its ultimate analysis that conclusion is destructive of the premise upon which at last it rests, *viz.*, the unity of a common improvement. All the claims within the legitimate scope of a common improvement project are included upon the same footing and all others excluded; the interests represented in such an improvement are equal and undivided. This common relationship is in its nature correlative and comprehensive in each case, or it does not there exist at all. The collective claims are the beneficiaries and the improvement in whole is the instrumentality effecting the common benefit, the corresponding relations being coextensive.

Whether a general improvement, or system of improvements, is effective for the common benefit of all the claims to which it is directed is essentially a question of mining engineering rather than of law, and must be shown accordingly. But granted that that has been established in a given case, it obviously can be none the less true because it is made to appear that certain of the claims were located after the partial construction of the improvement. The portion so created in advance of the location of those claims thereafter contributes very materially to their improvement, within the terms and purpose of the statutory requirement, inuring to their benefit as well as to the benefit of their predecessors, in a common relation with its extension to all the claims thus involved. In short, as before stated, it is the group which receives the benefit and the entire improvement by which that end is accomplished. Subject to the arbi-

trary requirement that the extension shall represent an accession of at least \$500 in value, successively, for each of the later locations, the application of credits from the common improvement should follow upon that principle.

That in all such cases the contrary theory would impose a burden far beyond the statutory obligation may be simply illustrated by assuming the location of two contiguous claims and the construction of a tunnel for their common development, of the value of \$1,000, which would answer the statutory requirement as to them, and thereupon the location of two more claims so as to make a contiguous group of four. The subsequent extension of the tunnel improvement so as in fact to effect also the development of the later two claims and to represent a further value of \$1,000 would of itself and without regard to the preceding portion, leaving the older two claims out of view, obviously afford ample credits for the benefit of the junior claims, as would the whole tunnel, without further question, for the benefit of all four claims if all had been located at the outset; and yet in the case supposed it would be necessary that in the tunnel extension the added section should in itself attain a value of \$2,000, in order that, participating only in so much and in conjunction with the senior claims, the shares of the junior claims might reach the requisite \$500 each. Further locations, upon the same principle, would involve a successive increase in value in each corresponding extension in a like arithmetical progression.

If the requisite benefit to the group is shown, or to the extent of such of the claims as are so benefited, and the elements of contiguity and common interest in the claims concerned appear; if the improvement represents a total value sufficient for patent purposes for the number of claims so involved; if for each claim located after the partial construction of the improvement the latter has been subsequently extended so as to represent an added value of not less than \$500, each is entitled under the law to a share of the value of the common improvement in its entirety, no claim receiving more or less than another from that source, participating therein without distinction or difference; and as to each the statutory requirement in that behalf is satisfied. In so far, then, as the decision in the Mountain Chief case is in conflict herewith, upon this the third question considered in that case, it is hereby overruled; and such other decisions as are not in harmony herewith must to that extent be disregarded.

It is in this view that the definite principle of the Carretto case may operate without qualification and without imposing difficulties and complexities in administration. That principle condemns such unequal assignments as were attempted in the Carretto case itself; it condemns the apportionment of particular segments of a common im-

provement to particular claims, as had been done at intervals in the Mountain Chief case and to which the principle was expressly applied in that case; and it affords a simple and accurate rule in the consideration of cases where assignments or apportionments of either character have theretofore been made in respect to part of the claims of a group, resting upon a common improvement, even though such claims have gone to patent and irrespective of the disposition made of the patented claims, except as a transfer may have so impaired the control or use of the improvement for the benefit of the unpatented claims as to render it unavailable to them.

Your office will call upon the company to show whether the present common improvement embraces an extension, succeeding the five locations in June, 1905, and prior to the expiration of the period of publication of notice of the application for patent, representing not less than \$500 in further value for each of those claims. If by satisfactory proofs that question is answered in the affirmative, it must be held that the several entered claims have at their disposal, within the contemplation of the statute, ample credits for patent purposes; and the entry will then be approved intact in the absence of objection otherwise. The order of your office, therefore, is modified accordingly.

In conclusion, it may be remarked that what is hereinabove held is not inconsistent with the decision in the case of Tough Nut No. 2 and Other Lode Claims (36 L. D., 9), in which the improvements relied upon, which in fact were not inherently of a mining character, were complete long prior to the location of the four claims stricken from the entry, and no sufficient improvements had followed the location of those claims.

REPAYMENT—MINING SURVEY DEPOSITS—SECTION 2402, REVISED STATUTES.

GOLDEN EMPIRE MINING CO.

Section 2402 of the Revised Statutes authorizes repayment, to the depositor, of the unearned portion of a mining survey deposit.

Case of Elijah M. Dunphy, 8 L. D., 102, overruled in so far as in conflict.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(F. W. C.) *Land Office, June 30, 1908.* (E. B. C.)

The Golden Empire Mining Company has appealed from an order denying its application for transfer of \$30, being a part of an unexpended balance standing to the credit of the company upon the books of the office of the surveyor-general for South Dakota, on account of moneys deposited by the company to the credit of the Treasurer of the United States originally for the purpose of defraying the cost of office work connected with the survey of certain mining

claims owned by it, to the credit of similar work incident to the survey of the Mineral Zone lode mining location situated in the same surveying district and claimed by one Chambers Kellar.

From the record it appears that on October 23, 1903, the company deposited with the First National Bank of Deadwood, South Dakota, a designated United States depository, to the credit of the Treasurer of the United States, per certificate of deposit No. 174, the sum of \$830, to cover the estimated cost of work to be performed in the office of the surveyor-general for Wyoming, in connection with the survey of the company's Alaska No. 1 and forty other lode mining claims, located in the State of Wyoming. Afterwards the company abandoned the survey of the claims and made application for a transfer of the unexpended balance of the deposit to the office of the surveyor-general for South Dakota, to be used to cover the costs of office work upon mineral surveys in the latter State. The surveyor-general for Wyoming reported that \$23.81 had been used in his office, in copying the location certificates and issuing the order for the survey. Thereupon, your office, September 26, 1907, directed the surveyor-general for South Dakota to place to the credit of the company, upon the books of his office, the unexpended balance, *viz.*, \$806.19, to be used by him in payment for work to be performed in connection with mineral surveys which might be applied for by the company in the State of South Dakota. Proper entries showing the transfer of that amount were made upon the books of your office and of the office of the surveyor-general for Wyoming.

In this connection your office advised the surveyor-general for South Dakota as follows:

It is held, however, that the application of said unexpended deposit is limited by departmental decision in the Dunphy case (8 L. D., 102), to work that may be applied for only by the party who made the deposit, and the right to use the unexpended amount referred to on work connected with the surveys applied for by other than the Golden Empire Mining Company is therefore denied.

October 25, 1907, the surveyor-general for South Dakota received an application for an order for the survey of the claim of Chambers Kellar, known as the Mineral Zone lode mining claim, and, at the same time, a request by the Golden Empire Mining Co. that \$30 of its unexpended balance be applied to defray the expenses of office work incidental to said survey. The request was denied and the application for survey rejected by the surveyor-general, because of the instructions above quoted.

From this action the company has appealed. For the reason that the action taken by the surveyor-general was based upon specific instructions by your office, the appeal has been transmitted for departmental consideration.

Section 2334 of the Revised Statutes requires that the expenses of the survey of a mining claim shall be paid by the applicant, and section 2325 provides that the plat and field notes of the claim applied for shall be "made by or under the direction of the United States surveyor-general." The deposit here in question finds its way into the Treasury of the United States solely under and by reason of the provisions of paragraph 91 of the Mining Regulations, which is as follows:

91. With regard to the *plating* 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.

This regulation in its present form was first promulgated as paragraph 75 of the mining circular of June 10, 1872 (Copp's Mining Decisions, p. 290). Prior to that time the mining claimant was required to deposit in favor of the United States not only the estimated cost of the *plating* and office work but as well the estimated expense of the field work of the survey, and also the cost of publication of notice of application (Circular, January 14, 1867—Copp's Min. Dec., p. 242).

The fund specified in the regulation is a general fund arising under the provisions of sections 2401, 2402, and 2403 of the Revised Statutes, the first and last as amended by the act of August 20, 1894 (28 Stat., 423), to which deposits of the kind here in question are passed until earned.

Section 2402 is as follows:

The deposit of money in a proper United States depository, under the provisions of the preceding section, shall be deemed an appropriation of the sums so deposited for the objects contemplated by that section, and the Secretary of the Treasury is authorized to cause the sums so deposited to be placed to the credit of the proper appropriations for the surveying service, but any excess in such sums over and above the actual cost of the surveys, comprising all expenses incident thereto for which they were severally deposited, shall be repaid to the depositors, respectively.

It will be observed that these deposits do not fall into or become a part of the general funds of the Government but are dedicated and appropriated for the surveys contemplated, with the provision that any excess over and above the actual cost of the surveys and expenses incidental thereto shall be repaid to the respective depositors.

In the case of Elijah M. Dunphy, *supra*, cited by your office, the question involved was the repayment of an unexpended portion of a mining survey deposit, the claimant having been refused the transfer of the deposit to the account of another mining claim. Your

office denied the application for repayment, on the ground that there was no authority of law authorizing its allowance. Appeal was taken, and it was contended that it had been the custom in such cases to make repayment and that to refuse the application was to require payment for work that had not been performed.

The decision, in part, stated:

The money deposited by Mr. Dunphy having in due course of business been turned into the Treasury, cannot be withdrawn without authority of law. In neither of the acts authorizing repayment is provision made for a case like this. The sum involved herein is in the possession of the United States without any consideration having been given therefor and the depositor is justly entitled to its return; but, in the absence of any law providing for repayment in such cases, it is not within the power of the Department to grant the relief prayed for.

While the money cannot be returned to the depositor, it can be applied to a new survey if one be desired.

In connection with this conclusion two opinions of the Attorney-General of the United States and three decisions of the Department were mentioned, but none of said cases involved the precise question there under consideration, namely, the repayment of the mining survey deposit. The Department based its conclusion upon the ground that neither of the repayment acts covered such a case, referring, undoubtedly, to sections 2362 and 2363 of the Revised Statutes and to the act of June 16, 1880 (21 Stat., 287). That the repayment of a mining survey deposit is not within the purview of these statutes is not to be questioned, but that the Dunphy case does not present a correct solution of the question there involved is the view now entertained by the Department, as will hereinafter appear.

The Department is advised that since said decision it has been the practice of your office to refuse all applications for repayment of such a deposit but, upon application therefor, to allow the depositor to apply the credit existing in his favor to office work incidental to the survey of another mining claim owned by him. Hence the question of repayment has not been since that decision brought before the Department. It also appears that the credit arising from deposits of the character here involved has been transferred from one surveying district to another, under the authorization and supervision of your office.

The appellant contends that the land department should go a step further, and authorize a transfer of credit to the use and benefit of a third party. In this connection, without deciding whether the section mentioned does or does not apply, it may be questioned whether the provisions of section 3477 of the Revised Statutes would not preclude the transfer requested. That section, in part, provides:

All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or condi-

tional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof.

Is not the requested transfer here involved, in essence and substance, although not in form perhaps, an assignment or transfer of a portion of a claim upon the United States?

The moneys derived from deposits for mining surveys, in common with other moneys derived from deposits made by settlers and coal land claimants for township surveys and by the owners and grantees of public lands for the surveys of such lands, are covered into the Treasury into one general fund. There are no separate accounts in the Treasury Department showing what sums are derived from the several sources mentioned. The mining survey deposit as such carries no distinguishing marks with it into this fund in the Treasury, but it is merged and its identity lost in the one common fund known as the deposits by individuals for the survey of public lands.

When moneys from this fund are required to defray the cost of office work in connection with surveys of the deposit system, upon the request of your office, the Interior Department makes requisition upon the Treasury calling for a single stated amount from the fund in favor of a specified surveyor-general, who has applied therefor to your office, which has found him to be entitled thereto, and thereupon the Treasurer withdraws the requisite amount from the fund and forwards it to such surveyor-general, in whose office only are kept the individual accounts showing the amount and purpose of all deposits for surveys in his surveying district and the portion of each deposit earned. The surveyor-general, being a disbursing officer of the Government under bonds, is charged with the official duty of properly disbursing, applying and accounting for the funds received from the Treasury, subject to the supervision of your office. The Treasury Department finds it unnecessary to keep any accounts with individual depositors or with the different surveyors-general in relation to this fund, such accounts being kept by the surveyors-general and by your office, respectively. Therefore, so far as the Treasury Department is concerned, moneys arising from mining survey deposits are not distinguished or segregated from other deposits by individuals for surveys, but are covered into the Treasury, are withdrawn therefrom, and are disbursed under and by reason of the provisions of sections 2401 and 2402, there being no other or different statutory authority for handling such deposits.

It then follows that the same statutory authority, namely section 2402, as authorizes the disbursement of moneys from this fund for

office work on mining surveys also provides for and authorizes the repayment of the unearned portion of the mining survey deposit to the depositors; or, to state the proposition in another form, there is precisely the same authority of law to make repayment of an unearned mining survey deposit as there is to withdraw money from the Treasury in order to pay for office work incidental to a mining survey in the office of the surveyor-general. The statutory power and authority existing for the latter purpose is equally existent for the former.

In the Dunphy case, above referred to, these sections of the Revised Statutes were not mentioned or considered and the conclusion there reached was grounded upon the want of authority under the repayment acts for a refund to the mining survey depositor. Upon further consideration the Department is of the opinion that the views above set forth express the better rule and that repayment of the unearned portion of a mining survey deposit to the depositor is authorized; and in so far as the decision in the Dunphy case (8 L. D., 102) holds to the contrary, the same is hereby overruled.

In reaching this conclusion the Department is not unaware that in some instances depositors for mining survey work have gone before Congress and have secured the passage of relief bills authorizing reimbursement to them and making appropriation of moneys therefor, but they have done this because they were unable to secure the desired relief through the land department because of the departmental holding in the Dunphy case. They could not get their requests for repayment approved by the land department, and hence were unable to present the same to the Treasury. As this Department is advised, these relief bills have not, in all instances, appropriated moneys for reimbursement from the fund created by these deposits, but in many cases the reimbursement has been from other moneys in the Treasury subject to general appropriation.

Upon the foregoing considerations and in the interests of good administration, as well as in view of the possible question suggested by the provisions of section 3477, *supra*, the Department is of the opinion that the Golden Empire Mining Company's application to transfer a portion of its mining survey deposit to defraying the cost of the office work incidental to the survey of the mining location claimed by Chambers Kellar was properly denied. The decision of your office is accordingly affirmed.

Nevertheless, in accordance with the views above expressed, the company may apply for repayment of the unearned portion of its mining survey deposit, if it so desires, under such directions as your office may deem necessary in the premises, and such application will be received and acted upon in due course.

# REGULATIONS FOR RIGHTS OF WAY OVER PUBLIC LANDS AND RESERVATIONS.

## CANALS, DITCHES, AND RESERVOIRS.

1. *General statement.*—Sections 18, 19, 20, and 21 of the act of Congress approved March 3, 1891 (26 Stat., 1095), entitled "An act to repeal timber-culture laws, and for other purposes," grant the right of way through the public lands and reservations of the United States for the use of canals, ditches, or reservoirs heretofore or hereafter constructed by corporations, individuals, or associations of individuals. If the right of way is upon a reservation not within the jurisdiction of the Interior Department, the application must be filed in accordance with these regulations, and will be submitted to the Department having jurisdiction. A map and field notes of the portion within any reservation, except in the case of a national forest, must be submitted in addition to the duplicates required herein. All maps and field notes must conform to the provisions of this circular.

The sections above noted read as follows:

SEC. 18. That the right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation, and duly organized under the laws of any State or Territory, which shall have filed or may hereafter file with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof; also the right to take from the public lands adjacent to the line of the canal or ditch, material, earth, and stone necessary for the construction of such canal or ditch: *Provided*, That no such right of way shall be so located as to interfere with the proper occupation by the Government of any such reservation, and all maps of location shall be subject to the approval of the Department of the Government having jurisdiction of such reservation, and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories.

SEC. 19. That any canal or ditch company desiring to secure the benefits of this act shall, within twelve months after the location of ten miles of its canal, if the same be upon surveyed lands, and if upon unsurveyed lands within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a map of its canal or ditch and reservoir; and upon the approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office, and thereafter all such lands over which such rights of way shall pass shall be disposed of subject to such right of way. Whenever any person or corporation, in the construction of any canal, ditch, or reservoir injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

SEC. 20. That the provisions of this act shall apply to all canals, ditches, or reservoirs heretofore or hereafter constructed, whether constructed by corporations, individuals, or association of individuals, on the filing of the certificates and maps herein provided for. If such ditch, canal, or reservoir has been or shall be constructed by an individual or association of individuals, it shall be sufficient for such individual or

association of individuals to file with the Secretary of the Interior and with the register of the land office where said land is located a map of the line of such canal, ditch, or reservoir, as in case of a corporation, with the name of the individual owner or owners thereof, together with the articles of association, if any there be. Plats heretofore filed shall have the benefits of this act from the date of their filing, as though filed under it: *Provided*, That if any section of said canal or ditch shall not be completed within five years after the location of said section the rights herein granted shall be forfeited as to any uncompleted section of said canal, ditch, or reservoir, to the extent that the same is not completed at the date of the forfeiture.

SEC. 21. That nothing in this act shall authorize such canal or ditch company to occupy such right of way except for the purpose of said canal or ditch, and then only so far as may be necessary for the construction, maintenance, and care of said canal or ditch.

2. *Material on adjacent lands.*—The word *adjacent*, as used in section 18 of the act, in connection with the right to take material for construction from the public lands, must be construed according to the conditions of each case (28 L. D., 439). The right extends only to construction, and no public timber or material may be taken or used for repair or improvements (14 L. D., 566). These decisions were rendered under the railroad right-of-way act, and are applied to this act since the words are the same in both.

Section 2 of the act approved May 11, 1898 (30 Stat., 404), entitled "An act to amend an act to permit the use of the right of way through public lands for tramroads, canals, and reservoirs, and for other purposes," authorizes the use of rights of way granted under the act of 1891 for purposes subsidiary to the main purpose of irrigation. The language of said section is as follows:

SEC. 2. That rights of way for ditches, canals, or reservoirs heretofore or hereafter approved under the provisions of sections eighteen, nineteen, twenty, and twenty-one of the act entitled "An act to repeal timber-culture laws, and for other purposes," approved March third, eighteen hundred and ninety-one, may be used for purposes of a public nature; and said rights of way may be used for purposes of water transportation, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation.

3. *Control of water.*—While these acts grant rights of way over the public lands necessary to the maintenance and use of ditches, canals, and reservoirs, the control of the flow and use of the water is, so far as this act is concerned, vested in the States or Territories, the jurisdiction of the Department of the Interior being limited to the approval of maps carrying the right of way over the public lands. If the right of way applied for under this act in any wise involves the appropriation of natural sources of water supply, the damming of rivers, or the use of lakes, the maps should be accompanied by proof that the plans and purposes of the projectors have been regularly submitted and approved in accordance with the local laws or customs governing the use of water in the State or Territory in which such right of way is located. No general rule can be adopted in regard to this matter. Each case must rest upon the showing filed.

4. *Nature of grant.*—The right granted is not in the nature of a grant of lands, but is a base or qualified fee. The possession and right of use of the lands are given for the purposes contemplated by law, but a reversionary interest remains in the United States, to be conveyed by it to the person to whom the land may be patented, whose rights will be subject to those of the grantee of the right of way. All persons settling on a tract of public land, to part of which right of way has attached for a canal, ditch, or reservoir, take the land subject to such right of way, and at the total area of the subdi-

vision entered, there being no authority to make deduction in such cases. If a settler has a valid claim to land existing at the date of the filing of the map of definite location, his right is superior, and he is entitled to such reasonable measure of damages for right of way as may be determined upon by agreement or in the courts, the question being one that does not fall within the jurisdiction of this Department. Section 21 of the act of March 3, 1891, provides that the grant of a right of way for a canal, ditch, or reservoir does not necessarily carry with it a right to the use of land 50 feet on each side, but only such land may be used as is necessary for construction, maintenance, and care of the canal, ditch, or reservoir. The width is not specified.

5. *Right of way through national forests.*—Whenever a right of way is through a national forest, the applicant must enter into such stipulation and execute such bond as the Forest Service may require for the protection of such national forest. No construction will be allowed in a national forest until an application for right of way has been regularly filed and approved by the Secretary of the Interior, or unless permission for such construction work has been specifically given.

6. *Right of way through proposed national forest.*—If the right of way is through land within a proposed national forest, the applicant must file the following stipulations under seal:

(a) That the proposed right of way is not so located as to interfere with the proper occupation and use of the reservation by the Government.

(b) That the applicant will cut no timber from the reserve outside the right of way, and will remove no timber from the land within the right of way except such as is rendered necessary for the proper use and enjoyment of the privilege for which application is made.

(c) That he will remove from the reservation, or destroy, under such safeguards as may be deemed necessary by the General Land Office, all standing, fallen, and dead timber, as well as all tops, lops, brush, and refuse cuttings on the right of way, for such distance on each side of the central line as may be required by the General Land Office to protect the forest from fire.

(d) That the applicant will furnish free of charge such assistance in men and material for fighting fires as may be spared without serious injury to the applicant's business.

(e) That should any portion of said right of way be included in a National Forest, the applicant will build new roads, trails, and crossings, as required by the Forest Service, in case any roads or trails are destroyed or intercepted by construction work or flooding upon said right of way.

The applicant will also be required to give bond to be approved by the Commissioner of the General Land Office, stipulating that the United States will be compensated "for any and all damage to the public lands, timber, natural curiosities, or other public property on such reservation, or upon the lands of the United States, by reason of such use and occupation of the reserve, regardless of the cause or circumstances under which such damage may occur." A bond furnished by any surety company that has complied with the provisions of the act of August 13, 1894 (28 Stat., 279), will be accepted. The amount of the bond can not be fixed until the application has been

submitted to the General Land Office, when a form of bond will be furnished and the amount thereof fixed.

7. *Right of way partly on unsurveyed land.*—Canals, ditches, or reservoirs lying partly upon unsurveyed land can be approved if the application and accompanying maps and papers conform to these regulations, but the approval will only relate to that portion traversing the surveyed lands. (For right of way wholly on unsurveyed land, see section 17.)

8. *Application by corporation.*—An incorporated company desiring to obtain the benefits of the law must file the papers and maps specified below with the register of the land district in which the canal, ditch, or reservoir is to be located. These papers and maps will be forwarded to the General Land Office, and, after examination, they will be submitted to the Secretary of the Interior with recommendation as to their approval:

(a) A copy of its articles of incorporation, duly certified, to by the proper officers of the company under its corporate seal, or by the secretary of the State or Territory where organized.

(b) A copy of the State or Territorial law under which the company was organized (if it was organized under State or Territorial law), with certificate of the governor or secretary of the State or Territory, under seal, that the same was the law at the date of incorporation. (See paragraph *k* of this section.)

(c) If the State or Territorial law directs that the articles of incorporation or other papers connected with the organization be filed with any State or Territorial officer, there must be submitted the certificate of such officer that the same have been filed according to law, and giving the date of the filing thereof.

(d) When a company is operating in a State or Territory other than that in which it is incorporated, it must submit the certificate of the proper officer of the State or Territory that it has complied with the laws of that State or Territory governing foreign corporations to the extent required to entitle the company to operate in such State or Territory.

No forms are prescribed for the above portion of the "due proofs" required, as each case must be governed to some extent by the laws of the State or Territory.

(e) The official statement, by the proper officer, under the seal of the company, that the organization has been completed, that the company is fully authorized to proceed with construction according to the existing law of the State or Territory in which it is incorporated, and that the copy of the articles filed is true and correct. (See Form 1, p. 587.)

(f) A true list, signed by the president, under the seal of the company, showing the names and designations of its officers at the date of the filing of the proofs. (See Form 2, p. 587.)

(g) A copy of the company's title or right to appropriate the water needed for its canals, ditches, and reservoirs, certified as required by the State or Territorial laws. If the miner's inch is the unit used in such title, its equivalent in cubic feet per second must be stated. If the right to appropriate the water has not been adjudicated under the local laws, a certified copy of the notice of appropriation will be sufficient. If the notice of appropriation is accompanied by a map of the canal or reservoir it will not be necessary to furnish a copy of the map

where the notice describes the location sufficiently to identify it with the canal or reservoir for which the right-of-way application is made. If the water-right claim has been transferred a number of times it is not necessary to furnish a copy of each instrument of transfer; an abstract of title will be accepted.

(h) A copy of the State or Territorial laws governing water rights and irrigation, with the certificate of the governor or secretary of the State or Territory that the same is the existing law. (See paragraph *k* of this section.)

(i) A separate statement as follows: The amount of water flowing in the stream supplying the canal, ditch, or reservoir, at the point of diversion or damming, during the preceding year or years. For this purpose it will be necessary to give the maximum, minimum, and average flow in cubic feet per second for each month during the period for which records are available. In cases of reservoirs of 5,000 acre-foot capacity, or more, or of ditches of 100 cubic feet per second capacity, or more, the amount of water, in acre-feet, available for storage or diversion, and the amount of water which it is proposed to divert annually from the stream or streams affected, with the period during which the water is to be diverted. The length, cross-section, grade, and capacity of the ditches to be constructed and the characteristics of each ditch as affecting the flow of water. The surveyor or engineer of the applicant must certify to the above, and must certify that all available records (specifying them), official and otherwise, have been consulted. If there is no well-defined flow which can be measured, or if there is no record of the flow, the area of the watershed, average annual rainfall, and estimated run-off at the point of diversion or damming must be given.

(j) Maps, field notes, and other papers, as hereinafter required.

(k) If certified copies of the existing laws regarding corporations and irrigation, and of new laws as passed from time to time, be forwarded to the General Land Office by the governor or secretary of the State or Territory, the applicant may file, in lieu of the requirements of paragraphs *b* and *h* of this section, a certificate of the governor or secretary of state, under seal, that no change has been made since a given date, not later than that of the laws last forwarded.

9. *Application by individuals.*—Individuals or associations of individuals making applications for right of way are required to file the information called for in paragraphs *g*, *h*, *i*, and *j* of the preceding section. Associations of individuals must, in addition, file their articles of association; if there be none, the fact must be stated over the signature of each member of the association.

10. *Field notes.*—Field notes of the surveys must be filed in duplicate, separate from the map, and in such form that they may be folded for filing. Complete field notes should not be placed on the map, but the following data should be shown thereon: (a) The station numbers where deflections or changes of numbering occur; (b) station numbers with distances to corners at points where the lines of the public surveys are crossed, and (c) the lines of reference of initial and terminal points, with their courses and distances. Typewritten field notes with clear carbon copies are preferred, as they expedite the examination of applications. The field notes should contain, in addition to the ordinary records of surveys, the data called for in this and in the following sections. They should state which line of the canal

was run—whether middle or a specified side line. The stations or courses should be numbered in the field notes and on the map. The record should be so complete that from it the surveys could be accurately retraced by a competent surveyor with proper instruments. The field notes should show whether the lines were run on the true or the magnetic bearings, and if run on magnetic bearings the declination of the needle and date of determination must be stated. The kind and size of the instrument used in running the lines and its minimum reading on the horizontal circle should be noted. The line of survey should be that of the actual location of the proposed ditch and, as exactly as possible, the water line of the proposed reservoir. The method of running the grade lines of canals and the water lines of reservoirs must be described.

11. *Maps.*—The maps filed must be drawn on tracing linen in duplicate, and must be strictly conformable to the field notes of the survey. They must be filed in the land office for the district in which the right of way is located; but if the right of way is located in more than one district, duplicate maps and field notes need be filed in but one district, and single sets in the others. Other canals, ditches, laterals, or reservoirs with which connections are made must be shown, but distinguished from those for which right of way is desired by ink of a different color.

The scale of the map should be 2,000 feet to the inch in the case of canals or ditches and 1,000 feet to the inch in the case of reservoirs. The scale may, however, be 1,000 feet to the inch in the case of canals or ditches and 500 feet to the inch in the case of reservoirs when such a scale is absolutely necessary to properly show the proposed works.

All subdivisions of the public surveys represented on the map should have their entire boundaries drawn, and on all lands affected by the right of way the smallest legal subdivisions (40-acre tracts and lots) must be shown. The section, township, and range must be clearly marked on the map.

The map must bear a statement of the width of each canal, ditch, or lateral at high-water line. If not of uniform width, the limits of the deviations must be clearly defined on the map. The field notes should record the changes in such a manner as to admit of exact location on the ground. In the case of a pipe line, the diameter of the pipe should be stated. The map must show the source of water supply.

In applications for right of way for a reservoir, the capacity of the reservoir must be stated on the map in acre-feet (i. e., the number of acres that will be covered to a depth of 1 foot by the water that the reservoir will hold; 1 acre-foot is 43,560 cubic feet). The map must show the source of water supply for the reservoir and the location and height of the dam.

12. *Initial and terminal points.*—The termini of a canal, ditch, or lateral should be fixed by reference of course and distance to the nearest existing corner of the public survey. The initial point of the survey of a reservoir should be fixed by reference of course and distance to the nearest existing corner outside the reservoir by a line that does not cross an area that will be covered with water when the reservoir is in use. The map, field notes, engineer's affidavit, and applicant's certificate (Forms 3 and 4) should each show these connections.

13. *Connections on unsurveyed land.*—When either terminal of a canal, ditch, or lateral is upon unsurveyed land, it must be connected

by traverse with an established corner of the public survey, if not more than 6 miles distant, and the single bearing and distance from the terminal point to the corner must be computed and noted on the map, in the engineer's affidavit, and in the applicant's certificate (Forms 3 and 4). The notes and all data for the computation of the traverse must be given in the field notes.

14. *Connections with monuments on unsurveyed land.*—When an established corner of the public survey is more than 6 miles distant 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 must give the course and distance to the terminus. The field notes must give an accurate description of the mark and full data of the traverse as required above. The engineer's affidavit and applicant's certificate (Forms 3 and 4) must state the connections. These monuments are of great importance.

15. *Forms for canal, etc., on unsurveyed land.*—When a canal, ditch, or lateral lies partly on unsurveyed land, each portion lying within surveyed and unsurveyed land will be separately described in the field notes and in Forms 3 and 4 by connections of termini, length, and width, as though each portion were independent. (See secs. 12, 13, and 14.)

16. *Forms for reservoir on unsurveyed land.*—When a reservoir lies partly on unsurveyed land its initial point must be noted, as required for the termini of ditches in section 12. The reference line must not cross an area that will be covered with water when the reservoir is in use. The areas of the several parts lying on surveyed and unsurveyed land must be separately noted on the map, in the field notes, and in Forms 3 and 4.

17. *Right of way wholly on unsurveyed land.*—Maps showing canals, ditches, or reservoirs wholly upon unsurveyed lands may be received and placed on file in the General Land Office and the local land office of the district in which the land is located, for general information. The date of filing will be noted thereon; but the maps will not be submitted to nor approved by the Secretary of the Interior, as the act makes no provision for the approval of any but maps showing the location in connection with the public surveys. The filing of such maps will not dispense with the filing of maps after the survey of the lands and within the time specified by the act granting the right of way. If these maps are in all respects regular when filed, they will receive the Secretary's approval. In filing such maps the initial and terminal points will be fixed as indicated in sections 13 and 14.

18. *Connections with public survey corners.*—Whenever the line of survey crosses a township or section line of the public survey, the distance to the nearest existing corner should be ascertained and noted. In the case of a reservoir the distance must not be measured across an area which will be covered with water when the reservoir is in use. The map of the canal, ditch, or reservoir must show these distances, and the field notes must give the points of intersection and the distances. When corners are destroyed by the canal or reservoir, proceed as directed in sections 19 and 20.

19. *Witness monuments for destroyed public survey corners.*—Whenever a corner of the public survey will be covered by earth or water, or otherwise rendered useless, marked monuments (one on each side of destroyed corner) must be set on each township or section line passing

through, or one on each line terminating at, said corner. These monuments must comply with the requirements for witness corners of the Manual of Surveying Instructions issued by the General Land Office, and must be at such distance from the works as to be safe from interference during the construction and operation of the same. If two or more consecutive corners on the same line are destroyed, the monument shall be set as required in the Manual for the nearest corner on that line to be covered.

20. *Method of establishing witness monuments.*—The line on which such monument is set will be determined by running a random line from the corner to be destroyed to the first existing corner on the line to be marked by the monument, a temporary mark being set on the random line at the distance of the proposed monument. If the random line strikes the corner run to, the monument will be established at the place marked; if the random line passes to one side of the corner, the north and south or east and west distance to it will be measured and the true course calculated. The proper correction of the temporary mark will then be computed and a permanent monument set in the proper place. The field notes for the surveys establishing the monuments must be in duplicate and separate from those of the canal or reservoir, and must be certified by the surveyor under oath. They must comply with the form of field notes prescribed in the Manual of Surveying Instructions issued by the General Land Office.

When application is made for a canal or reservoir which is constructed and in operation, the method to be adopted in setting the monuments must be governed by the special features of each case and left to the judgment of the surveyor. No field notes will be accepted unless the lines on which the monuments are set conform to the lines shown by the field notes of the survey as made originally under the direction of this office, and unless the notes are in such form that the computation can be verified and the lines retraced on the ground.

21. *Affidavit and certificate required.*—The engineer's affidavit and applicant's certificate must both designate by termini (as in sections 12 to 17, inclusive) and length each canal, ditch, or lateral, and by initial point and area each reservoir shown on a map, for which right of way is asked. This affidavit and this certificate (changed where necessary when an application is made by an individual or association of individuals) must be written on the map in duplicate. Applicants under the act of March 3, 1891, must include in the certificate (Form 4) the statement: "And I further certify that the right of way herein described is desired for the main purpose of irrigation." (See Forms 3 and 4, pages 587 and 588.) No changes or additions are allowable in the substance of these forms, except when the facts differ from those assumed therein.

22. *Notation on maps and records.*—When maps are filed, the register will note on each the name of the land office and the date of filing over his written signature. Notations will also be made on the records of the local land office, as to each *unpatented* tract affected, that application for right of way for a canal (or reservoir) is pending, giving date of filing and name of applicant. The register will certify on each map, over his written signature, that unpatented land is affected by the proposed right of way. The maps and field notes in duplicate, and any other papers filed in connection with the applica-

tion, will then be promptly transmitted to the General Land Office with report that the required notations have been made on the records of the local land office. Any valid right existing at the date of the filing of the right of way application will not be affected by the filing or approval thereof. (See sec. 4.) If no unpatented land is involved in the application, the local officers will reject it, allowing the usual right of appeal.

Upon the approval of a map of location by the Secretary of the Interior, the duplicate copy will be sent to the local officers, who will mark upon the township plats the lines of the canals, ditches, or reservoirs, as laid down on the map. They will also note the approval in ink, on the tract books, opposite each tract marked as required above and report to the General Land Office that notations have been made and the applicant notified of approval.

23. *Evidence of construction.*—When the canal, ditch, or reservoir is constructed, an affidavit of the engineer and certificate of the applicant (Forms 5 and 6) must be filed in the local office, in duplicate, for transmission to the General Land Office. No new map will be required, unless there are deviations from the right of way previously approved, either before or after construction, when there must be filed new maps and field notes in full, as herein provided, bearing proper forms, changed to agree with the facts in the case. The map must show clearly the portions amended or bear a statement describing them, and the location must be described in the forms as the *amended* survey and the *amended* definite location. In such cases the applicant must file a relinquishment, under seal, of all rights under the former approval as to the portions amended, said relinquishment to take effect when the map of amended definite location is approved by the Secretary of the Interior. If the canal or reservoir has been constructed on the location originally approved, and is to be used until the canal or reservoir on the amended location is ready for use, the relinquishment may be made to take effect upon the completion of the canal or reservoir on the amended location.

24. *Right of way on segregated reservoir sites.*—The act approved February 26, 1897 (29 Stat., 599), entitled "An act to provide for the use and occupation of reservoir sites reserved," permits the approval of applications under the above act of 1891 for right of way upon reservoir sites reserved under authority of the acts of October 2, 1888 (25 Stat., 505, 526), and August 30, 1890 (26 Stat., 371, 391). The text of the act is as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That all reservoir sites reserved or to be reserved shall be open to use and occupation under the right-of-way act of March third, eighteen hundred and ninety-one. And any State is hereby authorized to improve and occupy such reservoir sites to the same extent as an individual or private corporation, under such rules and regulations as the Secretary of the Interior may prescribe: *Provided,* That the charges for water coming in whole or part from reservoir sites used or occupied under the provisions of this act shall always be subject to the control and regulation of the respective States and Territories in which such reservoirs are in whole or part situate.

When an application is made under this act a reference to it should be added to Forms 4 and 6. In other respects the application should be prepared according to the preceding regulations.

## OIL PIPE LINES IN COLORADO AND WYOMING.

25. *Requirements.*—The act approved May 21, 1896 (29 Stat., 127), entitled "An act to grant right of way over the public domain for pipe lines in the States of Colorado and Wyoming," is similar in its requirements to the right-of-way act of March 3, 1891, and the preceding regulations furnish full information as to the preparation of the maps and papers. Applicants will be governed thereby so far as they are applicable.

The text of the act is as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the right of way through the public lands of the United States situate in the State of Colorado and in the State of Wyoming outside of the boundary lines of the Yellowstone National Park is hereby granted to any pipe-line company or corporation formed for the purpose of transporting oils, crude or refined, which shall have filed or may hereafter file with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of the ground occupied by said pipe line and twenty-five feet on each side of the center of line of the same; also the right to take from the public lands adjacent to the line of said pipe line material, earth, and stone necessary for the construction of said pipe line.

SEC. 2. That any company or corporation desiring to secure the benefits of this act shall within twelve months after the location of ten miles of the pipe line if the same be upon surveyed lands; and if the same be upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a map of its line, and upon the approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office, and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way.

SEC. 3. That if any section of said pipe line shall not be completed within five years after the location of said section the right herein granted shall be forfeited, as to any incomplete section of said pipe line, to the extent that the same is not completed at the date of the forfeiture.

SEC. 4. That nothing in this act shall authorize the use of such right of way except for the pipe line, and then only so far as may be necessary for its construction, maintenance, and care.

## RESERVOIRS FOR WATERING STOCK.

26. *General provisions.*—The act approved January 13, 1897 (29 Stat., 484), entitled "An act providing for the location and purchase of public lands for reservoir sites," is as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That any person, live-stock company, or transportation corporation engaged in breeding, grazing, driving, or transporting live stock may construct reservoirs upon unoccupied public lands of the United States, not mineral or otherwise reserved, for the purpose of furnishing water to such live stock, and shall have control of such reservoir, under regulations prescribed by the Secretary of the Interior, and the lands upon which the same is constructed, not exceeding one hundred and sixty acres, so long as such reservoir is maintained and water kept therein for such purposes: *Provided,* That such reservoir shall not be fenced and shall be open to the free use of any person desiring to water animals of any kind.

SEC. 2. That any person, live-stock company, or corporation desiring to avail themselves of the provisions of this act shall file a declaratory statement in the United States land office in the district where the land is situated, which statement shall describe the land where such reservoir is to be or has been constructed; shall state what business such corporation is engaged in; specify the capacity of the reservoir in gallons, and whether such company, person, or corporation has filed upon other reservoir sites within the same county; and if so, how many.

SEC. 3. That at any time after the completion of such reservoir or reservoirs which, if not completed at the date of the passage of this act, shall be constructed and completed within two years after filing such declaratory statement, such person, company, or corporation shall have the same accurately surveyed, as hereinafter provided, and shall file in the United States land office in the district in which such reservoir is located a map or plat showing the location of such reservoir, which map or plat shall be

transmitted by the register and receiver of said United States land office to the Secretary of the Interior and approved by him; and thereafter such land shall be reserved from sale by the Secretary of the Interior so long as such reservoir is kept in repair and water kept therein.

SEC. 4. That Congress may at any time amend, alter, or repeal this act.

27. *No lands sold.*—Although the title indicates that lands are to be sold for reservoir sites, the act does not provide for the sale of any lands, and therefore no lands can be sold under its provisions. The act, however, directs the Secretary of the Interior to reserve the lands from sale after the approval of the map showing the location of the reservoir. Homestead entries are allowed for lands embraced in reservoir declaratory statements, prior to the completion of the reservoir and the approval of the map, subject, however, to cancellation if the reservoir is completed within the time specified by the act.

28. *Declaratory statement.*—Any person, live-stock company, or transportation corporation engaged in breeding, grazing, driving, or transporting live stock, desiring to obtain the benefits of the act must file a declaratory statement in the United States land office in the district in which the land is located.

29. *Application by corporation.*—When the applicant is a corporation there should be filed a copy of its articles of incorporation and proofs of its organization, as required in section 8, paragraphs *a, b, c, d, e, f,* and *k* of these regulations. If these papers are filed with the first declaratory statement made by the company, a reference thereto by its number will be sufficient in any subsequent application by the company.

The declaratory statement must be made under oath and should be drawn in accordance with Form 9 (page 589), and must contain the following:

(a) The post-office address of the applicant; the name of the county in which the reservoir is to be or has been constructed; the description by the smallest legal subdivision (40-acre tracts or lots) of the land sought to be reserved which under no circumstances must exceed 160 acres; certificate that the land is not occupied or otherwise claimed; certificate that to the best of the applicant's knowledge and belief the land is not mineral or otherwise reserved; statement of the business of the applicant, which statement shall include full and minute information concerning the extent to which he is engaged in breeding, grazing, driving, or transporting live stock, the number and kinds of such stock, the place where they are being bred or grazed, whether within an inclosure or upon uninclosed lands, and also the points from which and to which they are being driven or transported; description of the land owned or claimed by the applicant in the vicinity of the proposed reservoir and statement of its amount; certificate that no part of the land sought to be reserved is or will be fenced, that all the land 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.

(b) The location of the reservoir described by the smallest legal subdivisions (40-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 2 miles of the land sought to be reserved; and if so, where.

(c) The numbers, locations, and areas of all other reservoir sites filed upon by the applicant, especially designating those in the county in which the proposed reservoir is located.

30. *Action by the Land Department on declaratory statements, and size, location, and number of reservoir sites.*—When such declaratory statement is filed, the date of filing will be noted thereon over the signature of the officer receiving it, and the statements will be numbered according to order of June 1, 1908. 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. For the filing of such reservoir declaratory statement the local officers will be authorized to charge the usual fees. (Sec. 2238, U. S. Rev. Stat.) The local officers will forward the declaratory statement with the regular monthly returns, with abstracts, in the usual manner. In acting upon these statements the following general rules will be applied:

(a) No reservation will be made for a reservoir of less than 250,000 gallons capacity, 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 1,500,000 gallons capacity or more 160 acres may be reserved.

(b) Not more than 160 acres shall be reserved for this purpose in any section.

(c) Not more than 160 acres shall be reserved for this purpose in one group of tracts adjoining or cornering upon each other.

(d) A distance of one-half mile must be left between any two groups of tracts which aggregate more than 160 acres.

(e) The local officers will reject any reservoir declaratory statement not in conformity with these rules.

(f) 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 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 appear, will be canceled and all rights thereunder be declared at an end.

(g) 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 appears that the declaratory statement is not filed in good faith for the sole purpose of accomplishing what the law authorizes to be done.

31. *Construction.*—The reservoir must be completed and constructed within two years after the filing of the declaratory statement; otherwise the declaratory statement will be subject to cancellation.

32. *Map and field notes of constructed reservoir.*—After the construction and completion of the reservoir the applicant shall have the same accurately surveyed and mapped, in accordance with the instructions of sections 10 to 22, inclusive, so far as they are appli-

cable. The map and field notes, which are not to be prepared in duplicate, must be filed in the proper local office. The map must bear Forms 10 and 11 (p. 591), and the field notes must be sworn to by the surveyor.

33. *Notations by local land officers.*—When the map, field notes, and other papers have been filed in the local office, the date of filing will be noted thereon and the proper notations will be made on the local office records, as in the case of the declaratory statement. Local officers will then promptly forward the maps and papers to the General Land Office.

34. *Approval.*—The map and papers will be examined in the General Land Office to determine whether they comply with the law and the regulations, and whether the amount of land desired is warranted by the showing made in the application. If found satisfactory they will be submitted to the Secretary of the Interior, and upon approval the lands shown to be necessary for the proper use and enjoyment of the reservoir will be reserved from other disposition so long as the reservoir is maintained and water kept therein for the purposes named in the act. Upon the receipt of notice of such reservation from the General Land Office the local officers will make the proper notations on their records and report the making thereof promptly to the General Land Office.

35. *Annual proof of maintenance.*—In order that this reservation shall be continued it is necessary that the reservoir "shall be kept in repair and water kept therein." For this reason the owner of the reservoir will be required during the month of January of each year to file in the local office an affidavit to the effect that the reservoir has been kept in repair and water kept therein during the preceding year, and that all the provisions of the act have been complied with. Form 12 (p. 591) will be used for this affidavit. Upon failure to file such affidavit steps will be taken looking to the revocation of the reservation of the lands.

36. *Reservoir on unsurveyed land.*—If the reservoir is located on unsurveyed land, the declaratory statement may be filed, the lands being described as closely as practicable.

The widely different conditions to be considered in the operations proposed by the applicants make it impossible to formulate regulations that will furnish the data necessary in all cases. Additional information will be called for whenever necessary for the proper consideration of any particular case.

#### TELEGRAPH AND TELEPHONE LINES, ELECTRICAL PLANTS, CANALS, AND RESERVOIRS.

37. *General statement.*—The act of February 15, 1901 (31 Stat., 790), entitled "An act relating to rights of way through certain parks, reservations, and other public lands," is as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* 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 rights of way through the public lands, forest and other reservations of the United States, and the Yosemite, Sequoia, and General Grant national parks, California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and

pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines, electrical, telegraph, and telephone lines and poles, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted hereunder or any one or more of the purposes herein named: *Provided*, That such permits shall be allowed within or through any of said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the Department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest: *Provided further*, That all permits given hereunder for telegraph and telephone purposes shall be subject to the provision of title sixty-five of the Revised Statutes of the United States, and amendments thereto, regulating rights of way for telegraph companies over the public domain: *And provided further*, That any permission given by the Secretary of the Interior under the provisions of this act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park.

This act, in general terms, authorizes the Secretary of the Interior, under regulations to be fixed by him, to grant permission to use rights of way through the public lands, forest and other reservations of the United States, and the Yosemite, Sequoia, and General Grant national parks in California, for every purpose contemplated by acts of January 21, 1895 (28 Stat., 635), May 14, 1896 (29 Stat., 120), and section 1 of the act of May 11, 1898 (30 Stat., 404), and for other purposes additional thereto, *except for tramroads, the provisions relating to tramroads, contained in the act of 1895 and in section 1 of the act of 1898, aforesaid remaining unmodified and not being in any manner extended.*

Although this act does not expressly repeal any provision of law relating to the granting of permission to use rights of way contained in the acts referred to, yet in view of the general scope and purpose of the act, and of the fact that Congress has, with the exception above noted, embodied therein the main features of the former acts relative to the granting of a mere permission or license for such use, it is evident that, for purposes of administration, the later act should control in so far as it pertains to the granting of permission to use rights of way for purposes therein specified. Accordingly all applications for *permission* to use rights of way for the purposes specified in this act must be submitted thereunder. Where, however, it is sought to acquire a right of way for the main purpose of irrigation, as contemplated by sections 18 to 21 of the act of March 3, 1891 (26 Stat., 1095), and section 2 of the act of May 11, 1898, *supra*, the application must be submitted in accordance with the regulations issued under said acts. (See pp. 567 to 575, inclusive.)

Application for permission to use the desired right of way through the public lands and parks designated in the act must be filed and permission must be granted, as herein provided, before any rights can be claimed thereunder.

38. *Nature of grant.*—It is to be specially noted that this act does not make a grant in the nature of an easement, but authorizes a mere permission in the nature of a license, revocable at any time, and it gives no right whatever to take from the public lands, reservations, or parks, adjacent to the right of way, any material, earth, or stone for construction or other purpose.

39. *Applications for right of way through national forests.*—By section 1 of the act of February 1, 1905 (33 Stat., 628), it is provided:

That the Secretary of the Department of Agriculture shall, from and after the passage of this act, execute or cause to be executed all laws affecting public lands heretofore or hereafter reserved under the provisions of section twenty-four of the act entitled "An act to repeal the timber-culture laws, and for other purposes," approved March third, eighteen hundred and ninety-one, and acts supplemental to and amendatory thereof, after such lands have been so reserved, excepting such laws as affect the surveying, prospecting, locating, appropriating, entering, relinquishing, reconveying, certifying, or patenting of any such lands.

Under this provision it has been determined that the Department of Agriculture is invested with jurisdiction to pass upon all applications under any law of the United States providing for the granting of a permission to occupy and use lands in a national forest, provided this occupation or use is temporary, and will in no wise affect the fee or cloud the title of the United States should the reserve be discontinued.

Therefore, when it is desired to obtain permission to use a right of way over public lands wholly within a national forest, an application should be prepared in accordance with the instructions issued by the Department of Agriculture, and the same filed with the officer in charge of such national forest.

In case the application involves rights and privileges upon public lands partly within and partly without a national forest, separate applications must be prepared, and the one affecting lands within the national forest filed with the forest officer and the other filed in the local land office.

40. *Applications for right of way through land outside of national forests.*—Where permission to use a right of way over lands wholly outside of national forests is desired, the application must be prepared and filed in accordance with sections 4 to 22, inclusive, appropriate changes being made in the prescribed forms so as to specify and relate to the act under which the application is made.

An affidavit by the applicant that he is a citizen of the United States must accompany the application. If the applicant is an association of citizens, each member must make affidavit of citizenship, and a complete list of the members must be given in an affidavit by one of them. If he is not a native-born citizen he must file the usual proofs of naturalization. The applicant must also set forth in the affidavit the purposes for which the right of way is to be used, and must show that he in good faith intends to utilize the same for such purposes.

41. *Buildings to be platted on map in main drawing and in separate drawing.*—When application is made for right of way for electrical or water plants, the location and extent of ground proposed to be occupied by buildings or other structures necessary to be used in connection therewith must be clearly designated on the map and described in the field notes and forms (7 and 8, p. 589) by reference to course and distance from a corner of the public survey. In addition to being shown in connection with the main drawing, the buildings or other structures must be platted on the map in a separate drawing on a scale sufficiently large to show clearly their dimensions and relative positions. When two or more of such proposed structures are to be located near each other, it will be sufficient to give the reference to a corner of the public survey for one of them, provided all the others are

connected therewith by course and distance shown on the map. The applicant must also file an affidavit setting forth the dimensions and proposed use of each of the structures, and must show definitely that each one is necessary for a proper use of the right of way for the purposes contemplated in the act.

42. *Unsurveyed lands.*—Permission may be given under this act (February 15, 1901) for rights of way upon unsurveyed lands, maps to be prepared in accordance with the requirements of this circular.

43. *National parks.*—Whenever a right of way is through any of the national parks designated in the act, the applicant must show to the satisfaction of the Department that the location and use of the right of way for the purposes contemplated will not interfere with the uses and purposes for which the park was originally dedicated, and will not result in damage or injury to the natural conditions of property or scenery existing therein. When the right of way is through any of the national parks designated in the act, the applicant must file the stipulations and bond required by section 6, but, in case of a telephone line, substitute the following: "That upon completion of the telephone lines they shall be subject to the free use of the park officers for all purposes incident to the administration of the park," for stipulation (e) under said section 6.

Whenever right of way within a park is desired for operations in connection with mining, quarrying, cutting timber, or manufacturing lumber, a satisfactory showing must be made of the applicant's right to engage in such operations within the park. If the application and the showing made in support thereof is satisfactory, the Secretary of the Interior will give the required permission in such form as may be deemed proper, according to the features of each case; and it is to be expressly understood, in accordance with the final proviso of the act, that any permission given thereunder may be modified or revoked by the Secretary or his successor, in his discretion, at any time, and shall not be held to confer any right, easement, or interest in, to, or over any public land or park. The final disposal by the United States of any tract traversed by the permitted right of way is of itself, without further act on the part of the Department, a revocation of the permission so far as it affects that tract; and any permission granted hereunder is also subject to such further and future regulations as may be adopted by the Department.

44. *Indian reservations.*—Applications for right of way under this act, all of which is located upon land within an Indian reservation, must be filed with the Commissioner of Indian Affairs. Applications for right of way affecting lands within and without Indian reservations must be filed in the local land office for forwarding to the Commissioner of the General Land Office. Before such applications are transmitted to the Department they will be submitted by the Commissioner of the General Land Office to the Commissioner of Indian Affairs for such action and recommendation as that officer may deem proper in so far as the same pertains to such Indian reservation. Applicants will be required to furnish, in triplicate, so much of the map and field notes as relate to that portion of the right of way within an Indian reservation; and if the application is subsequently granted, one copy of such portion of the map and field notes as pertains to such reservation will be placed on file in the Indian Office. In this connection, attention is directed to the provisions of

section 3 of the act of March 3, 1901 (31 Stat., 1083), which authorizes the granting of permanent rights of way, in the nature of easements, for telegraph and telephone purposes only, through Indian reservations and other Indian lands, upon payment of proper compensation for the benefit of the Indians interested therein. The provisions of the act of March 3, 1901, and the nature and character of the rights authorized to be secured thereunder differ materially from the provisions of the act on which these regulations are based and the rights authorized to be conferred thereunder. Applicants, therefore, desiring to secure permanent rights of way through Indian reservations or other Indian lands for telegraph and telephone purposes will be required to submit their applications therefor under the act of March 3, 1901, supra, in accordance with the then current regulations issued thereunder. (For existing regulations under said act, see regulations approved March 26, 1901.)

45. *Notations and procedure.*—Upon the filing of an application under this act, the register will note the same in pencil on the tract books, opposite the tracts traversed, giving date of filing and name of applicant, and also indorse on each map, over his written signature, the date of filing. If it appears that no portion of the public lands or parks designated in the act would be affected by the approval of such maps, they will be returned to the applicant with notice of that fact. If vacant public land or lands in any park so designated are affected by the proposed right of way, the register will so certify on the map and duplicate over his signature, and will promptly transmit the same to the General Land Office with report that the required notations have been made.

When permission to use the right of way applied for is given by the Secretary of the Interior, a copy of the original map will be sent to the local officers, who will mark upon the township plats the line of the right of way and will note in pencil, opposite each tract of public land affected, that such permission has been given, the date thereof, and a reference to the act.

#### TRAMROADS.

46. *Rights of ways for tramroads.*—The Secretary of the Interior is authorized to permit the use of rights of way for tramroads through the public lands of the United States, not within the limits of any park, national forest, or military or Indian reservation under the provisions of the act of Congress of January 21, 1895 (28 Stat., 635), as amended by section 1 of the act of May 11, 1898 (30 Stat., 404). The act of January 21, 1895, entitled "An act to permit the use of the right of way through the public lands for tramroads, canals, and reservoirs, and for other purposes," is as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* 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 the right of way through the public lands of the United States, 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 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 any 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 section 1 of the act of May 11, 1898, *supra*, as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the act entitled "An act to permit the use of the right of way through the public lands for tramroads, canals, and reservoirs, and for other purposes," approved January twenty-first, eighteen hundred and ninety-five, be, and the same is hereby, amended by adding thereto the following:

"That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of right of way upon the public lands of the United States, not within limits of any park, forest, military, or Indian reservations, for tramways, canals, or reservoirs, to the extent of the ground occupied by the water of the canals and reservoirs, and fifty feet on each side of the marginal limits thereof, or fifty feet on each side of the center line of the tramroad, by any citizen or association of citizens of the United States, for the purposes of furnishing water for domestic, public, and other beneficial uses."

Applications for permission to use rights of way for tramroads should be prepared and filed in accordance with the regulations hereinbefore prescribed relative to presentation of applications for rights of way under the act of February 15, 1901, and the then current regulations issued under the general railroad right-of-way act of March 3, 1875 (for existing regulations under the latter act see 32 L. D., 481), the prescribed forms in such regulations being so modified as to specify and relate to the acts under which the application is made. It is to be specially noted that the acts relating to tramroads do not authorize the granting of permission to use rights of way for such purpose within the limits of any park, national forest, or military or Indian reservation, and it is to be further noted that permission to use rights of way for tramroads over public lands, when granted, only confers a right in the nature of a license and is subject to all the conditions and limitations hereinbefore stated in section 43 of these regulations.

#### RIGHT OF WAY THROUGH NATIONAL FORESTS FOR DAMS, RESERVOIRS, WATER PLANTS, DITCHES, FLUMES, PIPES, TUNNELS, AND CANALS FOR MUNICIPAL OR MINING PURPOSES.

47. *General statement.*—Section 4, of the act of Congress approved February 1, 1905 (33 Stat., 628), reads as follows:

SEC. 4. That rights of way for the construction and maintenance of dams, reservoirs, water plants, ditches, flumes, pipes, tunnels, and canals, within and across the forest reserves of the United States, are hereby granted to citizens and corporations of the United States for municipal or mining purposes, and for the purposes of the milling and reduction of ores, during the period of their beneficial use, under such rules and regulations as may be prescribed by the Secretary of the Interior, and subject to the laws of the State or Territory in which said reserves are respectively situated.

This act grants rights of way through national forests to citizens and corporations of the United States for the objects therein specified, during the period of their beneficial use, under rules and regulations to be prescribed by the Secretary of the Interior, and subject to the laws of the State or Territory in which said forests are situated.

All applications for the right of way for the purposes set forth in said act must be submitted in accordance herewith.

No construction will be allowed in national forests until an application for right of way has been regularly filed in accordance with these regulations and has been approved by the Secretary of the Interior, or unless permission has been specifically given.

48. *Nature of grant.*—The right granted is not in the nature of a grant of lands, but is a base or qualified fee, giving the possession and right of use of the land for the purposes contemplated by the act, during the period of the beneficial use. When the use ceases the right terminates, and thereupon proper steps will be taken to revoke the grant.

No right, whatever, is given to take any material, earth, or stone for construction or other purposes, nor is any right given to use any land outside of what is actually necessary for the construction and maintenance of the works.

49. *Preparation of applications.*—Applications for right of way under this act should be made in the form of a map and field notes, in duplicate, and must be filed in the local land office for the district in which the land traversed by the right of way is situated; if the land is in more than one district, duplicate maps and field notes need be filed in only one district and single sets in the others. The maps, field notes, evidence of water rights, etc., and, when the applicant is a corporation, the articles of incorporation and proofs of organization must be prepared and filed in accordance with sections 7 to 21, inclusive, appropriate changes being made in the prescribed forms so as to specify and relate to the act under which the application is made.

An affidavit by the applicant that he is a citizen of the United States must accompany the application. If the applicant is an association of citizens, each member must make affidavit of citizenship, and a complete list of the members must be given in an affidavit of one of them. A copy of their articles of association must also be furnished, or if there be none, the fact must be stated over the signature of each member of the association.

If the applicant is not a native-born citizen, he must file the usual proof of naturalization. The applicant must set forth in the affidavit the purposes for which the right of way is desired.

50. *Water-plant structures.*—When application is made for right of way for water plants, the location and extent of ground proposed to be occupied by buildings, or other structures necessary to be used in connection therewith, must be clearly designated on the map and described in the field notes and forms (7 and 8, p. 589) by reference to course and distance from a corner of the public survey. In addition to being shown in connection with the main drawing, the buildings or other structures must be platted on the map in a separate drawing on a scale sufficiently large to show clearly their dimensions and relative positions. When two or more of such structures are to be located near each other, it will be sufficient to give the reference to a corner of the public survey for one of them, provided all others are connected therewith by course and distance shown on the map.

The applicant must also file an affidavit setting forth the dimensions and proposed use of each of the structures, and must show definitely that each is necessary to a proper enjoyment of the right of way granted by the act.

51. *Stipulation and bond.*—The applicant must enter into such stipulation and execute such bond as the Forest Service may require for the protection of the national forest.

52. *Notation by register.*—Upon the filing of an application under this act, the register will note the same in pencil on the tract books,

opposite the tracts traversed, giving date of filing and name of applicant, and also indorse on each map over his written signature the name of the land office and the date of filing.

If it appears that no portion of the public lands in a national forest would be affected by the approval of such maps, they will be returned to the applicant with notice of that fact. If unpatented lands are affected by the proposed right of way, the register will so certify on the map and duplicate, over his signature, and will promptly transmit the same to the General Land Office, with report that the required notations have been made.

Upon the approval of a map of location by the Secretary of the Interior, the duplicate copy will be sent to the local officers, who will mark upon the township plats the lines of the right of way as laid down on the map. They will also note the approval in ink on the tract books, opposite each legal subdivision affected, with a reference to the act mentioned on the map.

53. *Right of way through unsurveyed land.*—Maps showing reservoirs, canals, water plants, etc., wholly upon unsurveyed lands will be received and placed on file in the General Land Office and the local land office of the district in which the same is located, for general information, and the date of filing will be noted thereon.

FRED DENNETT,  
*Commissioner.*

Approved June 6, 1908.

FRANK PIERCE,  
*Acting Secretary.*

**FORMS FOR "DUE PROOFS" AND VERIFICATION OF MAPS OF  
RIGHT OF WAY FOR CANALS, DITCHES, AND RESERVOIRS.**

**FORM 1.**

I, \_\_\_\_\_, secretary (or president) of the \_\_\_\_\_ Company, do hereby certify that the organization of said company has been completed; that the company is fully authorized to proceed with construction, according to the existing laws of the State (or Territory) of \_\_\_\_\_, and that the copy of the articles of association (or incorporation) of the company filed in the Department of the Interior is a true and correct copy of the same.

In witness whereof I have hereunto set my name and the corporate seal of the company this \_\_\_\_\_ day of \_\_\_\_\_, in the year 19—.

[Seal of company.]

\_\_\_\_\_ of the \_\_\_\_\_ Company.

**FORM 2.**

I, \_\_\_\_\_, do certify that I am the president of the \_\_\_\_\_ Company, and that the following is a true list of the officers of the said company, with the full name and official designation of each, to wit: (Here insert the full name and official designation of each officer.)

In witness whereof I have hereunto set my name and the corporate seal of the company this \_\_\_\_\_ day of \_\_\_\_\_, in the year 19—.

[Seal of company.]

\_\_\_\_\_ President of the \_\_\_\_\_ Company.

**FORM 3.**

STATE OF \_\_\_\_\_,  
County of \_\_\_\_\_, ss:

\_\_\_\_\_, being duly sworn, says he is the chief engineer of (or the person employed to make the survey by) the \_\_\_\_\_ Company; that the survey of said company's (canals, ditches, and reservoirs), described as follows: (Here describe each canal, ditch, lateral, and reservoir for which right of way is asked, as required by section 21, being a total length of canals, ditches, and laterals of \_\_\_\_\_ miles, and a total area of reservoirs of \_\_\_\_\_ acres), was made by him (or under his direction) as chief engineer of the company (or as surveyor employed by the company) and under its authority, commenced on the \_\_\_\_\_ day of \_\_\_\_\_, 19—, and ending on the \_\_\_\_\_ day of \_\_\_\_\_, 19—, <sup>a</sup>[and that the survey of the said (canal, ditches, laterals, and reservoirs) accurately represents (a proper grade line for the flow of water, and accurately represents a level line, which is the proposed water line of the said reservoir)], and that such survey is accurately represented upon this map and by the accompanying field notes. <sup>a</sup>[And no lake or lake bed, stream or stream bed, is used for the said (canals, ditches, laterals, and reservoirs) except as shown on this map.]

Sworn and subscribed to before me this \_\_\_\_\_ day of \_\_\_\_\_, 19—.

[SEAL.]

\_\_\_\_\_ Notary Public.

<sup>a</sup> This clause to be omitted in applications for telephone and telegraph lines.

## FORM 4.

I, \_\_\_\_\_, do hereby certify that I am president of the \_\_\_\_\_ Company; that \_\_\_\_\_, who subscribed the accompanying affidavit, is the chief engineer of (or was employed to make the survey by) the said company; that the survey of the said (canals, ditches, laterals, and reservoirs), as accurately represented on this map and by the accompanying field notes, was made under authority of the company; that the company is duly authorized by its articles of incorporation to construct the said (canals, ditches, laterals, and reservoirs) upon the location shown upon this map; that the said (canals, ditches, laterals, and reservoirs), as represented on this map and by said field notes, was adopted by the company, by resolution of its board of directors, on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, as the definite location of the said (canals, ditches, laterals, and reservoirs) described as follows—(describe as in Form 3)—<sup>a</sup>and that no lake or lake bed, stream or stream bed, is used for the said (canals, ditches, laterals, and reservoirs) except as shown on this map]; and that the map has been prepared to be filed for the approval of the Secretary of the Interior, in order that the company may obtain the benefits of <sup>b</sup> (sections 18 to 21, inclusive, of the act of Congress approved March 3, 1891, entitled "An act to repeal timber-culture laws, and for other purposes," and section 2 of the act approved May 11, 1898); and I further certify that the right of way herein described is desired for the main purpose of irrigation.<sup>c</sup>

Attest:

[Seal of company.]

\_\_\_\_\_  
 President of the \_\_\_\_\_ Company,  
 \_\_\_\_\_  
 Secretary.

## FORM 5.

STATE OF \_\_\_\_\_,  
 County of \_\_\_\_\_, ss:

\_\_\_\_\_, being duly sworn, says that he is the chief engineer of (or was employed to construct) the (canals, ditches, laterals, and reservoirs) of the \_\_\_\_\_ Company; that said (canals, ditches, laterals, and reservoirs) have been constructed under his supervision, as follows: (Describe as required in section 21) a total length of constructed (canals, ditches, and laterals) of \_\_\_\_\_ miles, and a total area of constructed reservoirs of \_\_\_\_\_ acres; that construction was commenced on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, and completed on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_; that the constructed (canals, ditches, laterals, and reservoirs), as aforesaid, conform to the map and field notes which received the approval of the Secretary of the Interior on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

Sworn and subscribed to before me this — day of \_\_\_\_\_, 19\_\_\_\_.

[SEAL.]

\_\_\_\_\_  
 Notary Public.

## FORM 6.

I, \_\_\_\_\_, do certify that I am the president of the \_\_\_\_\_ company; that the (canals, ditches, laterals, and reservoirs) described as follows (describe as in Form 5) were actually constructed as set forth in the accompanying affidavit of \_\_\_\_\_, chief engineer (or the person employed by the company in the premises), and on the exact location represented on the map and by the field notes approved by the Secretary of the Interior, on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_; and that the company has in all things complied with the requirements of the act of Congress <sup>d</sup> (March 3, 1891, grant-

<sup>a</sup> This clause to be omitted in applications for telephone and telegraph lines.

<sup>b</sup> Here insert the description of the act of Congress under which the application is made when filed under some other act than that of 1891 and 1898.

<sup>c</sup> Or, where filed under other acts than that of 1891 and 1898, state the purposes for which right of way is applied for.

<sup>d</sup> Here insert the description of the act of Congress under which the application is made when filed under some other act than that of 1891.

ing right of way for canals, ditches, and reservoirs through the public lands of the United States).

[Seal of company.]

Attest:

\_\_\_\_\_  
Secretary.

\_\_\_\_\_  
President of the \_\_\_\_\_ Company.

FORM 7.

[Under act February 15, 1901.]

STATE OF \_\_\_\_\_,  
County of \_\_\_\_\_, ss:

\_\_\_\_\_, being duly sworn, says he is the chief engineer of (or the person employed by) the \_\_\_\_\_ company, under whose supervision the survey was made of the grounds selected by the company for structures for electrical purposes under the act of Congress approved February 15, 1901, said grounds (here describe as required by sections 41 and 50); that the accompanying drawing correctly represents the locations of the said structures; and that in his belief the structures represented are actually and to their entire extent required for the necessary uses contemplated by the said act of February 15, 1901 (31 Stat., 790).

\_\_\_\_\_  
Chief Engineer.

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

[SEAL.]

\_\_\_\_\_  
Notary Public.

FORM 8.

[Under act of February 15, 1901.]

I, \_\_\_\_\_, do hereby certify that I am the president of the \_\_\_\_\_ company; that the survey of the structures represented on the accompanying drawing 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 drawing actually represents the structures required (here describe as required by sections 41 and 50) for electrical purposes, under the act of Congress approved February 15, 1901; and that the company, by resolution of its board of directors, passed on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, directed the proper officers to present the said drawing for the approval of the Secretary of the Interior in order that the company may obtain the use of the grounds required for said structures, under the provisions of said act approved February 15, 1901 (31 Stat., 790).

\_\_\_\_\_  
President of the \_\_\_\_\_ Company.

[Seal of the company.]

Attest:

\_\_\_\_\_  
Secretary.

FORM 9.

*Reservoir declaratory statement.*

[Under act of Jan. 13, 1897 (29 Stat., 484).]

RES. D. S. }  
No. \_\_\_\_\_ }

LAND OFFICE AT \_\_\_\_\_,  
\_\_\_\_\_, 19\_\_\_\_.

I, \_\_\_\_\_, of \_\_\_\_\_, do hereby certify that I am president of the \_\_\_\_\_ company, and on behalf of said company, and under its authority, do hereby apply for the reservation of land in \_\_\_\_\_ County, State of \_\_\_\_\_, for the construction and use of a reservoir for furnishing water for live stock under the provisions of the act of January 13, 1897 (29 Stat., 484). The location of said reservoir and of the land necessary for its use, is as follows: \_\_\_\_\_ of section \_\_\_\_\_ in township \_\_\_\_\_, of range \_\_\_\_\_ M., containing \_\_\_\_\_ acres.

I hereby certify that to the best of my knowledge and belief the said land is not occupied or otherwise claimed, is not mineral or otherwise reserved, and that the said reservoir is to be used in connection with the business of the applicant of

The land owned or claimed by the applicant within the vicinity of the said reservoir (within three miles) is as follows: \_\_\_\_\_

I further certify that no part of the land to be reserved under this application is or will be fenced; that the same shall be kept open to the free use of any person desiring to water animals of any kind; that the land will not be used for any purpose except the watering of stock, and that the land is not, by reason of its proximity to other lands reserved for reservoirs, excluded from reservation by the regulations and rulings of the Land Department.

The water of said reservoir will cover an area of \_\_\_\_\_ acres, in \_\_\_\_\_ of section \_\_\_\_\_ in township \_\_\_\_\_, of range \_\_\_\_\_ of said lands; the capacity of the reservoir will be \_\_\_\_\_ gallons, and the dam will be \_\_\_\_\_ feet high. The source of the water for said reservoir is \_\_\_\_\_

and there are no streams or springs within two miles of the land to be reserved except as follows: \_\_\_\_\_

The applicant has filed no other declaratory statements under this act except as follows:

- No. \_\_\_\_\_, \_\_\_\_\_ land office, area to be reserved \_\_\_\_\_ acres.
- No. \_\_\_\_\_, \_\_\_\_\_ land office, area to be reserved \_\_\_\_\_ acres.
- No. \_\_\_\_\_, \_\_\_\_\_ land office, area to be reserved \_\_\_\_\_ acres.
- No. \_\_\_\_\_, \_\_\_\_\_ land office, area to be reserved \_\_\_\_\_ acres.
- No. \_\_\_\_\_, \_\_\_\_\_ land office, area to be reserved \_\_\_\_\_ acres.
- No. \_\_\_\_\_, \_\_\_\_\_ land office, area to be reserved \_\_\_\_\_ acres.
- No. \_\_\_\_\_, \_\_\_\_\_ land office, area to be reserved \_\_\_\_\_ acres.
- No. \_\_\_\_\_, \_\_\_\_\_ land office, area to be reserved \_\_\_\_\_ acres.
- No. \_\_\_\_\_, \_\_\_\_\_ land office, area to be reserved \_\_\_\_\_ acres.

Total, \_\_\_\_\_ acres, of which Nos. \_\_\_\_\_ are located in said county.

And I further certify that it is the bona fide purpose and intention of this applicant to construct and complete said reservoir and maintain the same in accordance with the provisions of said act of Congress and such regulations as are or may be prescribed thereunder.

[Seal of company.] \_\_\_\_\_

Attest:

Secretary.

STATE OF \_\_\_\_\_,  
County of \_\_\_\_\_, ss:

\_\_\_\_\_ being duly sworn, deposes and says that the statements herein made are true to the best of his knowledge and belief.

Sworn to and subscribed before me this \_\_\_\_\_ day of \_\_\_\_\_, in the year 19\_\_\_\_.

[SEAL.]

Notary Public.

NOTE.—When the applicant is a corporation the form should be executed by its president, under its seal, and attested by its secretary. When the applicant is not a corporation or an association of individuals, strike out the words in italics.

LAND OFFICE AT \_\_\_\_\_,  
\_\_\_\_\_, 19\_\_\_\_.

I, \_\_\_\_\_, register of the land office, do hereby certify that the foregoing application is for the reservation of lands subject thereto under the provisions of the act of January 13, 1897; that there is no prior valid adverse right to the same; and that the land is not, by reason of its proximity to other lands reserved for reservoirs, excluded from reservation by the regulations and rulings of the Land Department.

Fees, \$ \_\_\_\_\_ paid.

Register.

The description of the business of the applicant should include "a full and minute statement of the extent to which he is engaged in breeding, grazing, driving, or transporting live stock, giving the number and kinds of such stock, the place where they are being bred or grazed, and whether within an inclosure or upon uninclosed lands, and also from where and to where they are being driven or transported." Circular June 23, 1899.

## FORM 10.

STATE OF \_\_\_\_\_,  
County of \_\_\_\_\_, ss:

\_\_\_\_\_, being duly sworn, says that he is the person who was employed to make the survey of a reservoir covering an area of \_\_\_\_\_ acres, the initial point of the survey being \_\_\_\_\_ (here describe as required by section 21); said reservoir having been constructed upon the \_\_\_\_\_ quarter of the \_\_\_\_\_ quarter of section \_\_\_\_\_, township \_\_\_\_\_, range \_\_\_\_\_, \_\_\_\_\_ principal meridian, as proposed by reservoir declaratory statement No. \_\_\_\_\_, which was filed in the local land office at \_\_\_\_\_, under the provisions of the act of January 13, 1897 (29 Stat., 484); that the said survey was made on the \_\_\_\_\_ day of \_\_\_\_\_, 19—; that the dam and all necessary works have been constructed in a substantial manner; that the reservoir has a capacity of \_\_\_\_\_ gallons, and at the time of said survey contained \_\_\_\_\_ gallons of water.

Sworn and subscribed to before me this \_\_\_\_\_ day of \_\_\_\_\_, 19—.

[SEAL.]

\_\_\_\_\_  
Notary Public.

## FORM 11.

I, \_\_\_\_\_, do certify that I am the president of the \_\_\_\_\_ company which filed (or that I am the person who filed) reservoir declaratory statement No. \_\_\_\_\_, in the local land office at \_\_\_\_\_; that the reservoir proposed has been constructed upon the \_\_\_\_\_ quarter of the \_\_\_\_\_ quarter of section \_\_\_\_\_, township \_\_\_\_\_, range \_\_\_\_\_, \_\_\_\_\_ principal meridian, covering an area of \_\_\_\_\_ acres, the initial point of the survey being \_\_\_\_\_ (describe as in Form 10); that the dam and all necessary works have been constructed in a substantial manner in good faith in order that the reservoir may be used and maintained for the purposes, and in the manner prescribed by the said act of January 13, 1897 (29 Stat., 484), the provisions of which have been and will be complied with in all respects.

[Seal of company.]

\_\_\_\_\_  
President of the Company.

Attest:

\_\_\_\_\_  
Secretary.

## FORM 12.

STATE OF \_\_\_\_\_,  
County of \_\_\_\_\_, ss:

\_\_\_\_\_, being duly sworn, deposes and says that he is the president of the \_\_\_\_\_ company which filed (or that he is the person who filed) reservoir declaratory statement No. \_\_\_\_\_, in the local land office at \_\_\_\_\_; that the reservoir constructed in pursuance thereof, as heretofore certified, has been kept in repair; that water has been kept therein to the extent of not less than \_\_\_\_\_ gallons during the entire calendar year of 19—; that neither the reservoir nor any part of the land reserved for use in connection therewith is or has been fenced during said years, and that the said company has in all things complied with the provisions of the act of January 13, 1897 (29 Stat., 484).

\_\_\_\_\_  
President of \_\_\_\_\_ Company.

Sworn and subscribed to before me this \_\_\_\_\_ day of \_\_\_\_\_, 19—.

[SEAL.]

\_\_\_\_\_  
Notary Public.

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Instructions of February 21, 1908, with respect to evidence of water rights in final proofs on desert-land entries.	282
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The right to make new or additional homestead entry under the act of March 3, 1879, is limited to those who prior thereto had taken a homestead of 80 acres upon an even-numbered section within the limits of a railroad grant, and remained in possession thereof, residing upon and cultivating the same, at the date of the passage of said act.	516

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 One who made a homestead entry which for any reason he failed to perfect and which resulted in its being lost or forfeited prior to the passage of the act of June 5, 1900, was under that act entitled to the benefits of the homestead law as though such former entry had not been made, provided such right of second entry was exercised prior to the act of April 28, 1904 ----- 221

The provisions of section 2372 of the Revised Statutes, authorizing a cash entryman who by mistake in description made entry of a tract not intended to be entered "to change the entry and transfer the payment from the tract erroneously entered to that intended to be entered, if unsold, or, if sold, to any other tract liable to entry," have no application to homestead entries ----- 180

While the land department has applied the principle of section 2372 to homestead and other non-cash entries and permitted amendment to carry out the original intention of the entryman, it has never been extended to permit an entryman to change his entry from the tract actually entered to one not originally intended to be entered ----- 180

The disqualification imposed under the homestead law on one who is the proprietor of more than 160 acres of land, does not extend to one who at the time of making entry holds lands under a contract of purchase, where at the time the contract was entered into and at the date the entry was allowed the contractor was not the owner, of, had no interest in, or power over the title to the lands he assumed to sell; and the fact that he subsequently becomes the owner thereof can in no wise affect the qualifications of the entryman at the date the entry was made. ----- 82

A homestead entry based upon settlement made in reliance upon the holding of the land department that land acquired under the timber and stone act was not contemplated by the act of August 30, 1890, limiting the amount of land that might be acquired by any one person under the agricultural public land laws to 320 acres, may be permitted to stand notwithstanding the land department had, subsequent to the settlement but prior to entry, changed

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One disqualified to make homestead entry by reason of being a minor can not qualify himself to make entry as the head of a family by adopting a younger brother during the lifetime of the parents and with a view to evade the law. 133

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The heirs of a successful contestant against a homestead entry, who make entry in the exercise of the preference right under the contest, stand in the place of the deceased contestant, with the same rights and privileges and burdened with the same duties and obligations relative to compliance with law in the matters of residence and cultivation ----- 26

Under the provisions of the act of July 26, 1892, the heirs of a deceased contestant are entitled to the same rights that contestant would have been entitled to if his death had not occurred, and where at the time of his death he was disqualified to make entry by reason of being an alien and not having declared his intention to become a citizen, no rights exist to which his heirs can succeed under said act ----- 168

DESERTED WIFE.

Separation of a husband and wife by mutual consent does not constitute the wife the head of a family within the meaning of section 2289 of the Revised Statutes, or authorize her to make a homestead entry as a deserted wife ----- 258

ADDITIONAL.

Circular of July 27, 1907, relative to additional entries ----- 46

An entry of lands subject to the provisions of the reclamation act will not be allowed as addi-

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tional to a prior entry subject only to the provisions of the general homestead law.....	449	no such right, therefore, exists in her estate after her death.....	311
The right of additional entry accorded by section 6 of the act of March 2, 1889, is limited to persons "entitled, under the provisions of the homestead law, to enter a homestead;" hence one who is the owner of more than 160 acres of land is not entitled to make entry under said section....	96	Where a successful contestant in the exercise of his preference right applies to locate separate soldiers' additional rights on the different legal subdivisions constituting the contested entry, such applications may be treated as one application for the entire body of land involved.....	499
The right to make new or additional homestead entry under the act of March 3, 1879, is limited to those who prior thereto had taken a homestead of 80 acres upon an even-numbered section within the limits of a railroad grant, and remained in possession thereof, residing upon and cultivating the same, at the date of the passage of said act.....	516	Where one entitled under section 2 of the act of March 2, 1889, to make a second homestead entry for 160 acres, and also entitled to make a soldiers' additional entry under section 2306 of the Revised Statutes, exercises the former right, he thereby forfeits the latter; and such additional right is not, under section 2 of the act of June 5, 1900, restored by commutation of the second entry.....	231
<b>SOLDIERS' ADDITIONAL.</b>		The holder of a number of fractional portions of different soldiers' additional rights may combine and locate them upon one body of land of their aggregate quantity; but the rule of approximation can not be invoked in such case unless the excess area of the combined rights be less than the deficiency would be if the smallest legal subdivision of the location were eliminated and unless all other prerequisites to the application of the rule exist as to each separate fractional portion of right involved in the location.....	305
Circulars of February 21 and March 26, 1908, governing location of soldiers' additional rights, etc.....	278, 346	In applying the rule of approximation in cases where the assignee of two or more fractional portions of different soldiers' additional rights combines and applies to locate them on one body of land, the rights will be severally considered, and where the excess amount applied for is less than the average of the rights sought to be used, the entry may be allowed.....	417
Circular of February 21, 1908, requiring publication and posting of notice of applications to make location of scrip, warrants, certificates, soldiers' additional rights, and lieu selections, discussed, particularly with respect to the provisions thereof relating to soldiers' additional rights, and adhered to.....	522	The rule of approximation permitted in the location of soldiers' additional rights is a purely administrative equitable rule, not founded upon any law, and can not be insisted upon as an absolute right; and where the privilege is abused to accomplish an evasion of positive law, the land department has full power to, change the rule to prevent the abuse; and entries procured through such abuse of the rule are	
The fact that a woman who applies to locate a soldiers' additional right is under 21 years of age is no ground for rejection of the application, if it be shown that under the laws of the State she has attained her majority.....	387		
To entitle one to the privileges conferred by sections 2304, 2306, and 2307 of the Revised Statutes the soldier whose military service is alleged as the basis for the right must have been honorably discharged; and such fact can not be inferred from the official record which shows that the soldier was "dismissed the service".....	347		
Where the widow of a soldier made homestead entry for less than 160 acres and remarried prior to the enactment of the Revised Statutes and remained a married woman at that date and until her death, she was never in her lifetime entitled to make an additional entry under section 2307 of the Revised Statutes, and			

not entitled to equitable consideration on the ground that they were made under authorized existing practice----- 543

While the rule of approximation is permitted in the location of combinations of soldiers' additional rights, it has never been held by the Department that such rights might be so combined and located as by aid of the rule to acquire areas largely in excess of the aggregate acreage of the combined rights; and the allowance of entry by the Commissioner of the General Land Office, on such a location, prior to the decision of the Department that the rule could be invoked in the location of combinations only where the excess is less than the average of the combined rights, conferred no such vested right upon the entryman as would entitle him to equitable consideration on the ground that the entry was made under authorized existing practice----- 530

Where one entitled to a soldiers' additional right under section 2306 of the Revised Statutes, based upon an original entry canceled for abandonment, was permitted to make a second homestead entry for not exceeding the area of the right, at a time when there was no law authorizing second homestead entries, the second entry might properly have been treated as made in the exercise of the additional right and title permitted to be perfected under that section; but where the title was never so perfected, the second entry having also been abandoned, at a time when the land department erroneously required residence and cultivation upon soldiers' additional entries in instances where the original entry had been abandoned, the entryman can not be held to have exhausted or in anywise affected his soldiers' additional right by making the second entry----- 486

The act of August 18, 1894, validated all soldiers' additional certificates outstanding at its date and all transfers thereof, whether past or subsequent, in the hands of *bona fide* innocent purchasers, but does not require or contemplate the issuance of new certificates, in the name of subsequent assignees, for any remaining portions of rights formerly evidenced by certificates which have been

surrendered and canceled as satisfied, which remaining portions can only be asserted, established, and allowed as personal rights and without reference to the provisions of said act.----- 434

Under the provision of the act of February 25, 1907, that all lands in the former Columbia Indian reservation embraced in applications to make entry under section 2306 of the Revised Statutes, "which were presented before the lands covered by such application were withdrawn under the reclamation act, are hereby declared to be subject to such entries," the point to which action had been proceeded with under departmental regulations respecting any such application at the time of the passage of the act is not material, the only limitation being that the application should have been presented before the lands covered thereby were withdrawn under the reclamation act. 130

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Circular of June 13, 1908, under sections 9 and 10, act of May 29, 1908, relative to commutation, etc----- 514

Absence in prison under judicial restraint will not be considered residence toward making up the period of eight months required by section 9 of the act of May 29, 1908----- 502

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Boxing and chipping pine trees for turpentine is not cultivation... 302

ACTS OF APRIL 28, 1904.

1. *Kinkaid Act.*

One who makes additional entry for the full quantity of land to which he is entitled under the Kinkaid Act, will not be permitted to subsequently amend his entry by eliminating a portion thereof and substituting other contiguous lands which have since become vacant, merely because the lands desired are of better quality, where the proposed amendment is not shown to be in accordance with his original intention.----- 507

Section 3 of the act of April 28, 1904, contemplates, as a condition precedent to the passing of title to an additional entry thereunder, residence upon and cultivation of the land embraced in the original

entry, or upon the original and additional entry, for the full period of five years; and if both entries are concurrent, and the original is commuted, title will not pass for the additional until there has been five years' residence and cultivation upon the land included in the original or upon that and the additional entry..... 402

The act of March 2, 1907, amended the act of April 28, 1904, to permit persons who made entry between April 28 and June 28, 1904, to make additional entry in the same manner as those who made entry prior to April 28, "subject to existing rights;" and where an additional entry under section 2 of the act of April 28, based upon an original entry made between the dates mentioned in the amendatory act, was prior to the date of that act held for cancellation, upon contest, on the sole ground that it was invalid because based upon an original entry made subsequently to the passage of the act of April 28, the additional entry will be held intact, the invalidity being cured by the amendatory act and the rights of the entryman being superior to those of the contestant..... 3

**2. Second and Additional Entries.**

Circular of July 27, 1907, relative to additional entries..... 46

Since the passage of the act of April 28, 1904, the Secretary of the Interior has no discretionary power to allow second homestead entries, but his power in this respect is defined and limited by the provisions of that act..... 154

Where on account of irregularity of the surveys one makes improvements on land intended to be taken as a homestead but not included in the entry as made, he may properly sell such improvements, and by such sale his right to make another entry under the act of April 28, 1904, is not prejudiced though followed by relinquishment of the lands actually embraced in his entry but never intended to be taken..... 64

A homesteader who in the exercise of his right to make second entry under the provisions of the act of April 28, 1904, enters Chipewewa agricultural lands, opened to disposal under the act of January 14, 1889, may, by virtue of the

act of March 3, 1905, extending the provisions of section 2301 of the Revised Statutes to such lands, commute his entry by paying the price provided in the act of 1889, notwithstanding the provision in the act of 1904 forbidding commutation of entries allowed thereunder..... 363

**ACT OF FEBRUARY 8, 1908.**

Circular of February 29, 1908, concerning second entries under this act..... 291

In making second homestead entry under the provisions of the act of February 8, 1908, credit can not be allowed for the fees and commissions paid upon the original abandoned entry..... 473

Credit for instalments paid upon the Indian price for the land embraced in the original abandoned entry may be allowed in the second entry where it embraces land of the same class for which like payments are required..... 473

No such rights are acquired by an application to make a second homestead entry while the first is still of record and not actually abandoned as will prevent the allowance of the subsequent application of another for the same land; and the provisions of the second homestead act of February 8, 1908, can not be invoked in such case to the prejudice of the adverse applicant..... 450

An application to make second homestead entry which could not legally have been allowed under existing law and which was denied by the land department and pending on motion for review at the date of the passage of the act of February 8, 1908, can not be allowed under that act, to the prejudice of the rights of another under a *bona fide* application for the same land made prior to said act. 518

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See *Railroad Grant; School Land; States and Territories.*

**Indian Lands.**

Proclamation of August 12, and regulations of August 13, 1907, governing opening of Lower Brule lands..... 52, 54

All rights under a trust patent issued in the name of an allottee subsequent to his death, he having in his lifetime made selection, inure to his heirs..... 114

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Lands within that portion of the ceded Gros Ventre, Piegan, Blood, Blackfeet, and River Crow Indian Reservation established by executive order of April 13, 1875, and opened to entry by and in accordance with the provisions of the act of May 1, 1888, are not subject to selection as indemnity by the Northern Pacific Railway Company ----- 7

Lands formerly within the Gros Ventre, Piegan, Blood, Blackfeet, and River Crow Indian Reservation in Montana and opened to entry under section 3 of the act of May 1, 1888, are subject to selection by the State on account of the grant for public buildings made by the act of February 22, 1889 ----- 75

Residence upon the White Earth Indian Reservation is a condition precedent to the right to an allotment of lands on that reservation under the acts of January 14, 1889, and April 28, 1904 ----- 234

An Indian entitled to annuities under section 7 of the act of January 14, 1889, does not forfeit his right thereto by removing from the reservation and adopting the habits of civilized life ----- 234

The provision in the act of April 28, 1904 (known as the Steener-son Act), that allotments and patents to Indians on the White Earth Reservation shall be in the manner and have the same effect as provided in the general allotment act of February 8, 1887, are in no wise affected by the provisions of the act of May 8, 1906 (known as the Burke Act), and patents issued to such Indians should be in the form prescribed by the general allotment act ----- 210

The provision in the act of April 28, 1904, that upon the cancellation of the patent issued upon a wrongful or erroneous allotment, as therein provided for, the lands shall not be opened to settlement for sixty days after such cancellation, operates to reserve such lands from all forms of disposition for the specified period ----- 289

The act of April 21, 1904, does not limit the time within which members of the Turtle Mountain band of Chippewa Indians who may be unable to secure land upon their ceded reservation may take a homestead from any vacant public land belonging to the United States, as provided in said act,

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and the Department has no authority to fix a date after which children born into the band shall not be entitled to such right ----- 105

Commissioner of General Land Office directed to instruct the proper local officers to consider applications of members of the Turtle Mountain band of Chippewa Indians for allotment of public lands under the provisions of the act of April 21, 1904, in two or more noncontiguous tracts, only when favorably recommended by the superintendent of the Fort Totten Indian School ----- 452

In contemplation of that portion of the instructions of June 23, 1905, governing the opening of certain Chippewa lands, which forbids intending settlers and entrymen to go upon the lands prior to the hour of opening, presence upon a public road running through the lands is equivalent to presence upon the land, and one who in violation of the instructions makes settlement from such point of vantage immediately at the hour of opening is not entitled to assert a superior right by reason thereof as against another who made entry for the same tract one minute after the hour of opening ----- 323

A homesteader who in the exercise of his right to make second entry under the provisions of the act of April 28, 1904, enters Chippewa agricultural lands, opened to disposal under the act of January 14, 1889, may, by virtue of the act of March 3, 1905, extending the provisions of section 2301 of the Revised Statutes to such lands, commute his entry by paying the price provided in the act of 1889, notwithstanding the provision in the act of 1904 forbidding commutation of entries allowed thereunder ----- 363

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It is the province of the land department to determine whether assignments of military bounty land warrants or surveyor-generals' certificates or scrip issued under the act of June 2, 1858, are sufficient, independently of the adjudication of the courts, and where the validity of warrants or certificates and the assignments thereof have been authenticated by the Commissioner of the General Land Office, in the proper exercise of his jurisdiction and authority, and have passed into the hands of innocent purchasers upon the faith of such authentication, and are held or have been located by such purchasers, the question as to the regularity of the assignments should not be reopened.----- 11

**Selection.**

See *Railroad Grant; Reservations; School Land; States and Territories.*

**Settlement.**

One who makes immediate settlement at the hour of opening, upon lands opened to "settlement and entry," has a superior right over another who at that hour was standing in line at the local office but who on account of his position in the line did not make entry until shortly after the opening hour.----- 162

Presence upon a public road running through lands is equivalent to presence upon the land, and one who in violation of instructions makes settlement from such point of vantage immediately at the hour of opening is not entitled to assert a superior right by reason thereof as against another who made entry for the same tract one minute after the hour of opening.----- 323

**Settlers.**

See *Desert Land; Railroad Lands.*

**Special Agent.**

Instructions of September 30, 1907, relative to manner of proceeding upon reports of.----- 112

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**States and Territories.**

See *School Land; Swamp Land.*  
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of August 18, 1894, is not limited to the exact area necessary to supply the deficiency in its grant existing at the time of the filing of the application for survey ----- 479

The provisions of the act of August 18, 1894, authorizing the withdrawal of lands "with a view to satisfying the public land grants" of the several States therein named, contemplates withdrawals in aid of both original and indemnity selections.----- 479

Paragraph 9 of regulations of April 25, 1907, providing that notice of selections of lands by the several States under grants for educational and other purposes "must be given by publication once a week for five consecutive weeks in a newspaper of general circulation in the county where the lands are located," discussed and adhered to.----- 415

A State in making selection of lands at the time they are opened to entry may file its list through a personal representative; and although the required affidavits accompanying the same may have been executed prior to the time fixed for the opening, if they were executed within a reasonable time prior to the filing of the application, the facts therein recited should, in the absence of any showing to the contrary, be accepted as true at the date the list is presented.----- 315

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