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GENERAL LAND OFFICE

IN

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DECISIONS

RELATING TO

THE PUBLIC LANDS.

TIMBER TRESPASS—SETTLER'S CLAIM.

W. CRATSENBERG.

For timber cut by a homesteader from his claim, which he abandons as soon as the cutting is done, the purchaser must settle by paying the purchase price.

Secretary Teller to Commissioner McFarland, July 5, 1884.

I am in receipt of yours of May 29, inclosing the several documents therein enumerated, relative to the trespass of Willis (or William) Cratsenberg, of Michigan.

Cratsenberg is charged with having cut during the winter of 1880-'81 26,000 feet of pine timber from certain described land entered by him as a homestead on the 26th of April, 1880, but abandoned by the entryman as soon as the timber had been cut therefrom. There are no improvements on the tract, and the present whereabouts of the trespasser is unknown.

The timber was sold to R. W. Norris, of Whitehall, Mich., and by him manufactured into lumber and sold. Said Norris claims to have been an innocent purchaser, and offers to pay the United States \$2 per 1,000 feet for said lumber, making a total of \$52.20.

In view of the fact that the timber was cut from a claim upon which the entryman had not established a permanent residence, nor made any improvements whatever, and that the purchaser does not claim to have made any careful inquiry as to the right of said Cratsenberg to the timber purchased from him, I concur in your recommendation that settlement be made upon the basis of the decision of the Supreme Court in the case of *Wooden Ware Company v. The United States* (106 U. S., 432), to wit, in the present case a total of \$112.40.

You will notify the special agent and the proper receiver of public moneys accordingly.

TIMBER TRESPASS—SETTLER'S CLAIM.

NEHEMIAH P. CLARK.

Trespassers cutting timber during homesteader's temporary absence, and removing it against his protest, should be prosecuted civilly and criminally.

Secretary Teller to the Attorney-General, July 7, 1884.

SIR: The recommendations in the Commissioner's letter of July 3, 1884, are approved. * * *

LETTER.

SIR: I have the honor to transmit herewith report of special agent Milton Peden and copy of agent's letter of transmittal, dated April 16, 1884, relative to timber trespass upon W. $\frac{1}{2}$ of NE. $\frac{1}{4}$ and Lots 1 and 2, Sec. 18, T. 130 N., R. 31 W., Minnesota, entered under the homestead law by Noah Baker, October 23, 1882.

As Baker had made complaint (copy herewith) to this office that while engaged in work 2 miles distant from said land, the pine timber to the amount of 100,000 feet was cut and removed, I directed the agent to examine as to both the timber cutting complained of and the circumstances of Baker's absence from his claim long enough for parties to cut, without his knowledge, the amount stated.

The facts as reported by the agent are that Baker, while engaged in clearing a lot and erecting a house upon his claim, boarded with his family at his brother's, a few miles distant, and remunerated his brother by working for him at such times as his help was needed. On one occasion while thus engaged, Warren Hasty, of Monticello, who was cutting timber for Nehemiah P. Clark, of Saint Cloud, on certain land owned by Clark, went upon Baker's claim adjoining, and with a large force of men cut all the timber of any value. Baker, upon his return, found that the logs were being removed. He remonstrated, but was threatened with personal violence if he dared to interfere. Subsequently he applied to Mr. Clark for remuneration, and was twice assured (April 9 and May 9, 1883) that he would be promptly paid for all timber cut from his claim. Copies of Mr. Clark's written promises on the dates referred to are attached to the agent's letter.

Payment was not made, however, and Baker was finally informed by Clark that the government had been paid for the timber.

The agent examined the records in the district clerk's office at Saint Paul, and ascertained that on the 15th of May, 1883, the United States district attorney filed a complaint against Warren Hasty, charging him with having cut 600 pine trees from the said Lot 2, and on the 17th of May, 1883, Hasty was arraigned before the United States commissioner, "plead to said charge," and was released on his own recognizance, and there the case ended.

The agent reports that Baker has established a permanent residence upon his claim, cleared and cultivated a portion of the land, erected a good hewed-log house two stories high, a kitchen one story high with a good cellar, and a good stable. Everything manifests his undoubted good faith and honorable intentions as an honest, industrious man, working hard to secure a comfortable home for himself and family. He has refused to sell any of the timber, and is much chagrined by its loss

and the serious injury to his property, there being not a pine tree of any value left for his own use in further improving the land.

The special agent is "convinced that Clark had Hasty arrested in order to head off and then smother the case"; he also judges from a conversation he had with Mr. Clark (brother-in-law to the United States district attorney) that Clark's "intentions are to have Hasty arraigned and a nominal fine assessed against him in the case and end the matter"; that Clark "remarked that the court had held that when a party had been fined for trespass the value of the timber involved could not be collected from the receiver."

The logs, amounting, as reported by the agent, to 63,000 feet, were at date of report, April 16, 1884, in the boom near the mouth of Little Elk River, where they are stated to be worth \$6.50 per thousand, and are held as the property of Clark.

Hasty claims that the trespass was a mistake. This can hardly be credited, inasmuch as one of the witnesses named in the report states that he informed the trespasser that he was cutting on Baker's claim. Moreover, it is fair to presume that Hasty was well acquainted with the land, having, as the agent states, worked in the near vicinity for years previous; and this statement is corroborated by the fact that the records of this office show settlement for timber trespass upon neighboring public lands to have been made with the government by Warren Hasty, through N. P. Clark, his surety, amounting to \$735.

The facts and circumstances, as reported in the case under consideration, strongly indicate an attempt to impose upon and defraud of his rights a homesteader who is honestly laboring to acquire full title to his claim, which he holds from the government.

The legal title to the land, from which Clark through the criminal acts of Hasty has unlawfully obtained the timber, is still in the United States. That the land is embraced in the homestead entry of the settler aggravates the offense.

Believing that it is not the purpose of the Department to permit the timber to be thus unlawfully removed for the benefit of loggers and lumber dealers only, and without fault and against the protest of settlers, from lands which are actually government property, I respectfully recommend that the case be referred to the honorable Attorney-General, with the request that he cause to be instituted against Nehemiah P. Clark criminal proceedings for the trespass, and civil suit for the full value of the timber in its present position and condition; (*Bolles' Wooden Ware Co. v. U. S.*, 106 U. S., 432).

As stated in your letter to this office, dated January 21 last, it is "the duty of a wise and beneficent government not only to be careful to do no injustice, but to be actively instrumental in establishing and securing justice, especially in behalf of those too weak or too ignorant to maintain their own rights."

Although action as recommended will not secure to Baker recovery of damages, it may secure justice to him, in so far as to vindicate his rights in the premises as a homesteader, which he ineffectually sought to maintain, and it will tend hereafter to establish and secure the rights of all homesteaders who may be similarly imposed upon and defrauded.

SURVEY—CERTIFICATES OF DEPOSIT.

MINERVA H. PURDY.

The proof and payment in this case, and in all cases hereafter, must be received (under act March 3, 1879, and office circular September 15, 1883, which provide that certificates of deposit may be assigned by indorsement in accordance with the usages governing in cases of ordinary negotiable paper) on account of surveys, in the same manner as if tendered by the depositors in person.

Commissioner McFarland to the receiver, Fargo, Dakota, July 5, 1884.

I have to acknowledge the receipt of the register's letter of the 3d instant, transmitting the final proof papers of Minerva H. Purdy in homestead entry No. 13,188, commuted to cash; also the triplicate certificate of deposit, No. 1142, for \$200, issued by the Stock Growers National Bank of Cheyenne, Wyoming, April 28, 1884, in favor of Charles H. Davis, on account of surveys, and by him properly assigned; and the appeal of S. B. Pinney, esq., attorney for Minerva H. Purdy, from your decision of July 3 last, refusing to accept the proof and payment, because the certificate of deposit tendered in payment thereof is not assigned by the party desiring to make the entry, nor by Mr. Pinney as attorney in fact; and in reply thereto I have to state as follows:

The act of March 3, 1879, authorizing the assignment of certificates of deposit, provides that said certificates may be assigned by indorsement, and the circular of this office, dated September 15, 1883, recognizes assignments made in accordance with the usages governing in cases of ordinary negotiable paper.

You are therefore instructed to receive the proof in this case, and the certificate of deposit tendered in payment therefor; and hereafter, when certificates of deposit on account of surveys are presented to you in accordance with law and the instructions of this office, you will receive them in the same manner as if tendered by the depositors in person.

 TIMBER TRESPASS—KEEPER'S CHARGES.

AH WING ET AL.

Persons settling for timber trespass should pay keeper's charges, *pro rata*, prior to release of the wood or timber cut.

Secretary Teller to Commissioner McFarland, July 7, 1884.

In compliance with the recommendation contained in your letter of the 3d instant, you are hereby authorized to require of Ah Wing, Ah Quong, Ah Date, Ah Tie, and Ah Poy, trespassers on the public lands, at Bodie, Cal., in addition to the sum of \$100 each, authorized by my letter of 8th of May last, the payment *pro rata* of the keeper's charge, the wood in question to be released to them on such payment. You will by

telegraph direct the receiver at Bodie to suspend the settlement *ad interim*.

LETTER.

SIR: I have the honor to refer herewith copy of a communication, dated the 12th ultimo, from the receiver of public moneys, Bodie, Cal., relative to the action directed by this office in accordance with your instructions of the 8th of May last, authorizing the acceptance of \$100 each from Ah Wing, Ah Quong, Ah Date, Ah Tie, and Ah Poy, all of Bodie, whose trespass cases were submitted for your consideration May 5, 1884, also to inclose copy of a letter dated the 14th ultimo, from William A. Mather, alleged custodian of certain public timber involved in said trespasses.

It appears from the latter communication that on the 10th of November last special agent Chadwick appointed Mather keeper of a quantity of cord wood, which had been released to the United States by the above trespassers, pending settlement of their several cases, and promised him a stipulated consideration for such guardianship till the government should make final disposition of the trespass matter.

As compensation for that service Mather now claims of the government, on the score that he was duly appointed by a public officer, the sum of \$434, embracing a period of two hundred and seventeen days at \$2 per diem.

It further appears from the receiver's letter, herewith, that Mather, in order to establish his possession of the cord wood in question, has secured a lien thereon from the superior court of Mono county, California.

As settlement by the trespass parties is still pending (as shown by the receiver's communication), I beg leave to resubmit the matter and to respectfully recommend that your former action be so amended that, in addition to the indemnity of \$1 per cord for the wood cut and sold by the trespassers, they be required to pay the keeper's charges *prorata* upon compliance therewith the wood held by said keeper to be released to them.

That possible embarrassments may not ensue, I further recommend that authority be granted this office to telegraph the receiver at Bodie directing suspension of settlement *ad interim*.

 HOMESTEAD—DEATH OF CONTESTANT.

MORGAN v. DOYLE.

The preferred right of a contestant is a personal one, and his death leaves the case between the government and the entryman. In this instance, as the entryman has subsequently complied with the law and shown good faith, the entry may stand.

Secretary Teller to Commissioner McFarland, July 7, 1884.

I have considered the case of Henry Morgan v. M. B. Doyle, on the appeal of Doyle from your decision of October 3, 1883, holding for cancellation his homestead entry for the NW. $\frac{1}{4}$ of Sec. 20, T. 139, R. 81, Bismarck, Dakota.

October 25, 1881, Doyle made his entry, and Morgan, November 28, 1882, began contest against the same, alleging abandonment, the hearing being had February 27, 1883.

It appears that Doyle, at the time he made entry, was clerk of the court, and living at Mandan, Dakota. Some time in April, 1882, he went

with his wife to the claim, where he had previously procured the erection of a house, and remained one night, returning the next day to Mandan. Subsequently, and up to December 10, 1882, he once or twice a month, with his wife, visited the land and staid overnight there. During this time his improvements comprised a house worth, perhaps, \$100, and breaking to the extent of about nine acres, a part of which was cultivated to crop.

The above state of facts was explained by the claimant's showing, to the effect that his official duties required his presence at Mandan, and that his poverty precluded him from adopting any other course during that time.

I concur in your conclusion that the evidence on behalf of Doyle did not establish such a condition of affairs as would justify his failure to properly reside upon the land. A temporary absence in the performance of official duties would not be considered as abandonment where a bona-fide settlement, followed by residence, preceded such absence (*Harris v. Radcliffe*, 2 L. D., 147); but in this case Doyle's official duties prevented him from residing on the land when he made his entry, and his acts thereafter, even if good faith be conceded, can only be construed as an endeavor to comply nominally with the law while actually residing elsewhere; and were it not for circumstances arising subsequently to the hearing and your decision, I should affirm the judgment of your office without further consideration.

It appears, however, from the affidavit of the attending physician, that Morgan died May 5, 1884, and by *ex parte* evidence, filed by Doyle, it is shown that since April, 1883, he has resided continuously upon his land, and that he has placed improvements thereon to the value of eight hundred dollars.

Now, whatever right the contestant acquires in cases of this nature is by virtue of the act May 14, 1880 (21 Stat. 140), and the right thereby conferred is personal (*Boyson v. Born*, 9 C. L. O., 61); hence the case, as it now stands, is entirely between the entryman and the government.

In view of the fact that Doyle has since April, 1883, complied in all respects with the law, and shown his good faith by the extensive improvements, I am of the opinion that his entry should not be disturbed.

Your decision is, therefore, reversed, and the contest dismissed.

OFFICIAL PENALTY ENVELOPES.

CIRCULAR.

WASHINGTON, JULY 9, 1884.

By "An act making appropriations for the service of the Post-Office Department for the fiscal year ending June 30, 1885, and for other purposes," it is provided:

SECTION 3. That section twenty-nine of the act of March third, eigh-

teen hundred and seventy-nine (United States Statutes at Large, page 362), be, and is hereby, amended so as to read as follows:

"The provisions of the fifth and sixth sections of the act entitled 'An act establishing post routes, and for other purposes,' approved March 3, 1877, for the transmission of official mail matter, be, and they are hereby, extended to all officers of the United States Government, not including members of Congress. The envelopes of such matter in all cases to bear appropriate indorsements, containing the proper designation of the office from or officer from whom the same is transmitted, with a statement of the penalty for their misuse. And the provisions of said fifth and sixth sections are hereby likewise extended and made applicable to all official mail matter of the Smithsonian Institution: *Provided*, That any Department or officer authorized to use the penalty envelopes may inclose them with return address to any person or persons from or through whom official information is desired, the same to be used only to cover such official information and indorsements relating thereto: *Provided further*, That any letter or packet to be registered by either of the Executive Departments or Bureaus thereof, or by the Agricultural Department, or by the Public Printer, may be registered, without the payment of any registry fee; and any part paid letter or packet addressed to either of said Departments or Bureaus, may be delivered free; but where there is good reason to believe the omission to prepay the full postage thereon was intentional, such letter or packet shall be returned to the sender: *Provided further*, That this act shall not extend or apply to pension agents or other officers who receive a fixed allowance as compensation for their services, including expenses of postages. And Section 3915 of the Revised Statutes of the United States, so far as the same relates to stamps and stamped envelopes for official purposes, is hereby repealed."

By the terms of this act, the use of official stamps is abolished; and, to prevent confusion, officers of this Department having such official stamps in their possession will immediately return them to the Secretary of the Interior, or to the office through which they were issued, and will also make requisition for the number and size of "Return Penalty Envelopes," to be used in lieu of stamps, which may be required for their use during the ensuing six months. Further supplies will be furnished upon subsequent requisitions.

Registration will hereafter be free; but, in order that the registration branch of the Postal Service may not be unnecessarily taxed, it is desirable that letters and packages should be registered only when such precaution is deemed requisite.

Officers of this Department entitled to use penalty envelopes are not authorized to have such penalty or return penalty envelopes printed, but will use only those supplied by the Department upon requisition.

A return penalty envelope must be addressed to the officer or agent requesting official information, prior to inclosing it to any person or persons from or through whom such information is desired, the same to be used in reply, only to cover such information and indorsements relating thereto.

Pension agents or other officers who receive a fixed allowance as compensation for their services, including expenses of postages, are not entitled to the use of penalty or return penalty envelopes. Special

agents and officers, or employés detailed as such, are entitled to use the penalty and return penalty envelopes subject to the foregoing provisions and limitations.

H. M. TELLER,
Secretary.

DESERT LAND—FINAL PROOF.

RICHARD A. BALLANTYNE.

There is no authority for extension of time in making final proof in desert land entries. Persons who delay beyond the legal period are liable to contests for non-compliance.

Commissioner McFarland to Hon. John T. Caine, H. R., July 9, 1884.

SIR: I am in receipt of your letter of the 5th ultimo, transmitting a communication from Richard Ballantyne, dated Ogden, Utah, May 30, 1884, in relation to desert land entry No. 95, made at Salt Lake City, Utah Territory.

Said entry was made by Richard A. Ballantyne, June 5, 1877, upon the NW. $\frac{1}{4}$ of SW. $\frac{1}{4}$, W. $\frac{1}{2}$ of NE. $\frac{1}{4}$ and W. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of Sec. 12, T. 5 N., R. 2 W.

In said communication Mr. Ballantyne, who is the father of the entryman, states that the water for the irrigation of said lands must be taken from Weber River, and that a canal $9\frac{1}{2}$ miles in length and 20 feet wide at the bottom, has been constructed at great expense for the purpose of irrigating said and other tracts of land in the vicinity thereof; that the water had been turned into the canal, but before it reached the land in question several breaks were made therein by the water, to repair which would require probably three months' more time, which he asks may be granted to enable them to comply with the requirements of the law as to the reclamation of the land.

Mr. Ballantyne testifies to the good faith of the entryman and his bona-fide efforts to reclaim the land within the statutory period, and, as the cause of his failure so to do, refers to the great difficulties which had to be overcome in building the canal, and the time lost in repairing the breaks therein above mentioned.

You state that you are cognizant of the difficulties attending the building of the canal, and that by allowing such extension of time as may be within my power, individual enterprise would be rewarded and combined endeavors to reclaim a considerable tract of land from sterility to fruitfulness stimulated.

In reply you are advised that I do not think that I am authorized by law to extend the time for making final proof and payment, and therefore decline to grant Mr. Ballantyne's request. But in view of the good faith of the entryman, his bona-fide efforts to reclaim the land within the time allowed by law for that purpose, and the large amount of

money and labor expended in constructing the canal, the final proof showing a proper reclamation of the land, if submitted promptly, will, in the absence of an application to contest the entry, be accepted.

DESERT LAND—GROWING GRASS.

MILLER *v.* NOBLE.

Where the claimant was negligent in his reclamation, but the default was cured before contest, and a naturally worthless (alkaline) tract was converted into grass-bearing land, the entry will not be disturbed.

Secretary Teller to Commissioner McFarland, July 14, 1884.

I have considered the case of John W. Miller *v.* Daniel B. Noble, on the appeal of Noble from your decision of November 28, 1883 (10 C. L. O., 331) holding for cancellation his desert-land entry, No. 76, for the SW. $\frac{1}{4}$ of SE. $\frac{1}{4}$, N. $\frac{1}{2}$ of SE. $\frac{1}{4}$, S. $\frac{1}{2}$ of NE. $\frac{1}{4}$, S. $\frac{1}{2}$ of NW. $\frac{1}{4}$, and the SW. $\frac{1}{4}$, Sec. 28, T. 8 S., R. 8 W., Helena, Montana.

February 23, 1878, Noble filed his desert-land declaratory statement for said land, and June 15, 1880, made final proof and payment, and received final certificate thereon.

October 8, 1882, Miller filed an affidavit, alleging among other grounds of contest:

1. That the land covered by said entry was not desert land.
2. That if said land was subject to entry as desert in character, it was not reclaimed at the time final proof was made.
3. That Noble's entry was in fact made in the interest and for the benefit of one Selway.

January 15, 1883, your office directed a hearing on the said allegations of Miller, which was accordingly had in March, 1883.

After a careful examination of the evidence, I am led to concur in your conclusion that the land was properly subject to entry as desert land, and that there is no evidence to warrant a conclusion adverse to the claimant under the third allegation.

A large number of witnesses were examined on behalf of the contestant, and a still greater number for the claimant, and upon the material points the evidence is conflicting and very unsatisfactory in its character.

It appears that Noble took no action in the matter of reclaiming the land until the spring of 1880, when he procured a survey for the necessary ditches; thereafter he constructed certain ditches in accordance with said survey, and offered his final proof June 15 of the same year. At the time of final proof no attempt had been made to cultivate or to crop any part of said claim, nor has any such use of the land been made since entry, the claimant only using the same as meadow and pasture

land; hence it becomes difficult to ascertain the result of the alleged reclamation.

Placing the most favorable construction upon the evidence furnished by the contestant, I find that the land prior to entry did produce on certain small portions thereof a little "salt" or "slough" grass, but of a very poor quality, and not worth the labor of saving, and that it is doubtful whether the side ditches, constructed before final proof, were sufficient to properly distribute water over the claim.

It is shown by the claimant that he did, in fact, have sufficient water upon the land to effect its reclamation when he made his final proof. This fact is testified to by several witnesses. In carrying out his system of irrigation, Noble alleges (and in this he is well corroborated) that he could and did make use of certain natural depressions or "water-ways" extending over the land, and hence was enabled to lead water upon each legal subdivision of the land without actually constructing ditches thereto in some instances; and that, as the result of his irrigation, the land has each year since entry been extensively used for pasture, and for such purposes is fully reclaimed.

Taking all the evidence together, it is a matter of doubt whether any system of irrigation could, except after a considerable term of years, so change the naturally unproductive quality of the soil (owing to its alkaline character) as to make it valuable for the production of any crop except grass; but I am clearly of the opinion that the land was absolutely worthless in a state of nature, and that, as the result of irrigation, it is now valuable pasture land.

Now, it is to be observed that Noble did nothing towards reclaiming the land until a very short time before making final proof; that at said time there could be seen no direct results of the irrigation other than the presence of water upon the land where it before had not been found; and that a considerable amount of ditching was done upon the land just before the hearing.

The desert-land act of March 3, 1877 (19 Stat., 377), under which this entry was made, does not specify how or to what extent land is to be reclaimed, except "by conducting water upon the same," nor does said act contain any penalty or forfeiture clause covering a failure to properly reclaim the land; but in the place of such forfeiture the purchaser is required, as an assurance of good faith, to advance twenty-five cents per acre of the price fixed for the land at the time he files his declaratory statement.

In *Wallace v. Boyce* (1 L. D., 54), this Department held substantially that the final proof must show that the land from a desert condition has been reduced to an agricultural state. But in the case of *Babcock v. Watson* (2 L. D., 19), it was said, in referring to the phrase "some agricultural crop," that it meant not only the amount of the crop, but also the kind, and that it might include grass, wheat, or barley, or such other crop as the country and climate were adapted to. Hence it would

seem that "results" might be shown after a sufficient lapse of time, even though no attempt was made to cultivate the land by plowing and sowing seed.

In this case, however, the time between bringing water upon the land and making final proof was so brief, that the effect of the water upon the land could not then be seen. Still I am of the opinion that, as the evidence shows the land to have been actually reclaimed, judging from the "results" existing before the contest was begun, the entry should not be disturbed.

It is to be noticed that the entry was made in June, 1880, and that it remained unassailed for more than two years. Under such circumstances I should hesitate to cancel an entry except upon the most convincing evidence of an attempt to obtain title in fraud of the law and requirements of the Department thereunder.

Your decision is therefore reversed, and the contest is dismissed.

MINING CLAIM—FORM OF LODGE LOCATION.

BREECE MINING COMPANY.

The form of a lode location need not necessarily be that of a parallelogram; the formation of the mineral deposit must govern.

Secretary Teller to Commissioner McFarland, July 16, 1884.

I have considered the claim of the Breece Mining Company upon the Philadelphia Lode, mineral entry 1336, lot 486, district No. 3, Leadville, Colorado, on appeal by the claimants from your decision of August 23, 1883, requiring an amended survey of the location.

The plat of survey on file shows a location running northeasterly 875 feet, measured along the line marked "center of vein;" thence southeasterly, at a right angle with its former course, 450 feet; thence northeasterly, parallel with its original course, 175 feet. It is thus 1,500 feet in length, measured along said "center of vein," and it is 300 feet or less between the side lines. The location, which was made September 19, 1877, appears to be surrounded by other locations on all sides, its western end line being part of the east line of lot 487, and its eastern end line lying within the limits of lot 474 and parallel with the former. A few feet south of the center line of the location, and at its western extremity, is the discovery shaft, and a second shaft appears some 600 feet to the eastward, being a few feet north of said center line. There appears to have been no discovery of mineral elsewhere in the location. Affidavits set forth that the underlying mineral is found as a comparatively level deposit, irregular in form, in no wise resembling a fissure vein, and not capable of being traced by its outcroppings.

Your decision holds that, "as the peculiar conditions do not exist that would make such a location satisfy the intent of the mining act,

it will be necessary to amend the survey so as to conform to all the requirements of the statute, Section 2320, Revised Statutes, as construed by this (your) office, to wit: A lode claim must be to all intents and purposes essentially a parallelogram." Such a construction should be founded on the reason of the thing, or on the clear intent of the statute. As to the former, I fail to perceive any reasonableness in the requirement of a parallelogrammic form. If a fissure vein deviates literally at an angle, it is reasonable, as the primary purpose of the statute is to grant the mineral, that the location should deviate with it. If the mineral is not deposited in a fissure, but in irregularly-shaped masses, as in this instance, then, as it can in no wise affect the interests of either the United States or adjoining locators whether any given L-shaped lot be covered by one or by two locatons, it is unreasonable to hold that it shall not be embraced by one location.

Turning to the statute referred to, it reads, that "a mining claim located after the 10th day of May, 1872, may equal, but shall not exceed, 1,500 feet in length along the vein or lode," and that "no claim shall extend more than 300 feet on each side of the middle of the vein at the surface." It is apparent that the purpose of these provisions is to limit the dimensions of the location, and not to prescribe its shape. It is to be not more than 1,500 feet long, and not more than 600 feet wide. The point of measurement selected is the "vein," and if the measurements be made along and from the middle of a vein which departs literally from its course at a right angle, it is obvious that the statute is satisfied. Precisely the same quantity of land and of lode is appropriated by an L-shaped as by an I-shaped location, where the length and width are determined from the middle of the vein.

"There is no language in the act," say the court in *Wolfley v. Lebanon Mining Company* (4 Col., 112), "that requires the diagram to be in the form of a parallelogram, or in any other particular form." I will go further and say, that the language of the statute precludes the conclusion that it contemplated a parallelogrammic location. The requirement of such a shape might be inferred if the language had been "no claim shall exceed 1,500 feet in length by 600 in width;" but the introduction of the provisions requiring a measurement of length "along the vein," and of width from "the middle of the vein," plainly points to a reason for the selection of the central line of the location instead of the side line, and that reason must have been the possible tortuous course of the vein. There could be no practical purpose in selecting the middle of the vein as the place of measurement, except to provide for an appropriation of the same quantity of surface by a deflecting as by a straight location.

Since the statute authorizes an L-shaped or other irregularly-shaped location in the case of a fissure vein, it must authorize it in the case of a horizontal deposit, such as is found in this case, if the reason of the thing does not forbid. That such a deposit is within the meaning

of the descriptive terms "vein or lode" in the statute is settled (*Stevens v. Williams*, 1 McCrary, 480), and I have said above that there are no practical considerations opposing it. Therefore I see no reason for objecting to the location in the case before me, and reverse your decision.

TOWN SITE—ENTRY BY JUDGE.

TOWNSITE OF ASPEN.

Application for the townsite, which lay in Gunnison county, was made by the judge of said county in 1880; pending its consideration on the question of the alleged mineral character of the land, the town was incorporated in April, 1881; afterwards the county was divided into Gunnison and Pitkin counties, throwing the town into the latter county, whereupon, in June, 1881, the judge of Pitkin county made the entry: held that the entry should have been made in the name of the corporate authorities as trustees, and that, since the parties have so agreed, patent may so issue without cancellation and new entry.

Secretary Teller to Commissioner McFarland, July 18, 1884.

On the 13th of May last I verbally requested you to transmit for my consideration the case of the Aspen townsite claim, entry No. 647, Leadville, Colorado, made June 2, 1881, by J. W. Deane, county judge, for 255.50 acres, delineated by special survey.

This entry was, on the 9th of June, 1881, disavowed and protested by the mayor, recorder, trustees, and more than one hundred citizens of said town.

May 5, 1884, after showing satisfactorily to you that said town was in April, 1881, incorporated, a date prior to the date of said entry, you held it for cancellation, on the ground that by Section 2387, Revised Statutes, the entry must be made by the corporate authorities and not by the county judge. You further held that although Judge Deane was commissioned and took the oath of office on the first day of June, yet as his official bond was not approved until the 6th of June, 1881, and as the laws of Colorado provide that such an officer shall not enter upon his duties until the giving of a good and sufficient bond, he was not competent to make the entry.

Upon the first proposition, you are undoubtedly correct in holding that entry in case of incorporated towns should be made by the corporate authorities. Upon the second I cannot agree with you. It is not alleged that the bond of Deane was executed after the date of entry, but that it was not at that time approved. If it was found good and sufficient when examined, it was a good bond from its execution, the approval being evidence of its original sufficiency. And even were it not made until after the entry, he was in commission and had taken the oath of office, and the United States would not be bound to look beyond his commission in recognizing him as an officer and receiving his application to purchase under the United States statute.

I find, however, in this case, certain facts not noticed by you, to wit: that on the 23d of March, 1880, application to enter said townsite was filed in the district office by the county judge (Smith) of Gunnison County, in which the land then lay; that said application was accompanied by a duly-executed plat of survey, and was signed by more than sixty applicants; that afterward, on the 27th of August, 1880, the register and receiver ordered a hearing upon certain allegations touching the mineral character of the land; that on the 22d of October they rendered their decision thereon, holding that the townsite application to enter should be allowed; that on the 11th of April, 1881, you affirmed their decision; that appeal was waived on the 2d of June, 1881, and on the same day the entry of the land was allowed to be made by Deane, who had been commissioned judge of Pitkin county, which had been set off by legislative act from Gunnison county during the pendency of these proceedings. It appears also that the money paid was already in the hands of the district officers, having been tendered by Judge Smith to support the pending application. Upon these facts it is claimed by claimants on the part of the county judge that the entry by Judge Deane was proper, even if the town was previously incorporated; although, it may be here recited, they do not admit the fact of such incorporation at date of entry, but contest the validity of the proceedings by which the incorporation was effected.

On the other hand, the claimants on behalf of the corporate authorities contend that the incorporation was effective, that the mayor alone had the right of entry June 2, 1881, and that consequently the act of Deane was *coram non judice*, and void, which conclusion you have adopted as a basis for your decision.

I think the pending application filed by the judge, having complete jurisdiction when it was presented, is sufficient as a basis for the entry whenever the preliminary contest was decided; that the legislature of Colorado, in dividing the county, compelled the town to accept a new trustee; that the incorporation of Aspen, prior to the application or appointment of the judge for the new county, had devolved the trust under the laws of the United States upon the corporate authorities, and thus barred the trusteeship of the judge; that in consequence the corporate authorities should have been described in the certificate of entry as trustees and the entry so reported.

It follows, that while the act of the judge was ineffectual to invest him with the trust, it did not avoid the right of the town or the efficiency of the pending application and tender of payment; and as claimants under the entry now agree (appeal from your decision having been waived by the present county judge) that patent may issue in the name of the corporate authorities upon the entry already made, I direct that this be done, and your decision holding the entry for cancellation is modified accordingly.

HOMESTEAD—ABANDONMENT.

WILMARTH AND KEMP.

The ruling in *Baxter v. Cross* governs in all cases arising after it was rendered.

Acting Secretary Joslyn to Commissioner McFarland, July 19, 1884.

Please find herewith inclosed a letter from Messrs. Wilmarth and Kemp, of Huron, Dakota, inquiring whether the ruling in the case of *Amley v. Sando* (11 C. L. O., 50), or the ruling in *Baxter v. Cross* (11 C. L. O., 103; 2 L. D., 69), is to be followed. For their information, and for that of others concerned, I may state that the latter decision governs in all cases arising after the date on which it was rendered.

I may observe, further, that the former case was a review of a decision of March 17, 1884, when the rule obtained which was laid down in *Bennett v. Baxley* (10 C. L. O., 359; 2 L. D., 151). It simply enforced said rule, as its language plainly indicates, though at the same time making a correction in the calculation of time appearing in it. *Bennett v. Baxley* was a formulation of the ruling which had for years obtained in the Land Department, and which excluded only the day of entry in calculating abandonment for six months next after homestead entry, for which contest would lie. When the case of *Baxter v. Cross* came under consideration, it was deemed proper to modify said rule, and it was accordingly done. In doing so, the case of *Bennett v. Baxley* and the rule laid down in it were cited; and, that case being overruled, it naturally followed that all others founded on it fell with it.

DONATION—REISSUE OF PATENT.

JOSIAH PETRAIN AND WIFE.

Application to reissue patent, changing the boundary line, whereby the quantity of land would be increased, is denied, because said line was in accordance with claimant's notice, because the official survey has stood unchallenged for twenty years and upwards, and because the change would derange the dividing line between the half of donee and that of his wife, and probably lead to litigation and the unsettling of existing titles.

Assistant Commissioner Harrison to register and receiver, Vancouver, Wash., July 19, 1884.

I am in receipt of the register's letter of 3d of May last, inclosing affidavits of Mathias Spurgeon, Roson M. Seward, and P. W. Crawford, accompanied by a patent, dated November 22, 1865, issued in favor of Joseph Petrain and wife, for lands claimed by Petrain as a donation. These lands are surveyed as claim No. 55, being parts of Secs. 8, 9, 16, 17, and 21, in T. 2 N., R. 1 E., Washington Territory, and cover an area of 525.67 acres.

These papers are filed here for the purpose of having the east boundary line of the survey of said donation changed so as to run N. 3° E., instead of running N. as it does by the official survey, and to have a corrected patent issued in accordance with the survey as thus amended.

The affidavit of Crawford states that he found the original southeast and northeast corners of said claim as established by the official survey, and that a straight line connecting these points must be run from said southeast corner on a course N. 3° E.

Spurgeon and Seward are the present owners of the land in question, as appears by their joint affidavit.

This claim comes under the 4th section of the act of September 27, 1850 (9 Stat., 496).

By the 6th section of the act of February 14, 1853 (10 Stat., 158), those claiming under the 4th section of said act of 1850 were required to give notice of their claims in writing prior to December 1, 1853, or be forever thereafter debarred from receiving any benefit thereunder.

Pursuant to this requirement of the act of 1853, Petrain gave notice of his claim to 640 acres on the 16th of August, 1853. This notice gives the boundaries of the land claimed, as follows: Commencing at the northwest corner of the donation of A. M. Short, and running thence N. 80 chs., thence W. 80 chs., thence S. 80 chs., and thence E. 80 chs., to the place of beginning. Reference is made in this notice to a paper in the case, from which it appears that Mr. Petrain procured a record of his claim to be made in the office of the probate court for Clark county, Washington Territory, in accordance with the above description.

The public surveys were extended over the township in which this claim is located, and the plat thereof approved May 20, 1860. On the 27th of June following, Petrain filed another notice, in which his claim is described as follows: Beginning at a stake 21 chs. S. and 2.40 chs. E. qr. post between Secs. 16 and 21, T. 2 N., R. 1 E., and running thence N. 3° E. 80 chs., thence N. 56° W. 65 chs., thence S. 56¼° W. 18 chs., thence S. 3° W. 48.50 chs., thence S. 39° E. 39 chs., and thence S. 56° E. 51 chs. to the place of beginning. This notice is very much changed by striking out courses and distances and inserting others; and as it is above given it agrees with his third notice filed a year later.

The claim plat upon which Petrain's claim is shown was approved September 15, 1863.

On July 26, 1862, the donation certificate in this case was issued, and as the claim plat had not then been constructed, a special plat of the survey of the claim was procured from the surveyor-general and forwarded here with the papers in the case. The records of this office show that said patent was sent for delivery to the register on the 23d of November, 1865. The register on the 30th ultimo reported that the records of his office fail to show when the delivery of the patent was made. By calculations made in this office the official survey is found to close within less than one chain; and by taking the northeast corner of the

claim as the initial point, it is found that the east line, if run on a course north about one-half degree east, would close exactly.

To change this east line as requested, making it run N. 3° E. would change the length of this line and the northeast line with which it connects (that is, if the lines of the survey closed), and give the donee about sixteen acres more land, most of it carved out of Section 16.

As the law required this donee to give notice in writing of the land which he claimed, and as he gave notice, stating his claim to be in the form of a square, all its lines 80 chains in length; and as the law also provided that if the donee did not give this notice he should be debarred from receiving any benefit under the law; and as a patent for land, a large part of which lies outside of this notice, has been issued, it would seem that the present parties ought to be satisfied with this line, which is the only one bounding the claim that has any appearance of being located by the original notice; and more especially should they be satisfied with the existing survey after the same has stood unchallenged for upwards of twenty years, either by the donee or those claiming under him.

To now change this east line so as to increase the area of the claim would remove the dividing line separating the donee's half from that which was assigned the wife, and might, and probably would, lead to litigation and the unsettling of existing titles.

In view of all the facts in this case, of the great liberality which has been shown the donee in patenting to him land outside of his original notice, of the great length of time which has elapsed since the official survey of the claim was executed, and of the fact that the survey has stood without protest for so long a period, I am of the opinion that it is my duty to refuse to allow a change of the boundaries of said claim as asked. I therefore decline to order a resurvey of said east boundary line, or in any manner to disturb the status of said donation as patented, and herewith return the patent received with the register's said letter, that it may be handed to the party entitled thereto.

SOLDIERS' HOMESTEAD—SETTLEMENT AND ENTRY.

CHARLES HOTALING.

Settlement, improvement, and entry must be made within six months after date of filing.

Contest will lie for failure in either particular, and the successful contestant has a preferred right of entry.

Secretary Teller to Commissioner McFarland, July 21, 1884.

I have considered the appeal of Charles Hotaling from your decision of August 13, 1883, declining to entertain his appeal from the action of the local officers at Huron, Dakota, dismissing his contest against John M. Leech's homestead claim upon the NW. $\frac{1}{4}$ of Sec. 26, T. 110, R. 62 Mitchell series.

It appears from the record that Leech filed a soldier's declaratory statement for said tract February 6, 1882, and made entry No. 21,069 on August 1, 1882, but that he has never resided on or cultivated it. On December 12, 1882, Hotaling filed an affidavit of contest, alleging Leech's failure to settle on and improve said tract within six months after his filing. On February 27, 1883, one Willis H. Davis offered an affidavit of contest, alleging Leech's abandonment and change of residence for six months after his entry. On motion of Davis's attorney the local officers on the same day dismissed Hotaling's contest, on the ground that he was not a qualified homesteader, and accepted Davis's contest. From said action, which was taken without notice to him, Hotaling appealed to your office, with the result aforesaid.

It is objected to said appeal that it was not filed within thirty days after February 27, 1883. It bears no date, and the local officers are unable to determine whether or not it was filed within said period; but Hotaling and his attorney testify that it was filed on February 28, 1883. It is noticeable that another appeal, written by the same attorney, and admittedly filed on February 24, 1883, bears no date; the omission of the date is therefore not a suspicious circumstance. In view of the uncertainty of the local officers, and the oath of the appellant and his attorney, the said objection is overruled.

I concur in your opinion that there is no law requiring a contestant against a homestead claim to be himself a qualified homesteader. Consequently, the dismissal of Hotaling's contest by the local officers was unwarranted, and must not be allowed to prejudice his interests. His contest should have been reinstated by your office, and in what follows it will be supposed that it is reinstated.

We have, then, the case of a contest filed upon a contest—Davis's upon Hotaling's—which is only allowable when the earlier of the two is on its face invalid. Your decision holds that the contest was invalid, because Leech's entry was not "subject to contest, on the ground of failure to comply with the law as to residence until six months from date of *entry* had elapsed." Hotaling's affidavit alleges failure "to settle and improve" within six months after date of *filing*. Section 2304, Revised Statutes, provides that a soldier homestead settler "shall be allowed six months after locating his homestead and filing his declaratory statement within which to make his entry and commence his settlement and improvement;" and Section 2309, after providing for the initiation of the claim by filing a declaratory statement, proceeds to declare, "but such claimant (under Section 2304), in person, shall, within the prescribed time, make his actual entry, commence settlement and improvements on the same, and thereafter fulfill all the requirements of law." There is no doubt in my mind that the law requires the soldier to do three things within six months after filing his declaratory statement, namely, to make entry, to begin settlement, and to begin improvement. A claimant who fails to perform any one of these acts within said time

fails to comply with the law, and his claim is therefore not a valid claim. So it has been formally ruled, as appears from circular of March 20, 1883 (10 C. L. O., 37).

Again, what was the object which Congress had in view in framing this statute? If the words, "and commence settlement and improvement," in Sections 2304 and 2309, had been omitted, it would have followed that a year must elapse before the claim would be subject to contest; for under the homestead law no claim is subject to contest for failure to settle until six months after entry. It would have been equivalent to allowing the soldier a year within which to commence his settlement. No other construction would have been possible. If, therefore, Congress had intended to allow him a year, I think that they would have omitted those words from the law. The fact that, on the contrary, they inserted them, is to my mind conclusive evidence of their intention to prevent such construction, and to declare plainly that a soldier, like any other homesteader, must settle within six months after making his claim.

Failure to so settle and improve the land being in violation of the law, is there a penalty for it? If there is a failure to enter in time, it is proved by the official records; the right to file a declaratory statement is held to be exhausted, and the tract is subject to the claim of others, notwithstanding a settlement or improvement of it. Hence the penalty for this breach of duty is exacted by the Land Department. If there is failure in settlement and improvement, since these are equally breaches of duty, it follows that the penalty for them should also be exacted by subjecting the land to claims by others. In the circular of March 20, 1883, it is said, "His rights are exhausted by the first filing, and if he does not within six months make his personal entry at the land office, and *commence his settlement (and improvement)*, as required by law, *he obtains no right to the land.*" If so, surely he should not be allowed to hold it to the detriment of other settlers. But the case supposes the homestead entry to be made; and, clearly, the only means of knowledge of the breach available to the Land Department is a contest. The necessities of the case demand that the Department resort to the ordinary method of meting out justice to delinquent claimants, where the delinquency has not been cured, if it be not expressly prohibited. There appearing to be no such prohibition, it would seem, then, that on general principles a contest for failure to settle and cultivate for six months after filing is allowable.

In Section 2297, Revised Statutes, the forfeiture declared is for abandonment or change of residence for more than six months "after filing the affidavit, as required in Section 2290," namely, the affidavit filed with the application to enter. Said affidavit is not identical with the declaratory statement, and hence there is no express provision for a contest such as Hotaling has initiated. It is to be observed, however, that Section 2297 contemplates the filing of the affidavit, the initial act in an ordi-

nary homestead entry, as vesting a good right to the tract in the entryman, defeasible only upon breach of condition subsequent; whereas in the case of the soldier claimant, settlement, improvement, and entry are conditions precedent, without which no right to the tract is acquired. "Thereafter," says the statute, the soldier must "fulfill all the requirements of the law"—the conditions subsequent—as in other cases; but *theretofore*—*i. e.*, prior to acquiring a right to the tract—he must settle and improve as well as enter. A failure in either requirement, therefore, vitiates the entry as entirely as does a want of any other qualification or essential act; and I think that it is the duty of the Land Department to permit a contest on the ground of illegal inception as freely as it would in other cases of alleged illegal entry.

This ruling is in harmony with the practice relating to the entry of others on lands covered by the declaratory filings of soldiers. Circular of May 20, 1883 (*supra*), after declaring that the declaratory filing is not a bar to settlement or entry by others, and that if the soldier does not within six months after filing make entry and commence his settlement as required by law, "he obtains no right to the land," proceeds to declare that "if the soldier does not establish his residence on the land as required, the next comer may take the land." Now, a soldier's declaratory filing, like a pre-emptor's declaratory filing, is the initial step to an entry, and an entry must be founded on settlement. The two filings differ in one respect only, namely, that, as a special concession to the soldier, he is permitted to base his settlement on his filing, instead of basing his filing on his settlement as the pre-emptor must. It is a change of form, but not of substance. We properly go to the well-settled rulings in pre-emption cases, in order to determine the legal effect of a filing and entry without settlement. They are voidable. If a pre-emptor applies to make entry, and it is shown that there was in fact no settlement, his application is rejected; if this be done at the instance of an adverse claimant, he takes the land; if it be done in the course of a contest after entry, the contestant acquires a preferred right to the land. The reason is plain. The law never contemplated the reservation and entry of a pre-emption claim without settlement, and this principle is carried into the soldiers' homestead law in express language. If we again turn to the pre-emption law, we find no provision for contesting an entry not based on settlement; but the practice of the Land Department has uniformly sanctioned such contests, and, on the same principle, it should sanction contests against a soldier's entry not based on settlement.

Whilst in this case your office holds that a contest for failure to settle will not lie, it appears that twice at least within a year it has held to the contrary. In the case of Lloyd H. Dillon (10 C. L. O., 70) it is said, "Where settlement and improvements are not commenced within the time required (six months after filing), the entry is liable to be contested for failure to comply with the law." In the case of W. H. Hyers

(10 C. L. O., 4) it is said, "There is no uncertainty as to what the statute requires. The party must settle upon and commence improving his claim within six months from date of his homestead declaratory statement. Failing to do this, his entry is subject to contest." It would seem, therefore, that your office would have been justified by its own precedents, apparently not overruled, in allowing a contest in this case, as in other cases of illegal entry.

In this aspect the contestant is admitted as *amicus curiæ*, and, under the act of May 14, 1880, if he procures a cancellation of the claim, has the preferred right of entry for thirty days. This act gives a valuable right to a successful contestant, as a reward for proving the illegality of a claim; and it follows that, being once recognized as a contestant, he has the right of appeal. His right, as against the government, takes effect when he offers and is allowed to contest, and is only properly protected by allowing him to carry his cause to the court of last resort.

I am therefore of opinion that Hotaling's contest was legal, and that Davis's was improperly allowed pending its consideration. The latter should be canceled and the former reinstated, and your decision is accordingly reversed.

SOLDIERS' HOMESTEAD—RESIDENCE; RES JUDICATA.

HIGGINS *v.* WELLS.

When the entryman has established a personal residence, it may be maintained by the residence of his family.

Keeping a house in a town, to which the family return from time to time, does not in itself prove want of good faith.

Res judicata will apply, notwithstanding the allegation that the decision was founded on error of fact and law.

Secretary Teller to Commissioner McFarland, July 21, 1884.

I have considered the case of W. W. Higgins *v.* W. L. Wells, involving the latter's soldiers' homestead entry, number 16,268, made April 9, 1878, on the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 28, T. 12 N., R. 10 E., Lincoln, Nebraska, on appeal by Higgins from your decision of February 18, 1884, dismissing the contest.

It appears that when Wells (from whose five years of residence and cultivation four years were to be deducted because of his services as a soldier) came to offer his final proofs of June 7, 1881, objection to their reception was made by said Higgins, and your office allowed him to institute contest. This he did on January 10, 1882, his affidavit setting forth that "the said Wells never made the said land his permanent bona-fide home for one year, nor for any period of time whatever," and reciting various facts in support of this proposition. At the hearing there was introduced much evidence relating to the acts of the claimant

subsequent to April 9, 1879, the end of the one-year's residence and cultivation required, all of which is irrelevant to the issue. As to the year in question the evidence shows that Wells, after making entry, built a house, stable, etc., and dug a well on the land, and began to cultivate it, and that he moved his family into the house on June 4, 1878, where they remained until November 26 following, when they were absent until about April 1, 1879. It is quite evident from these facts (admitting that a residence was established) that there was no change of residence or abandonment of the land for more than six months after entry. Hence the entry was not subject to contest under Section 2297, Revised Statutes.

The validity of Wells's residence is attacked on the ground that he was a clerk of the county court, and had his personal and legal residence at the county seat. It has been settled that official position and duty in a town or city and residence on a homestead are compatible with each other. The mere fact of such official position proves nothing, therefore. In this case the removal of his family to the land and the permanent and valuable improvements made are evidences of good faith in the claim, which is, after all, the gist of the whole matter. These are the ordinary evidences of good faith demanded, and I see no reason for requiring extraordinary evidences in this case.

It is urged, however, that Wells's family only visited the land during the summer, remaining at the county seat during the winter, where he had a house and kept most of his furniture. This I think a mere refinement in argument. The homestead law is a practical law, and is so devised that it may have a practical enforcement. The law itself provides its own evidence of good faith in improvement, cultivation, and residence; if these exist as facts, the law is satisfied. If the things done on the land are sufficient to warrant good faith, we must infer good faith; and we may not go off the land and find a fact elsewhere, from which we may infer bad faith. For example, if a claimant has a hundred dollars' worth of furniture on his homestead, and two hundred dollars' worth in a house that he occupied before he took the homestead, it would be absurd to infer bad faith from the latter fact. So, if he owns a house in a town, wherein he lived before entering his homestead, and which he retains and visits periodically for purposes of business or pleasure, his good faith is not thereby impeached. The extra furniture and the extra land are not forbidden by anything in either the letter or spirit of the homestead law.

Wherefore I find in the record no cause for excepting to the final proofs in this case. I may add that, in his appeal to this office, Higgins takes no exception to your ruling that Wells's residence satisfied the law; wherefrom I infer that he assents to it.

His appeal is entirely addressed to a discussion of the question of his superior right to the land, all of which I am compelled to disregard, first, because it was not an issue in the contest, and second, because it

is *res judicata*. On the latter point, I may explain that in the case of *Coburn v. Wells and Higgins*, decided by this Department October 18, 1880, the question of the priority of right to the land between Wells and Higgins came directly in issue, and was determined in favor of Wells. Higgins alleges that said decision was founded on error of fact and law; but I cannot undertake to make even a preliminary inquiry into the question. If said charge had been duly brought before my predecessor, I have no doubt that he would have entertained it and corrected any error that was shown to exist. But Higgins accepted the decision without protest, and cannot be heard now to object to it. The application of the doctrine of *res judicata* to this class of cases has been sanctioned by long usage in the Land Department, and I need not now discuss its legality or necessity. I am constrained to apply it in this case to the question of Wells's superior right to the land.

Your decision is affirmed.

PRE-EMPTION—ALIENATION AFTER ENTRY.

C. P. COGSWELL.

The right to assign and convey after proof, payment, and final certificate is, so far as relates to a bona-fide pre-emption, without any restriction whatever; and whether such assignment was or was not made to a bona-fide purchaser is immaterial as affecting the right of the entryman to assign and convey.

Purchasers from persons who hold final certificates purchase with notice that the Land Department is but an administrator of the law, and that it has no authority to issue patents to pre-emptors or entrymen who have not complied with the law or who have procured their certificates by fraud.

Secretary Teller to Commissioner McFarland, July 21, 1884.

I have considered the petition of C. P. Cogswell for a writ or order of certiorari under Rules of Practice 83 and 84.

The petition sets forth that certain parties made pre-emption cash entries, viz, Nos. 2927, 2928, 2999, 3001, 3002, 3003, 3007, 3041, and 3114, for public lands in Duluth district, Minnesota; that final proof of the pre-emptors was made in the manner required by law, and final entry papers were executed and issued by the local officers in each of the cases, and thereupon the entrymen, by deeds of warranty, conveyed all of said lands to the C. N. Nelson Lumber Company; that, relying upon the conveyances to said company, the final receipts issued to the entrymen, and the laws of Minnesota declaring such receipts to be prima-facie evidence of title in the courts, the petitioner, in good faith and for full value, became the purchaser of all of said lands, and holds them as security for certain bonds of said Lumber Company now in the hands of innocent purchasers of the same, who rely upon said lands as security for said bonds; that, subsequently to said final proofs, entries, and conveyances, your office, acting upon the report of the special agent, or

dered a hearing at the local office to examine certain charges alleged against said entries; that petitioner was not a party to the hearing and had no notice thereof; and that as a result of such hearing you canceled said entries August 31, 1883; that, upon learning such action, petitioner filed in your office a petition to intervene and become a party to the record, and praying that his rights as assignee of said entrymen be fully protected; that, May 13, 1884, you declined to recognize his rights to any of said lands, and declared your action of August 31, 1883, final; that the testimony upon which you acted in canceling said entries consisted of general statements of the special agent and his assistants as to the nature of the lands lying within a portion of the Duluth land district, and that if your said action remains in force the persons holding the bonds supposed to be secured by said lands will be subjected to great loss and damage and to irreparable injury.

The principal question presented by the petition, and in the argument of counsel for the petitioner, is as to the legal effect of that part of Section 2262, Revised Statutes, which declares in case of forfeiture that "any grant or conveyance" made by the pre-emptor, "except in the hands of bona-fide purchasers, for valuable consideration, shall be null and void."

It is urged on behalf of the petitioner that the converse of this declaration of the statute necessarily follows, *i. e.*, that where a party has in good faith, for a valuable consideration, purchased from a pre-emptor, he shall be protected, and the land so purchased shall be patented to him.

Counsel refer to the case of Charlemagne Tower, (2 L. D., 779, 780), and remark that, if that case is to stand, the result follows that a party who purchases from a pre-emptor *before* entry is protected under the section aforesaid, while he who purchases *after* proof made and final certificate issued is not protected.

It will be seen upon an examination of the facts in the original case that proof and payment had been made and final certificate issued. Mr. Tower claimed "that he was a bona-fide purchaser of said lands after entry for value, and without notice of any defect in the title of the holders of the certificates." It was therefore unnecessary to consider the effect of a grant or conveyance before entry, and, so far as the discussion in the decision involved that question, it should not be regarded as authority. Such decision, in discussing the question of the effect of a conveyance *before* entry, has evidently led to a misconstruction of my views relating to the right to assign and convey *after* entry.

I am of the opinion that the right to assign and convey after proof, payment, and final certificate, is, so far as relates to a bona-fide pre-emption, without any restriction whatever; and whether such assignment was or was not made to a bona-fide purchaser is immaterial as affecting the right of the entryman to assign and convey. And since the question is presented by the case now under consideration, I shall proceed,

as briefly as possible, to consider the status of the title to pre-emption lands after proof, payment, and final certificate.

By the pre-emption act of May 29, 1830 (4 Stat., 420), Congress prohibited assignments in the following terms: "And that all assignments and transfers of the right of pre-emption given by this act prior to the issuance of patents shall be null and void."

This provision was carried into Section 12 of the pre-emption act of September 4, 1841 (5 Stat., 453), and is now incorporated into Section 2263, Revised Statutes.

The act of January 23, 1832, provided that all persons who had purchased lands under the act of May 29, 1830, aforesaid, might assign and transfer their certificates of purchase notwithstanding anything to the contrary in said last-mentioned act.

In *Myers v. Croft* (13 Wall., 291) the disability mentioned in Section 2263 was construed to extend "only to the assignment of the *pre-emption right*," and it was held that after the pre-emptor had "proved up his right and paid the government for the land, restriction upon the power of alienation after this would injure the pre-emptor and could serve no important purpose of public policy."

In *Quinby v. Conlan* (104 U. S., 420) it was held that "the act of Congress forbids the sale of pre-emptive rights to the public lands acquired by settlement and improvement. The general pre-emption law declares that all transfers and assignments of rights thus obtained prior to the issuing of patent shall be null and void. This court held (*Myers v. Croft*), looking at the purpose of prohibition, that it did not forbid the sale of the land after the entry was effected; that is, after the right to a patent had become vested; but did apply to all prior transfers." "When the land has been purchased and paid for," and a final certificate issued, "it is no longer the property of the United States, but of the purchaser." The final certificate which the purchaser holds can "no more be canceled by the United States than a patent." Taxes may be assessed upon lands held under such certificates for State, county, and township purposes, where the act of Congress admitting States into the Union expressly provides that the State shall impose no tax or assessment of any description "upon any of the lands of the United States within its limits." The land so held is real estate; it descends to the heirs, and does not go to the executor or administrator; and "in every legal and equitable aspect it is considered as belonging to the realty."

When the certificate is issued and delivered, the contract of purchase is complete, and the "government agrees to make a proper conveyance as soon as it can, and in the mean time holds the naked legal fee in trust for the purchaser, who has the equitable title." When the patent does issue it "relates back to the inception of the right of the patentee so far as it may be necessary to cut off intervening claimants." When the purchase money has paid and the certificate issued a vested right obtains, and "the government can no more dispose of the land to another

person than if the patent had issued." The right to a patent once vested is "equivalent to a patent issued," and "the final certificate obtained on the payment of the money is as binding on the government as a patent." From the time of payment and final certificate "the United States has no real interest in the land. It only holds the dry legal title in trust for the purchaser, pending the usual necessary delay in issuing patents." "The entry and patent are regarded as one title. The title dates from the date of the entry and payment, and not from the date of the patent." These certificates are received in the courts as evidence of title not only when offered by the persons to whom they are issued, but by persons to whom the lands have been conveyed. See *Carroll v. Safford* (3 How., 441), *Witherspoon v. Duncan* (4 Wall., 210), *Hughes v. United States* (*Ib.*, 232), *Stark v. Starrs* (6 Wall., 402), *The Yosemite Valley case* (15 Wall., 77), *Frisbie v. Whitney* (9 Wall., 187), *Astron v. Hammond* (3 McLean, 109), *Mining and Milling Co. v. Spargo* (16 Fed. Rep., 348), *McConnell v. Wilcox* (1 Scam., 344), *Wilcox v. Kinzie* (3 Scam., 223).

It will be seen from these authorities that the right to transfer the title of which the final certificate is the evidence, and which is equivalent to a patent and can "no more be canceled by the United States than a patent," does not stand at all upon the provisions of Section 2262. It stands (in the absence of statutory prohibition) upon elementary principles and the right of a purchaser to convey property which he has bought and paid for in full, in relation to which he has nothing further to do, of which he is the equitable owner, and lacks only the transfer to him of the dry legal title, which the vendor holds in trust for him. It is a fact generally known that in all the new States such title, for the purposes of private and judicial sale, taxation, inheritance of real estate, and all other kindred objects, is treated by the courts, the local legislatures, and individuals in the same manner as if a patent had issued.

While all this is true, it does not follow that the United States is absolutely bound to convey the title after payment and final certificate either to the pre-emptor or to his vendee, whether such vendee is or is not a purchaser in good faith for a valuable consideration; because these decisions assume that there has been a compliance with all the conditions requisite to a complete appropriation of the land, and that the payment has been made and the certificate issued in conformity to law.

For instance, in the case of *Carroll v. Safford* (*supra*)—which perhaps gives as broad and firm a character to the title held under the certificate as any case which can be found in the books—it is observed that "if the land had been previously sold by the United States, or reserved from sale, the certificate or patent might be recalled by the United States as having been issued through mistake. In this respect there is no difference between the certificate holder and the patentee."

In *Myers v. Croft* the court said that the legislation was directed against the transfer of the right of pre-emption, "leaving the pre-emptor

free to sell his land after the entry, if at that time he was in good faith the owner of the land and had done nothing inconsistent with the provision of the law on the subject." And again: "The object of Congress was obtained when the pre-emptor went with clean hands to the land office and proved up his rights and paid the government for his land."

Good faith and cleanly acts are here imputed to the pre-emptor (the vendor), and not to the purchaser.

Upon the question of your power to cancel an entry after a final certificate has issued I refer to the authorities following:

In the case of *Moore v. Robbins* (96 U. S., 530), as to one forty-acre tract there, under consideration, there had been two sales and two final certificates issued; one to the pre-emptor and one to a purchaser at a public sale. The court held that the Secretary of the Interior (the contest having reached him on appeal) "had the authority undoubtedly to decide finally for the Land Department who was entitled to the patent; and though no patent has been issued, that decision remains the authoritative judgment of the Department as to who has equitable title to the land." As to the other forty, patent having been issued, the decision held that all jurisdiction had passed to the courts.

In the case of *Harkness v. Underhill* (1 Black, 316) an entry had been made and a final certificate issued and recorded in the county recorder's office, when the question was raised whether the entry, having been allowed by the register and receiver, could be set aside by the Commissioner. The court held that the question had several times been raised and decided in the affirmative by that court, and cited *Garland v. Wynn* (20 How., 6) and *Lytle v. State of Arkansas* (9 How., 314).

In the case of *Horace Whitaker, ex rel. Nathan H. Garretson, v. Southern Pacific Railroad Company*, decided by this Department in July, 1880 (2 C. L. L., 919), Whitaker was the pre-emptor, who had made proof and payment and had received a final receipt. Garretson was a bona-fide purchaser of the land from Whitaker, and held under a deed executed by him some months after he received the final certificate. Upon a hearing ordered and had subsequently to the issuing of the final certificate, it was found that Whitaker's pre-emption affidavit and pre-emption proofs were false and fraudulent, and upon such finding it was held that "Garretson's claim, so far as the Department was concerned, was defeated." It was further held, "that the doctrine of bona-fide purchaser is not applicable to one who purchases of a pre-emptor before patent; that such purchasers must abide by a disposition of the cases by your office or this Department; that they take no better title than their vendors have; and that your office and the Department had full authority to cancel pre-emption entries for invalidity and fraud."

The case of *Margaret S. Kissack*, decided by this Department in September, 1880 (2 C. L. L., 421), was that of a commutation of a homestead entry. Kissack purchased the land by deed, and claimed "that patent ought to issue for her benefit as a bona-fide purchaser for a val-

uable consideration." It was found that Frazier, the entryman, "had failed to comply with the requirements of the homestead law," and it was again held that "Kissack purchased no better title than Frazier had, and took subject to the action of your office upon the entry."

In *Root v. Shields* (1 Wool., 340) the sale was made after entry, but before patent. Mr. Justice Miller states in his opinion that some at least of the "defendants purchased and paid their money without any knowledge in fact of any defect in the title. Yet they are not bona-fide purchasers for a valuable consideration without notice in the sense in which the terms are employed in courts of equity."

Congress has assumed that your office has the power to cancel entries after payment and final receipt, by providing, in many instances, for the repayment of the purchase money "upon the surrender of the duplicate receipt."

The petition sets forth that the laws of Minnesota, where the lands in question are situated, declare that the final receipts shall be received in the courts as prima-facie evidence of title. But the courts of Minnesota have repeatedly decided that "parties purchasing from pre-emptors before the issuance of the patent take subject to the authority of the Commissioner of the General Land Office to cancel the pre-emption entry and defeat the rights acquired by it." See *Randall v. Edert* (7 Minn., 359), *Gray v. Stockton* (8 Minn., 472). Both of these cases show that after payment and final receipt the lands had been transferred several times, and at the time the entries were canceled were obviously held by bona-fide purchasers for valuable consideration.

The practice of your office and the law as settled by the courts is not inconsistent with the character of the title which arises upon payment and final certificate, conceding, as we do, that the "right to a patent once vested" is "equivalent to a patent issued," and that a certificate can no "more be canceled by the United States than a patent."

Generally, then, a patent may be canceled for the same causes that would authorize the cancellation of a certificate. For instance, a patent may be canceled "if there be any equitable reason as against the government" why the patentee should not retain the patent; "if it has been issued without authority of the law or by mistake of facts or by fraud of the grantee, the United States can by a bill in chancery have a decree in chancery annulling the patent." "Nor is fraud the only ground upon which a bill will be sustained. Patents are sometimes issued unadvisedly or by mistake, where the officer has no authority in law to grant them, or where another party has a higher equity and should have received the patent; in such cases courts of law will pronounce them void." See *United States v. Stone* (2 Wall., 535), *United States v. Schurz* (102 U. S., 404).

If the patent has issued, the jurisdiction to make cancellation is in the courts; and if your office has improperly issued a patent, it cannot

issue a second while the first remains outstanding (*Moore v. Robbins*, 96 U. S., 530).

But, as we have seen, your office has jurisdiction for proper cause to cancel entries, after payment and final certificate, before patent. The principle upon which the cancellation proceeds in the case of either final certificate or patent is essentially the same; the tribunals are different.

Although your office may be informed of the fact that a pre-emptor (who has complied with the law) has sold his land after final certificate, nevertheless it will issue the patent to the pre-emptor. The instances are exceptional, and are expressly pointed out by statute, where the patent for public lands issues to the transferee.

The Land Department deals directly with the pre-emptors, with its own vendees, with the persons with whom it contracts. It cannot undertake to follow the transfers of the grantees, to settle the questions which may arise upon such transfers, and attempt to adjust the character of alleged bona-fide purchasers for value from its own grantees. The government issues the patent to the pre-emptor, and such questions, if they arise, must be determined by the courts. See *Kissack's case (supra)*.

Purchasers from persons who hold final certificates purchase with notice that the Land Department is but an administrator of the law, and that it has no authority to issue patents to pre-emptors or entrymen who have not complied with the law or have procured their certificates by fraud.

The petition, therefore, so far as it proceeds upon the ground that the petitioner is a bona-fide holder for a valuable consideration, and should therefore be protected and patent issue without regard as to whether the pre-emptor complied with the law or procured his final certificate by fraudulent practices, must be denied.

The petitioner, however, alleges that the final proofs of the pre-emptors complied strictly with the law; that the proofs taken upon the hearing ordered, and upon which the entries were canceled by your office, were uncertain, indefinite, and not sufficient to authorize such action; and that he had no notice of such hearing.

This Department has recognized the right of the purchasers to appear and be heard upon the question whether the entryman has complied with the law (*Whitaker, ex rel. Garretson, v. Railroad, supra.*) Such a purchaser would be a proper if not necessary party in a bill to cancel a patent alleged to have been procured by fraud.

For the purpose of enabling this Department to examine the proofs and inquire whether your action in canceling said entries was authorized, the order of certiorari will be granted.

You are therefore directed to certify all papers, proofs, and proceedings of such entries in the matter to this Department.

TOWN SITE—OFFERED LAND; SETTLEMENT.

EUREKA SPRINGS *v.* NORTHCUTT ET AL.

A town may make private cash entry of offered land not within the corporate limits, without reference to the limitations of the townsite laws based on population.

Whether offered land may be taken by regular town site entry, *quære*. In this case the cancellation of certain homestead entries on offered land leaves it withdrawn from private entry, and it may therefore be treated as unoffered and subject to disposal as a townsite.

Actual townsite settlement, even prior to incorporation, is notice to pre-emption and homestead settlers, who may not appropriate the lands embraced by it by anticipating the application at the local office.

Secretary Teller to Commissioner McFarland, July 21, 1884.

SIR: I have examined the case of the town site claim of Eureka Springs *v.* Joseph K. Northcutt, Robert J. Alexander, William Evans, L. M. Lloyd, E. A. Chapman, David C. Bays, Benjamin Woodruff, Peter Van Winkle, and George W. Penn, involving the right of entry to the S. $\frac{1}{2}$ of Sec. 10, the NW. $\frac{1}{4}$ of Sec. 14, the NE. $\frac{1}{4}$, the NW. $\frac{1}{4}$, the SE. $\frac{1}{4}$, the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, and the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 15, T. 20 N., R. 26 W., Harrison district, Arkansas, on appeal from your decision of July 19, 1883.

All the lands except the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of 14 and the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of 15 were offered at public sale October 11, 1877, no bids being received, and the same remained, therefore, subject to private entry. The excepted tracts were embraced in the homestead entry of Lewis Hanneke, June 15, 1872, canceled for abandonment by your letter of September 30, 1879, which was received at the local office October 8, 1879, and consequently these subdivisions were not subject to disposal until said last-mentioned date, and have never since become subject to private entry.

August 15, 1879, Northcutt made homestead entry No. 4884 for the SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$, and N. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of Sec. 15. February 25, 1880, he published, under act of March 3, 1879, his intention to prove up and commute his homestead to cash entry, as provided by Section 2301, Revised Statutes, and on the day fixed, viz, April 19, 1880, he appeared and made proof and tender of payment.

Alexander made homestead entry No. 4885, August 15, 1879, for NW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, N. $\frac{1}{2}$ of NW. $\frac{1}{4}$, and SW. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of Sec. 15. On the 9th of February, 1880, he published notice of his intention to commute, and, pursuant thereto, offered final proof and payment March 13, 1880.

September 10, 1879, Evans made private cash entry No. 398 for the SW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of Sec. 10.

October 16, 1879, he made private entry No. 408 for the NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of Sec. 10.

October 27, 1879, he entered the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 10, cash entry No. 413.

January 2, 1880, Lloyd and Chapman entered the SW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Sec. 10, cash entry No. 433.

January 23, 1880, Peter Van Winkle made cash entry No. 446, embracing, with other tracts, the NE. $\frac{1}{4}$ of SE. $\frac{1}{4}$, and SW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of Sec. 15.

January 27, 1880, Woodruff entered the SW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Sec. 15, cash entry No. 453.

April 21, 1881, Penn applied to enter at private entry the NW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Sec. 10, and was denied the right on the ground that a contest was pending to determine the respective agricultural and mineral values of the land. He appealed, and after the departmental decision of March 9, 1882, adjudging the land agricultural, his entry was admitted March 20, 1882, cash entry No. 1089.

October 27, 1879, Bays filed pre-emption declaratory statement No. 65, for the SW. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of Sec. 14, and NE. $\frac{1}{4}$ of NE. $\frac{1}{2}$, and S. $\frac{1}{2}$ of NE. $\frac{1}{4}$ of Sec. 15, alleging settlement October 21. After published notice, he offered his final proof and payment May 29, 1880, which was rejected by the register and receiver on account of the pending contest ordered by your letter of February 24, 1880, to determine the mineral value of the lands.

February 13, 1880, the register and receiver forwarded to your office copies of mining locations made by certain parties, William R. Conant, James M. Wisdom, George W. Dale, and others, at various dates subsequent to the entries of Northcutt and others, with mineral affidavits covering the entire Sections 10 and 15, and demanding the cancellation of said entries in order that they might enter their several mining claims. This communication resulted in your letter of the 24th of February, 1880, ordering a hearing to determine the agricultural character of the land, notice of which was issued March 20, and date fixed for May 3, 1880.

In the mean time, after an attempt by certain parties, initiated in October, 1879, to procure an incorporation of a town embracing the S. $\frac{1}{2}$ of Section 10, and all of Section 15, which attempt seems to have been ignored for some cause, one reason alleged being the fact that the petition was not signed by twenty legal voters, the number prescribed by the law of the State, a petition duly signed was presented to the county court on the 9th of January, 1880. After hearing by the court, the town of Eureka Springs was incorporated on the 14th of February, 1880, and was organized by the election of a mayor and other officers on the 6th of April, 1880.

The hearing being in progress on the 10th day of May, 1880, Elisha Rosson, mayor, appeared at the district office, and made and filed for consideration, and for transmission to your office with the contest proceedings, an application on behalf of the townsite to enter the N. $\frac{1}{2}$, the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, and the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 15, containing 440 acres, being the land covered by the homestead entries of Northcutt and

Alexander, and that portion of Bays' pre-emption claim situated in Sec. 15.

He filed with this application an unverified paper, without date or signature, or any statement as to its authenticity or adoption, which purported by its contents to be a draft or copy of "Ordinance No. 19," pre-faced as "An ordinance to empower and to provide for the action of the mayor to enter or purchase a certain tract of land for the townsite of the corporate town of Eureka Springs, Carroll county, Arkansas."

The description of the land in the body of the ordinance is as follows, viz: "West half, west quarter, section fourteen, northeast quarter, northwest quarter, north half of the southwest quarter and northwest quarter of the southeast quarter, section fifteen, (township and range described), in all five hundred and twenty acres."

This, with respect to the lands in Section 15, is identical with the application of the mayor, and being incomplete as to any proper subdivision of Section 14, and no part of that section being within corporate limits, the mayor, without doubt advisedly, as stated by affidavit of John Carroll, his successor, dated January 31, 1881, sent to your office by Hon. T. M. Gunter, February 11, 1881, omitted to apply for any lands, except those in Section 15, correctly described by the reputed ordinance, on which he based his authority to intervene in the contest proceedings.

These proceedings continued as reported by the district officers till July 10, 1880, when they closed the case.

On the 19th of the month, after the case was closed, the mayor filed with them certain unsworn papers addressed jointly to the Commissioner of the General Land Office and the register and receiver, ostensibly prepared, as shown by their date, July 12, 1880, alleging an application on the 10th of May, 1880, for the lands according to the imperfect description of the ordinance, and asking a hearing not only to vacate the claims of Northcutt, Alexander, and Bays, but the mineral claims also, alleging a priority of right and occupation as a town situated on the public lands, which papers were transmitted with the case July 22, 1880, the register and receiver stating that the facts were not in accord with the allegations as to such application.

The district officers rendered their opinion that the lands were mineral. You affirmed their decision April 14, 1881, and also adjudged that a townsite entry might be made, as well as mineral entries, and that mutual clauses of reservation should be inserted in the patents, saving to each class of occupants its respective rights. You further stated that "if the land was agricultural, the townsite claim is shown to be the prior one, and would, if the contest were between the agricultural and townsite claimants, upon the evidence submitted, be decided in favor of the town."

Appeal was filed from this decision, and the case came before my predecessor. He decided, March 9, 1882, that the lands were agricult-

ural and vacated your decision as to the priority of the townsite claim, and directed you to dispose of the question in due course of proceedings under the established rules of practice.

Up to this point, the controversy, so far as related to the townsite, had been limited to the lands, 440 acres, covered by the original application of Mayor Rosson, or, at the utmost, to the 520 acres, which included the imperfect description in Section 14, subsequently alleged to be the W. $\frac{1}{2}$ of NW. $\frac{1}{4}$ of said section, the SW. $\frac{1}{4}$ of which NW. $\frac{1}{4}$ was claimed by Bays as a pre-emption right.

It appears, however, that on the rendition of your decision of April 14, 1881, and without awaiting the issue of the appeal, John Carroll, who had succeeded Rosson as mayor, filed, on the 10th of June, 1881, a paper reported by the district officers and accepted by you, and through all the subsequent proceedings styled an application, by which it is claimed that he applied to enter not only the 440 acres applied for by Rosson, but the following land in addition to wit: The S. $\frac{1}{2}$ of Sec. 10, the NW. $\frac{1}{4}$ of Sec. 14, and the NE. $\frac{1}{4}$ of SE. $\frac{1}{4}$, the S. $\frac{1}{2}$ of SE. $\frac{1}{4}$, and the SW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Sec. 15, embracing in all 1,080 acres.

This paper and the letter of the register and receiver transmitting the same to you on the 11th of June, 1881, are as follows:

STATE OF ARKANSAS,
County of Carroll:

JUNE 10, 1881.

Before the register and receiver at the land office at Harrison, Boone county, Arkansas.

Your petitioner, John Carroll, states that he is mayor of the town of Eureka Springs, Carroll county, Arkansas, commissioned by the governor of said State, duly qualified and acting at the present time as such mayor.

He, as such mayor, further states that the town of Eureka Springs, in said county and State, is legally organized under the general laws of the State of Arkansas, approved March 9th, 1875, and that said town is now transacting business under the name and style of the incorporated town of Eureka Springs.

He further states that said Eureka Springs is situated upon the following lands, to wit: The S. $\frac{1}{2}$ of Sec. 10, the N. $\frac{1}{2}$, N. $\frac{1}{2}$ of SW. $\frac{1}{4}$, SW. $\frac{1}{4}$ of SW. $\frac{1}{4}$, SE. $\frac{1}{4}$ Sec. 15, and NW. $\frac{1}{4}$ Sec. 14, T. 20 N., R. 26 W., containing 1,080 acres, situate in Carroll county, Arkansas, being public lands of the United States, and that such lands aforesaid are now settled and occupied by eight thousand inhabitants or more, by actual count in May, 1881.

He further states that, in the year 1879, great numbers of citizens of the United States settled and occupied these lands aforesaid for the purpose of business and trade, and made thereupon valuable and important improvements, and the said citizens, in the year 1879-'80, legally created and organized, in accordance with the general laws of the State of Arkansas, approved as aforesaid, the said town of Eureka Springs.

He further states that Elisha Rosson, his predecessor in office, did, on the 10th day of May, 1880, apply to enter at the district land office, at Harrison, Ark., under the townsite act the N. $\frac{1}{2}$ and NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$

and N. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of Sec. 15, T. 20 N., R. 26 W., 440 acres, for the use and benefit and in trust for the inhabitants of the incorporated town of Eureka Springs, lying and being within the boundaries of said town.

That said application is made in compliance with the honorable Commissioner's letter N, dated April 14, 1881, and is for the use and benefit of the incorporated town of Eureka Springs, in Carroll county, State of Arkansas.

JOHN CARROLL, *Mayor,*
Eureka Springs, Ark.

UNITED STATES LAND OFFICE,
Harrison, Ark., June 11, 1881.

SIR: On the 10th instant, John Carroll, mayor of Eureka Springs, Carroll county, Arkansas, made application to enter under the townsite act, and for the use and benefit of the incorporated town of Eureka Springs, the following lands, viz: The S. $\frac{1}{2}$ of Sec. 10, the N. $\frac{1}{2}$, SE. $\frac{1}{4}$, N. $\frac{1}{2}$ of SW. $\frac{1}{4}$, and SW. $\frac{1}{4}$ of SW. $\frac{1}{4}$, Sec. 15, and NW. $\frac{1}{4}$, Sec. 14, T. 20 N., R. 26 W., in said Carroll county.

But the lands embraced in the S. $\frac{1}{2}$ of 10, and in Sections 15, 20 and 26, are embodied in your decision in the case of W. R. Conant *et al.* and J. K. Northcutt *et al.*, contained in your letter N, April 14, 1881, and allowing the said parties sixty days for taking an appeal from said decision.

The respective parties in said case were duly notified of the contents of said decision and their rights in the premises April 26 and 27, 1881, and the time for not taking an appeal not having elapsed, this office did not feel warranted in allowing said application, and so informed the said John Carroll, mayor.

As regards the NW. $\frac{1}{4}$ Sec. 14, 20 N., 26 W., we find the SW. $\frac{1}{4}$ of NW. $\frac{1}{4}$ to be embraced in the pre-emption declaratory statement of David C. Bays, No. 65, dated October 27, 1879, final proof submitted, and affidavits have been filed in this office, alleging all of said section to be mineral in character, of which facts Mayor Carroll was advised, and hence we did not feel warranted in allowing said application as to said last described tract.

Said Carroll specially requested that we submit the matter to you for your consideration and action, preferring this course to our rejection and his appealing from our decision. And in accordance with his request, we transmit the same for your consideration.

Very respectfully,

JOHN MURPHY, *Register.*
R. S. ARMITAGE, *Receiver.*

COMMISSIONER GENERAL LAND OFFICE,
Washington, D. C.

Carroll had previously, on the 24th of February, 1881, filed a similar paper, asking permission to enter, in addition to the 520 acres alleged by him to have been applied for by Rosson, the S. $\frac{1}{2}$ of Sec. 10, and the SW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Sec. 15, but not making formal application, which paper seems also to have been treated as an application, and indorsed as rejected for the reason that most of the land had been previously appropriated and was then under contest to determine its character.

It will be observed that from this first rejection he took no appeal, and relies principally upon his application in June, which though not in form, may be regarded as a substantive presentation of his claim of right, as mayor,

to enter the lands; and, though ambiguous as to whether he intended it to embrace more than the Rosson application, especially in view of the reference to your decision and the fact that only that application was in any manner before you or comprehended in the case, yet, taken in connection with his application of February, which did expressly include a part of the additional lands, it may be considered that the fair intent of the instrument was to apply for the whole description recited in it and to assert a claim to the entire tract of 1,080 acres.

Be this as it may, you, by your letter of May 22, 1882, being the first action by you after the rendition of the department decision of March 9, 1882, vacating former decisions, and being the first consideration of the paper after its transmission by the register and receiver, elected to treat it as an application for the whole tract, and ordered a hearing between the townsite claimants and each of the parties who had entered or filed upon the lands, for the purpose of determining the facts as to date of settlement and initiation of the respective claims, and the legal priorities resulting therefrom.

Such hearing was had, and a vast mass of confused matter, testimony and exhibits was reported by the register and receiver with their decision of November 25, 1882, which was in favor of the individual claimants.

June 5, 1883, your office, by the Acting Commissioner, after an exhaustive examination, affirmed the decision of the district officers in favor of such claimants, except Penn, whose claim was rejected, and Bays, whose claim was rejected for the lands in Section 15, within the corporate limits at date of entry but not at date of settlement and filing, and allowed for the SW. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of 14, which was not within the corporation.

Upon the application of the attorneys for the townsite claimants, you reconsidered this decision, and, after hearing argument, you awarded the whole claim to the town, holding that although the land was offered and subject to private entry, a reservation was established in favor of the town which operated to bar the right of individuals and give the exclusive privilege of entry to the town authorities; you finding from your examination that at the date of the respective individual entries the town improvements and population were sufficient to authorize an entry of an area large enough to include these respective claims, and that these improvements upon a part of the lands operated, from their proximity to the lands which had not been appropriated to town uses, to put applicants upon notice that these tracts might be needed to make up the legal maximum, and so forbade the allowance of the private applications as to all the tracts afterward included in the incorporation. A preliminary question touching the pre-emptive right of townsite claimants upon offered lands was also decided by you in favor of the town.

Appeal is taken upon all points of your decision, both of fact and law.

It is insisted that the findings of fact by the Acting Commissioner on the 5th of June in favor of the individual claims are substantially correct, and also that if any town settlement existed at date of the respective entries, no reservation was created thereby, and that the legal title acquired by such entry must conclusively prevail against any equities, real or apparent, asserted by the corporation.

In my view of the case, as it now comes before me, it will not be necessary to discuss all the questions tentatively passed upon by you, but I shall confine myself to the immediate rights resting upon what appear to be the facts reasonably established by the conflicting testimony.

And at the outset I conclude that as to all the lands in Section 10, except the NW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ claimed by Penn, and as to the tracts entered by Woodruff and Van Winkle in Section 15, there is no priority either of settlement or of application to warrant an award of the same to the townsite claimants. They were entered prior to the incorporation, and the mayor, in making application on the 10th of May, 1880, in obedience to the alleged ordinance of council, made no claim to them, nor was any suggestion of an intention to claim them communicated to your office until after your decision of 1881, as hereinbefore recited. Nor is there among the present papers any exhibit or claim of an act of the city council directing the mayor to apply for them, at that time or subsequently. It must be held, accordingly, that even if there were proofs of town settlement prior to the dates of cash entry, the election of the city to leave the claims unquestioned by its original application bars the setting up of a subsequent claim; and as there is no proof of such priority except a slight amount of testimony as to the commencement of a street survey on a small part of the Woodruff forty, he being apparently the principal projector of such improvement, I adjudge that these entries ought not to have been included in the order for a hearing, and direct that they be released from further suspension.

The Penn forty, being the NW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Sec. 10, may be next disposed of, his entry being dated March 20, 1882, based on his original application of April 21, 1881. At this date it is found by you that the tract had been surveyed into lots, blocks, and streets; but it is not clear from the testimony whether it was actually occupied by lot owners. It was within the corporate limits; but, without reference to its condition in this respect, the record of the case now shows that Mayor Carroll had included it in his cash application of February 24, 1881, which was prior to that of Penn, and, the land being offered, has legal precedence as an application to purchase. The record shows also an application of still earlier date from other parties, which, however, was rejected without appeal, and no claim is presented thereon. I therefore award this tract to the city, upon the prior application of Mayor Carroll.

Respecting the NW. $\frac{1}{4}$ of Sec. 14, outside the corporate limits, the SW. $\frac{1}{4}$ of which is included in Bays' pre-emption claim, it is to be observed that the N. $\frac{1}{2}$ and the SE. $\frac{1}{4}$ of the same are offered land, without

claim adverse to the application of the mayor to purchase. They may, therefore, be entered as offered lands by such town under the application, although not within the corporate limits, and without reference to the limitations as to population contained in the townsite laws, or to the question whether the special provisions of the townsite acts are or are not applicable to offered lands.

This disposes of all claims except the pre-emption of Bays for the SW. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of 14, the E. $\frac{1}{2}$ of NE. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of 15, the homestead of Northcutt for the SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, and the N. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of 15, and the homestead of Alexander for the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, and the SW. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of 15. The homestead entries were made August 15 and the pre-emption settlement October 21, 1879. The homestead tracts were offered, the pre-emption tract, except the NE. $\frac{1}{4}$ of NE. $\frac{1}{4}$, unoffered land.

I am of the opinion that sufficient evidence has been given of the fact of settlement for town purposes upon this land at the date of the inception of these claims to warrant me in holding it excluded from pre-emption and homestead entry, without regard to the good faith of the parties attempting to appropriate the same by settlement claims, which is a matter rendered extremely doubtful by the evidence. This being so, the question is between the town claimants and the government, as to the precise forms of the admission of the townsite entry, and it is immaterial to the rejected claimants whether or not the fact that the lands were offered shall be held to bar the rights granted by the townsite laws.

A part of the lands, it is shown, are unoffered, and, under long-established regulations, the cancellation of the homestead entries now in question will leave the residue again withdrawn from private entry; so that, constructively at least, they may be treated as unoffered lands, and subject to disposal as a townsite.

By this, I do not mean to declare my opinion that offered lands may not be taken by regular townsite entry, other claims being disposed of. On the contrary, I incline to the opposite opinion. But as I have viewed this case in the foregoing recitals, it is not necessary to decide absolutely what is or what is not the law on that subject. I merely direct this remark to the fact that the point has not escaped my attention.

I conclude that substantial justice will require, in this case, that the homestead entries of Northcutt and Alexander, and the cash entry of Penn, be canceled, the pre-emption claim of Bays rejected, and the town authorities be allowed to enter the lands covered thereby, together with the residue of the NW. $\frac{1}{4}$ of Sec. 14, and the other tracts of offered land as applied for, not embraced in conflicting entries. The cash entries of Evans, Lloyd & Chapman, Van Winkle, and Woodruff will remain intact.

PRACTICE—TRANSMISSION OF APPEALS.

DANIEL WITTER.

After filing of an appeal, the local officers must allow the appellees a reasonable time (if necessary, ten days after the expiration of the thirty days provided in Rule 51) to examine it before forwarding the papers to the general land office.

*Acting Commissioner Harrison to register and receiver, Denver, Colo
July 23, 1884.*

I am in receipt of a letter dated 11th instant, from Mr. Daniel Witter, of Denver, Colorado, stating that in cases where appeals are taken from your decisions, it frequently happens that the appeal is not filed until the last day of the time allowed, and then the cases are immediately transmitted to this office without notice to the opposite party and without opportunity of an examination by him of the grounds of appeal or of the argument of appellant, and it is assumed that such is the requirement of Rule of Practice 51. This rule provides that in contest case shall be forwarded until the expiration of thirty days, in order that all parties "may have full opportunity to examine the record and prepare their arguments," unless they agree to an earlier transmission. There is no requirement that appealed cases shall be transmitted immediately upon the expiration of the thirty days, without allowing appellee the opportunity contemplated by the rule. It has always been presumed that the parties themselves would use due diligence, and that the register and receiver would exercise reasonable discretion in such matters, so as to secure to all parties and not to deny to either the benefit proposed by the rule. It would be an unfairness not contemplated in the practice of the Land Department if, when an appeal is not filed until the last day allowed for appeal, the register and receiver should immediately forward the papers, and the opposite party be thus prevented from examining the appeal. No formal rule in regard to the retention of appealed cases beyond the thirty days allowed for appeal has ever been promulgated, but registers and receivers have frequently been instructed that they should allow appellees a reasonable time for examination before forwarding appealed cases to this office. You will be governed by these instructions, and will be deemed authorized, in the absence of more specific rules, to retain appealed cases for a period of ten days after the expiration of the thirty days allowed for appeal, when appeals are not filed in time to give the opposite party reasonable opportunity to examine the appeal and argument of appellant within said thirty days.

HOMESTEAD—SOLDIERS' ADDITIONAL; FRAUD.

NOAH ROBBINS.

Where an attorney fraudulently obtained a power to sell the additional homestead right, the certificate thereunder made will be canceled and a new certificate issued to the soldier.

Acting Secretary Joslyn to Commissioner McFarland, July 24, 1884.

I have considered the appeal of Noah Robbins from your decision of February 8, 1883, holding that under the facts then presented your office could grant him no relief. It appears that Robbins made homestead entry December 10, 1873, of a certain tract of public land in the Gainesville, Florida, land district, and was entitled to an additional entry under Section 2306, Revised Statutes. He was ignorant of this right (as he represented to your office) until advised thereof by one J. W. Price, an attorney resident in the State of Florida, who offered to prosecute his claim, and to await payment for his services until the proper certificate was placed in his (Robbins') hands. Confiding in Price's representations and integrity, he signed or authorized his signature to whatever papers Price presented to him as necessary to accomplish that end. He afterwards ascertained that among the papers so executed, or pretended to be executed, was a power of attorney authorizing Price, or his substitute, to sell said additional homestead right, and to locate the land when the claim was perfected. It appears that Price sold the claim to Gilmore & Co., of Washington, who prosecuted it to completion, so that a certificate issued October 18, 1878, and was delivered to them, and they located it November 18, 1878, upon the E. $\frac{1}{2}$ of NE. $\frac{1}{4}$ of Sec. 30, T. 18, R. 16, Sacramento, California. Since it also satisfactorily appeared from the affidavits on file that Robbins never knowingly signed or authorized his signature to such or any power of attorney in the premises, but that the same was fraudulently obtained, or was a forgery, and that he never in fact sold or authorized the sale of said claim, nor ever received any compensation therefor, but that he employed Price as his agent to prosecute said claim in his own name and behalf only, and that within a reasonable time after ascertaining the facts he took measures to protect his rights and for the cancellation of any claim which Gilmore & Co., Price, or any other person, might have or make to said additional homestead under and by virtue of said power, and that he prosecuted the same with reasonable diligence, I directed, December 7, 1883 an investigation of the facts. Notices were issued to the parties above named, and the hearing was upon May 13, 1884, Robbins and Price being present. The latter introduced no testimony. That introduced by Robbins fully sustains his allegations, showing that he executed such papers as Price represented were necessary to secure his additional homestead, and not, knowingly, any other; that he was not advised and did not know of said power, and never intended to transfer his said

claim; that he has not received from Gilmore & Co., Price, or any one else, any money or other consideration therefor, but that, on the contrary, after advice from Price that the prosecution of his claim was progressing in his (Robbins') own behalf to a successful issue, he allowed Price, contrary to the terms of their original agreement, to retain a portion of his wages as a carpenter for work he performed for Price, in part payment of his services in prosecuting the claim.

It also appears that Robbins is an ignorant colored man, unable to read and write, and that none of said papers were read and explained to him by the officer before whom they were executed, or by any one, and that, even if read, Robbins could not have comprehended their meaning and effect without explanation, by reason of his ignorance of business matters.

I am satisfied, from an examination of the testimony, that Robbins never intended to sell or transfer his additional homestead claim, and that said power of attorney was fraudulently obtained from him, he not knowing the nature and purport thereof. This fraud vitiates all proceedings thereunder, so that neither Gilmore & Co., Price, nor any one else, can have any valid claim in or to said certificate or in the location thereof, as against Robbins. Nor can Robbins be thereby deprived of his right to his additional homestead.

I therefore direct cancellation of said certificate and its location, and that a new certificate issue to Robbins, authorizing its location upon eighty acres of public unappropriated land. But as the present entry, by virtue of said power, was made prior to the act of June 15, 1880, the party in interest should be allowed the reasonable time of sixty days within which to purchase the located tract under the second section of the act, if no valid objection against the same appears; and you will so notify Price and Gilmore & Co., or any other person who may appear from your record interested therein.

Your decision is modified accordingly.

MINING CLAIM—ADVERSE APPLICATIONS.

HALL ET AL. vs. STREET.

Where application for patent was made for ground covered by a prior application, and the conflict was shown by the record in the first application, the second application should have been treated as an adverse claim.

Although the second applicants did not file an adverse claim, being misled by the error of the register in receiving their application, they will now be allowed thirty days in which to institute suit.

Surveyors-general are required hereafter to indicate the date of location upon the approved plats of survey.

Acting Secretary Joslyn to Commissioner McFarland, July 24, 1884.

I have considered the case *M. J. Hall et al.*, claimants of the Ohio Lode, mineral entry No. 851, *v. A. W. Street*, trustee, claimant of the

Queen of the Hills Lode, on appeal by the plaintiffs from your decision of October 29, 1882, holding said entry for cancellation.

These lodes are situate in the Uintah mining district, Summit county, Utah, and are designated, respectively, as lot No. 277 and lot No. 282.

October 25, 1882, the said trustee (by W. W. Woods, his attorney in fact), filed application No. 1023, in the Salt Lake City land-office, for the Queen of the Hills Lode, survey No. 246.

October 30, 1882, the plaintiffs filed application No. 1027, in said office, for the Ohio Lode, survey No. 241.

Notice of the former application was duly published in the Park Mining Record, a weekly paper, from October 28 to December 30, 1882, the full period of sixty days.

Notice of the latter application was also duly published in said paper from November 4 (not 7, as you state), 1882, to January 6, 1883, the full period of sixty days.

January 10, 1883, the Ohio Lode applicants filed application to purchase, and made entry (No. 851) of their entire claim.

January 23, 1883, the applicants for the Queen of the Hills Lode applied to purchase and make entry of their claim, but the register and receiver denied the application upon the ground of conflict with the Ohio Lode claim.

Whereupon, the Queen of the Hills applicants having appealed, you held the Ohio Lode entry for cancellation, upon the ground that the Queen of the Hills application, having been regular, was an appropriation of the land, and that the register and receiver's action in allowing the Ohio Lode application and entry was "wholly unauthorized, and contrary to law and the uniform practice of this office."

It appears that although the Queen of the Hills application was filed prior to that of the Ohio Lode, the location and survey of the latter claim nevertheless antedated the location and survey of the former. Such state of facts would seem to account for the further fact that the official plat of survey of the Queen of the Hills showed the existence of a conflict with the Ohio Lode, while the plat of the latter showed none.

The register and receiver allowed the application for the former claim because none had been made or filed for the latter; and they allowed the application for the latter because the official plat of the survey thereof "*showed no conflict of any kind.*"

In this they erred.

They should instead have treated the junior application as an adverse claim—since the conflict in question had been shown to exist by the record of the senior application—and thereupon stayed all proceedings, except the publication of the Queen of the Hills notice of application, until the controversy had been settled by a court of competent jurisdiction, or the adverse claim waived. It was competent for the Ohio Lode claimants to adverse the Queen of the Hills Lode, but they were

misled by the register and receiver's erroneous action in allowing their application and failing to stay proceedings. Their statutory right to institute judicial proceedings cannot, however, be denied them solely upon the ground of the register and receiver's dereliction, and their own consequential failure to exercise such right. It was not competent for the register and receiver to allow the junior application. Said procedure, having been manifestly erroneous, should be corrected in so far as this Department has power to afford the opportunity; and to this end the parties should be remitted to a court of competent jurisdiction pursuant to the express provisions of the statute, in order that the question of the right of possession to the area in the conflict (alleged to be some 2.33 acres) shall be determined by such court.

You will accordingly suspend action upon the claims, and advise the Ohio Lode claimants that thirty days will be allowed to institute judicial proceedings, in case no suit has been already commenced.

It will be observed that neither of the plats of official survey shows when the respective claims were located. The necessity of such showing has been demonstrated in the premises.

You will accordingly, hereafter, require surveyors-general to indicate the date of location upon the approved plats of survey.

Your decision is modified in accordance with the foregoing.

PRACTICE—RECONSIDERATION; OFFICIAL NEGLIGENCE.

POSTLE v. STRICKLER.

Where a contest was dismissed which would have been sustained if all the facts had been before the Department at the time, and the error was subsequently corrected on review, the fact that the application for reconsideration was not made within thirty days, as required by the rules of practice, is not material.

The plaintiff in a valid contest can lose no rights through the neglect of the local officers to perform their duties correctly.

Acting Secretary Joslyn to Commissioner McFarland, July 25, 1884.

I have again considered the case of Martin Postle v. Jacob Strickler, involving the latter's timber-culture entry made June 18, 1877, upon land within the Grand Island, Nebraska, land district.

Postle commenced a contest against Strickler on December 28, 1881, upon allegations that he had failed to comply with the law. The local officers, as also your office, found that under the testimony the allegations were sustained. But on appeal by Strickler, Secretary Teller dismissed the contest June 25, 1883, for the reason that Postle did not (so far as appeared from the record) apply to enter the tract when initiating his contest. On February 14, 1884, Postle filed affidavits to the effect that he did make such application when commencing his contest, and asked that the matter be investigated. This was in the nature of a motion

for reconsideration of the decision of June 25, and under the rules of practice should have been made within thirty days from notice of the decision. But, there being no party in interest except Postle and Strickler, and the application under the allegation being meritorious, the investigation was ordered February 19, following, and resulted in a report from the local officers, under date of March 3, to the effect that Postle's application to enter the tract, made at date of his contest, had been mislaid by the former officers of the office and was then only found, and they transmitted the same to you. Thereupon, April 29, 1884, Secretary Teller, finding that Postle's allegations against Strickler were sustained by the testimony, (as found also by you and the local officers), reconsidered his decision of June 25, 1883, and Postle was authorized to enter the tract, on the ground of his successful contest, and that, having complied with the law in respect to his application, he should lose no right by reason of a defective record for which he was not responsible.

Motion is now made for reconsideration of this last decision, by Henry Rogers. It appears that July 17, 1883, Postle was notified by the local officers of Secretary Teller's adverse decision of June 25, 1883, and that upon the following day (July 18) Strickler relinquished his entry, and that on the same day Rogers made timber-culture entry of the tract. As Postle was allowed by the rules of practice thirty days within which to move a reconsideration of this decision, Rogers could not within that time make a valid entry of the tract. At most, it could only be subject to this right of Postle. But he claims that Postle, having neglected such motion for more than thirty days, and down to February, 1884, lost his rights, and that his own entry should stand. It appears that immediately after notification of the decision of June 25, Postle instituted inquiry for said application at the local land office, of his attorneys, and wherever else the same might probably be found, and diligently and persistently continued the search until rewarded therein, under the investigation ordered by this Department; and he filed his affidavits tending to show that he duly filed said application, and the loss of the same, as soon thereafter as he reasonably could. His attorneys were also similarly engaged in the search.

The case clearly shows that Postle filed an application to enter the tract when initiating his contest; that the loss thereof was from no fault or laches on his part, but by the neglect of the local officers; that he exercised reasonable diligence in its discovery, and hence that, although he did not file his motion for reconsideration of the decision of June 25 within the time required by the rule, he did so as soon as he could make a proper showing and reasonably establish the alleged facts.

In view of these matters (without considering the question of collusion as between Rogers and Strickler, which you suggest), I deny Rogers' motion for reconsideration, under the ruling in *Lytle v. Arkansas* (9 How., 314), that where an individual in the prosecution of a right does every-

thing which the law requires him to do, and he fails to attain his right by the misconduct or neglect of a public officer, the law will protect him. Postle is clearly within this principle, and the same must be applied to the case rather than a technical rule of practice; none of which rules (as appears from the last paragraph thereof) deprive this Department of its supervisory powers. He is therefore allowed to enter the tract at any time within thirty days from notice hereof, and the entry of Rogers is held subject thereto. On Postle's entry, that of Rogers will be canceled.

PRIVATE CLAIM—INDEMNITY SCRIP.

LETTRIEUS ALRIO.

To render indemnity certificates available in the name of an assignee, title in the assignee must be shown. If there are defects in the chain of title presented, the assignment cannot be authenticated.

Since the claim to the indemnity by purchaser under succession sale is subject to the objections held to be valid in the Joshua Garrett case, it cannot be recognized.

*Acting Commissioner Harrison to surveyor-general, New Orleans, La.,
July 25, 1884.*

The Rio Hondo claim of Lettrieus Alrio is entered as No. 137, 3d class, in the report of the register and receiver at Opelousas, dated November 1, 1884, American State Papers, Green's ed., Vol. 4, pp. 54 and 77.

It was confirmed by the act approved May 24, 1828 (6 Stat., 382), and has not been located in place by the United States, or otherwise satisfied.

On November 2, 1876, you issued, and transmitted to this office for authentication, certificates of location under the provisions of the act of June 2, 1858, in this and a number of other Rio Hondo claims; the Alrio certificates being numbered 319 A to 319 H, inclusive, for 80 acres each—640 acres.

This scrip being prepared upon the old printed form, was canceled, and under date of March 9, 1881, you prepared and transmitted new certificates of the same designations, upon the engraved form, which are pending for authentication simply upon the question of the legal proprietorship therein.

The person who applied for this indemnity is Mrs. H. W. Reynolds (widow of H. W. Reynolds, testamentary executor of Waterman's estate), through her attorney.

Under the provisions of the 4th section of the act of January 28, 1879, assignees of indemnity scrip of this character are vested with all the rights of original owners; they can locate the certificates and receive patents in their own names, and also apply such scrip in payment and commutation of pre-emption and homestead entries.

For these reasons the chain of title, from the original confirmee to the person or persons applying for the indemnity, must be established to the satisfaction of this office before the scrip will be issued and delivered.

There are links missing in the chain of title presented by Mrs. Reynolds; otherwise, the scrip in question might have been approved and delivered to her long since.

Now comes E. A. Sempayrue, through his attorney, as an applicant for said scrip, by virtue of probate proceedings in the estate of Lettrius Alrio in the probate court of the parish of Natchitoches, Louisiana.

It appears by the procès-verbal, transmitted with your letter of December 23, 1882, that the succession of Alrio was opened in said parish with due observance of the usual forms under the civil code of Louisiana; and that Mr. Sempayrue, on the 14th day of September, 1882, at the court-house door, purchased the inchoate claim for the sum of \$40, being the last and highest bidder, etc.

Upon examination of the record of this transaction, I find that many of the objections to claims to indemnity acquired *in toto* under such succession proceedings, as indicated in the Department decision dated February 28, 1880 (Land Office Report, 1881, p. 196), in the case of Joshua Garrett, apply with equal force to the case under consideration; and those objections were adhered to by the Secretary in his decision of October 31, last, in the claim of David Devor.

But aside from this, it is shown that by an act of sale passed before Frederick Williams, a notary public of Natchitoches, on March 25, 1837, William P. Jones, as the attorney-in-fact of Alrio, sold said claim No. 137, third class, to Cabel Richardson Parker and Charles Gustavus Oehmichen, "for and in consideration of the sum of one hundred dollars, cash in hand paid."

Certified copies of the act of sale, and the power of attorney given William P. Jones by "Lettrius" Alrio, on the 27th of February, 1837, with attesting witnesses, are on file here, and it appears that the person who executed said power was a *female*.

This raises questions of fact; for the petition for administration filed August 10, 1882 (forming part of the procès-verbal), sets forth that said "Lettrius Alrio died intestate in the parish of Natchitoches about the year 1850; that *he* left us property," etc.; (the italics are mine).

Was the original confirmee a female? or, as a matter of fact, did the confirmee die long prior to the year 1850, and was it his widow who executed said power on February 27, 1837?

The reasonable presumption is that Jones, who sold his claim to Parker and Oehmichen (and other neighboring Rio Hondo claims on the same day and date, which sales are a matter of record in Natchitoches parish), had proper authority from the parties in interest to so transfer the property; but the evidence before this office of the legality of the conveyance of the Alrio claim is not conclusive.

Nevertheless, if the sale was valid, the opening of the succession in the years 1882 (so far as said claim No. 137 was concerned) was illegal and void, and Mr. Sempayrue took nothing under his purchase and sheriff's deed.

I cannot, therefore, for the reasons above stated, authenticate the scrip in question, and recognize Mr. Sempayrue's right to the same.

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PRE-EMPTION—ERRORS BY LOCAL OFFICERS.

CALL v. SWAIM.

A pre-emption certificate, stating erroneously that the settler had thirty-three months within which to make final proof, will not protect him if he fails to prove up in twelve months in the face of an adverse claim.

One who settles or resides on public land as tenant of another, who claims it, cannot thereby legally establish a claim to the land in his own right.

Acting Secretary Joslyn to Commissioner McFarland, July 28, 1884.

Your decision of March 31, 1882, in the case of Wilkinson Call v. Robert Swaim, involving lands in Sec. 15, T. 10, R. 23, Gainesville, Florida, held Call's homestead entry for cancellation, and awarded the tract to Swaim; and April 16, 1883, Secretary Teller affirmed the same on Call's appeal. Mr. Call has moved a reconsideration of the latter decision upon the ground, chiefly, that Swaim, having filed a pre-emption declaratory statement November 11, alleging settlement October 15, 1879, and not having made his final proof and payment within twelve months from the date of his settlement—the tract being "offered" land—forfeited his claim (Sec. 2264 Rev. Stat.), and the land became subject to his own homestead entry of December 17, 1880.

1459 It appears that when Swaim made his filing the local officers issued to him the ordinary pre-emption receipt or certificate, wherein it was stated, among other things, that he could make his proof and payment within thirty months therefrom, they erroneously supposing the tract to be "unoffered" land; and Secretary Teller held that, under Secretary Kirkwood's decision of December 19, 1881, in the case of Vettel v. Norton (I. L. D., 4667, Swaim had the right to rely upon the certificate of government officers, acting within the sphere of their authority, and would be protected thereby. The facts in that case are quite similar to those in the present one, except that Vettel, in whose favor the decision was rendered, had very large and valuable improvements on the tract, while Norton's were of trifling value, and his entry was apparently made for the purpose of defrauding Vettel, and appropriating to himself Vettel's labor and expenditures. Equitable considerations appear, therefore, to have controlled that decision in order to protect an honest settler, acting under an officer's certificate erroneously issued in ignorance of whether the land was "offered" or "unoffered." Such a certifi-

cation was not, I think, within the power of the local officers, because not in accordance with the law. Where statute directs a certain thing, it is not competent for subordinate officers to change the enactment and give rights to parties which the statute withholds, under supposed facts which do not exist. Nor do I think Secretary Teller intended to announce in the case in question that local officers could lawfully issue a certificate which might cure a failure to comply with a positive enactment in the presence of an adverse claim, but only that (as held in *Johnson v. Towsley*, 13 Wall., 72) a pre-emptor might file his declaratory statement (or otherwise comply with the law) after the time required therefor, *in the absence of an adverse claim*; and such was the opinion of Secretary Kirkwood in the case of Vettel, for he said, "Strictly, Vettel failed to comply with a requirement of law, and in the presence of a valid adverse claim his filing would be subject to forfeiture," thus showing that, under the facts of the case, equitable rather than legal considerations directed his decision.

Besides, pre-emptors and homestead claimants, as well as public officers, are presumed to know the public law, and when Call, in ignorance of the provisions of the certificate issued to Swaim, made his homestead entry after expiration of the twelve months within which Swaim was required by law to make his proof and payment, he had a right to regard the tract as vacant, and that his entry would attach. It may be well doubted whether under such circumstances this certificate, issued both against the law and the fact, could protect Swaim as against the statutory right of Call.

And, further, on May 27, 1881, Acting Secretary Bell ruled (8 C. L. O., 58) that final proof and payment upon all "offered" lands in Florida and certain other named States must be made within twelve months from settlement, under the accepted practice of your office. This ruling was in force certainly down to Secretary Kirkwood's decision in December following, and has not been overruled, unless by Secretary Kirkwood's decision, which I think did not, and was not intended to, overrule it. It was not presented by counsel to the attention of Secretary Teller, and was not considered by him, or he might have announced a different decision. It must therefore still be held the settled rule of your office, both under the law and practice.

Even if the foregoing were not conclusive as to all rights Swaim is said to have acquired by reason of his settlement and residence, it appears that the said settlement and residence were not made nor maintained for the purpose of acquiring title to public lands, and so can avail him nothing.

The evidence shows beyond a question that Swaim "was placed" on the land by one Simkins, an adjacent land owner, who also at such time claimed the land upon which Swaim was so located. That Swaim, as the tenant of Simkins, continued for several years upon the land, and ultimately recognized Call as his landlord, and at no time, prior to the

filing of his declaratory statement, professed that his residence upon said land was other than that of a tenant.

A residence thus begun and continued could not by the mere will of the tenant be converted into a legal residence in his own right, by which a settler's claim to public land might be established.

The motion for reconsideration is therefore granted, the filing of Swaim is canceled, and the entry of Call will stand.

Your decision is modified accordingly.

HOMESTEAD—RESIDENCE.

BLACK *v.* CANON.

Failure to commence residence within the prescribed time after transmutation will not forfeit the entry, where it was caused by family sickness and severe weather, and where there was otherwise good faith.

Acting Secretary Joslyn to Commissioner McFarland, July 29, 1884.

I have considered the case of Isaiah W. Black *v.* George D. Canon, involving the latter's homestead entry, made September 22, 1882, upon the SW. $\frac{1}{4}$ of Sec. 26, T. 108, R. 62, Mitchell, Dakota, on appeal by Canon from your decision of October 15, 1883, holding his entry for cancellation.

This contest was commenced April 14, 1883, upon allegations of abandonment. It appears that Canon filed pre-emption declaratory statement June 3, alleging settlement June 1, 1882. He immediately broke five acres of the tract, sleeping in a wagon thereon during the time, from his inability from poverty to build a house. He then sought work elsewhere to obtain a livelihood, and to enable him to pay for the land. But at length doubting his ability to make his payment within the required time, he changed his declaratory statement to homestead, and then went to his former home in Nebraska to work for wages, intending to return to the land within six months from his entry. He was there detained by the sickness of his mother and by the severity of the weather, so that after a return journey of sixteen days he did not reach the land until April 22, 1883, or about one week after commencement of the contest, but before the first publication of the notice. He immediately purchased lumber and commenced the erection of a house, and was at work on the land when notice of the contest was posted thereon, and was residing thereon at the date of trial. The whole case shows his good faith and purpose to comply with the law, and that he was only prevented therefrom by climatic and other reasons beyond his control. The short time of his failure to commence residence on the land does not, under the facts, require forfeiture of his claim, more especially as there are no equities in favor of Black, who has never resided upon nor improved it.

I reverse your decision and dismiss the contest.

HOMESTEAD—COMMUTATION; CULTIVATION.

JOHN E. TYRL.

Clearing the land of timber for the purpose of planting it, is cultivation within the meaning of Section 2301, Revised Statutes.

Acting Secretary Joslyn to Commissioner McFarland, July 29, 1884.

I have considered the appeal of John E. Tyrl from your decision of January 17, 1884, in which you held for cancellation his cash entry No. 6198, March 13, 1883, for the W. $\frac{1}{2}$ of NE. $\frac{1}{4}$, and Lots 1 and 3 of Sec. 30, T. 62 N., R. 23 W., Duluth district, Minnesota.

It appears that said Tyrl made homestead entry No. 1894, for said tracts on January 24, 1883, alleging settlement July 15, 1882. March 7, 1883, he applied to commute said homestead entry under Section 2301, Revised Statutes, which was allowed, and cash certificate No. 6198 was issued March 13, 1883.

You held said cash entry No. 6198 for cancellation, for the reason that the proof "clearly establishes the fact that no portion of the land was cultivated by him."

It appears from the proof that Tyrl was qualified to make said homestead entry, that he settled upon the land at the date alleged, established his residence thereon the same day, built a log house 12x16 feet, in which he has resided continuously up to the time of making proof, and that his improvements are worth one hundred and fifty dollars.

The proof also shows that Tyrl has cleared "about one-half acre" of said land, but has cultivated no portion of it nor raised any crop thereon.

The reason given by Tyrl for non-cultivation is that he "settled too late."

It is not denied by the counsel for the appellant that the commutation proof required by said Section 2301 must show some cultivation by the entryman. It is, however, insisted that, in this case, the clearing of about one-half acre, taken in connection with the time of settlement, and the other proof offered, is a sufficient compliance with the requirement of said section.

Cultivation, as defined by Webster, is "the art or practice of cultivating; improvement for agricultural purposes; tillage; production by tillage."

It is clear that the kind of labor, as well as the amount required to prepare agricultural land for tillage, will depend upon the character of the land sought to be cultivated.

The clearing of land covered with timber is as essential to successful cultivation of the soil as is the actual planting of the seed.

The real question at issue is the good faith of the entryman.

In this case there is no adverse claimant.

The entryman and his witnesses swear that he has acted in good faith, and I see no reason why the entry should be canceled. Your decision is accordingly reversed.

RAILROAD GRANT—PREDECESSOR'S DECISION.

SAINT PAUL, MINNEAPOLIS & MANITOBA RAILROAD COMPANY *v.*
BOND.

The Eben Owen decision is held not to apply to the present case, as there was no selection by the railroad company of the tract, which is in the indemnity limits. As there never was a decision on the merits, and the homesteader has kept alive his claim by residing on the land, the case may be reconsidered.

Acting Secretary Joslyn to Commissioner McFarland, July 30, 1884.

I have considered the case of the Saint Paul, Minneapolis & Manitoba Railroad Company *v.* John M. Bond, involving the SE. $\frac{1}{4}$ of Sec. 1, T. 129, R. 35, St. Cloud, Minnesota, on appeal by the company from your decision of November 13, 1883, re-opening his case.

It appears that the land is within the indemnity limits of the grant to the State, now enjoyed by said company, withdrawal for which became effective February 12, 1872. Bond made homestead entry No. 10,325 thereon, March 6, 1879, alleging settlement in March, 1877, and continuous residence and improvement thereafter. On April 15, 1881, your predecessor held the entry for cancellation, because of conflict with the withdrawal. Bond appealed, alleging that at date of the withdrawal the land was occupied by one Sutton, into possession of whose improvements and claim he came, which made his claim good under the act of April 21, 1876; and alleging further that the land had been relinquished by the governor of the State under the State act of March 1, 1877. These were new facts, and justified a reconsideration of the case by your office, which was made; and it was held that the plea of Sutton's claim was insufficient, and that Bond might have thirty days in which to prove the fact of the governor's relinquishment. Of this decision his attorney was notified, and, no further action on his behalf being taken, your predecessor closed the case and canceled the entry October 25, 1881. There has been no appeal from this action. The railroad company have not selected the land. On March 29, 1883, Bond applied for reconsideration of his case, again claiming by virtue of the act of April 21, 1876, and of the governor's relinquishment. You reopened the case, and found error in the decision of your predecessor, that the departmental records show that said relinquishment was made, and that Bond's claim was confirmed by said act of Congress. You accordingly allowed him to perfect his original appeal, which had never been transmitted to this Department; and from this the company appeal.

The first ground is that it is error for a Commissioner to reverse a decision of his predecessor, which has become final, and they cite as

authority the case of Eben Owen (9 C. L. O., 111). That case was one where the decision involved the claim and right of a third party, a contestant, and was made under Section 2273, Revised Statutes, providing that the Commissioner's decision shall be final "in cases of contest for the right of pre-emption," which by analogy is extended to other classes of contest. As the right of a railroad company to indemnity lands attaches only by selection, as there was no selection by the company in this case, there was no adverse right, and no contest on the question of priorities. Further, the decision was not final on the merits, but the case was closed for want of prosecution. As Bond has kept alive his claim to the land by continuous possession, I see no reason why your office may not now consider it on its merits. The question is between him and the government, and a stranger to the record cannot object to its reconsideration.

The second error assigned is that the relinquishment of this land by the governor of Minnesota cannot divest the rights of the railroad company. As they have made no selection of the land, they have acquired no rights in it, and were therefore not prejudiced by said relinquishment.

In relation to Bond's claim under the act of April 21, 1876 (19 Stat., 35), I may observe that in my judgment said act does not apply to his case. As a railroad company's title to indemnity lands is acquired by selection, and not by the definite location, a legal settlement on such lands before or after definite location and prior to their withdrawal gave a good claim to the tract, and required no act of Congress to confirm it. It excepted the land from the operation of the withdrawal (Jasper Prest, 2 L. D., 506).

I see no reason why Bond should perfect the appeal referred to in your decision, unless points of law other than those above decided arise in your disposition of the case. The case is properly before you for reconsideration; if you decide it against him, he has the right of appeal; if in his favor, the company will be heard on any new question of law or practice.

With this modification, your decision is affirmed.

PRACTICE—CONTEST EXPENSES.

GRAM *v.* MCALLISTER.

The contestant against a homestead entry must pay all the costs of contest. The expense herein described is no exception to the rule.

*Assistant Commissioner Harrison to register and receiver, Huron, Dak.,
July 30, 1884.*

Your letter of June 24, 1884, is at hand, transmitting the appeal of Allen P. Cram from your action dismissing his contest against homestead entry No. 4456, June 23, 1883, of Cora McAllister, for S. $\frac{1}{2}$ of NE. $\frac{1}{4}$, NE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of Sec. 26, and SE. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of Sec. 23, T. 109, R. 61.

You state that "on the day of trial, after disposing of certain matters, which are duly set forth in the appeal, Cram refused to pay the costs incurred," whereupon the contest was dismissed.

The "certain matters" referred to as "duly set forth in the appeal" are to the effect that on the day of trial the plaintiff made affidavit for continuance, because of the absence of witnesses, setting forth what he expected to prove by them.

This affidavit was admitted by the defendant under Rule 22. It was then stipulated that further testimony should be reduced to writing by the stenographer, and submitted to the register and receiver.

The plaintiff offered no testimony, resting his case upon that in the admitted affidavit of continuance, and paid all costs up to this point.

The defendant had reduced to writing the testimony of nine witnesses, and plaintiff was called upon to deposit \$45 to pay the cost of taking this testimony. This he refused to do, and you dismissed his contest. In this you were correct. The reducing of this testimony to writing does not come under the exception made by Rule 56, but under the general rule which requires the contestant of a homestead entry to "pay the costs of the contest."

PRE-EMPTION AND HOMESTEAD—FINAL PROOF.

CIRCULAR.

Registers enjoined to see that final-proof notices are published only in established bona-fide newspapers having an actual and legitimate circulation in the vicinity of the land.

WASHINGTON, D. C., JULY 31, 1884.

Registers United States Land Offices :

GENTLEMEN: Numerous complaints are received at this office relative to the publication of final-proof notices under the act of March 3, 1879 (20 Stat., 472). Unjust discrimination in favor of particular papers, and publication in papers charging excessive rates, are among the complaints made, while still more serious complaint exists that notices are frequently published in papers having little or no circulation or no existence except for the purpose of obtaining such advertisements, and in some cases that fraudulent publication is made by the insertion of the advertisements in a few copies only of a newspaper and not in the regular edition, or that a correct notice is inserted in a few copies of the paper and the notice then changed by altering the description of the land or otherwise, and the altered notice printed in the remainder of the issue.

You are enjoined to exercise the greatest care and diligence to see that final proof-notices are published only in established bona-fide newspapers, having an actual and legitimate circulation in the vicinity of the land. The paper must be actually published where it purports to be, and must be a reputable newspaper of general circulation and not a mere land-

notice advertising medium without regular subscribers or general patronage.

You may require evidence of the character and stability of any paper in which publication notices are sought, and should do so in all cases where the facts are not within your own knowledge, or of common repute. Affidavits of the publisher in respect to the bona-fide establishment of his paper, the regularity of its publication, its places of circulation, the extent of its subscription list, the number of copies actually printed of its regular edition, the number of exchanges, and other facts may be required when necessary, and in such cases the affidavit of the post-master of the place where the paper is published, showing the number of copies mailed, the regularity of mailing, and range of distribution, may also be required. Whether there is a post-office at the professed place of publication should be inquired into, as also whether there is a town or inhabitants at such place. A newspaper purporting to be published at a place where there are few or no inhabitants, and no post-office for its mailing and distributing, cannot be regarded as a proper newspaper for the publication of proof notices, nor can any newspaper be so regarded which does not possess adequate character and stability.

You will hereafter require an affidavit from the publisher or his responsible representative, to accompany the proof of publication, and a true copy of the published notice, showing that the same was correctly published the requisite number of times in the regular and entire issue of every number of the paper during the period and times of publication. This affidavit must be furnished at the expense of the publisher.

You are not to give the publication to papers that are not "reputable newspapers of general circulation," upon the ground of being "nearest the land." The purpose of the law is that general public notice shall be given of intention to make proof. A publication that does not effectuate such notice is a defeat of the purpose of the law. Where there are several papers which are "newspapers" within the meaning of the law, and any one of which might be designated under these instructions, you will use your discretion in making your selection, and in the reasonable and honest exercise of that discretion you will not be interfered with by this office. You are not to construe the words "as nearest" as binding you to any rule of strict calculation of geographical distance, but you are to select which among the proper papers regularly published and having a stable circulation nearest the land you will designate for the purpose of such publication.

The circular of January, 1884, in respect to rates charged for advertising as governing your designation, will be adhered to.

Very respectfully,

N. C. McFARLAND,
Commissioner.

Approved August 1, 1884.

M. L. JOSLYN,
Acting Secretary.

HOMESTEAD—TRESPASS UPON.

SAWYER & WAITE.

Action for trespass upon a bona-fide homestead claim may be brought by the entryman prior to final proof.

Commissioner McFarland to Messrs. Sawyer & Waite, Menominee, Mich., July 31, 1884.

GENTLEMEN: In reply to your letter of the 16th instant, inquiring if a homesteader who is living on the land can, before making final proof, bring action for trespass in his own name, you are advised that so long as the homesteader complies with the requirements of the law in acquiring title to his claim, he is considered as having the exclusive right of possession. He therefore may seek the protection of the courts against any trespass perpetrated upon his claim.

PRE-EMPTION—FRAUDULENT ENTRY.

LIVINGSTON v. ROSKRUGE.

Notwithstanding approval of the proofs in an *ex parte* case, and cash entry thereupon, hearing will be ordered on a subsequent allegation of fraud.

Acting Secretary Joslyn to Commissioner McFarland July 31, 1884.

On March 21, 1883, you rejected the final proofs of George J. Roskruge, submitted June 9, 1882, and also his application to enter Lots 1 and 2, and the E. $\frac{1}{2}$ of NW. $\frac{1}{4}$ of Sec. 7, T. 16, R. 14 E., Tucson, Ariz., under his declaratory statement filed October 24, alleging settlement October 21, 1881, but allowed him to show compliance with the law at any time before expiration of his declaratory statement. On his appeal therefrom—there appearing no adverse claimant—this Department modified your decision January 2, 1884, and allowed the entry, the proofs showing that Roskruge had erected a house and had resided on the tract from the date of his settlement, and had cleared and fenced about five acres, of which one acre was in cultivation—his said improvements being valued at two hundred dollars.

Anna M. Livingston subsequently filed allegations that she settled upon the land April 28, and filed declaratory statement July 16, 1883, upon advice from the local officers that the tract was vacant; that she has made valuable improvements thereon; that Roskruge never actually resided on the land, nor cultivated or improved it as he claimed, but that his proofs in these respects are false and fraudulent; and she asked for a hearing that she might prove the same. You refused her application; but as some or all of her allegations were corroborated by fourteen affiants, and were filed after the Department's decision of January

2, you were directed on the 18th instant to certify the case to this Department.

From an inspection of the record and the allegations of Miss Livingston, I think her application for a hearing should be granted. You will, therefore, direct that the facts respecting Roskrugs's settlement, residence, cultivation and improvement of the land be investigated at a hearing to be ordered for that purpose; and, upon report thereof, you will dispose of the case as the facts may require, and in the mean time suspend all action under Roskrugs's cash entry of January 24, 1884.

WITHDRAWALS OF LAND BY COMMISSIONER.

DAVID B. EMMERT.

The Commissioner's withdrawal from entry of a township pending the survey of a town's claim which is supposed to embrace it, is legal if not disapproved by the Secretary.

Acting Secretary Joslyn to Commissioner McFarland, July 29, 1884.

I have considered the appeal of David B. Emmert from your decision of January 5, 1884, rejecting his timber-culture application for the NW. $\frac{1}{4}$ of Sec. 22, T. 10 N., R. 3 E., Santa Fé, New Mexico, on the ground that it was made while the land was withdrawn.

It appears from the record that the township in which said tract lies "was withdrawn from disposal to await the survey of the Albuquerque claim, which was supposed to embrace part of the land in the same." Said withdrawal was made by your office, and appellant urges that, not being made by specific order of the Secretary, it was illegal. This position seems to me to be untenable. Section 453, Revised Statutes, provides that "the Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties . . . in anywise respecting such public lands." That temporary withdrawals of land, such as in this case, may be made for the protection both of the claimant and of settlers, I think will not be denied; and it, therefore, is one of the duties with which the Commissioner is charged by statute, under the Secretary's direction. By the practice of the Land Department he is vested with a discretionary authority in such cases, and such a withdrawal made by him is made "under the direction of the Secretary of the Interior," if it is not disapproved. In this instance it is not disapproved.

Your decision is therefore affirmed.

* *PRE-EMPTION—OWNING OTHER LAND.*MCDONALD *v.* FALLON.

Where the proprietor of three hundred and twenty acres of land, part of which was acquired under the homestead law, conveyed one acre of it to his infant child, and also removed to the land of a neighbor, with whom he resided for three weeks before going upon his pre-emption claim in the same State (meanwhile leaving his family on his own land), he cannot be considered a qualified pre-emptor.

Acting Secretary Joslyn to Commissioner McFarland, August 1, 1884.

I have considered the case of Thomas McDonald *v.* William Fallon, involving the SW. $\frac{1}{4}$ of Sec. 14, T. 29, R. 12, Niobrara, Nebraska, on appeal by Fallon from your decision of November 6, 1883, rejecting his final proofs and holding his filing for cancellation.

Fallon filed declaratory statement August 25, alleging settlement August 12, 1881, and McDonald made homestead entry August 19, 1882. Upon Fallon's notice of intention to make proof and payment, a hearing was held February 16, 1883, at which McDonald objected to his right of entry, alleging, among other things, that he was the owner of three hundred and twenty acres of land in the State of Nebraska, and removed therefrom to reside on the land in question, and was therefore not a qualified pre-emptor under Section 2260, Revised Statutes.

It appears from your records that Fallon made homestead entry October 15, 1874, upon the NW. $\frac{1}{4}$ of Sec. 13, T. 29, R. 12 W., in the Niobrara land district; that final certificate issued thereon June 11, 1881, and that it was approved for patent September 6, 1881. It also appears from the testimony that July 19, 1881, Fallon conveyed one acre of this tract to his daughter Catherine, then under the age of six years, for the nominal consideration of one dollar, and because also, as he states, she was his "first born" child. This deed remained in his own or in his wife's custody until February 20, 1883 (after the hearing), when it was recorded. It appears also that at about the date of this deed Fallon went to a neighbor's, where he remained for about three weeks—his family remaining at the homestead—from whence he went to the land in question to make his alleged settlement, his family or some of them continuing to reside at the homestead.

No satisfactory explanation is made of these transactions, and the conclusion seems irresistible that Fallon conveyed this one acre to his infant child upon the supposition that his ownership would be thereby reduced to three hundred and nineteen acres of land and thus enable him to avoid that provision of the statute which prohibits the owner of three hundred and twenty acres from acquiring a pre-emption right, and that he took up a nominal residence with his neighbor for three weeks in the expectation that he might thereby avoid that other provision which does not permit one who quits or abandons his residence

on his own land to reside on the public land in the same state to acquire the right of pre-emption. Both of these transactions were evidently in evasion of the law, and he was not therefore a qualified pre-emptor. He could not do indirectly that which the law directly prohibited. I affirm your decision in respect to him.

It appears also that after the decision of the local officers adverse to Fallon, McDonald, representing that in his opinion Fallon had a valid claim to the tract in question, asked leave to withdraw his objections thereto, that his own entry be canceled, and that he be permitted to make another entry, with allowance for fees already paid. That this request was not made in collusion with Fallon appears only from McDonald's voluntary statement to that effect. But, however this may be, his request for cancellation of his entry, accompanied by the condition that he be permitted to make another entry, cannot be allowed. Upon cancellation of Fallon's filing, no reason now appears why his entry should not stand, subject to his compliance with the law, or why it does not exhaust his homestead right.

CONTEST—REHEARING; FRAUD.

ANNA M. MOSES.

Allegation of fraud, corroborated, though irregularly made, is ground for rehearing.

Acting Secretary Joslyn to Commissioner McFarland, August 2, 1884.

I have considered the motion of Anna M. Moses for a reconsideration of my decision of March 15, 1884, in the case of *Moses v. Brown* (2 L. D., 259).

The motion sets forth that in her contest affidavit Mrs. Moses was misled by the indorsements, etc., on the timber-culture entry papers of John B. Brown into assigning incorrect dates in her allegation of failure to cultivate and break. Assuming this to be the fact, it has no relevancy to the issue in that case, which did not arise on her original contest, but on a second contest initiated after the dismissal of the first. Had she appealed to your office from that action, said fact might properly be introduced, but it is too late to set it up after she acquiesced in the dismissal and instituted new proceedings.

It is also urged that the contest of S. H. Brown is defective, in that the affidavit is not sufficiently specific, and that it should be dismissed. If so, the contestee may complain of it, but a mere stranger to the record, which Mrs. Moses became after the dismissal of her original contest, leaving S. H. Brown's contest of record, cannot be heard to do so (*Hanson v. Howe*, 2 L. D., 220).

Said case of *Hanson v. Howe* is invoked in support of the motion, but it is evident that it has not the remotest bearing on this case.

There the irregular contest was dismissed on the motion of a stranger; here it was dismissed by contestant's counsel: there the contestant appealed; here she acquiesced in the action. She might have applied to amend the record in her original contest, and this Department would have sustained the application if brought before it, but she did not, and, having slept on her rights, she now asks for relief from the consequences of her own neglect, after the claim and interest of another have interposed. It would be against justice and the rules of practice to accord such relief under these circumstances, and it is therefore denied.

The motion for a reconsideration is dismissed.

Mrs. Moses has in an irregular manner interjected into this motion certain allegations of bad faith on the part of S. H. Brown, which were not in the case when before me for decision. She charges, with corroborating proof, that in June, 1883, said Brown offered to sell his right of entry, in case he was successful in his contest; and that the motion of contestee to dismiss the contest of Moses *v.* Brown was made by an attorney for both parties in the contest of Brown *v.* Brown, or, in other words, that S. H. Brown alone was the real actor in those proceedings. You will observe from my decision that I had some doubts of his good faith in the matter, and that if I had been convinced of it I would have taken summary action. Had these charges then been circumstantially made, I would have ordered a rehearing to determine the facts; for if they be true, S. H. Brown's contest should be dismissed, with right to Mrs. Moses to proceed with her contest. In dealing with these claims bad faith or fraud should not even be winked at, and you are therefore directed to order a rehearing on these two charges, to be promptly held, and to take action as above indicated if the charges are sustained.

PRE-EMPTION AND HOMESTEAD—FINAL-PROOF FEES.

INSTRUCTIONS.

Registers and receivers are entitled to fees for testimony reduced to writing in final homestead or pre-emption proofs, whether the entries are allowed or not; they are allowed the same fees for examining proofs made before judges or clerks of courts as are allowed by law for taking the same, whether they are approved or not.

Acting Commissioner Harrison to receiver, Niobrara, Nebraska, August 4, 1884.

* * * I have to state that registers and receivers are entitled to receive fees for testimony reduced to writing by them in final homestead or pre-emption proofs, whether the entries are afterwards allowed or not.

Registers and receivers are allowed the same fees for examining the proofs made before judges or clerks of courts, whether approved or not, as are allowed by law for taking the same.

PRACTICE—APPEALS.

OJO DEL ESPIRITU SANTO.

Neither the local officers nor the surveyors-general may fix the time for appeal from the decisions of the General Land Office, nor grant extension of the time limited by the rules.

Assistant Commissioner Harrison to surveyor-general, Santa Fé, New Mexico, August 4, 1884.

My attention is called to the notices given by your predecessor to parties interested of my decision in the matter of the survey of the Rancho Ojo del Espiritu Santo, copies of which are inclosed in his letters to this office of July 18th and 21st July last, in the first of which the parties were informed that they were allowed until the 1st of October, and in the second until the 1st of November, in which to appeal from said decision.

The letter of this office communicating said decision requested the late surveyor-general to give notice thereof to the parties interested, informing them also of their right of appeal, and to advise this office of the date and manner of service of such notice; and it directed him, if appeal should not be taken within the time allowed by the rules, to proceed to execute the amendment to the survey ordered by said decision, etc.

You will see, by reference to the rules of practice regulating appeals from decisions of this office, that no power is given to the local officers or the surveyors-general to fix the time within which such appeals may be taken, or to grant extension of the time limited by the rules. The extension granted in the case in question cannot therefore be recognized.

Applications for extension in such cases should be addressed to this office, and be presented within the time for appeal allowed by the rules; they should state the reasons rendering the extension necessary, and be verified by the oath of the parties applying.

OREGON DONATION—ABANDONMENT.

JAMES RUSSELL.

Settlement, etc., commencing March 1, 1855, must have continued until March 1, 1859. As the residence in this case ceased in February, 1856, the claim is held for cancellation.

Assistant Commissioner Harrison to register and receiver, Oregon City, Oregon, August 4, 1884.

It appears by evidence on file here that the survey of T. 4 N., R. 1 W., Oregon, was approved on the 5th day of May, 1854, and that of T. 4 N., R. 2 W., was approved on the 19th day of January, 1856.

James Russell, a married man, claiming 320 acres of land under the fifth section of the act of Congress approved September 27, 1850 (9 Stat., 496), and supplemental legislation, filed his notice, dated November 27, 1855, designating the tracts claimed by him as the fractional S. $\frac{1}{2}$ NE. $\frac{1}{4}$, fractional N. $\frac{1}{2}$ SE. $\frac{1}{4}$, fractional N. $\frac{1}{2}$ S. $\frac{1}{2}$ SE. $\frac{1}{4}$, S. $\frac{1}{2}$ NW. $\frac{1}{4}$, and N. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 7, T. 4 N., R. 1 W., and SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 12, T. 4 N., R. 2 W. This notice is numbered 7467.

One of the witnesses in the case fixes the date of the donee's settlement on said land as March 1, 1855, while the other witness fixes the date on the 30th of July, 1854. Both of these witnesses continue the donee's occupancy until February 11, 1856.

On the 20th of September, 1879, Emerson E. Quick made his affidavit before the receiver, alleging that the claim of Russell to said land had been abandoned by him for more than twenty-two years, and that Russell's present residence was unknown. Upon this showing, you allowed a notice to be inserted from October 9 to November 6, 1879, in a weekly newspaper published at Hillsboro. This published notice states in substance that complaint had been entered at your office by Emerson E. Quick, of Washington county, Oregon, that said donee had abandoned his donation entry, No. 7467, upon a part of Sec. 7, T. 4 N., R. 1 W., and a part of Sec. 12, T. 4 N., R. 2 W., that said complaint had been made with a view to the cancellation of said entry, and that a hearing would be had at your office on November 15, 1879, at 10 a. m., at which time the parties could respond and furnish testimony concerning said alleged abandonment.

At the time appointed by said notice Russell did not appear, but the receiver took the affidavits of J. T. McNulty and Aaron Broyles, wherefrom it appears that Russell had abandoned said land and had not lived upon or cultivated it since the year 1858. On the 25th of November, 1879, you found upon the evidence in the case that the donee had not complied with the donation law, and that his claim ought to be canceled.

This office on the 7th of December, 1880, requested further evidence upon the question of abandonment. Pursuant to this request, the register forwarded here, on the 25th of May, 1881, the joint affidavit of Aaron Broyles and George Frantz, fixing the abandonment of said claim by Russell to be "about February, 1856." Accompanying and attached to this affidavit is a certificate made by the county clerk of Columbia county (the county where said land lies), certifying that the name of James Russell does not occur in either the direct or inverted index to record of deeds for said county. The 7th Section of said act of 1850 provides as follows:

That within twelve months after the surveys have been made, or, where the survey has been made before the settlement, then within twelve months from the time the settlement was commenced, each person claiming a donation right under this act shall prove to the satisfac-

tion of the surveyor-general, or of such other officer as may be appointed by law for that purpose, that the settlement and cultivation required by this act had been commenced, specifying the time of commencement.

Russell's witnesses disagree as to the date of his settlement on the land in question, one fixing it in July, 1854, and the other in March, 1855; but both agree that his occupancy continued from March, 1855, until February, 1856. This evidence shows that the law had been complied with between these latter dates, and fixes the date of settlement on March 1, 1855, according to the requirements of said 7th Section. Taking, then, March 1, 1855, as the date of Russell's commencement of residence on and cultivation of his donation, it was necessary for him to show that he had continued the same until March 1, 1859, in order to acquire title thereto by virtue of such occupation. This has not been done, but on the contrary it appears that Russell ceased his residence on said land about February, 1856, and has not occupied it since that date.

The records of this office show that the SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, the NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$, and Lots 2 and 3, Sec. 7, T. 4 N., R. 1 W., and the SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of Sec. 12, T. 4 N., R. 2 W., have been sold and patented to other parties than Russell. This leaves one-half or thereabouts of said donation undisposed of. In view of the facts as they appear in this case, and of the law applicable thereto, I am of the opinion that Russell abandoned in 1856 his claim to the land described in said notice No. 7467, by reason of his ceasing to cultivate and reside thereon. The same is therefore held for cancellation, subject to the right of appeal to the honorable Secretary of the Interior as provided by the rules of practice now in force.

In future you will consult this office before ordering hearings in contests against donation claims.

HOMESTEAD—CUTTING TIMBER.

EDWARD A. TIGHE.

Constructing buildings and roads for lumbering purposes, clearing off timber for the purpose of selling it, and living on the land whilst so cutting and selling timber, are not the improvement, cultivation, and residence required by the homestead law, and will not support a commutation entry.

*Commissioner McFarland to register and receiver, Marquette, Mich.
August 5, 1884.*

On August 20, 1881, Edward A. Tighe made homestead entry No. 2501 for the W. $\frac{1}{2}$, SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, and NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$, of Sec. 31, T. 41 N., R. 16 W., Michigan, and on September 23, 1882, commuted the same to cash entry No. 13,777.

On September 26, 1883, special timber agent John H. Welch reported that he had made an examination of an alleged timber trespass com-

mitted by Tighe on said land, and of his homestead entry as connected therewith, and found that Tighe had never resided on the land; that his residence was in Milwaukee, Wisconsin; that there were no improvements on the land except three buildings, one of which was used as a dwelling or cook-room, and one as a sleeping-room for men while engaged in cutting and removing timber, and one as a stable for horses and cattle; that no ground was cleared, or ever had been; that there were no fences, nor any signs of residence except for lumbering purposes; and that there were no circumstances mitigating the timber trespass, which was material, there having been 174,261 feet of timber removed which was sold in Milwaukee for \$2,439.65, and 16,000 feet more already cut but not removed. The timber removed was hauled by Tighe's teams to his dock in Section 33, and shipped by his vessel to Milwaukee.

Witnesses who had been in Tighe's employ in cutting and removing the timber testified that Tighe had never resided on the land except to lumber, and that there were no fences on the land, no crops growing, no land cleared for cultivation, and no improvements except the chopping of the pine, cedar, and hemlock timber, and three buildings put up for lumber camps.

Upon this report of the character of Tighe's homestead entry, the same was held for cancellation as illegal and fraudulent November 17, 1883, and Mr. Tighe allowed sixty days within which to show cause why the same should not be canceled. A hearing in the case was ordered January 10, 1884, upon application of claimant, and on March 17, 1884, you transmitted your report of the testimony as taken at said hearing, together with certain papers submitted by special agent Welch, consisting of affidavits taken by special agent Barnes in June, 1883, relative to said entry. * * *

There appears to be no material conflict of testimony between the special agent, and the witnesses whose affidavits were taken by him, and Mr. Tighe and his witnesses. That Tighe "lived" on the land three or four months in the winter of 1881-'82, and one or two months in the winter of 1883, is proved. It is also proved that he was engaged in superintending the cutting and removal of the timber at those periods. It is not shown that he was there for any other purpose. His statement to several parties that he "intended" the land for a farm, and for a permanent residence, is admissible testimony, and if his acts were consonant with such intention, the testimony would be entitled to weight. I find no supporting evidence of that intention up to the date of the institution of proceedings against him for timber trespass and for the cancellation of his entry. He made his commutation entry when he had done nothing except to take the timber, and he had done nothing else at the date these proceedings were instituted. The alleged "improvements" were necessary for lumbering purposes and were so used. He had a logging camp, houses for his choppers to live in, a stable for horses and cattle for hauling lumber to the wharf, and a road. A logging camp

and buildings and roads necessary for lumbering purposes, constructed and used for such purposes and apparently for no other, do not constitute improvements upon land within the meaning of the homestead law. Neither does the cutting and removal of timber for commercial purposes, unconnected with the act of clearing land for cultivation, constitute such improvement. Nor does living upon the land while getting the timber, and for the purpose of getting the timber, constitute residence within the meaning of the law.

It may be that Mr. Tighe supposed, as he states, that he could commute his homestead entry without actual and bona-fide residence on the land, and that all he had to do besides making permanent improvements was to pay for the land; but such is not the law, as citizens of public-land States are generally aware. The tract entered was in a timber region, and admittedly inaccessible at that time for ordinary purposes. It is not a fair presumption that Mr. Tighe did not know that it was valuable for timber, but it is a fair presumption that the timber constituted its chief value. I am satisfied from all the testimony in the case that the entry was made primarily for the purpose of getting the timber, and that there had been no actual compliance with law in the matter of residence, and none in respect to cultivation, or clearing for cultivation, at the time said entry was commuted. The commutation at that date was therefore premature and illegal, even if the intention to make the land an actual place of residence at some future time had existed.

Mr. Tighe, however, had returned to the land at date of hearing, was then claiming to live there, and was continuing to claim the land as his homestead. He also states in a letter to this office that if he loses the land, and the trespass suit is decided against him, he will be ruined.

As a matter of leniency, therefore, and to enable Mr. Tighe to make his avowed intentions good by his acts, I am disposed to suspend further proceedings against the entry and to allow him six months further in which to make supplemental proof of actual and continuous residence for the required time additional to what he has heretofore attempted to show, together with the cultivation, or clearing for cultivation, necessary to commutation. Such supplemental proof must be satisfactory to you, and the witnesses should be closely cross-examined by you.

TIMBER TRESPASS—SETTLER'S CLAIM.

MARY A. MAXFIELD.

A bona-fide settler may dispose of the down and fallen timber on his claim, for improvements and support, while perfecting title to it.

*Acting Commissioner Harrison to Mrs. Maxfield, St. Hilaire, Minnesota,
August 6, 1884.*

MADAM: In reply to your letter of July last, without other date, asking whether, in view of a contested case that you state has been decided in

your favor by the local officers at Crookston, you may use or dispose of the down and fallen timber on the land before the case shall have been acted upon by this office, you are advised that if you have established your residence upon the claim, have been residing there for the purpose of cultivating and improving the land, intending to make a permanent home and acquire full title for yourself, you are permitted to apply the timber towards your support and making improvements while perfecting your title.

With reference to making final proof before winter, I am not able to advise you in the absence of any description, in your letter, of the land, or other data by which to identify your case upon the records of this office.

PRE-EMPTION—INSANITY; ENTRY BY WIFE.

HELEN A. COFFMAN.

Where a pre-emptor in Kansas became insane after filing and residing on the land for three years, and his wife made homestead entry in her own name, the technical invalidity will be overlooked; in view of the local laws it will be regarded as a transmutation, and she may have credit for the residence.

Acting Secretary Joslyn to Commissioner McFarland, August 6, 1884.

In the matter of the appeal of Helen A. Coffman from your decision of May 26, 1883, refusing to allow credit for full period of residence upon her homestead entry No. 17, 139, Kirwin, Kansas, dated December 29, 1881, embracing the W. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of Sec. 18, and the W. $\frac{1}{2}$ of NW. $\frac{1}{4}$ of Sec. 19, T. 6, R. 13, and the S. $\frac{1}{2}$ of NE. $\frac{1}{4}$ of Sec. 24, T. 6, R. 14, it appears that her husband for nearly three years prior to date of such entry had lived upon the land as a pre-emptor, having filed his declaratory statement therefor; that not long previous to that date he became insane, and incapable of completing his proof and payment, and was sent to an asylum after due legal inquisition; that the homestead affidavit was made before, and the papers evidently prepared by, the same probate judge who had acted in the lunacy proceedings, and who was therefore fully cognizant of all the steps taken by her to secure proper control of the homestead, by which she was by her husband's incompetency rendered the natural and legal representative; that such entry shows upon its face, by the recitals in the affidavit, that it was intended as a transmutation of the pre-emption to a homestead; and that it was only technically invalid in that it was done in her name instead of that of her husband.

Her final proof shows all the facts of residence from the original date, and were the entry in his name there would be no question of the application of the acts of March 3, 1877 (19 Stat., 403), and June 14, 1878 (20 Stat., 113). I do not regard it as material in such a case that the

entry was admitted in her name, who had a right to make it as head of a family, while at the same time charged with the duty by her relation to the husband of securing the incipient pre-emption right from loss through failure to prove up within the legal period. Under Kansas laws, either the husband or wife has one-half interest in the real estate of the other in case of death, and the homestead on which they actually reside, to the extent of one hundred and sixty acres, becomes at death the absolute property of the survivor and children.

These things being so, there is manifest propriety, in construing the provisions of the beneficial statute above cited, in so extending the remedy that it shall embrace the mischief, and hold within its intent whatever is fairly shown to lie within the spirit of the law.

You are accordingly authorized in this case to admit the final entry of Mrs. Coffman.

COAL LAND—SUBDIVISIONAL ENTRY.

MITCHELL *v.* BROWN.

Coal lands must be entered by legal subdivisions, and there is no authority for segregating the coal from the other land within a forty-acre subdivision. The question to be determined is whether the forty acres, taken as a whole, are more valuable for the coal which they contain than for agricultural purposes.

*Acting Commissioner Harrison to the register and receiver, Durango, Colo.,
August 6, 1884.*

The case of Edgar R. Mitchell *v.* Jacob S. Brown, involving the character of the SE. $\frac{1}{4}$ of SW. $\frac{1}{4}$, Sec. 14, T. 35 N., R. 11 W., has been examined.

September 6, 1880, Brown made homestead application No. 66, Lake City series, for the SE. $\frac{1}{4}$ of SW. $\frac{1}{4}$, and the SW. $\frac{1}{4}$ of SE. $\frac{1}{4}$, Sec. 14, and the N. $\frac{1}{2}$ of NE. $\frac{1}{4}$, Sec. 23, said township and range, New Mexico meridian. Upon application of Mitchell, received with register and receiver's letter of April 25, 1881, this office, under date of March 8, 1882, ordered a hearing to determine the true character of said SE. $\frac{1}{4}$ of SW. $\frac{1}{4}$, Sec. 14, alleged by Mitchell in his application for contest to contain coal.

The hearing was duly held, and the register and receiver, Lake City, rendered their joint opinion, dated August 24, 1882, holding that said forty acres in dispute are not of the character to warrant their cultivation for profit, either by a farmer or ranchman, and that the forty is valuable for coal to the extent of two and a half or three acres. They conclude, therefore, that Brown's said entry should be cancelled to the extent of said SE. $\frac{1}{4}$ of SW. $\frac{1}{4}$, and that Mitchell should be permitted to make coal entry of same. Brown appealed to this office on the ground that the evidence does not sustain the register and receiver's conclusion as to the character of the tract; that if a portion only is found to be coal land he, Brown, should be allowed to segregate; and upon the

further ground that the tract in dispute being within the Fort Lewis military reservation, Mitchell is not entitled to make coal entry thereof.

The survey of the township was made in April, 1880. The field-notes thereof show the land to be good, and, though too high for agriculture, well adapted to stock-growing. The NW. $\frac{1}{4}$ of Sec. 14 is returned on the plat of the survey of the township as mineral, and it is the only tract in the section so returned. From this record status of the tract at the time Brown made his said entry, it appears that the land was at that date subject to such appropriation, and the burden of proof must, therefore, rest on the party who attempts to show the contrary. The testimony, which is quite voluminous, has been carefully examined, and I think it shows that there is some land in the southwest corner of the forty in dispute which is valuable for its coal deposits. That the coal is of good quality is disputed, but it is in evidence and uncontradicted that coal from the mine has been marketed and used.

It appears from the evidence submitted, that the tunnel from which the mine is worked was started from a point some fifty feet north of the south line of the forty in dispute, because this was the most convenient point from which to reach the vein. The tunnel extends some two hundred and fifty feet southwesterly and across said south line, and the greater portion of the workings from the tunnel are within the forty south of the disputed ground, and within the Fort Lewis military reservation. One "room," however extends from the tunnel northwesterly into the ground in controversy, and from this room coal has also been taken.

The plat submitted by contestant and marked "Exhibit A", the correctness of which it appears is admitted by Brown, shows this one room to extend about forty feet north of the south line of the forty in question; and it is not shown by the plat, nor claimed by contestant, that there has been any coal taken from said SE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ except that taken from this room. The evidence shows that the breast of this room has caved in, and there is therefore but little positive testimony touching the actual extent and condition of the vein where last worked. Contestant claims that the coal taken from the breast in room No. 1, was of fair quality, while Brown's witnesses testify that it was not of that quality that would make it valuable for mining. From this room No. 1 the hill gradually descends to the south, east, and northeast. The vein, as explored in the rooms 1, 2, 3, and 4, dips with the descent of the hill southeasterly. The testimony shows that there are a few acres in the SW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ valuable for coal. This fact was found by the register and receiver, and is generally admitted by the witnesses for Brown. That the deposit of coal extends north along the west line and through the forty has not in my opinion been proved. Room No. 1, if extended upon the vein alleged and in the direction entered upon as shown upon the diagram, Exhibit A, would intersect the west line of the forty about two hundred feet north of the section line.

The contestant has made no effort to show that the land in the eastern portion of the forty, which lies east of the La Plata River, contains coal.

Mitchell has failed to prove the correctness of his allegation, except as to the few acres before described, and it does not appear from the testimony or from the record status of the tract that coal exists at any other point thereon. Lands entered as coal lands must be entered by legal subdivisions as made by the regular United States survey; (see page 2, rule 2, coal circular of July 31, 1882). There is no authority for segregating the coal from the other land within a forty-acre legal subdivision.

It does not follow, though, that where a part of a forty-acre tract is coal land the whole tract should be reserved for disposal under the coal-land laws. The question to be determined is whether the forty acres, taken as an entirety, are more valuable for the coal that they contain than for agricultural purposes. I do not find that the record or the testimony justifies your conclusion that Brown's attempt to cultivate was done for the purpose of manufacturing evidence. The forty in dispute has in my opinion more value for purposes of agriculture—stock-raising, its grass (hay), and timber—than for coal. It is therefore adjudged to be agricultural land, and not subject to coal entry.

A portion of Brown's entry, including the south 19.03 acres of the forty in question, falls within the exterior limits of the Fort Lewis military reservation. The executive order establishing the reservation was made January 27, 1882, subsequently to the date of such entry, and contains the following clause: "excepting therefrom all . . . lands and parts of same now filed or entered, the titles to which have been, or may be, perfected by the present claimants, their heirs or assigns." However, it is intended herein to decide only upon the character of the tract in dispute. The validity of the said entry in other respects has not been considered.

CONTEST—BIDDING FOR RIGHT; REPAYMENT.

SUMNER J. MAINES.

Where one successfully bid and paid for the preference right of contest, and his contest thereupon instituted was dismissed because of a prior contest of record, which the local officers had overlooked, he is entitled to repayment.

Acting Secretary Joslyn to Commissioner McFarland, August 11, 1884.

I am in receipt of your letter of the 7th inst., in reply to my reference to you for report of letter of 18th ultimo from H. C. Hinckley, of Huron, Dakota, in relation to the claim of Sumner J. Maines for repayment of seventy dollars paid by him to the local office at Huron for the preference right to contest timber-culture entry No. 5357, Sioux Falls, Dakota.

Said payment grew out of a simultaneous filing of applications to contest by Mr. Maines and a Mr. Messenger, when, to determine which of the two should be allowed to contest, the preference right was sold to Mr. Maines, the highest bidder, for seventy dollars. Subsequently it was discovered that there was at the date of Maines's application a pending contest of record against the tract. His contest was thereupon dismissed by direction of your office, by its letter dated May 7, 1883, to the register and receiver. Maines then made application for repayment of the seventy dollars paid by him for the preference right of contest. Said application was rejected pursuant to instructions from your office under date of November 26, 1883, on the ground "that there is no provision of law authorizing the return of the amount paid in such cases." Maines then appealed to your office on the question of his right to contest the timber-culture entry as against Ella D. Houghton, whose application to contest was pending at the date of the similar application by Maines. His appeal was dismissed by your decision of February 16, 1884. He has since rested until the 18th ultimo, when Mr. Hinckley, in his behalf, addressed a letter to the Department, setting forth the hardship to Maines as a poor man, and asking relief. Though the rules of practice relative to appeal have not been strictly followed, and though the limitation of time within which appeal may be taken has expired, I think the facts in this case are such as to warrant attention, and, if need be, supervisory action on my part. The question is one in which only the United States and Maines are interested.

Without stopping here to discuss the legality or propriety of the practice which permits parties to bid for and purchase, as herein indicated, a preference right to contest, I will remark, first, that the claimant failed to receive the benefit promised him as a result of his purchase; and, second, that such failure was through no fault of his, but was the fault of the government through its officers or records, he having been actually misinformed and misled as to the facts. He was told that, as the highest bidder, he would have the preference right of contest. After having paid his money he was informed that, by reason of the discovery of a pending contest at the time of his application, he had no right and that his contest must be dismissed.

From the foregoing it is clear that the departmental decision of December 27, 1883, in the case of Ozra M. Woodward (2 L. D., 688), cited in your report of 7th instant, can have no application to this case. In that case the applicant had the full benefit of the right for which he bid and which he purchased; in this no benefit accrued. In that case the applicant had a full knowledge of the facts when he paid his money; in this, though led to believe that he had all the facts of interest to him relative to the tract in question, claimant was not fully informed until after he had paid his money, when he learned from the officers, who had accepted it, that he had no rights whatever under his purchase.

I am satisfied from the facts before me that this is a case in which,

under the law, the amount claimed may be properly repaid. It has been accounted for as money received on account of the disposal of public land. It appearing that it was received through error and mistake on the part of the government, it is evident to my mind that it may be returned, under the rule providing for repayment in cases of erroneous entry or disposal.

Following the views herein expressed, you will cause repayment to be made to Sumner J. Maines of the seventy dollars paid by him for the preference right of contest.

DESERT LAND—CONTESTANT'S PREFERRED RIGHT.

FRASER v. RINGGOLD.

Where several questions relating to a claim are pending for consideration, it is error to pass upon one only.

One who contests and procures the cancellation of a desert-land entry has the preferred right to enter the tract under the act of May 14, 1880, inasmuch as said law is remedial, and this class of entries, if not embraced by the letter, are within the reason and purpose of the statute.

Acting Secretary Joslyn to Commissioner McFarland, August 13, 1884.

I have considered the case of Larkins K. Fraser *v.* Amos A. Ringgold, involving the SE. $\frac{1}{4}$ of Sec. 26, T. 16, R. 24, Visalia, California, on appeal by Fraser from your decision of July 13, 1883, holding his homestead entry for cancellation, and allowing that of Ringgold to stand.

It appears that Robert J. Fraser, father of Larkins K. Fraser, made desert-land entry of the tract in November, 1879. This entry was cancelled for relinquishment May 31, 1882, notice of which reached the local office June 8, 1882, upon which day Larkins K. Fraser made homestead entry of the tract. On July 6 Ringgold was permitted to make homestead entry of the tract, upon his allegation of settlement on the 4th of April.

It appears that Ringgold was upon the land on this day, but he did no act of settlement. On the 5th he applied at the local office to file upon it, but his application was rejected, because the tract was covered by the desert-land entry. He then asked leave to contest the entry on the ground that the land was agricultural in character, and not subject to desert entry. This application was also rejected for like reason. On April 27 he hauled lumber on the land for the erection of a house, which he built on the 24th and 25th, into which he moved and which he continually occupied until June 10. From that time he was "off and on" the land until the day of hearing in December following, having in the mean time built another house and dug a well.

On the 22d of May, 1882, you rejected his application to file, but instead of acting upon his application to contest, you postponed its con-

sideration, pending his right of appeal from your decision touching his filing. This was error. You should have passed upon his entire case, so that all could have been concluded together.

In the mean time, on the 20th of April, Fraser relinquished his desert-land entry, and after its cancellation L. R. Fraser, his son, as before stated, made homestead entry on the day of receipt of your letter at the district office. Fraser built a house on the land April 21 and 22, 1882, cut and stacked hay in May, and erected a covering over it in November, during which month he commenced the erection of another house, which was finished at the date of hearing. His residence on the land was not continuous, but "off and on" from April 21. It appears that Robert J. Fraser plowed and cultivated about forty acres of land, and cut hay thereon from 1879 to 1882, without, so far as appears, any irrigation thereof, and that his son, the claimant, assisted in this work. Your decision holds that in the absence of proof of irrigation, the presumption is that the land was agricultural and not desert land, and hence that the entry of Fraser was fraudulent; and that, as the son assisted the father, the son's homestead entry was also fraudulent, and should for that reason be cancelled.

I do not think this necessarily followed. Up to date of attaining his majority young Fraser was under his father's direction, and his labor was no indication of any attempt at illegal appropriation. After that date it is not shown that he had any share or interest in the land, although he planted a crop in 1881, the proceeds of which he gathered after the allowance of his homestead entry; yet it is not reasonable from this fact to presume fraud on his part in connection with the entry of his father. Unless, therefore, (although the appearances are conclusive), Ringgold has acquired some right superior to that of Fraser, since both upon the land at date of cancellation of the prior entry and had permanent improvements thereon, they are equal in the eye of the law, and a fair division should be made between them, awarding to each the legal subdivisions covered thereby.

For the purpose of inquiry into this superiority of right, it becomes necessary to consider the act of May 14, 1880 (21 Stat., 140). That statute provides three things:

1. The opening of land subject to "pre-emption, homestead, or timber-culture" claims to immediate settlement and entry upon the failing of a written relinquishment of any such claim.

2. The preference right of entry to any person who "has contested, paid the land office fees, and procured the cancellation of any" such claim.

3. The right of pre-emption to a homestead by act of settlement, as under the pre-emption laws.

In this case there was an application to contest, a relinquishment, and acts of settlement, both claimants having settled on the land. The contest was not recognized, no fees were paid, no notice was issued;

the status of the applicant was that of an informer merely, so that he secured no vested right under the second section of the act. If he succeeds, it must be under the first and third sections.

This depends upon the question whether or not a desert-land entry falls by construction within the act as a "pre-emption" claim. Up to this time, I am not aware that there has been a decision on this point by the head of the Department, and the regulations are silent respecting it. It seems to have gone without saying, however, that such entry is not embraced in the provision.

It must be conceded that the act of 1880 is a remedial statute, changing the policy of previous administrations, both as regards the right of settlers to make immediate entry without awaiting formal cancellations by you, as well as giving them preference rights by way of inducement to contest fraudulent and abandoned claims, and their right to regard settlement as a pre-emption in cases of homestead claim. It covers descriptively the leading classes of inchoate claims which depended upon good faith, both of inception and performance, for their ultimate validity and the securing of title. The word pre-emption is one of broad signification, and was in use under State laws and in other statutes before its incorporation into the United States land system. It is held, in general, that claims under the townsite laws are pre-emptions; so of the settlement statutes respecting certain Indian lands; and, broadly, that where a special preference is given to a claimant, dependent or contingent upon the performance of conditions which any one of a qualified class may reasonably fulfill, by which he may hold to the exclusion of others, such preference is a pre-emption, and inures to the individual upon the inception of his claim. Measured by these rules, a desert-land entry is much more clearly within the definition than many others which are so recognized.

It falls also within the reason of the law, as an entry under which fraud may be attempted by the appropriation, in large quantity, of good arable lands in their natural state, thus evading the statutory limitations of other settlement laws; also in that it is under a statute looking to reclamation and permanent improvement, upon which proof of good faith is necessary to complete the title, and on failure of which it ought to be forfeited, where the same policy of inducement to contest, of speedy restoration in case of relinquishment, and of security of settlement after its restoration, ought to prevail, as in case of lands liable to restoration technically within the very words of the statute. It is also an entry which ought to be included in such classification as will bring it within the rules of practice relating to contests and administrative investigation, without the necessity of making special rules.

Upon all these reasons, and many others which suggest themselves without enumeration, I conclude that desert-land entries are included within the act of May 14, 1880, and may be also, as pre-emptions, held subject to the rules of practice in the matter of hearings and contests.

Upon this conclusion I might technically hold that as Ringgold was upon the land with the lumber for the house or cabin at the date of relinquishment, April 20, while Fraser fixes the date of building his house on or about the 21st, which he also gives as the date of relinquishment, the former has the legal right as the prior settler after relinquishment. But it would be manifestly unjust to deny the same settlement-right to Fraser, who was on the land, and at least within a day built a small house, while Ringgold did not build till the 24th. It will be more in accordance with right, in applying the new rule suggested by the foregoing, to treat them both as settlers equal in time and fairly equal in respect to good faith and improvements, and award a division, upon their showing the exact legal subdivisions embraced by their respective improvements. In case either does not wish to accept the portion awarded as his full homestead, he may amend to embrace contiguous land to make up 160 acres, or either may abandon in favor of the other without prejudice to his right to enter other lands under the homestead law. You will take proper measures to ascertain the facts necessary to the execution of this decision.

PRIVATE CLAIM—ACTS OF 1860 AND 1872.

HEIRS OF JOHN WREN SCOTT.

As the claim in question is not in the form and accompanied by the proofs required by the act of June 22, 1860, and as said act has expired by limitation, it will not be entertained.

Commissioner McFarland to James E. Richardson, Esq., New Orleans, La., August 14th, 1884.

The petition addressed by you to the honorable Secretary of the Interior, in behalf of the heirs of John Wren Scott, under date of June 30, 1884, in which you make application "for final adjudication and confirmation of titles to certain lauds in the southeastern district of Louisiana, east of the Mississippi River," has been referred by the Department to this office.

It appears from the statements in said petition, in substance, that the claim upon which the application is founded is that of the undivided half interest in the claim of Donaldson and Scott for part of the Houmas grant as described in the "Old Board Report No. 133," referred to in said petition and represented in the copy of map annexed thereto. The claim is asserted under the original grant, the stipulations contained in the treaty of cession between France and the United States, the laws of nations, the constitution and laws of the United States, and particularly under the second section of the act of Congress of June 2, 1858 (11 Stat., 294), "absolutely and unconditionally," as alleged, confirming said Donaldson and Scott claim No. 133. The present assertion of the

claim of the heirs of Scott is made "in direct protest as against any and all other claimants whatsoever"; and the action solicited is asked for "by and in virtue of the act of Congress approved 22nd June, 1860, . . . and of the act of Congress supplemental thereto approved 10th June, 1872."

If the case presented came within the jurisdiction of the Department for examination and action, the provisions of the grant and the obligations created by treaty, and imposed by law, as referred to in the petition, would of course require and receive due consideration; but with this allusion here made thereto, attention is called to the fact that by the late decision of the Supreme Court of the United States in the cases of *Slidell et al. v. Grandjean et al.* (111, U. S., 412), it was expressly held, in relation to the second section of the act of June 2, 1858, referred to in said petition as confirming the claim of Donaldson and Scott, that the three claims, comprising together the Houmas granted tract, described in the report of the commissioners referred to in said section, of which that of Donaldson and Scott, No. 133, was one, were not confirmed by said section.

By reference to the act of June 22, 1860 (12 Stats., 85), under which the present application is made, it will be seen that the claims provided for therein were required to be presented, with the evidence in support of them and the formalities specified, to the commissioners designated, whose duty it was made to report the same, with their conclusion, to the Commissioner of the General Land Office, by whom they were to be reported to Congress for final action, with his approval or disapproval of the opinion of the commissioners; except that, in the event of his agreement with the commissioners in the rejection of a claim, the decision thereon should be final.

It will also be seen by reference to the act of June 10, 1872 (17 Stat., 378), that by the first section thereof the act of June 22, 1860, aforesaid was extended and continued in force for the period of three years from and after its passage only, namely, to June 10, 1875.

The present proceeding therefore is unauthorized and of no effect, for the two-fold reason that it is not in the form nor accompanied by the proofs and formalities required by the act under which it purports to have been taken, and that the act has expired by limitation, and ceased to be of force; and as there is no provision of law empowering this Department to adjudicate and confirm titles under claims of this character, the petition cannot be entertained.

OREGON DONATION—CLAIM BY A WOMAN.

ANNA HICKS.

As the benefits of Section 5, Act of September 27, 1850, are limited to "white male citizens," with the qualifications prescribed, the claim of a widow, who had proved the requisite four years' residence and cultivation, is held for cancellation.

Assistant Commissioner Harrison to register and receiver, Roseburg, Oreg., August 15, 1884.

It appears by evidence on file here than Anna Hicks, a widow, arrived in Oregon in May, 1854, and settled upon 160 acres of land in August following, claiming it as a donation under the act of September 27, 1850 (9 Stat., 496), and supplemental legislation.

Mrs. Hicks, on the 7th of November, 1854, filed notice of her claim, which was numbered 5363, describing the lands settled upon as the E. $\frac{1}{2}$ of SE. $\frac{1}{4}$, and E. $\frac{1}{2}$ of NE. $\frac{1}{4}$, Sec. 34, T. 18 S., R. 3 W., Oregon, and thereafter made proof of four years' residence on and cultivation of said tracts, and procured the issue of certificate therefor, which was numbered 1672.

The 5th section of said act of September, 1850, provides, "That to all *white male citizens* of the United States, or persons who shall have made a declaration of intention to become such, above the age of twenty-one years, emigrating to and settling in said Territory between the first day of December, eighteen hundred and fifty, and the first day of December, eighteen hundred and fifty-three," etc. The time within which a person might settle under this section was extended to December 1, 1855, by the 5th section of the act of February 14, 1853 (10 Stat., 158).

As Mrs. Hicks is not a white male citizen of the United States, she could not claim any of the benefits conferred by the provisions of the 5th section of said act of 1850, and for this reason her claim to said lands is held for cancellation, subject, however, to her right of appeal. * * *

SETTLEMENT—UNSURVEYED LAND.

LITTLE v. DURANT.

An act of settlement upon unsurveyed land must be of such a character, and so open and notorious, as to be notice to the public generally of the extent of the claim.

Acting Secretary Joslyn to Commissioner McFarland, August 16, 1884.

I have considered the case of Orrin C. Little v. Levi R. Durant, involving the right to Lot 4 of Sec. 2, T. 34 N., R. 7 W., N. M. M., Durango, Colorado, on appeal from your decision of December 7, 1883, awarding said tract to Durant.

The record shows that Durant made homestead entry No. 3, for the S. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of Sec. 35, T. 35 N., and Lots 3 and 4 of Sec. 2, T. 34 N.,

R. 7 W., N. M. M., on November 3, 1882, alleging residence upon the land applied for since October 20, 1878.

On November 9, 1882, Little made application to enter, under the homestead laws, said Lot 4 and the SW. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of Sec. 2 and Lot 1 of Sec. 3, T. 34 N., R. 7 W., N. M. M., alleging residence upon said land since May 10, 1881.

Little's application was rejected by the register and receiver because of conflict with said homestead entry, and, on appeal, you affirmed their decision and allowed Little to contest the right to said Lot 4, should he so desire. On June 9, 1883, Little filed his affidavit for contest, alleging priority of settlement upon the land in dispute. On February 19, 1883, a hearing was had before the register and receiver, at which both parties appeared with their witnesses, and were represented by counsel.

From the testimony there taken, the register and receiver were of the opinion that said homestead entry should be canceled, as to said Lot 4, and that said Little should be allowed to embrace the same in his homestead entry. Durant appealed, and you reversed the decision of the register and receiver, as above stated.

It appears that both applications were made, within the time prescribed by law, for land which, at the date of the alleged settlements, was unsurveyed. The evidence shows that Durant, by his agent, John W. Moss, bought the improvements and possessory right to the claim of Willard Dunham, and moved upon the land about October 20, 1878. Durant's residence is not upon the tract in dispute.

The contestant, Little, settled upon the land applied for by him on or about May 10, 1881, having purchased the improvements and possessory right to the same from one John Ballinger, who, at the time of the sale, showed him the corners and boundary lines of his claim. The testimony of Little shows that the tract in dispute was included within the claim purchased by him from Ballinger. It also appears that Little built two log houses, one 16 x 18 feet and one 18 x 22 feet connected by a roof, a log stable, and a chicken house, all on the lot in question, and that he cultivated about one acre in the year 1881. His improvements are worth from \$135 to \$350. The essential inquiry in this case is, Which is the prior settler? The burden of proof is upon contestant, Little; (*Ballard v. McKinney*, 1 L. D., 483).

Durant contends that since his said purchase from Dunham he has always claimed 160 acres in a square, one-half lying north and one-half south of the line dividing townships 34 and 35, and that near the southwest corner of his claim stands a blazed pine tree marking that corner, while a fence marks the northern boundary of his claim. There is also another fence extending along the township line, and across a narrow strip of the northeast corner of said Lot 4 to a bluff on Pine river. It is insisted by Durant that he had such an occupation of the tract in question at the date when Little settled and commenced building thereon, as to put him upon notice that he (Durant) claimed

the land in question; and, in addition thereto, that Little was in fact notified that he claimed said lot as a part of his homestead while he was building his first log house upon the land.

No inflexible rule can be formulated as to what shall constitute occupancy and possession by a settler. The Assistant Attorney-General, Mr. W. H. Smith, in the case of *Allman v. Thulon* (1 C. L. L., 690), cited by you, says that "a person is a settler who, intending to initiate a claim under any law of the United States for the disposition of the public domain, does some act connecting himself with the particular tract claimed, said act being equivalent to an announcement of such his intention, and from which the public generally may have notice of his claim. Such act constitutes a 'settlement,' and it may be by going upon the land, and cutting down trees, building a house, fencing the tract, etc."

While it is true, as was held by the United States Supreme Court in the case of *Ellicott v. Pearl* (10 Peters, 412), that, where land is described by metes and bounds in a conveyance, "to constitute actual possession it is not necessary that there should be any fence or enclosure of the land," it is, nevertheless, essential that the act of settlement upon unsurveyed land must be of such a character and so notorious that the "public generally" may have notice of the settler's claim. In *Brumagim v. Bradshaw* (39 Cal., 24, 46) the supreme court of California held that "the mere intention to occupy land, however openly proclaimed, is not possession. The intention must be carried into actual execution by such open, unequivocal, and notorious acts of dominion as plainly indicate to the public that the person who performs them has appropriated the land and claims the exclusive dominion over it." While the testimony is conflicting, I think the weight of the evidence shows that Durant failed to do any act equivalent to an announcement of his intention to claim the land in dispute.

The evidence relied upon to prove the alleged notice to Little of Durant's claim is the testimony of one John Dowden, who was in the employment of Durant, and one J. A. Epperson, who was present and engaged in the alleged conversation. Dowden testifies that he told Little that he thought he was building on Mr. Durant's claim, and that Little told him that he thought he was not, that if he was he would move down, and that he did not want anybody to get in between him and Durant. Dowden further testifies that he told Little that Durant claimed to a big pine tree that was down the road about 250 yards. The testimony of Dowden is corroborated by that of Epperson, who also states that one Jesse Hammond was present at the time the alleged conversation took place. Jesse Hammond testifies:—"Dowden and Epperson came there and asked me who was putting up the house? I told them that I was helping Mr. Little. Mr. Epperson asked if I did not think we were putting it pretty close to Mr. Durant's. I told them that I thought not, as John Ballinger had told me that he claimed this forty of land where this house now stands. Epperson told me that there was a big

tree south, but did not say what one, or how it was marked." Hammond also states that neither Epperson nor Dowden addressed his conversation to Little. Hammond is corroborated by the testimony of Little. Durant admits that he met Little several times after the alleged conversation, and never spoke to him about the tract in dispute.

It does not appear that Dowden and Epperson were sent by Durant to notify Little that Durant claimed the tract in question. They showed Little no boundary lines, and, although Little met Durant frequently and spent the night with him at Durango after said conversation, not one word was said about Little's settlement on said tract. The conversation relied upon is too vague and uncertain to be considered actual notice to Little of Durant's claim to the tract upon which he was building his residence.

It appears that Little is duly qualified to make a homestead entry, and has been an actual settler, residing with his family upon said Lot 4, improving and making it his home continually since May 10, 1881. From all of the facts and circumstances in the case, after careful consideration, I am of the opinion that Little has acted in good faith, and that he has a superior right to the tract in dispute. I therefore reverse your decision, and direct that said homestead, so far as the same covers said Lot 4, be canceled, and that Little's said application be allowed.

TOWN SITE—PRE-EMPTION CONFLICT.

JOHN PHILLIPSON.

The incorporation of a town with limits inclosing 5,760 acres will not bar pre-emption entry within said limits, on land not actually settled upon and used for business and municipal purposes.

Assistant Commissioner Harrison to register and receiver, Watertown Dak., August 18, 1884.

I have received your letter of the 7th inst., transmitting supplemental proof in support of John Phillipson's pre-emption final proof upon D. S. 11,604, covering SE. $\frac{1}{4}$ of Sec. 35, T. 110, R. 54, as called for by my letter of May 8 last. The land is included within the limits of the incorporated town of Brookings.

Phillipson filed May 9, alleging settlement May 3, 1883, and made proof November 12 last. The town of Brookings was incorporated by act of the Territorial legislature in the year 1883, the day and the month not being furnished. The limits of said town, as defined by said act, include all of Sections 22, 23, 24, 25, 26, 27, 34, 35, and 36, T. 110, R. 54, being 5,760 acres. With your letter you transmit a diagram duly certified to by the register of deeds, of the proper county, showing that said town proper is located and laid out upon the SW. $\frac{1}{4}$ of SE. $\frac{1}{4}$, Sec. 23, NE. $\frac{1}{4}$ NE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, and N. $\frac{1}{2}$ of SE. $\frac{1}{4}$, Sec. 26. The near-

est land occupied for town purposes is more than three-fourths of a mile from the land claimed by Phillipson.

The town is located upon lands entered by private individuals, and, therefore, the population and improvements would not have entitled the town to an entry of adjoining public lands under the townsite laws. The first section of the Act of March 3, 1877, provides that the existence or incorporation of any town upon the public lands of the United States shall not be held to exclude from pre-emption or homestead entry a greater quantity than 2,560 acres of land, or the maximum area which may be entered as a townsite under existing laws, unless the entire tract claimed or incorporated as such townsite shall, including and in excess of the area above specified, be actually settled upon, inhabited, improved and used for business and municipal purposes. It is shown that the only tracts within the corporate limits of said town that are in any manner used or occupied for trade or business are the W. $\frac{1}{2}$ of N. E. $\frac{1}{4}$, and E. $\frac{1}{2}$ of N. W. $\frac{1}{4}$, Sec. 26.

The proof shows compliance with law in all respects, and for the reasons hereinbefore stated, the inclusion of the land within the corporate limits will not prevent an entry.

The proof is returned herewith, and you will allow an entry.

PRIVATE CLAIM—VACATION OF PATENT.

RANCHO LOS PUTOS.

As the land forming the interest of the petitioners is outside of the limits of the grant, and therefore cannot be included in a resurvey and reissue of patent, the petitioners have no interest in the private claim that could entitle them to bring suit to change location of claim.

The United States, having by repeated official acts recognized the correctness of the location, are estopped from now questioning it.

Acting Secretary Joslyn to Commissioner McFarland, August 18, 1884.

I return the papers accompanying your report of 15th instant in the matter of the application for an investigation, and institution of suit to vacate the patent issued June 4, 1858, upon the California confirmed claim, known as the rancho Los Putos, said application having been presented by J. W. Douglass, attorney for W. W. Brown and D. W. Bouldin.

Upon careful consideration of your report, I concur fully in the views expressed, and accordingly decline to recommend the institution of suit, or to take further action upon the petition, and you will so advise the petitioners.

REPORT.

SIR: I have received, by reference from the Department of June 17th last, "for report and recommendation," the petition of Messrs. W. W. Brown and D. W. Bouldin, of San Francisco, addressed to you, asking

for an investigation relating to the survey of the rancho Los Putos, in Solano county, California, and authority to the law officers of the United States to commence proceedings in equity, in the name of the United States, to annul the patent of said rancho heretofore issued to the confirmees thereof, on the ground of fraud in procuring the survey upon which said patent was issued.

In response to said reference I have the honor to submit the following report.

The rancho Los Putos or Lihuaytos was granted by the Mexican authorities to Juan Manuel Vaca and Jose Felipe Armigo (the latter of whom, it appears, came to be recognized in subsequent proceedings by the name of Peña). The claim was presented for confirmation, to the board of land commissioners, under the Act of March 3, 1851, and rejected; but on appeal to the United States district court for the northern district of California, was confirmed by decree of July 5, 1855, which decree was affirmed by the Supreme Court of the United States at the December term thereof (1855). A survey of the confirmed claim was made, under instructions of the surveyor-general, by United States deputy-surveyor D. C. Cage, in May, 1857, was approved by the surveyor-general, and patent issued thereon to the confirmees June 4, 1858.

The petition referred to alleges, in substance, that the land conceded by the grant, lay on both sides (north and south) of the Rio de los Putos (now called Putoh creek), and the complaint therein, made upon information and belief, is, in brief—the claim, as surveyed and patented, being bounded on the north by the Rio de los Putos—that the portion thereof lying, as claimed, on the north side (in extent some 32,000 acres) was, as the result of bribery, wrongfully and fraudulently excluded from said survey.

The petitioners allege interest under purchase from Vaca and Peña, made before the confirmation of Los Putos, of undivided interests in portions of that part lying north of the Putoh creek, of which they held possession, as stated, until some time after the survey was made and patent issued.

An argument has been filed in this office in the case, in behalf of sundry owners of public land liable to be affected, controverting the positions and prayer of said petition.

Referring to the record of the proceedings in the case, more particularly to the concessions under which the grant was claimed, the confirmation thereof and accompanying and subsequent action, it appears, that in their petition to the board of land commissioners the claimants described the land claimed by them by the boundary lines set forth in said petition (being the same as are recited in the petition referred, commencing on the 6th page thereof, and shown on the diagram annexed thereto by shading in red), thereby claiming expressly lands lying on the north side of the Rio Los Putos; which claim, as relating to said lands, was wholly ignored by the confirmation.

The district court found the claim of Vaca and Peña—quoting from its decree of July 5, 1855—"to be a good and valid claim to the extent of ten square leagues, or sitios de ganado mayor, and for no more, in the land described in the original grant and the map annexed thereto set forth in the record, subject to any measurement of adjoining ranchos held by grantees under grant issued prior to the 30 August, 1845, the date of the grant made by Governor Pio Pico, set forth in the record; provided said quantity of land to them granted, and now to them so confirmed, be contained within the boundaries called for in said grant and map to which the grant refers; and if there be less than ten square

leagues, or sitios de gañado mayor, within said limits, then there is confirmed to them the said less quantity; (see petitioners' 'Exhibit A')."

The grant made by Governor Pio Pico at the date above mentioned describes the land granted as being "known by the name of 'Los Putos,' on the margins of the river, adjoining on east the rancho of Don Guillermo Wolfskill, without prejudice to the measurement to be made of the contiguous ranchos heretofore conceded. . . . The tract of which donation is made of ten sitios de gañado mayor in entire conformity as heretofore it had been conceded to them. The judge giving possession shall cause it to be measured agreeably to ordinance, leaving the surplus thereof to the proper uses of the nation; (petitioners' Exhibit A continued)."

This grant of August 30, 1845, makes concession of the land "in entire conformity as heretofore it had been conceded", and the decree of the district court designates the tract confirmed as being "in the land described in the original grant and the map annexed thereto set forth in the record."

The "original grant" to Vaca and Armigo thus recognized and referred to, was made by Governor Michelorena in January 27, 1843, and described the land granted as "the place known by the name of 'Lihuyayos,' bounded at the east by the Sacramento river, at the west by the sierra of Napa, at the north by the creek (arroyo) de Lihuyayos, and at the south by the river Suisin, without injury to the measurements which are to be made of the contiguous ranchos. . . . The tract of which donation is made is of ten sitios de gañado mayor as shown in the sketch which is annexed to the respective expediente. The judge giving possession shall cause it to be measured," etc. "(see petitioners' Exhibit A continued;)" which differs slightly from the translation in the record given above, but is the same in substance.

Besides clearly setting forth the boundaries (being prominent, permanent natural objects), this grant refers to the sketch (diseño) upon which the same boundaries, north, south, east and west, are plainly delineated, the lines embracing a tract of country much larger than the ten square leagues granted.

It appears by the record that prior to the grant by Governor Michelorena to Vaca and Armijo, a grant of four square leagues had been made by Governor Alvarado to Guillermo Wolfskill, partially, at least, within the same boundaries, and that a sharp contest arose between the grantees as to their respective rights, which was finally settled by agreement of the parties, under which Vaca was to remove to the eastward of the land claimed by Wolfskill and to apply for a new concession. This agreement was carried into effect by the grant of August 30, 1845, made by Governor Pio Pico, which was a reconcession to Vaca and Armijo, differing, in effect, from the original grant, only in that it expressly recognized the prior rights of Wolfskill. The grant to Wolfskill described the four leagues granted to him as "located on the banks of the river called Los Putos," and the diseño referred to in the grant shows it lying on both sides of the river. It was so confirmed, surveyed, and patented.

There is nothing, however, in the record, to support the claim of the present petitioners, that the land granted to Vaca and Armijo extended north of the river, except the reference to it in the Governor Pico grant as being "on the margins of the river" ("en los margenes del rio" in the original); but this does not, necessarily, and (taken in connection with the grant and map referred to, which make the river the north boundary) could not mean the margins on both sides. It probably had reference to the margins of the various bends and reaches of the river upon the side where the grant terminated.

Any doubt, however, arising therefrom, must be set at rest by the decision of Supreme Court, the final decree in the case (*U. S. v. Vaca and Peña*; 18 How., 556). The court, in its opinion, held as follows:

"On the 27th January, 1843, the claimants and appellees in this case, Juan Manuel Vaca and Jose Phelipe Peña (the latter under the name of Armijo), received a grant of land from Micheltorena, then governor; the boundaries of which, as stated in the grant, are, the Sacramento river on the east; on the west the sierra of Napa; at the north the creek of Lihuaytos (which was also given as the name by which the tract should be designated), and the extent ten sitios de gañado mayor. Prior to this grant a sketch or map was furnished according to law, as is shown in the recitals of the grant."

After referring to the controversy with Wolfskill, the settlement thereof and the grant by Governor Pio Pico, the opinion proceeds:

"The grant by Pico designated the tract as 'Los Putos.' The stream Los Putos is the same called in the former grant—'Lihuaytos.'"

". . . . The chief objection urged to this grant is the want of a survey, and that there is no sufficient designation of boundaries to sever it from the public domain. It is a sufficient answer to this that the quantity is definite and the general locality. The claimant had been in possession before applying for the grant under a license from Vallejo; the tract was known by the designation of 'Los Putos,' or 'Lihuaytos.' It was to be located on the eastern boundary of Wolfskill, and on the margin of the river."

The survey of the confirmed tract was made in 1857 as before stated, under special instructions from the surveyor-general—see petitioners' Exhibit D—and located the same within the boundaries set forth in the final decree, bounding the part which lies east of the Wolfskill tract, on the north by the Rio los Putos. The survey was approved by the surveyor-general. On examination by this office it was held that the tract as located thereby was within the boundaries prescribed by the decree of confirmation, and patent was issued thereon bearing date June 4, 1858, under instructions from the Department given upon application of this office for direction in the premises.

In June, 1878, twenty years after the issuing of the patent, the present petitioners made application to the surveyor-general for a survey of the confirmed claim of Vaca and Peña, upon the alleged ground that it had never been surveyed, which application was denied.

On appeal to this office the decision of the surveyor-general was affirmed, and, on further appeal to the Department, Secretary Schurz, under date of June 21, 1879, after reciting the prior proceedings in the case, among others that in September, 1860, parties, claiming interests in the land covered by the grant and that the survey was erroneous and fraudulent, petitioned the district court for a return of the survey into the court for review and correction, and that the court denied the motion for the reason that patent for the land had issued and it had no jurisdiction; and the facts appearing from the records of this office that of the land alleged to be embraced within said Los Putos grant but excluded therefrom by the survey, and which said application claimed should be surveyed and included therein, about 30,000 acres had been selected by the State of California as swamp and school lands and filed upon by pre-emption claimants, portions of which had been patented, held as follows:

"In view of these facts I am of the opinion that the decision of my predecessor approving said survey, after consideration, and ordering the land therein embraced to patent, and no new facts appearing which

would authorize an opening of the case, was final and is binding upon his successor, and that the case is *res judicata*; (2 Ops., 9; 5, 29; 9, 101, 301; 12, 358; U. S. v. Bank of Metropolis, 15 Pet., 401.)

"Without, therefore, considering the authority of the government again to exercise control, by a new survey, over land it has once patented, or whether the applicants are not estopped, by their own laches, on consideration of law and public policy, from now asserting any further claim to lands alleged to be embraced in said grant, after having for nearly twenty years, with knowledge of all the facts, neglected to make known or prosecute their alleged rights, during which time said survey passed through all required forms without objection save the verbal protest of Brown, and various other rights have intervened, and the government has parted with its title to a large body of the land claimed by the applicant, I am of the opinion that you properly refused said application and affirm your decision."

A subsequent application by the present petitioners, Messrs. Brown and Bouldin, for a review of the foregoing decision, was denied by the Secretary, under date of May 31, 1880.

No change has taken place since said decision in the status of the case, nor in the policy adopted in regard to the land that might be affected by a change in the location of the grant; and most of the land lying north of the Rio Los Putos and claimed by the petitioners to have been wrongfully excluded from the survey, as also of that lying within the confirmed limits outside of the surveyed tract, has been disposed of or entries allowed thereon by the United States as upon land constituting part of the public domain.

The tract surveyed and patented to the confirmees embraces 44,383.78 acres, being 3.02 acres less than the ten leagues confirmed; the location was made with all the forms prescribed by law; there is nothing in the record of the proceedings to suggest wrongdoing in regard thereto; the tract located is clearly within the confirmed limits of the claim, and large interests have been acquired by the State of California and by individual citizens, depending upon the adjustment so made of the private claim; all questions between the grant claimants and the United States have been disposed of, and the objections of the present petitioners have been adjudicated and readjudicated, as far as the power of the executive departments, to which jurisdiction thereof belonged, extends.

The present application is directed to the same object, a relocation of the grant, through different means, the intervention of the courts; the United States, by the use of its name, to be made the ostensible party seeking relief.

It is shown conclusively by the original grant and map referred to, and the final decision of the Supreme Court, that the land north of the Rio los Putos, upon the claim to which the present application is founded, was not within the limits of the private claim as granted and confirmed. The purchase thereof, if made upon the supposition that it constituted any part of said claim, was, at the best, a mistake. It carried no right in nor title to any of the lands within the exterior limits of the Los Putos grant. No proper survey of the grant could be made which would include such purchase. The courts on a plea for the relief sought could not grant it without setting aside, in effect, the action under the former government and the decision of the Supreme Court of the United States—in fact, making a new grant and confirmation.

The petitioners therefore have no interest in the land surveyed and patented, or in any of the lands within the exterior limits of the grant which could be surveyed under the confirmation in satisfaction of the private claim, and are not entitled to maintain a suit in equity to set aside the patent in question, or in any manner to influence or control the location so as to include or affect the lands outside of said exterior limits.

The United States, which it is sought to place in the attitude of party complainant in the solicited litigation, is, upon every principle of private right and public policy, estopped, by the deliberately-considered and repeated action of its duly constituted official agents, from questioning the correctness of the location sought to be reformed.

I therefore respectfully recommend that the prayer of the petition, both as to the suggested investigation and for authority to sue in the name of the United States, be denied.

TOWN SITE—MINERAL CONFLICT.

M. A. AND EDWARD HICKEY.

Where there appears to be a town settlement upon a mineral claim, a clause of reservation should properly go into the mineral patent.

The rights of claimants under the mineral location and the town settlement are to be determined in the courts and not in the Land Department.

Acting Secretary Joslyn to Commissioner McFarland, August 18, 1884.

I have considered the case presented by the appeal of M. A. and Edward Hickey from your decision of October 8, 1883, wherein you held that the patent, if one should issue, for mineral entry No. 907, Lizzie Lode claim, Helena, Montana, should contain a clause reserving town-site rights.

It appears that the mining claim was located October 20, 1876, and that application for patent was filed August 4, 1881. The entry was allowed November 24, 1882. On July 25, 1876, the town site of Butte City was entered, patent issuing thereon September 26, 1877.

An unsworn paper, dated May 18, 1883, signed by F. V. Schener *et al.*, addressed to Hon. Martin Maginnis, and by him referred to your office July 18, 1883, sets forth in the form of a protest that on account of the rapid growth of Butte City during the last eight years "buildings and improvements of an expensive character have gradually extended eastward upon the public land, until at present, within the limits of what is now surveyed and claimed as the Lizzie Lode claim, such improvements aggregate not less than forty thousand dollars." The protestants also declare that "until two years since we have been in ignorance of any interference with other claims."

The Lizzie Lode lies about three hundred yards outside of the boundary-line of the town site. The time when the protestants placed their improvements on the land now embraced within the lode claim is only shown as in the protest above quoted, though the mineral claimants

allege that all of said improvements were made subsequently to the location.

In the case of the Little Nettie Lode, this Department held, December 18, 1880, that a clause reserving townsite rights should be inserted in the mineral patent, although in that case no application for the entry of the alleged townsite appeared to have been made, it only appearing that a portion of the town known as Lead City covered the mineral claim.

In the Rico Town Site case it was held that "whether the lot owner does take his lot subject to the rights of the mineral claimant as to surface must depend on priority of occupation; if a portion of the public lands have been settled upon and occupied by a townsite, such occupation is a lawful one. . . . The rights of the occupants are fully recognized by the custom and usages of the country, as well as by the statute, and provision is made for the completion of the title by patent to the corporation authorities or to the county judge in trust for such "lot owners" (1 L. D., 567).

It would seem, then, that the Department had fairly decided that where there appeared to be a town settlement upon a mineral claim the clause of reservation should properly go into the patent, even when such settlement was not protected by the townsite entry, and that the actual rights of the claimants under the mineral location and the town settlement would depend upon priority of occupation. But in the Rico case it was held that this question of occupation must be left to courts of competent jurisdiction to settle, and that in the nature of things the Department could not be called upon to adjudicate such questions.

Your decision is affirmed.

TIMBER ENTRY—FINAL PROOF; FRAUD.

INSTRUCTIONS.

Final proof and payment may not be made until after the expiration of the required sixty days of publication.

In *ex parte* cases, if the local officers are satisfied that an application for the land is illegal or fraudulent, they should reject it; if they are in doubt about it, such doubt should be noted on the papers as basis for a special investigation.

Entries made for the benefit of others are in evasion of the law, and are fraudulent.

Acting Commissioner Harrison to register and receiver, Humboldt, Cal., August 19, 1884.

I am informed that when application is made to purchase land under the timber-land act of June 3, 1878, it is your practice to allow proof to be filed at the time of the filing of the application, or at any time within the sixty days of publication.

Such a practice is unauthorized and irregular, and, if heretofore followed at your office, must be at once discontinued.

By the express terms of the statute, proof and payment is to be made "*after the expiration of said sixty days.*" This provision precludes the making of proof or payment *before* the expiration of the period of publication, and you will not hereafter permit such proof to be made or filed in your office in any case of a timber-land application until *after* the sixty days of publication of notice has expired. Neither will you accept proofs in any case which appear to have been made in blank and post-dated to suit the case, or which you know or have reason to believe were so made.

Your attention is called to the circular of instructions of this office of May 1, 1880, which requires proof and payment to be made *after the expiration of the sixty days* of publication and *within ninety days* from date of original application, and at the expiration of said ninety days to cancel all applications when proof and payment have not been so made. You will in the future be governed strictly by the foregoing instructions.

I am further informed that great numbers of fraudulent timber-land entries have been made at your office. It is stated as a particular allegation that the California Redwood Company has hired men by the wholesale to make such entries, and that agents of this company constantly appear at your office as agents of the entrymen and pay for the land, and that these are matters of common notoriety in your district.

If it be true that entries are made in the manner alleged, it appears to me strange that your suspicions have not been aroused, and that information of such or like circumstances has not been communicated by you to this office.

Complaints of fraudulent entries under the timber-land act are so numerous, and so well sustained by investigations that have been made, as to render it a matter of surprise to me that such entries should be so loosely allowed by local land officers.

You are instructed to hereafter exercise the utmost vigilance in the matter of applications and entries under the act named. The duties of registers and receivers in the execution of the public land laws are not merely perfunctory, and an application which they have reason to believe is fraudulent in fact or in law should not be received merely because prescribed forms of application and entry have been followed.

The law restricts timber-land entries to 160 acres to any one person. No person can be allowed to do indirectly what the law forbids him from doing directly. Entries made for, or by the procurement or in the interest of, others than the entrymen are in evasion of the law, and are illegal and fraudulent. Each applicant is required to swear to the character and condition of the land; that he does not apply to purchase it on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whomsoever, by which the title he may acquire from the government may inure in whole or in part to the benefit of any other person than himself.

This affidavit must be made by applicant before the register or receiver, who, in the proper discharge of their duties, should orally examine affiant upon each and all the material points set forth in his affidavit, and such examination may, and should be, as close, thorough, and exhaustive as the circumstances of the case may require.

Your attention is called to the instructions of the Secretary of the Interior in the case of Henry Buchman (3 Rep., 275), as follows :

“It is claimed, in behalf of Buchman, that matters within the personal knowledge of the local officers, but not appearing in regular proof, cannot be considered in the disposition of his case; but in my judgment it is not only eminently proper, but their duty requires a statement for your consideration of such facts within their personal knowledge as in their opinion show or tend to show fraud or non-compliance with the requirements of the law *in all applications to enter public land*; and as agent of the government they should especially protect its interests when there is no adverse claimant to elicit the facts. Practice Rules 37 and 38 require them in trials, so far as they can, to ascertain the exact condition and status of the land, and all the facts touching the rights of the parties, and the nature, extent, and value of alleged improvements, and by whom made and when, and the date of settlement. When there is no trial, and the proofs are wholly *ex parte*, this duty requires from them double watchfulness, and that they report to you whatever (whether within their personal knowledge or otherwise) tends to show any fraudulent proceeding in the case, or any non-compliance with the requirements of the law.”

If you are satisfied that an entry is sought to be made in fraud or evasion of the law in any particular, you should promptly reject the application, stating your reasons therefor. You must be satisfied, upon an examination of applicant, aided by your information relative to parties and lands, that a legal and bona-fide appropriation of the land is sought by the party for his own use and benefit, and that the land is properly subject to such entry.

If you are not so satisfied, and yet are not sufficiently satisfied of the fraudulent character of the application or entry to reject, you should note your doubts and the causes therefor on the papers transmitted, in order that a special investigation may be made.

You should at all times direct the attention of the special agent on duty in your district to suspected frauds of whatever character in connection with any entries or appropriation of public lands.

PRE-EMPTION—RESIDENCE AND IMPROVEMENT.

FORBES *v.* DRISCOLL.

A settler who merely uses his land as a herding place for cattle, while he resides at a distance, does not comply with the pre-emption law.

Acting Secretary Joslyn to Commissioner McFarland, August 21, 1884.

I have considered the appeal of George W. Forbes from your decision of March 1, 1884, in the case of said Forbes *v.* Frederick Driscoll, wherein you hold his declaratory statement for cancellation.

Forbes filed declaratory statement No. 138 on May 20, 1879, for the SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, the NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$, and the E. $\frac{1}{2}$ of SW. $\frac{1}{4}$, Sec. 30, T. 6, R. 4, Deadwood, Dakota, alleging settlement April 27, 1879.

Driscoll filed declaratory statement No. 284 for the same land January 8, 1880, alleging settlement January 6, 1880.

Township plat filed March 17, 1879.

On November 7, 1881, Forbes filed an affidavit in the local office in which he requested that a hearing be ordered to determine the respective rights of the parties. In accordance therewith the parties were notified to appear December 13, 1881, for hearing. The testimony presented on that occasion, which is quite voluminous, establishes the following state of facts:

Shortly after filing his declaratory statement, Forbes erected a number of corrals and inclosures on the land suitable for holding cattle; a cabin which stood on the tract prior to his advent was improved to the extent of a board addition; some fencing was constructed partially inclosing the cabin, and about four acres of the inclosure were plowed and a portion planted to vegetables.

Forbes allowed a man by the name of Petty, with his family, to occupy the premises as a dairy, and also for the purpose of ranching his herd, which consisted of milch cows and calves. In consideration of these privileges, Petty, it appears, was required to look after the interests of Forbes on the place. This arrangement seems to have existed from about the middle of June, 1879, until the middle of October, 1879, when Petty with his family and effects left the place.

Forbes was extensively engaged in the cattle business, principally supplying the Deadwood market with beef and draught cattle; his business, it appears, necessitated his absence from the place for the greater part of the time; it is shown, also, that he slept but a few times on the tract, and occasionally ate a meal at Petty's table; no household utensils, such as are necessary to a settler's comfort, were furnished by him; those in use, it is shown, belonged to Petty. This tract, it seems, was occupied by him at convenient periods merely as a depot for holding his cattle.

The fact that the premises were left unoccupied and uncared for by him subsequent to Petty's departure, so that eventually the house became uninhabitable, although Forbes was continually in the neighborhood until December, 1879, is additional evidence to my mind that he not only failed to establish his residence as required by law, but that he abandoned the place.

Your decision is affirmed.

SCHOOL LAND—RAILROAD GRANT.

SOUTHERN PACIFIC RAILROAD COMPANY (BRANCH LINE) v. STATE
OF CALIFORNIA.

Although the State indemnity selection is invalid, because made prior to the final survey of the rancho claim, nevertheless, as it was made in 1867, when the practice prevailed of allowing the State to make such selections prior to and subject to the determination of the loss of land in place by a rancho claim, it was voidable, and not void; such being its status at date the right of the company attached, there was such an appropriation as excepted the land from the railroad grant.

Acting Secretary Joslyn to Commissioner McFarland, August 22, 1884.

* * * The case involves the N. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ and Lots 1, 2 and 3 of Sec. 35, and Lots 3 and 4 of Sec. 25, T. 16 S., R. 21 E., S. B. M., Los Angeles district, California, on appeal by the company from your decisions of April 17, and June 13, 1883.

The tract is within the twenty miles (or granted) limits of the grant of March 3, 1871 (16 Stat., 573, 579), to the company, the right whereof attached (upon filing the map of designated route in your office) April 3, 1871, and the withdrawal for which was made May 10 ensuing.

It appears that under date of April 11, 1867, the State selected (per R. & R., No. 885 B) the tract in question, together with the SE. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of Sec. 26, T. 16 S., R. 21 E., S. B. M., in lieu of the NE. $\frac{1}{4}$, N. $\frac{1}{2}$ of SE. $\frac{1}{4}$, and SW. $\frac{1}{4}$ of Sec. 36, T. 3 S., R. 11 W., S. B. M., alleged to have been lost in place, the same being within the rancho Los Coyotes. But, the final survey of said rancho not having been approved and patented until March 9, 1875, your office canceled said selection March 29, 1881, holding the same to be invalid upon the ground that the loss of section 36 had not been ascertained or determined at the date of such selection.

It thus appears that the selection in question antedated the survey of said rancho, and remained extant upon the record nearly fourteen years.

March 7, 1882, J. W. Shanklin, surveyor-general of California, requested your office to reinstate said selection, or permit the State to make a new selection of the land, alleging that plat of the survey of said rancho "was approved by the surveyor-general in 1859 upon Hancock's survey made in 1857; that that was the ground whereon the State and United States officers based their action," and not upon the date of the patent; that "the surveyor-general says that the records of his office fail to show that the court to which the survey was referred either approved or disapproved the survey as approved by the surveyor-general in 1859, and as advertised under the law of June 14, 1860;" and that in such case the Land Department never acquired jurisdiction over said survey according to Sec. 2, Act of July 1, 1864.

The records of your office show, however, that the survey of said rancho (including Sec. 36, T. 3 S., R. 11 W.), which formed the basis for the patent, was made pursuant to the provisions of the act of July 1, 1864 (13 Stat., 332), in December, 1868, published in March and April, 1873, approved by the surveyor-general of California December 8, 1873, and approved and patented by your office March 9, 1875.

By your decision of April 17, 1883, you held that as the State had not at the date of her selection lost the land "in place," it was not competent for her to select indemnity therefor, and that hence such selection was without authority of law; but you further held that (the tract in question having been thus appropriated by the State in the year 1867, and until March 29, 1881) such selection was a bar to any other disposition of the land until the selection was canceled," and that (the railroad grant having been made meantime, and the line of road definitely located before said selection was decided to be invalid and canceled) the same was such an appropriation of the land as excepted it from said grant.

You accordingly permitted the State to re-select said land. The company's attorney having by letter dated April 24, 1883, asked for a reconsideration of your said decision, you rendered your decision of June 13, 1883, declining to reconsider the former decision. Wherefore the company appeals, asserting that as the State acquiesced in and failed to appeal from your predecessor's decision of November 16, 1880, holding said selection for cancellation (because at date of same said rancho had not been surveyed, nor had any loss to the school grant accrued), her right is concluded and she is estopped to deny the invalidity of said selection.

The 6th section of the act of July 23, 1866 (14 Stat., 218), expressly declares that the act of March 3, 1853 (10 Stat., 244)—

Shall be construed as giving the State of California the right to select for school purposes other lands in lieu of such sixteenth and thirty-sixth sections as were settled upon prior to survey, reserved for public uses, covered by grants made under Spanish or Mexican authority, or by other private claims, or where such sections would be so covered if the lines of the public surveys were extended over such lands, which shall be determined whenever township lines shall have been extended over such land, and in case of Spanish or Mexican grants, when the final survey of such grants shall have been made. The surveyor-general for the State of California shall furnish the State authorities with lists of all such sections so covered, as a basis of selection, such selections to be made from surveyed lands, and within the same land district as the section for which the selection is made.

It thus appears that the selection in question was premature, the question of the loss of the said Section 36 to the State not having been ascertained or determined at the date of such selection. Nor can such question ever be determined until the final survey of the rancho claim shall have been made pursuant to the express provisions of the said statute, inasmuch as the status of neither Section 16 nor Section 36 could be ascertained until the extent and exact *locus* of the rancho were ascertained and determined in the manner prescribed by law. Until such fact was ascertained and determined, it could not be certainly known whether any basis for such selection existed, or whether the State had actually lost either, or both, or any portion of either of said sections "in place."

I am aware that in the case of *Selby v. State of California* (3 U. S. L. O., 4), my predecessor, Mr. Secretary Chandler, held (under date of March 10, 1876,) that an invalid State selection does not reserve the land covered thereby from pre-emption or homestead claims; and that State selections are invalid that have been made in lieu of Sections 16 and 36 embraced in unadjusted Spanish or Mexican grants. And under date of August 18, 1876, he further held in the same entitled case (*Ibid.*, 89), that a State's right to make such selections does not attach until the approval by your office of the final survey of a rancho embracing said sections; that the State's selection acquired no validity until approved by this Department, "but the approval under such circumstances should not be held to relate back to the date of selection, to the injury of adverse claims to the land;" and that his aforesaid "decision of March 10, 1876, should be vacated." And for future guidance, in furtherance of the aforesaid statutory provision, my said predecessor directed that no further selections should be permitted in advance of the approval of the survey; and the surveyor-general of California should be instructed not to furnish lists to the State of Sections 16 and 36, included within the limits of any private grant, until he shall have received official information from you that the survey thereof has been approved."

It will be observed, however, that the selection in question was made (as hereinbefore stated) April 11, 1867, when a different practice obtained, and it was then regarded as competent for the register and receiver to allow such selections, subject to final adjudication.

In the celebrated case of *United States v. Schurz* (102 U. S., 378) the Supreme Court say: "The whole question is one of disputed law and disputed facts. It was a question for the land officers to consider and decide before they determined to issue McBride's patent. It was within their jurisdiction to do so. If they decided erroneously, the patent may be voidable, but not absolutely void."

As before stated, although said selection antedated even the survey of said rancho, the substantial fact has been shown, nevertheless, that the selection was prima-facie valid and remained extant upon the record nearly fourteen years, during which period it operated as a bar to the attachment of the company's right, or to any other disposition whatsoever. See *Perkins v. Central Pacific R. R. Co.* (1 L. D., 357); *Graham v. Hastings & Dakota Ry. Co.* (*Ibid.*, 380). Hence it was not absolutely void, but merely voidable; and the question whether it were void or voidable could not be determined in the first instance, but necessarily involved an adjudication to determine such question. See *Atlantic and Pacific R. R. Co. v. Fisher* (1 L. D., 406).

I therefore concur with you in the opinion that the selection in question was such an appropriation of the land as to except the same from the operation of the company's grant.

Your decisions are accordingly affirmed.

INDIAN HOMESTEADS—ACT OF 1884.

CIRCULAR.

WASHINGTON, D. C., August 23, 1884.

Registers and receivers, U. S. district land offices:

GENTLEMEN: The following extract from the Act of July 4, 1884, making appropriations for the current and contingent expenses of the Indian Department, is published for your information and guidance:

“That such Indians as may now be located on public lands, or as may, under the direction of the Secretary of the Interior, or otherwise, hereafter so locate, may avail themselves of the provisions of the homestead laws as fully and to the same extent as may now be done by citizens of the United States; and to aid such Indians in making selections of homesteads and the necessary proofs at the proper land offices, one thousand dollars, or so much thereof as may be necessary, is hereby appropriated; but no fees or commissions shall be charged on account of said entries or proofs. All patents therefor shall be of the legal effect, and declare that the United States does and will hold the land thus entered for the period of twenty-five years, in trust for the sole use and benefit of the Indian by whom such entry shall have been made, or, in case of his decease, of his widow and heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his widow and heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever.”

Upon any Indian applying to enter land under the above act you will allow him to do so without payment of fee or commissions, but you will require him to furnish a certificate from the agent of the tribe to which he belongs, that he is an Indian, of the age of twenty-one years, or the head of a family, and not the subject of any foreign country. The entries will be numbered in the same series as other homesteads, but the papers, abstracts, and tract books should be annotated “Indian homestead, act July 4, 1884.”

Very respectfully,

N. C. MCFARLAND,
Commissioner.

Approved:

M. L. JOSLYN,
Acting Secretary.

AUGUST 22, 1884.

PRE-EMPTION—SETTLEMENT; SECOND FILING.

STEELE *v.* ENGELMAN.

Engelman settled on a lot included in his filing, which lot he afterwards abandoned.

Having failed to connect himself with any part of the remaining portion of his claim by settlement until after an adverse right attached, he cannot hold as a pre-emptor.

One is not disqualified for filing for land upon which he had settled by reason of having previously filed for land upon which he had not settled.

The ruling in the case of *Ramage v. Maloney* is not applicable where the adverse claim is initiated prior to notice of final proof.

Acting Secretary Joslyn to Commissioner McFarland, August 25, 1884.

I have considered the case of *Erasmus D. Steele v. John C. Engelman*, as presented by the appeal of Engelman from your decision of November 15, 1883, rejecting his final pre-emption proof for the N. $\frac{1}{2}$ of NE. $\frac{1}{4}$ of Sec. 30, and SW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of Sec. 19, T. 17 N., R. 1 E., Humboldt, California.

December 26, 1879, Engelman filed his declaratory statement for the land above described, including therein also Lot 8 of Sec. 30, alleging settlement November 1, 1879.

March 27, 1882, Steele made homestead entry for the SW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of Sec. 19 and N. $\frac{1}{2}$ of NE. $\frac{1}{4}$ and SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of Sec. 30.

July 28, 1882, Engelman gave notice by publication of his intention to make final proof and payment September 16, 1882.

In the notice thus published no reference was made to Lot 8, for the reason, as it appears, that he had prior thereto abandoned said lot for the benefit of his son, D. W. Engelman.

On an affidavit of Steele, duly corroborated, a hearing was ordered by the local office as to Engelman's right to purchase under the pre-emption law.

Steele's affidavit raised the following points:

1. Engelman was not a qualified pre-emptor at the time he filed his declaratory statement.
2. The time allowed the pre-emptor by law for making final proof and payment had expired prior to his making the same.
3. Engelman failed to comply with the requirements of the pre-emption law in the matter of residence.

On the charge as laid in the second specification the local office found for the contestant and recommended the rejection of the final proof.

Your decision citing *Ramage v. Maloney* (1 L. D., 468) overruled the local office, but rejected the final proof on the third ground. I am unable to concur in this conclusion. In the *Ramage* case there was an attempt to initiate an adverse claim after commencement of publication, but such attempt was not allowed to defeat the right of the pre-emptor to make final proof. This case, however, should be distinguished from the one cited, in that Steele had asserted a rightful claim

to the land prior to the issuance of Engelman's notice, subject only to defeat through the pre-emptor's compliance with the law, and as such compliance, through the pre-emptor's default, became impossible, so the right of Steele ripened into a paramount claim for the land. Steele's settlement and entry should have put Engelman on notice that his rights were thereafter in jeopardy if he failed to comply with the law, and his subsequent failure to make proof and payment within the statutory time must therefore entail the forfeiture of his rights when confronted by the adverse claim of the homestead settler.

The allegation as to Engelman's disqualification to file for this land was based on the following facts, which are of record. Engelman, July 17, 1871, filed for the NW. $\frac{1}{4}$ of Sec. 24, T. 17 N., R. 1 W., alleging settlement July 5, 1871. At that time the township, within which the land in controversy is located had not been surveyed, and was not until October, 1877. In September, 1877, he applied for leave to amend his filing, so as to have it cover the W. $\frac{1}{2}$ of NW. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ of Sec. 19, T. 17 N., R. 1 E., setting forth that he had settled on the tract last named in 1871 and continuously resided thereon from that date, and that his improvements were all on said tract also. October 11, 1877, your office granted the request of Engelman, canceled the first filing, and allowed him to file "upon the tract upon which he has actually made settlement," as soon as the township plat should be on file in the local office. Under this order Engelman made the filing which covers the land now in dispute; but it will be observed that said filing did not cover any of the land asked for in his petition for amendment. As a matter of fact the settlement upon which Engelman's right depended was upon Lot 8, and as the first filing was therefore illegal, and the one he expressed a desire to make, in his prayer for amendment, would for same reason have been of no validity, I can see no reason why he was not entitled to file for the land upon which he settled.

The evidence shows that in 1871 Engelman settled upon the said Lot 8, and from that date continued to reside thereon until some time in the latter part of March, 1882, when, as he testifies, he moved on to the land in contest, though change of residence at that time is denied by the contestant. It appears that the claimant's son filed for adjoining land, including Lot 8, and although the claimant had priority of settlement, he waived such right and let his son make final proof and payment for said lot, July 5, 1881. The claimant then bought from his son that portion of Lot 8 upon which he had placed his improvements.

Now the contestant alleges that he settled upon the tract in dispute March 2, 1882; that at that time there was no one occupying or living upon said land, and that he thereafter continued to live on said land in compliance with the homestead law; that although Engelman did in the latter part of March, 1882, build a small cabin on said land, he did not occupy the same as a home, but continued to make his home at Lot 8. Engelman, on the other hand, claims to have begun the erection of a

house in February, 1882, on said land, and to have removed thereto from Lot 8 some time in March; that he lived on said land till after making final proof in September, 1882, when he returned to Lot 8, where he has since made his home. The evidence shows no improvements in the way of cultivating the land, except in the matter of clearing a few acres from trees, and sowing some grass seed by Engelman.

I am of the opinion, after a careful examination of the testimony, that Engelman did not settle upon the land he seeks to buy under the pre-emption law until after the settlement of Steele, when it was too late for him (Engelman) to cure the defect in his claim to the land. The fact of Engelman's residence upon the land after his settlement is also much in doubt, but my conclusion in the matter of settlement precludes the necessity of discussing the subject of such residence.

Although at the time of filing Engelman was qualified, he thereafter abandoned the tract upon which he had his settlement, and so lost the rights he had acquired by such settlement and residence, and failed subsequently to connect himself with that portion of the land not formerly abandoned until after the settlement right of Steele had intervened.

With the modification indicated, your decision is affirmed and the final proof of Engelman rejected.

NEW MEXICO DONATION—RELINQUISHMENT.

MARIA GUADALUPE OLIVAS.

As the relinquishment is made by a female, without explanation of her relationship to the donee, it cannot be accepted as a basis for cancellation of the claim.

Assistant Commissioner Harrison to register and receiver, Santa Fé, N. Mex., August 27, 1884.

The donation claim of Maria Guadalupe Olivas, notification No. 218, embraces the NW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, NE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, Sec. 1, T. 30 N., R. 27 E., and W. $\frac{1}{2}$ of SE. $\frac{1}{4}$ Sec. 36, T. 31 N., R. 27 E., and final certificate No. 109 was issued in the case May 7, 1880.

I am in receipt of your letter of the 8th ultimo, enclosing what purports to be a relinquishment of the aforesaid claim, executed by "Maria Guadalupe Olivas," before the clerk of the probate court of Colfax county, New Mexico; but the affiant is, it appears, a female, and no statement is made as to the decease of the donee, or of the relationship existing between the donee and the party executing the relinquishment.

The paper cannot, therefore, be accepted as sufficient basis for the cancellation of the claim; but as the donation was invalid in its incep-

tion, for the reason that settlement and cultivation thereon were not begun within the time required by law—viz, on or before Jan'y 1, 1858—it is hereby held for cancellation with the usual right of appeal.

TIMBER CULTURE—CONTEST; APPLICATION.

ADAIR v. NEAL.

Where timber-culture contestant filed an application for the land after date of initiating contest, but before dismissal of the contest under the Bundy-Livingston decision, he may have a new contest as of date of said filing in the absence of intervening adverse rights.

Acting Secretary Joslyn to Commissioner McFarland, August 28, 1884.

I have considered the appeal of Albert A. Adair from your decision of July 31, 1883, dismissing contest in the case of said Adair v. Melvin H. Neal.

Neal made timber-culture entry No. 3259, May 15, 1880, covering the NW. $\frac{1}{4}$ of Sec. 9, T. 97, R. 62, Yankton, Dakota.

On August 24, 1882, Adair filed contest against the entry, alleging failure by Neal to comply with the requirements of the timber-culture law, but omitted to file an application to enter the tract in question.

It appears that a hearing was held October 26, 1882, on the conclusion of which the local officers rendered an opinion recommending that the entry be canceled, from which action no appeal was taken.

On January 22, 1883, in pursuance of Department circular dated December 20, 1882, Adair was notified that the contest was dismissed for the reason that he failed to file an application to enter the land at the time of initiating such contest. It appears, however, that on January 4, 1883, he was permitted to file his application to enter the tract.

Having filed the requisite application in the absence of an intervening adverse claim, he will be permitted to proceed with a new contest, dating his right to initiate the same from the time of filing the application to enter; (*Fergus v. Gray*, 2 L. D., 296).

Your decision is therefore reversed.

PRE-EMPTION—FINAL PROOF.

ANNA C. LINDBERG.

Pre-emption, final proof, and affidavit may be executed before a clerk of court, in Dakota or elsewhere, who is also attorney for the pre-emptor.

Acting Secretary Joslyn to Commissioner McFarland, August 28, 1884.

I have considered the application of Mr. George W. Wells for a review of your decision suspending the cash entry of Anna C. Lindberg, No. 7487 (commuted homestead entry No. 11,276), for the NE. $\frac{1}{4}$ of Sec. 3, T. 144, R. 55, Fargo, Dak

August 18, 1882, Lindberg made homestead entry for the tract described, and August 3, 1883, gave notice, by publication, of her intention to make final entry of the same on September 25, 1883, under the provisions of Section 2301 of the Revised Statutes. This notice was signed by Emmans & Miller, as attorneys, and set forth that the proof of the claimant's right to make entry would be made before "W. P. Miller, clerk of the district court, at Hope, Steele county, Dakota," on September 20, 1883. The proof was duly made on the day named, and before the officer specified in the notice. October 11, 1883, the local office allowed the entry on the proof submitted.

When the matter came before your office you suspended the final proof on the ground that as the "W. P. Miller," clerk of the district court, was identical with the "Miller" who appeared as one of the attorneys of claimant, said Miller was, under the laws of Dakota, disqualified to take the proof, by reason of his relation, as attorney, to the claimant, and hence not qualified under the laws of the United States to act officially in the matter of taking said proof.

From your report of August 20, 1884, in this case, it appears that your action was determined by the rule laid down in *Traugh v. Ernst* (2 L. D., 212) and *Sweeten v. Stevenson* (11 C. L. O., 194), together with my order of July 12, 1884.

Now Section 2301 of the Revised Statutes provides that where land has been entered as a homestead it may be purchased at the minimum price "on making proof of settlement and cultivation, as provided by law, granting pre-emption rights."

Looking into the requirements of the pre-emption law with respect to final proof prior to purchase thereunder, we find that Section 2262 of the Revised Statutes provides that before any person shall be allowed to make such purchase "he shall make oath before the receiver or register," touching his qualifications to purchase land under the pre-emption law, while Section 2262 requires that the proof of settlement and improvement "shall be made to the satisfaction of the register and receiver of the land district in which such lands lie, agreeably to such rules as may be prescribed by the Secretary of the Interior." In the one case the officer *before whom* the oath is to be taken is specifically named, while in the other there is nothing prohibiting the taking of the evidence before any officer qualified to administer an oath, so that such evidence, when taken, shall be to the satisfaction of the local office, acting under the regulations provided by this Department.

Both of the sections last referred to were enacted in the pre-emption act of September 4, 1841 (5 Stat., 453), substantially as they now appear in the Revised Statutes; and September 15, 1841, your office, in a general circular of instructions addressed to registers and receivers, said that the witnesses testifying as to the pre-emptor's qualifications and compliance with the law should be sworn "by some officer competent to administer oaths, and if not too inconvenient, by reason of distance

of residence from your office or other good cause, must be examined by you," but provided that in case of distance, sickness, or infirmity the local office was authorized to receive depositions (1 Lester, 360).

In the general circular of September 28, 1842 (1 Lester, 368), your office directed the district officers to require "satisfactory proof" that the pre-emptor had not left land of his own in the same State or Territory to make the alleged settlement.

Your predecessor, in a letter of instructions addressed to the local office at Los Angeles, Cal., March 17, 1877, called attention to the requirements of Sections 2262 and 2263 and the instructions of September 15, 1851 (referred to above), but said that while Section 2262 required the pre-emptor's affidavit to be made before one of the local officers, the practice of your office had been to accept proof taken before any officer qualified to administer an oath when such proof was approved by the local office (2 C. L. L., 603). In the Chisholm case (2 C. L. L., 602), Acting Commissioner Baxter, however, pointed out the difference existing between the two sections, and said that the "proof" referred to in the Los Angeles letter had reference only to the proof of settlement and improvement required in Section 2263, holding that the pre-emptor's affidavit must be executed before the register or receiver in compliance with Section 2262.

The law regulating final proof in pre-emption or commuted homestead cases remained unchanged until the act of June 9, 1880 (21 Stat., 169), when Congress provided "That the affidavit required to be made by Sections 2262 and 2301 of the Revised Statutes of the United States may be made before the clerk of the county court, or of any court of record of the county and State or district and Territory in which the lands are situated; . . . and the affidavit so made and duly subscribed shall have the same force and effect as if made before the register or receiver of the proper land district; and the same shall be transmitted by such clerk of the court to the register and receiver, with the fee and charges allowed by law."

It will be observed that Section 2301 does not specifically name an affidavit that is to be executed before the register or receiver, merely requiring "proof of settlement and cultivation as provided by law granting pre-emption rights"; but as the pre-emption law does require, in Section 2262, the pre-emptor's oath to be taken before one of the district officers, so a form for an oath, to be thus taken, but modified to suit the difference in the proceeding, has been provided by your office for use in proving up a commuted homestead entry, and under the act last cited this oath may now be made before one of the officers therein named.

The Dakota code provides in Section 468, under the head of civil procedure, that "an affidavit may be made in and out of this Territory before any person authorized to take depositions, and must be authenticated in the same way"; and in Section 473 that "the officer before

whom depositions are taken must not be a relative or attorney of either party, or otherwise interested in the event of the action or proceeding."

The case of *Traugh v. Ernst*, cited in your report, was a contest directed against a timber-culture entry in Dakota, wherein the affidavit of contest had been executed before one of the attorneys of record, acting as a notary public; and, under the provisions of the Dakota code, your office held that the official acts of the notary public could not be recognized while he was at the same time acting as attorney, and this Department affirmed your decision. *Sweeten v. Stevenson*, also quoted by you, was a contest against a homestead entry in Missouri, where not only the affidavit of contest, but the testimony also, was taken before one of the attorneys, and in disposing of that case your ruling in the *Traugh* case was approved. In *McCall v. Molnar* (2 L. D., 265), however, attention was called to the difference existing between the two cases cited above, it being held in said case that "in the absence of any provision in the local law, or in the rules of practice adopted by the Department, forbidding the attorney from acting as a notary public in the preparation of an affidavit for his client, I see no reason for declaring a contest illegal because based upon an affidavit of contest thus executed," and also that the decision in *Sweeten v. Stevenson* was not intended to formulate a rule that would render inoperative contests already begun under a different rule.

The departmental order of July 12 (temporarily suspending action in certain cases involving this question), referred to by you, was based upon the disclosure of facts in the *Sweeten* case, especially with reference to the fact that the evidence had been taken, in a contested case, before one of the attorneys, and for the purpose of a further consideration of the question thus presented you were directed to suspend action in similar cases (11 C. L. O., 130).

In none of the cases cited by you was there any discussion on the question raised in making *ex parte* final proof under Sections 2262 and 2301; hence the doctrine laid down in said cases cannot be held applicable to this case, especially if it is found that the law makes a specific provision therefor.

Prior to the act of June 9, 1880, all of the final proof, except the pre-emptor's oath, might be taken before any officer qualified to administer an oath; but by that act the restriction with respect to the pre-emptor's oath was removed, and certain other officers named whose official acts should be recognized in such matter; and the oath, thus made, was to "have the same force and effect as if made before the register or receiver."

It cannot be held that where an officer is specifically designated to do a certain thing by the law of the United States his official authority may be abridged by local enactments; so it must be conceded that now the final affidavit provided for in Sections 2262 and 2301 may be exe-

cut before any of the officers named in the act of June 9, 1880, although under the local law such officer apparently might be incompetent to administer the oath. The authority thus conferred must carry with it the necessary power to take the remainder of the testimony properly forming a part of the final proof. That this was the intention of Congress becomes apparent when we examine the last clause of the act now under consideration, where we find the following: "And the same shall be transmitted by such clerk of the court to the register and receiver with the *fee and charges allowed by law.*" Now, as the law does not provide for any fee or charge to be paid on filing the pre-emptor's final oath, it is evident that reference here is had to the submission of the entire final proof taken before such clerk, with a view to final consummation of the entry. It should be observed that for the purpose of transmitting the proof, the said clerk by the statute is directed to act on behalf of the applicant as his attorney or agent. So that as the law itself establishes such a relation between the purchaser and the officer for one purpose, it cannot be deemed any infraction of the same law if such officer lends his assistance to the preparation of the notice or other papers preliminary to final proof, especially when it is remembered that such services are hardly entitled to the dignity of being considered the proper work of an attorney, as the forms provided in these proceedings render such work merely clerical in its nature.

Your action in suspending the final proof herein was erroneous, and is accordingly reversed. As pointed out herein, the order of July 12th did not apply to cases like this, and you will therefore proceed in all such cases without reference to said order.

NOTICE OF THE RIGHT OF APPEAL.

CIRCULAR.

WASHINGTON, D. C., August 29, 1884.

Registers and Receivers, United States Land Offices:

GENTLEMEN: The practice which prevails at many of the local offices of publishing notices of the right of appeal in contested cases must be discontinued, as the same is not authorized by law or any regulation of the Department, and entails a needless expense on the contestant.

Rule 17, of the Rules of Practice, should be followed in the service of such notices.

N. C. MCFARLAND,
Commissioner.

Approved.
M. L. JOSLYN,
Acting Secretary.

PRE-EMPTION—IMPROVEMENTS.

PRUITT *v.* CHADBOURNE.

The purchase of a prior settler's improvements is not an act of settlement, and cannot initiate a right to the land; upon actual settlement, however, such improvements are regarded as the improvements which the law requires a pre-emptor to make.

Improvements upon land abandoned by a settler are not a bar to settlement by another person.

Acting Secretary Joslyn to Commissioner McFarland, August 6, 1884.

I have considered the case of W. H. Pruitt *v.* Anna Chadbourne, involving the SW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of Sec. 17, and the W. $\frac{1}{2}$ of NE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of Sec. 20, T. 14 S., R. 78 W., Leadville district, Colorado, on appeal by Pruitt from your decision of November 27, 1883, awarding the land to Chadbourne.

It appears that Chadbourne settled on the land August 31, 1882, and filed her declaratory statement the next day. On the 30th of September Pruitt filed his declaratory statement, alleging settlement on the 27th of the same month. When Chadbourne offered her final proofs, Pruitt appeared and contested them. He showed that certain improvements (a cabin, well, fence, etc.) were put on the land by one Anthony in 1880 or 1881, that Anthony sold them to one Van Arsdale on August 10, 1882, and that Van Arsdale sold them to him (Pruitt) on August 31, 1882, the day of Chadbourne's settlement. He also showed that when he afterwards attempted to settle and move his family upon the land, he was prevented by the orders of Chadbourne. He introduced evidence to show that Chadbourne had not complied with the law in respect of improvement and cultivation. The local officers found in favor of Chadbourne, and your office has sustained this decision.

Pruitt gained no right to the land by the purchase of the improvements. Had he made the first settlement, these purchased improvements would have been his improvements in the eye of the law. A pre-emptive right is acquired by settlement—going upon the land and doing something there to indicate to the world that the settler intends to appropriate it for a home—and not by something done away from the land, though with reference to it. Pruitt performed no act of settlement; Chadbourne did—she began to build a house. She found these improvements there, but she knew that the land had been abandoned by Anthony, and they therefore offered no obstacle to her settlement. Having settled, and so acquired a priority of claim to the land, her rights would have been superior to those of Pruitt if he had settled, and therefore the fact that he was deterred from settling or residing on the land by her threats is immaterial. As to her own improvement, cultivation, and residence, the evidence shows them to have been sufficient.

Your decision is affirmed.

LAND WARRANT—FRAUD.

L. C. BLACK.

The rule was enunciated in 1856 that a military bounty-land warrant, in the hands of a bona-fide purchaser for value without notice, may not be canceled on the ground that it was issued under misapprehension or on imperfect or false evidence.

The public has a right to rely on this ruling, and to purchase prima-facie valid warrants freely, with the assurance that a good title is acquired by their assignment

Acting Secretary Joslyn to Commissioner McFarland, August 14, 1884.

I have considered the appeal of L. C. Black from your decision of June 17, 1884, in the matter of the location of bounty-land warrant No. 110,966, for 160 acres, Act of 1855, requiring substitution under Rule 41 of Circular of July 20, 1875, and holding that said warrant must be returned to the Commissioner of Pensions for cancellation.

It appears that the warrant is regular on its face, and was issued to one Robert Hammill on December 12, 1870. By him it was assigned in blank April 11, 1871, was purchased by said Black, transferred to one Matthews, and through him passed into the hands of James M. Turner and John M. Longyear, who located it April 18, 1881, on the SE. $\frac{1}{4}$ of Sec. 20, T. 46 N., R. 42 W., Marquette district, Michigan. There being in the record no exception taken to said assignment and transfers, I assume that you regard them as regular. On May 28, 1880, as it appears, the Commissioner of Pensions filed in your office a caveat against said warrant, on the ground that its issue was procured by fraud. It is proper to say, however, that the record before me contains no satisfactory evidence of said fraud; nevertheless your action aforesaid is based on it. The appellant sets up that as bona-fide assignees for value the locators have full title to the warrant, free from any equities existing between the original parties.

It is unnecessary for me to discuss the effect of the act of March 22, 1852 (Section 2414, R. S.), making bounty-land warrants assignable; it was elaborately treated of in 1856 in an opinion of Attorney-General Cushing (7 Ops., 657). In said opinion it was ruled that such a warrant as that herein involved, in the hands of a bona-fide purchaser for value without notice, may not be canceled on the ground that it was issued under misapprehension or on imperfect or false evidence. Said ruling was then, and has ever since been, accepted as the rule of this Department. It was reiterated by Mr. Secretary Kirkwood in the case of Andrew Anderson (1 L. D., 7). The public at large had a right to rely on said ruling, and to purchase prima-facie valid warrants freely, with the assurance that the title acquired by assignment would be perfect.

Your decision is therefore reversed.

HOMESTEAD—SETTLEMENT; ABANDONMENT.

TIPP *v.* THOMAS.

A. filed homestead application October 26, alleging settlement October 24; B. filed November 9, alleging settlement October 10; A. applied to amend so as to show settlement on October 2: held that it was competent for him to set up and to prove the true date.

Where one in fact abandoned his homestead, (executing a relinquishment, which, however, his attorney failed to file for two weeks), and on the same day settled on another tract, he made a good settlement.

Acting Secretary Joslyn to Commissioner McFarland, August 18, 1884.

I have considered the case of George Tipp *v.* Robert B. Thomas, involving the NE. $\frac{1}{4}$ of Sec. 32, T. 13 S., R. 19 W., Wa-Keeney, Kansas, on appeal by Tipp from your decision of September 19, 1883, awarding the land to Thomas.

The record shows that the land was formerly covered by the homestead entry of one Louis Fischer, which was canceled September 2, 1882, on contest brought by one C. C. Edson. Edson took immediate possession and built a house on it, but did not exercise his preferred right as a successful contestant, and offered his improvements for sale in the same month. On October 26, 1882, Tipp made homestead entry No. 6187, alleging settlement October 24, 1882. On November 9, following, Thomas filed his declaratory statement No. 5299, alleging settlement October 10, 1882. On December 27, following, Tipp filed affidavit of contest against Thomas, alleging priority of right by virtue of his settlement on October 2, 1882, and invalidity of the pre-emption settlement by reason of the fact that Thomas had a subsisting homestead claim at its date. Hearing was had on February 6, 1883. In the following April Tipp filed a motion for an amendment of his application, so as to show settlement on October 2 instead of October 24, and an affidavit setting forth that, being a German, ignorant of the English language, he was not aware of said error until after the hearing and decision by the local office.

As to the alleged illegality in Thomas's settlement, it is founded on the fact that he had a neighboring homestead, which was not relinquished until October 26, 1882. Thomas shows that he executed the relinquishment on October 9 and left it with his attorney, who failed to file it until the 26th, and that he abandoned his homestead on the following day, October 10, and moved with his family upon the land in controversy. It appears that his homestead entry was restricted to eighty acres, and that he applied to pre-empt the land in controversy under the act of March 3, 1879. Said act has relation to new homestead claims and not to pre-emptions, and therefore has no bearing on his rights. Like any other homestead settler, he lost his right to the homestead by abandoning it, and it is immaterial that the contemporaneous relinquishment, which evidenced his good faith in abandoning, was not filed until shortly afterwards. The relinquishment affects the land, not the settler, under the act of May 14, 1880. Having returned the land to the

government, he had a perfect right to settle on other lands as a pre-emptor, if he was qualified. His settlement cannot be impeached on this ground.

The case between the parties, then, rests on the question of priority of settlement, and preliminary to that is the question whether Tipp can be heard to set up a date of settlement earlier than that specified in his application. I think he can. Section 3 of the act of May 14, 1880, makes his right "relate back to the date of settlement," and that date of settlement is to be established as a fact in all cases, whether *ex parte* or contested. If the correct date is alleged, it must nevertheless be proved; if an incorrect date is alleged, the correct date should likewise be proved. To rule otherwise is to hold that a settler is bound to prove by the oaths of himself and witnesses a thing which is in fact not true. The law gives him a right to the land from the date of his settlement, if duly exercised, and I think that this right is not to be defeated by a discrepant allegation he may have made, when he can show that it was made by mistake. I am of opinion, however, that the date alleged in his application should have weight as evidence against him, if he subsequently attempts to show a settlement earlier than that of an adverse claimant.

Next, as to the date of Tipp's settlement, which he fixes as October 2, 1882. . . . On the whole, I am of opinion that he made settlement on the land on October 2, 1882, with a view to taking it as a homestead.

It is urged, however, that Tipp's settlement was illegal, for the reason that he was then holding another tract of land under the pre-emption law. This might be true if he had continued to claim other land, but as he abandoned his pre-emption claim simultaneously with the making of his homestead settlement the latter was perfectly lawful.

As Tipp was the prior settler, qualified, and as he duly applied for the land, his right to it is superior to that of Thomas, and your decision awarding it to Thomas is therefore reversed.

CONTEST—APPEAL; REVIEW.

BISHOP *v.* PORTER.

Where contest for fraudulent inception was dismissed because not proved, and contestant filed motion for review on the ground of newly-discovered evidence, and of superior right to the land: held (1) that a rejected application for entry, in his hands at date of the contest, is not newly-discovered evidence; (2) that said application should have formed the basis of a contest or an appeal, and may not be revived after rejection has become final; and (3) that, on appeal or review, only those rights which are put in issue by the contest may be considered in the face of adverse rights.

Secretary Teller to Commissioner McFarland, July 15, 1884.

I have before me a motion by Thurlow Bishop, filed July 7, 1884, for a reconsideration of my decision of November 14, 1883, in the case of *Bishop v. Porter* (2 L. D., 119).

The original case came up on a contest grounded on Porter's alleged fraudulent entry, and not on Bishop's alleged superior rights. On the record I was compelled to consider the single question of fraud, and, there being evidence of irregularity but not of fraud, to sustain Porter's entry. Bishop was resident on the land, but, there being no evidence of a claim by him for it, I remarked that, if he had desired to assert his superior rights to the land, he should have filed a claim and grounded his contest on it. On March 3, 1884, a motion for reconsideration of said decision was filed by Bishop, grounded on alleged misconstruction of law and evidence, which was dismissed for the reason that it was filed after the time limited in Rule of Practice 77, and because it failed to assign a sufficient cause for reconsideration.

The pending motion is made on the ground of newly-discovered evidence. On examination, said evidence is found to be Bishop's homestead application, which it would appear he executed April 14, 1881, and filed in the local office, but which was returned to him because of Porter's prior entry of record. It need hardly be said that this evidence, which was in his possession at date of hearing, but which was not offered, is in no sense newly-discovered evidence. Hence the motion for reconsideration is barred by Rule of Practice 77.

But apart from this, the Land Department cannot at this date take cognizance of the fact that there was once an application by Bishop. It was rejected by the local officers, and, if he had rights under it, he has slept on them. If he had founded a contest on said application, or appealed to the General Land Office from its rejection, the application would have been a part of the record, and his rights under it considered and determined. But he did neither of these things, and his failure to appeal from the rejection of the local officers nullified the application; whilst his failure to contest on the ground of priority of right left the case without a question of that kind in it. On appeal or review, this office can only consider rights which are put in issue by the contest, and such as are founded on a live application. Bishop's rights were not the issue in the contest, and his application now before me is dead. Other rights to the land have intervened, and become fixed by my former decisions and by the aforesaid decision of the local officers, and they may not now be disturbed.

There is no way in which the Land Department can lawfully revive Mr. Bishop's claim. Were the question between him and the government alone, the Department would not object to his filing a new application, and retaining his land. But here Porter has rights to the tract, which cannot be ignored. Porter made bona-fide settlement prior to Bishop's settlement, and made entry within thirty days thereafter; therefore under Section 3 of the Act of May 14, 1880, his right related back to date of his settlement so as to cut off intervening claims. Bishop's claim which intervened was absolutely cut off if Porter's entry was valid; that is to say, if it was made in good faith and in substantial

compliance with the law. The evidence taken at the contest showed that it was so made, and that, while there might have been irregularity, there was no fraud, and hence Bishop's claim was cut off. Not only so, but, when the case came before me on appeal it was found that Bishop had no claim of record; and now it appears that a claim which he once preferred he abandoned, and rested his rights on a contest on the ground of fraudulent inception. Having chosen his own ground of contest, he must abide by the decision on it; having voluntarily allowed his claim to die, he cannot have a revival of it at Porter's expense.

The motion is dismissed.

FEES—TRANSCRIBING TESTIMONY.

INSTRUCTIONS.

Local officers may not employ clerks, in the pay of the United States, for the purpose of reducing testimony to writing.

Testimony must be written out and signed by the witness at the time of taking it; neither hearings nor reports may be delayed in order to give the writing to particular persons; a per-diem fee for hearing cases or taking testimony may not be charged.

*Acting Commissioner Harrison to register and receiver, Huron, Dakota,
July 23, 1884.*

I am in receipt of your letter of the 15th instant, advising me that the contract heretofore existing between yourselves and Nichols and Spalding has been rescinded. You state that you have asked to be allowed to employ men to do the work of reducing to writing testimony given before you, and that you will make no arrangement until you receive a response to said application. The application presumed to be referred to is your estimate for clerk hire for the current fiscal year, as I find no other communication from you of the date mentioned, viz, July 3, 1884.

You are informed that clerks cannot be authorized for the purpose of doing this work at the expense of the United States. When fees for reducing testimony to writing were paid into the treasury, it was proper that the work should be done by the regularly appointed clerks of the land office. But since the passage of the act of March 3, 1883, you are allowed to retain money received from this source, and the purpose and intent of the act is that the fees are to be so retained for expenses incurred.

The law is very plain, and there ought to be no difficulty in understanding it. Registers and receivers are allowed to charge fifteen cents for each one hundred words actually reduced to writing by them. You may employ such personal clerks or other persons to do this work as you please, and at your own expense, and pay them whatever price may be agreed upon, and take the fees allowed to be charged to the parties for that purpose.

There is no requirement of law that compels parties to have their testimony written out by you. If you do write it out, or cause it to be written out at your own expense, you may charge and retain the fifteen cents for each one hundred words allowed by law. Unless you do write it out, or cause it to be written out at your own expense, you cannot charge anything. And you cannot have this work done for your personal emolument at the public expense. The instructions in my previous letters that testimony, by whomsoever taken, must be written out and signed by witnesses at the time of taking the testimony, and that neither hearings nor reports can be delayed in order to give the writing to particular persons, and that a per diem fee for hearing cases or taking testimony cannot be charged by local officers, remain in force.

The foregoing will be regarded as general instructions to all registers and receivers.

PRE-EMPTION—RESIDENCE.

J. H. ABRAMS.

A settler must establish a bona-fide residence upon the land before excuses for absence (poverty, sickness, or the necessities of business) will be accepted. Absence must be the exception, and residence the rule.

Where the claimant, an unmarried man, a clerk in a neighboring town, charged with the support of his mother's family, and claiming no other home, made the usual improvements, but resided in the town, and slept on the claim (on an average) once a week, his final proof, offered at the expiration of six months, is rejected. He may re-offer it prior to the expiration of thirty-three months from date of his settlement.

Acting Secretary Joslyn to Commissioner McFarland, September 1, 1884.

I have examined the case presented by the appeal of J. H. Abrams from your decision of January 23, 1884, rejecting his final pre-emption proof for the NW. $\frac{1}{4}$ of Sec. 34, T. 163, R. 52, Grand Forks, Dakota.

April 20, 1883, Abrams filed his declaratory statement, alleging settlement on the same day, and offered his final proof October 27, 1883. The proof submitted shows that the settlement was made as alleged; that a house eight by ten feet, and stable ten by twelve feet, were erected, and five acres broken.

It also appears that the pre-emptor, who is a single man, and was at the time of making his filing living in Pembina, and engaged there as a clerk in a real estate office, has since his filing continued to reside for the greater part of the time in Pembina. In a supplemental affidavit, which accompanies the customary final proof, the pre-emptor alleges that he had no home except that upon his claim, but that being poor, and charged with the support of his mother and brothers and sisters, who resided in Pembina, he found it impossible to reside continuously upon the land. "That he went out to said land and slept thereon as many nights as it was possible for him to do, owing to his employment; that

the number of nights he slept thereon will average fully once a week in every month."

While it has been held repeatedly that continuous residence was not required in order to entitle the pre-emptor to purchase, such decisions have invariably gone upon the ground that a residence at some period had been fairly established upon the land, and that absence therefrom was the exception, and presence thereon the rule. In such cases, poverty, sickness, or the necessities of business, have been held to constitute a good excuse for the absence.

In this case, however, the final proof is offered within the shortest period possible under the law, during which time the pre-emptor has in no proper sense of that term established a residence upon the land, his presence thereon being the exception and absence therefrom the rule.

Although you rejected the final proof offered, you said that such rejection should not prejudice the pre-emptor's right to show compliance with the law at any time before the expiration of thirty-three months from date of settlement, and in this conclusion I concur.

Your decision is affirmed.

FEES—TRANSCRIBING TESTIMONY.

INSTRUCTIONS.

There is no authority for making two charges (for original and copy) for transcribing testimony.

Commissioner McFarland to register and receiver, Mitchell, Dakota, September 2, 1884.

I am in receipt of the register's letter of the 26th ultimo, relative to costs of transcribing testimony taken on cross-examinations in contested cases, in accordance with amended Rule of Practice 15, and desiring to know whether the word "transcribe," as used in said rule, is intended to refer to the "first writing down of the cross-examination," or to "the copying of the same."

You are advised that you have no authority to make two charges for taking testimony. You can charge fifteen cents once for each one hundred words reduced to writing by you and at your individual expense, and transmitted in readable form to this office, and you cannot charge any more.

Amended Rule 15 requires the whole cost of cross-examination to be paid by the party making such examination, and the rule is not affected by the decision in case of *Foster v. Breen* (2 L. D., 232), referred to by the register.

If parties choose to employ stenographers to take down and write out testimony, they may do so. But in such case they may make their own contracts, and you can have no interest in such contracts, nor make any

charge in connection with work so done. If you cause the testimony to be taken down and written out, you must do the whole for the legal charge of fifteen cents for each one hundred words.

Your attention is called to instructions of July 23, 1884 (3 L. D., 105), addressed to the Huron office.

REGISTRATION OF MAIL MATTER.

CIRCULAR.

WASHINGTON, D. C., September 3, 1884.

The Postmaster-General having decided that, under the terms of the act of July 5, 1884, "the fees on official mail matter registered elsewhere than at the Washington Post-Office must be paid," paragraph three of Department Circular of July 8, 1884 (3 L. D., 7), is hereby so far modified as to conform to said decision.

M. L. JOSLYN,
Acting Secretary.

WASHINGTON, D. C., September 10, 1884.

GENTLEMEN: Attention is directed to the foregoing copy of Department circular of September 3, 1884. Hereafter receivers and surveyors-general, acting as disbursing agents, will pay necessary registration fees from the advances for contingent expenses and transmit with their quarterly contingent expense accounts the voucher of the postmaster for such fees for the entire quarter.

Very respectfully,

N. C. MCFARLAND,
Commissioner.

PRACTICE—APPLICATIONS AND AFFIDAVITS.

INSTRUCTIONS.

Applications may be filed with, and affidavits may be made before, a local officer only when he is in the discharge of his official duty, in the local office, and during business hours.

Commissioner McFarland to F. D. Hobbs, inspector, September 4, 1884.

SIR: I am in receipt of your letter of the 26th ultimo, stating that you find in some districts that local officers are in the habit of transacting business out of office hours and outside of the land office, and you instance as follows:

"Claimants hunt up one of the officers at any hour of the day or night, either at his private residence or on the street, or may-be out of town somewhere, and swear to certain papers then and there. These papers

are not received by the officer at the time, but are retained by the attorney of the claimant until next morning, when they are presented at the counter at nine o'clock."

You state that this is generally done "as a matter of accommodation to the claimant, and for the purpose of enabling him to get back to his home or business by an early train, perhaps."

You also state that you have instructed local officers that all land-office business should be attended to at the land office, and nowhere else, and during office hours only, and that the swearing of parties by them outside of said office and hours is irregular and improper, but that some of the officers object to such instructions as unwarranted by the instructions of this office, and they think you too technical.

You are advised that the instructions given by you to local officers in this matter are correct, and strictly in accordance with the decisions and instructions of this office. It has repeatedly been held that applications handed to one of the officers out of the office, and after office hours, without the required fee, is not a legal application; (see *Gregory v. Kirtland*, 1 C. L. L., 228.)

The duties of local officers are to be discharged in their respective offices, and during the hours devoted to public business. When the law requires affidavits to be made before the register or receiver, they must be made before such officer officially, when in the public discharge of his official duties, or the affidavits cannot be recognized as a basis of entry.

An application is not complete until the required affidavit is made, and then the certificate must be issued, the fees or money paid, the receipt issued, and the proper records made; and all these steps must be taken in proper time and order. If the affidavit is authorized to be made before any other officer than a register or receiver, and is so made, it can, of course, be filed with the application; but if the affidavit is made before either the register or receiver, it must be made as a part of the regular proceedings at the time the application is presented.

Registers and receivers have no authority to administer oaths and affirmations generally, nor are they authorized to do public business privately or in chambers. Their place of business is the land office, and their business with the public must be conducted openly, publicly, and regularly, and not privately or in secret or otherwise irregularly.

The practice referred to by you may sometimes be a matter of accommodation, but it is liable to result in abuses and the securing of preference rights of entry by favored persons over those who present themselves at the land office in the proper manner and at the proper time.

You will adhere to the instructions heretofore given.

PRE-EMPTION—RESIDENCE.

EUGENE J. DE LENDRECIE.

Where the claimant, an unmarried man, a clerk in a neighboring town, claiming no other home, made the usual improvements, but, after residing for a month on the land, lived most of the time in town, revisiting the land at intervals of several weeks, his final proof, offered at the expiration of a year, is accepted.

Acting Secretary Joslyn to Commissioner McFarland, September 13, 1884.

I have considered the appeal of Eugene J. De Lendrecie from your decision of February 9, 1884, rejecting his final pre-emption proof for the SE. $\frac{1}{4}$ of Sec. 22, T. 145, R. 57, Fargo, Dakota.

June 30, 1882, De Lendrecie filed his declaratory statement, alleging settlement on the same day, and made his final proof July 1, 1883.

The proof submitted shows that settlement was made as alleged, followed by residence during the month of August, 1882. He has erected upon the claim a house, twelve by fourteen feet, and a stable, ten by twelve feet, and broken fifteen acres of land, his improvements being valued at two hundred and fifty dollars.

In a supplemental affidavit that accompanies his final proof, he sets forth that he is a single man, engaged as a clerk in Fargo; that he has no other means of support for himself, or improvement for his claim; that consequently he has been absent from the land the greater part of the time, but at no time for more than a few weeks, except during the winter of 1882, when the heavy snow prevented him from reaching the land; that twice he had gone to the land for the purpose of voting at elections in that precinct; that he has had no other home, and has expended upon the claim all his spare resources.

I am of the opinion that the pre-emptor should be allowed to purchase on the final proof offered. The character and extent of his improvements, together with his acts showing a bona-fide intention of making his home upon the land, being sufficient under the circumstances to excuse him from the necessity of showing a continuous residence.

Your decision is therefore reversed.

PRIVATE CLAIM—APPEAL; SUBSTITUTION.

KING *v.* LEITENSORFER.

The rulings of the Commissioner on June 27, 1883 (2 L. D., 378), and November 16, 1883 (*Idem*, 374), are approved. Mrs. King may be allowed a hearing in the event of further proceedings on Leitensdorfer's appeal.

Acting Secretary Joslyn to Commissioner McFarland, September 15, 1884.

* * * It further appears that the attorneys for Mrs. King filed a motion in the Supreme Court of the United States, in said case of *Craig v. Leitensdorfer*, on appeal from the United States circuit court for the

district of Colorado, to substitute the name of Mrs. King as defendant in error, in place and stead of that of Thomas Leitensdorfer, and, in case said motion is disallowed, that Mrs. King may intervene and be heard in all subsequent proceedings in said cause.

On January 7, 1884, the Supreme Court made the following order with reference to said motion: "The motion for substitution is denied, but printed arguments may be filed, by counsel for Mrs. King, on the final hearing of the cause or upon any motions made in the progress of the cause which may be supposed to affect her interests."

I concur with you that your decision of June 27, 1883, was a final determination of the matter as presented by the application of Mrs. King, and that an appeal therefrom by her to this Department was properly taken. The motion to dismiss, however, should have been made to this Department, and not to your office. The appeal was filed in time, reckoning from the date of notice to the attorneys residing in Colorado, and when said appeal was accepted by you your jurisdiction over the matter ended; (*McGovern v. Bartels*, 3 C. L. O., 70).

In the departmental decision of June 18, 1884, in the case of Rafael Chacon *et al.* (2 L. D., 590), it was held that "Leitensdorfer's claim stands finally rejected so far as executive action goes." Your decision of June 27, 1883, so far as the same denies the substitution of Mrs. King in the place of said Leitensdorfer in said appeal, is affirmed.

In view, however, of the decision of the supreme court of Colorado in the case of Leitensdorfer, appellant, *v.* Mrs. King, and of the decision of the Supreme Court of the United States upon Mrs. King's motion in the case of Leitensdorfer *v.* Craig, I see no reason why, should any further action be taken in your office with reference to Leitensdorfer's appeal, Mrs. King may not be advised of it, and be allowed a hearing in any proceedings that may be supposed to affect her interests in the premises.

OFFICIAL TELEGRAMS.

CIRCULAR.

WASHINGTON, D. C., September 17, 1884.

Telegrams from subordinate officers of the Department to the Secretary of the Interior must be prepaid.

In this connection it is suggested that greater care should be taken to reduce the words of a telegram to the least possible number.

H. M. TELLER,

Secretary.

PRE-EMPTION—FINAL PROOF; TESTIMONY.

INSTRUCTIONS.

Notice of final proof by the pre-emptor is the only contest against another settler that is necessary; the latter should always be specially cited, and full testimony should be taken.

It is only necessary to make six insertions of notice of final proof in a newspaper that is published weekly.

There is no objection to the taking of testimony near the land, under amended Rule 35, when reasonable cause for so doing is shown.

*Commissioner McFarland to register and receiver, Gunnison, Colorado,
September 17, 1884.*

A formal contest is unnecessary in case of conflicting pre-emption claims. When either party offers to make proof, the other (*who should always be specially cited*) may appear at the time and place fixed, and proceedings should thereupon be had in the same manner as in contest cases.

Notice to make proof is an invitation to all the world to contest the right of the party to make proof, and full testimony should then be taken on both sides, witnesses cross-examined, and the record made up for action and decision in the case.

Final proof notices are not required to be published in seven weekly issues of a newspaper. Six such insertions have been required by departmental rulings. No greater number is necessary.

It is stated upon information that the register declines to allow testimony in contested cases to be taken before some other qualified officer in the county where the land is situated, unless in cases of "extreme poverty." You are advised that such rule, if made, is not in accordance with the spirit and intent of amended Rule 35 of practice. The objects to be served are due regard to the public interests and the reasonable convenience of parties.

There is no objection to the taking of testimony in bona-fide contest cases near the land in controversy, whenever, by reason of distance or other good cause, the parties so desire, or you think expedient.

The judge and clerk of the same court cannot act in public land cases, one as an attorney before the other, and the other judicially in the same cases.

SWAMP LAND—SPECIAL AGENTS.

INSTRUCTIONS.

A special agent may administer oaths while investigating fraudulent claims, but on a hearing in indemnity swamp claims he cannot administer oaths, for he acts as the government's agent, and not judicially.

Commissioner McFarland to Robert L. Ream, special agent, September 17, 1884.

SIR: I am in receipt of your letter of August 25th last, transmitting the indemnity proof for Humboldt county, Iowa, and I find on examination of the same that the witnesses were sworn by you, which action was irregular, and the proof must therefore be rejected.

You are advised that you are not authorized to administer oaths to witnesses who testify in behalf of the State in support of indemnity claims under the acts of March 2, 1855, and March 3, 1857; such witnesses must be sworn by an officer authorized by law to administer oaths. See seventh paragraph on second page of official circular of August 12, 1878.

You are only authorized to administer oaths in the course of your investigations of fraudulent claims.

In obtaining evidence to controvert or test the reliability of evidence submitted by the State, and in taking testimony to determine any facts to be reported by you to this office, you can administer oaths. But it is not your duty to make up cases for the State.

You are to cross-examine the State's witnesses when you are present at the hearing, in which case you act as an agent of the government, and not judicially.

Your attention is called to your instructions from this office, dated June 22, 1883, which clearly sets forth your duties.

ATTORNEYS—ADMISSION TO PRACTICE.

REGULATIONS.

WASHINGTON, D. C., September 18, 1884.

Under the authority conferred on the Secretary of the Interior by the act of July 4, 1884,* it is hereby prescribed that an attorney at law who

* [PUBLIC No. 85.]

"AN ACT making appropriations for the payment of invalid and other pensions of the United States for the fiscal year ending June thirtieth, eighteen hundred and eighty-five, and for other purposes," approved July 4, 1884.

SEC. 5. That the Secretary of the Interior may prescribe rules and regulations governing the recognition of agents, attorneys, or other persons representing claimants before his Department, and may require of such persons, agents, or attorneys, before being recognized as representatives of claimants, that they shall show that they are

desires to represent claimants before the Department or one of its bureaus, shall file a certificate, under the seal of a United States, State, or Territorial court, that he is an attorney in good standing.

An agent or other person who desires to represent claimants before the Department or one of its bureaus shall file a certificate from a judge of a United States, State, or Territorial court, duly authenticated under the seal of the court, that such agent or other person is of good moral character and in good repute, possessed of the necessary qualifications to enable him to render such claimants valuable service, and otherwise competent to advise and assist such claimants in the presentation of their claims.

The Secretary may demand additional proof of qualifications, and reserves the right to decline to recognize any attorney, agent, or other person applying to represent claimants under this rule.

The oath of allegiance required by Section 3478 of the U. S. Revised Statutes must also be filed.

In the case of a firm the names of the individuals composing the firm must be given, and a certificate and oath as to each member of the firm will be required.

Unless specially called for, the certificate above referred to will not be required of any attorney or agent heretofore recognized and now in good standing before the Department.

An applicant for admission to practice under the above regulations must address a letter to the Secretary of the Interior inclosing the certificate and oath above required, in which letter his full name and post-office address must be given. He must state whether or not he has ever been recognized as attorney or agent before this Department or any bureau thereof, and, if so, whether he has ever been suspended or disbarred from practice. He must also state whether he holds any office under the Government of the United States.

H. M. TELLER,

Secretary.

of good moral character and in good repute, possessed of the necessary qualifications to enable them to render such claimants valuable service, and otherwise competent to advise and assist such claimants in the presentation of their claims; and such Secretary may, after notice and opportunity for a hearing, suspend or exclude from further practice before his Department any such person, agent, or attorney shown to be incompetent, disreputable, or who refuses to comply with the said rules and regulations, or who shall, with intent to defraud, in any manner deceive, mislead, or threaten any claimant or prospective claimant, by word, circular, letter, or by advertisement.

MINING CLAIM—PUBLICATION OF NOTICE.

CHARLES W. STEELE.

Publishers must not change figures to words, for the purpose of adding to the length of a notice and the charge for its publication. Newspapers which do so cannot be regarded as "reputable," and will not be designated for the publication of mining notices.

*Commissioner McFarland to register and receiver, Central City, Colorado,
September 18, 1884.*

I am in receipt of a letter from Mr. Charles W. Steele, of Georgetown, Colorado, enclosing copies of the notices of intention to apply for patent in case of mineral applications Nos. 2962, 2963, and 2964. Mr. Steele states that these notices were published in the *Montezuma Millrun*, a paper issued in Summit county, Colorado, owned and published by James R. Oliver. He also states that in the "copy" furnished the paper all courses and distances were given in figures, which the publisher changed into words, refusing to make any deduction from the cost on account of the extra space thus taken up, although charging the maximum price of fifty cents per line. His excuse is that his office did not contain sufficient figures to "set up" the notices as given to him, and that he was compelled to use words. The copies of the notices, inclosed in Mr. Steele's letter, which are evidently clipped from a newspaper, confirm his statement by showing words where figures are usually found in such notices.

This proceeding savors of extortion, and is evidently an attempt to evade the regulation established by authority of Section 2334, Revised Statutes. If the notice issued from your office was so changed as to add to its length by the substitution of words for figures, the charge being the maximum allowed by law, every line so added and charged for was an imposition upon the applicants for patent. While the publisher's reason for making the change in the notice may have been valid, it was no excuse for adding to the cost of publication.

A newspaper in which such changes are made for the purpose of making an additional charge for publication can hardly be characterized as "reputable," nor can it be regarded as a fit medium for the publication of the notices required by the mining laws which it disregards. As stated in Paragraph 88 of the Mining Circular, such abuses will not be tolerated.

You will immediately investigate this matter, and if you find the facts to be as stated above you will inform the publisher of the *Montezuma Millrun* that the notices issued from your office for publication must be followed in the published copy, or, if necessarily changed in the manner stated above, no charge must be made for the excess so occasioned; also that any overcharge made in the manner above described must be returned to the applicants from whom it has been obtained. In case of

the refusal of the publisher so to do, you will cease to regard his paper as a "reputable newspaper of general circulation," or to direct the publication of notices therein. The same principle will guide you in any similar case that may arise.

MINERAL LAND—BUILDING STONE.

H. P. BENNET, JR.

Land chiefly valuable for deposits of building stone, and containing no lodes or veins of quartz or other rock in place, may be entered as a placer claim.

Commissioner McFarland to register and receiver, Leadville, Colorado, September 18, 1884.

I have considered the question raised by register's letter of February 20th last, in regard to mineral application No. 2807 of H. P. Bennet, jr., for his placer claim, situated in Chaffee county, Colorado.

It appears that Mr. Bennet filed his said application in your office on December 4, 1883, and that publication was regularly made, by order of register, in the *Buena Vista Herald* from December 6, 1883, to February 7, 1884, without objection. On February 19, 1884, Mr. Bennet applied to purchase the land embraced in his application, but the register declined to allow the entry because he was "in doubt as to whether the character of the ground is such as to make it subject to pre-emption under the laws relating to placer claims."

In his application for patent Mr. Bennet claims the land as a "deposit of valuable building rock." The register reports that "it is evidently not agricultural land, and there appears to be no lode claim within it or in its vicinity"; also, that he has taken some pains to investigate its character in an informal way, and is satisfied that it is valuable only for the building stone that it contains. Deputy-mineral-surveyor Edwin H. Kellogg in his report, approved by the surveyor-general on November 23, 1883, says: "The quality of the land I would define as alluvial deposit, heavily mixed with water-worn boulders in the portion lying next the west boundary, and about 200 feet wide. The portion lying south of the foot of mountain noted is made up of heavy ridges of gravelly soil with rocky streaks through it. The remainder is covered by a high cliff of granite rocks and its fallen débris. There are not within the boundaries or in the immediate neighborhood any lode claims, or systems of lodes." The value of the claim seems to be entirely in the quarry in the face of the cliff, upon which the applicant has expended, in work and improvements, not less than five hundred dollars.

Section 2319, Revised Statutes, declares all valuable mineral deposits in lands belonging to the United States, and the lands in which such deposits are found, to be free and open to exploration, occupation, and

purchase by citizens of the United States and those who have declared their intention to become such. That stone is a mineral, see the cases cited on pages 509 and 510, C. M. L., 2d ed.; also *Maxwell v. Brierly*, 1 B. L. P., 98. Section 2329 provides for the entry and patent of "claims usually called placers, including all forms of deposit, excepting veins of quartz or other rock in place." In the present case, as the land has been shown to "contain valuable mineral deposits," but no "veins of quartz or rock in place," I think that entry may properly be allowed as a placer claim.

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RAILROAD GRANT—SETTLEMENT ON OFFERED LAND.

EMMERSON *v.* CENTRAL PACIFIC RAILROAD COMPANY.

When a pre-emption claim has attached by settlement, on offered land, though the settler may be in laches with his filing, it is excepted from the operation of any grant which is limited to lands free from such claims. That it was abandoned subsequently, after filing, does not affect the question.

Secretary Teller to Commissioner McFarland, September 18, 1884.

I have considered the case of *Harry Emmerson v. The Central Pacific Railroad Company*, involving the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 29, T. 12 N., R. 8 E., Sacramento district, California, on appeal by the company from your decision of January 7, 1882, denying their right to the land.

The tract is within the 10-mile limits of the grant to said company by act of July 1, 1862 (12 Stat., 494), their rights attached June 1, 1863, and withdrawal was made September 13, 1862. One Thomas Hutchinson, a qualified pre-emptor, settled on the land in 1860, and resided thereon until his death, not filing his declaratory statement, however, until July 20, 1865. On February 18, 1878, the said Emmerson applied to file for the land, alleging that it was excepted from the operation of the grant by Hutchinson's claim. This is the sole question in the case.

Your decision, holding that the land was so excepted from the operation of the grant, rests on the decision in the case of *Trepp v. N. P. Railroad* (1 L. D., 396), in which it was held that a pre-emption claim, not since abandoned, attaching to land within the granted limits of a railroad prior to date of the withdrawal and definite location, excludes it from the withdrawal and from the grant. This decision has since then been frequently approved, and governs the case at bar unless the facts are materially different. It is urged by the Central Pacific Company that the facts are materially different in that in the *Trepp* case the land was "unoffered," whereas in this case it was "offered," having been proclaimed in 1858.

An examination of the *Trepp* case discloses the fact that the character of the land was referred to by way of collateral support, but not as the foundation of the decision. The basis of that decision was the ruling of the Supreme Court in *Johnson v. Towsley* (13 Wall., 72), to

the effect that laches in filing a pre-emption claim does not forfeit the settler's rights against the government; whence it follows that a valid settlement creates a valid claim against the United States. The grant to the Northern Pacific Railroad had been limited to lands "free from pre-emption claims," among others; and as Trepp, though he had not filed his declaratory statement, had a "pre-emption claim," under the said ruling, when the right of the railroad company vested, it was held that it excepted the land from the grant. The land in controversy was unoffered, it is true, and the discussion of the case was therefore properly confined to the laws relating to unoffered lands. The Secretary adverted to the character of the land, observed that there could not reasonably be a forfeiture of it to the government for laches, pointed out the fact that the statute (Sec. 2265, R. S.) expressly subjected it to the claim of "the next settler," and held that, in the case before him, those words must be literally and strictly construed. And then after drawing the conclusion from this and other arguments that Trepp had a "claim" to the tract, and after remarking that "if it were an original proposition such would necessarily be the conclusion," he proceeded to say, "but this question was clearly and positively settled by the Supreme Court in the case of *Johnson v. Towsley*," the ruling in which he then cited and applied as above stated. It is evident, therefore, that the discussion concerning unoffered land might have been omitted without changing the decision.

The land in controversy in the case of *Johnson v. Towsley* was also unoffered land, but its character was referred to only so far as to indicate the law relating to it. The Court say, "it must be conceded that the land was of that class which had not been proclaimed for sale, and his case must be governed by the provision of that section." The provision of that section (now Sec. 2265, R. S.) was that, on laches in filing by the settler, "his claim shall be forfeited and the tract awarded to the next settler, who has given such notice," etc. In construing it the Court say: "If no other party has made a settlement or has given notice of such intention, then no one has been injured by a delay beyond three months; 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 that, if this is not done in 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." The construction then was, that the said provision was intended to protect settlers, and was not intended to protect the government. Now the provision relating to offered land (Sec. 2264, R. S.) is so similar in language that the same construction must necessarily be given it. On default in filing, "the tract of land so settled and improved shall be subject to the entry of any other purchaser." There is no declaration of forfeiture here, as in the former section, and nothing to indicate that Congress intended to provide for an absolute forfeiture; and it

follows inevitably that, as justly remarked by Mr. Secretary Delano, in *Walker & Walker* (1 C. L. L., 293), the construction in *Johnson v. Towsley* applies *a fortiori* to claims upon offered land. Such land therefore is subjected to entry by other purchasers, after laches in filing by the settler, but is not forfeited as against the government. And I know of no decision to the contrary since the case of *Walker & Walker*, just referred to.

In consonance with the decision in the *Trepp* case, I accordingly rule that when a pre-emption claim has attached by settlement to offered land, though the settler may be in laches with his filing, it is excepted from the operation of any grant which is limited to lands free from such claims. In the grant to the Central Pacific Railroad such a limitation was made, and it follows that the claim of *Hutchinson*, in the case before me, excepted the land from the withdrawal and from the grant. That it was abandoned subsequently, after filing, does not affect the question; (*Perkins v. C. P. R. R.*, 1 L. D., 357).

Your decision is for these reasons affirmed.

ENTRY—REJECTED APPLICATIONS.

INSTRUCTIONS.

When an application for entry is found to be erroneous, the practice at some offices is for the local officers to reject it, and, on appeal noted, to reserve the tract for thirty days, during which the application is perfected, or the appeal is withdrawn, and application for another person is filed by the same attorney; this is illegal, and the attempted reservation is void.

Where an application is rejected for defect, an appeal from the rejection bars an amendment of it, and a withdrawal of it for amendment bars an appeal.

Commissioner McFarland to register and receiver, Huron, Dakota, September 22, 1884.

Inspector F. D. Hobbs reports the following practice as prevailing at your office and at some other land offices: That when an application to file upon or enter a tract of land is presented, found defective, and rejected by the register, the attorney immediately files notice of appeal, a note is made upon the plat, and the land thereupon held reserved for thirty days, within which period the application is, perhaps, perfected, or the appeal is withdrawn and the same attorney files another application for another party for the same land. In this manner opportunity is afforded for the speculative covering of the land, and the inspector reports that the practice is availed of very freely.

You are instructed that such practice is without authority, and that while a party whose application is rejected for defect may either amend or appeal, he cannot do both, and he must elect which he will do, and that in neither case can the land be held reserved awaiting such election or action.

When appeal is taken from the rejection of an application to file or

enter, the same must be forthwith transmitted to this office; (see Rule 68). Another filing or entry made during the time allowed for appeal will be subject to any valid rights of appellant as determined by a final decision on the appeal; but the land remains open to any other appropriation until the perfected appeal is actually filed. Mere notice of appeal is not a bar to any other application or entry.

After appeal is taken, an amendment of the application cannot be allowed.

If the party desires to amend, and withdraws his application for that purpose, he cannot thereafter appeal from the rejection of the application as originally presented. A defective application withdrawn for amendment does not withhold the land from proper application by another party.

CONTEST—SPECULATION; ATTORNEYS.

INSTRUCTIONS.

Whether fraud, illegality, or non-compliance with law is alleged against a settler, the government is equally a party to the inquiry; if the contest be withdrawn, the papers must be forwarded to the Commissioner for further action.

It is the practice, to some extent, for attorneys to file contests, sell the right of contest, and withdraw the original and simultaneously file a contest for the buyer; this is illegal, and attorneys engaged in these speculative contests should be reported to the Commissioner.

Commissioner McFarland to register and receiver, Huron, Dakota, September 22, 1884.

Inspector Hobbs reports as a frequent practice in your district that attorneys file contests, sell the right of contest, withdraw the original contest and file another in the name of another party, thus controlling the disposition of the tract for speculative purposes.

You were advised by my decision in the case of *Delaney v. Bowers* (1 L. D. 189) that contests not made in good faith cannot be sanctioned.

Whenever illegality or fraud in the inception of an entry, or non-compliance with law, or other matter affecting the validity of an entry is alleged, the government has an interest in the determination of the facts. Such allegations put the Land Department upon inquiry, and entries against which charges have been made should be investigated, if not through a hearing in contest proceedings then by the Land Department itself. Accordingly whenever a contest has been initiated, and is afterwards withdrawn, you will at once forward the original contest affidavit, with all the papers in the case, to this office, in order that the matter may be placed in the hands of a special agent for investigation, both into the character of the entry and of the contest.

Attorneys engaged in presenting and withdrawing fictitious or speculative contests, or other irregular practices, should be reported to this office for the action of the Secretary of the Interior under act of July 4, 1884; (3 L. D., 113).

CONTEST—HEARINGS; TESTIMONY.

INSTRUCTIONS.

Testimony, taken in short-hand, will not be accepted until fairly written out and signed by the witness.

Hearings must be fixed at the earliest practicable moment, and, if not before the local officers, before a competent officer (not a mere stenographer), who will attend to them promptly; they may not be delayed in order to suit the convenience of certain stenographers.

Commissioner McFarland to register and receiver, Huron, Dakota, September 22, 1884.

Inspector F. D. Hobbs reports it to be your practice to accept testimony in contest cases when the stenographer's notes, and not the testimony as written out, are signed by the witnesses, the attorneys for the parties so stipulating. You are informed that this practice cannot be permitted. Witnesses are not bound by the stipulations of counsel. When testimony is taken in short-hand the notes should at once be written out so that the witnesses can read and sign their testimony before leaving town.

Hereafter no testimony will be accepted until fairly written out and signed by the witness in person.

Where hearings are ordered at your office they must be held at your office, in the presence of the officers, and not elsewhere or before any other officer or person. If you cannot hear the cases, you can order the testimony taken under amended Rule 15 of Practice before some other officer authorized to administer oaths. Stenographers as such are not officers, and parties cannot be cited before them unless they are also officers qualified to administer oaths and are acting in such official capacity.

I am informed that certain stenographers have taken testimony in cases set before you but actually not heard by you, but only by said stenographers; and the inspector states that they now have notes in cases where testimony given some time since is not yet written out, and that they are about forty days behind in this kind of work. Surely there must be in Huron several officers qualified to administer oaths and take testimony, before whom contest cases can be ordered in the event that your business does not permit either of you to hear the case. If not, the testimony should be taken before some clerk of court or other proper officer elsewhere, and as near or nearer the land than Huron. The public business must not be delayed for the purpose of giving the work to persons who are unable to perform it. Nor may hearings be set at distant days, for the purpose of having the testimony written by particular persons. Hearings must be fixed at the earliest practicable moment, and no more cases may be ordered before any officer than he can promptly attend to and complete at the time.

In cases ordered before you, the record must be made up immediately after hearing, your decision promptly rendered, and the papers duly transmitted to this office.

PROTEST CASES—TESTIMONY.

INSTRUCTIONS.

All testimony taken in protest cases must be forwarded to the Commissioner with the opinion of the local officers, whether or not there is an appeal.

Commissioner McFarland to register and receiver, Huron, Dakota, September 22, 1884.

I am informed by the reports of Inspector Hobbs that in protest cases when your decision is in favor of claimant, and there is no appeal, it is your practice to retain the testimony on your files, transmitting to this office only claimant's proof.

The rules of this office require the protest testimony to be sent to this office in all cases, whether appeal is taken from your decision or not, and the same should be accompanied by your opinion in the case. When there is no appeal, the protest testimony should be transmitted in a separate letter, and not with the entry papers.

PRACTICE—RES JUDICATA.

SOHN *v.* TEXAS AND PACIFIC RAILWAY COMPANY.

Application in 1879 for land in granted limits, on the ground that it was excepted by a rancho claim then *sub judice*, was finally rejected; application was filed in 1882 by the same persons for the same tract, on the ground that it was excepted by a pre-emption claim then subsisting; held that the case is not *res judicata*.

Secretary Teller to Commissioner McFarland, September 23, 1884.

I have considered the case of Harrison S. Sohn *v.* The Texas and Pacific Railroad Company, involving the SE. $\frac{1}{4}$ of Sec. 27, T. 18 S., R. 2 W., Los Angeles district, California, on appeal by the company from your decision of November 20, 1833, awarding the land to Sohn.

It appears that the land is within the 20-mile limits of the grant of March 3, 1871, to said company, and was withdrawn for their benefit October 15, 1871. The line of the road has not been definitely located. Sohn filed homestead application for the land April 19, 1882, which was rejected by the local office on the ground that the tract was within the withdrawal for said company. On appeal by Sohn, alleging that a valid pre-emption claim to the tract existed at date of said withdrawal, your office ordered a hearing, and on review of the evidence offered found that such a claim did then exist (made by one Howard Putnam, who filed declaratory statement No. 158 on April 16, 1870, and who resided on and improved the tract until 1872), and that it excepted the land from the withdrawal.

The company object that said evidence does not sufficiently identify the land. On examination of the evidence I find that the land in con-

trovery is sufficiently identified as the identical land which Howard Putnam claimed and occupied at date of the withdrawal.

They object further that the evidence does not sufficiently establish the qualifications of Putnam as a pre-emptor. I find that the evidence shows, by his own and the testimony of two others, that he had all the prescribed qualifications of a pre-emptor.

They object further that the right of Sohn to an entry on this land has been heretofore rejected and the land declared to be withdrawn for the railroad. I find that in 1879 Sohn applied for the land under the pre-emption law, alleging that it was excepted from the grant by reason of its being within the Melijo rancho, which was *sub judice* at that date, and that this claim was rejected, and the rejection became final. As this was an adjudication upon an issue different from that in the case before me, it does not affect the latter case.

The company object finally that Sohn has not shown his own qualifications, or taken the homestead oath. As the land in controversy was excepted from the withdrawal, and has not been appropriated by a definite location of the company's line, this question is exclusively between Sohn and the government.

Your decision is affirmed.

OFFICIAL TELEGRAMS.

CIRCULAR.

WASHINGTON, D. C., September 24, 1884.

The following schedule of rates for government telegrams, as fixed by the Postmaster-General, is published for the information and guidance of all officers, agents, and employés of this Department.

Attention is also invited to Department Circular of September 17, 1884 (3 L. D., 111), directing that "Telegrams from subordinate officers of the Department to the Secretary of the Interior must be prepaid."

H. M. TELLER,

Secretary.

SCHEDULE.

POST-OFFICE DEPARTMENT,

Washington, September 4, 1884.

Whereas, by the act of Congress approved July 24, 1865, entitled "An act to aid in the construction of telegraph lines and to secure to the government the use of the same for postal, military, and other purposes," it is provided that telegraphic communications between the several departments of the government and their officers and agents shall, in their transmission over the lines of said companies, have priority over all other business, and shall be sent at rates to be annually fixed by the Postmaster-General: Now, therefore, by virtue of the authority conferred on me by said act, I, Walter Q. Gresham, Postmaster-General of the

United States, do hereby fix the rates at which such communications (not including those passing over circuits established by the Chief Signal Officer of the Army) shall be sent until the close of the present fiscal year, as follows:

For day messages of not exceeding twenty (20) words, exclusive of the date, twenty (20) cents for distances within one thousand (1,000) miles, with an additional charge of five (5) cents for every additional two hundred and fifty miles or fraction thereof, but for no distance is the rate to exceed fifty (50) cents.

For night messages of not exceeding twenty (20) words, exclusive of date, fifteen (15) cents for all distances below two thousand miles, and for greater distances twenty-five (25) cents.

For both day and night messages an addition of one-fifth the rate is to be made for every five (5) words or fraction thereof in excess of twenty (20) words.

Provided, That in no case shall the government be charged higher rates than the public is charged for the same service.

In computing distances the shortest practicable route of the company transmitting the message shall, in all cases, be the basis of computation.

The rate for all messages in cipher, known as the Signal Service Weather Reports, shall not exceed three (3) cents for each word sent over each circuit as now or hereafter established by the Chief Signal Officer of the Army. All messages sent over a circuit will be dropped at all designated intermediate offices therein without additional charge.

All officers of the United States should indorse upon official messages transmitted by them the words "Official Business," and should report to the Postmaster-General any charge in excess of the above rates.

W. Q. GRESHAM,
Postmaster-General.

TIMBER TRESPASS—PUBLIC LAND.

W. K. ELLIOTT.

Down timber on the public lands may not be appropriated by the public generally.

*Acting Commissioner Harrison to W. K. Elliott, Wiley's Cove, Arkansas,
September 30, 1884.*

SIR: I am in receipt of your request of the 14th of August last, to be permitted to use for purposes of fencing certain "down" timber upon public land.

You are advised that the desired permission cannot be granted, there being no law authorizing such use of public timber.

Enclosed find circulars of June 1 and December 15, 1883, indicating by whom and for what purposes timber growing or being upon lands belonging to the United States may be used.

FEES—REDUCING TESTIMONY TO WRITING.

CALDWELL & SMITH.

Fees may be collected by the local officers for testimony actually reduced to writing by them or their clerks, but not for that reduced to writing by claimants or attorneys and examined by them.

When testimony fees have been improperly collectèd, repayment must be made to the principals and not to their attorneys.

Secretary Teller to Commissioner McFarland, October 1, 1884.

On the 28th of January last, in a letter to the register and receiver at Huron, Dakota (2 L. D.; 665), relative to the payment of fees for reducing testimony to writing in homestead and pre-emption final proofs, you decided that, except as provided by the act of March 3, 1877, such fees can properly be charged and received by local land officers only for testimony actually reduced to writing by them or their clerks.

The matter was brought to your attention on information that at the Huron office, and other local offices as well, the practice prevailed of charging fees under the provisions of the act of March 3, 1883 (22 Stat., 484), in cases where, though the proofs were made before the local officers, the testimony which went to make up such proofs was as a matter of fact prepared and written by claimants or their attorneys. This practice prevailed in the belief on the part of local officers that it was in accordance with the law.

You, however, held that it is without warrant of law, and, in your letter to the register and receiver at Huron, directed that all moneys, now in their hands or not heretofore covered into the treasury, received as testimony fees in cases where the testimony was not written out by themselves or their employés, nor received from clerks of courts, be returned to the parties entitled thereto,—the local officers to determine who are the parties entitled. The Huron office, though justifying its action in the belief that it was entitled to fees in the class of cases under consideration, acquiesced in your decision and determined pursuant thereto to make repayment to the principal in each case,—that is, to the claimants who had made the proof, rather than to the persons who had acted as their attorneys in preparing and submitting such proof. From this action on their part, and from that portion of your decision which relates to the parties to whom payments are to be made, an appeal is entered in behalf of Caldwell & Smith, who claim that, in cases in which they had acted as attorneys in the preparation and presentation of proofs, repayment should be made to them as attorneys, and to them only.

I may here mention an appeal by the register and receiver of the land office at Grand Forks, Dakota, dated the 18th ultimo, and now before me for action.

Said appeal is from that branch of your decision which requires

repayment, and as that is logically, as well as in fact, the first branch of your decision, and has direct relation to the questions involved in the appeal of Caldwell & Smith, it may properly be considered and disposed of in this connection. The register and receiver at Grand Forks claim that they, and similar officers, are legally entitled under the act of March 3, 1883, to fees for all testimony examined by and sworn to before them, whether said testimony has been actually reduced to writing by them or their employees or not, and therefore that you erred in directing any repayment of fees whatever.

Section one of the act of March 3, 1883, provides "that the fees allowed registers and receivers for testimony reduced by them to writing for claimants in establishing pre-emption and homestead rights and mineral entries, and in contested cases, shall not be considered or taken into account in determining the maximum of compensation of said officers." The law quoted makes no provision for the collection of fees. It simply provides for the disposition of certain fees allowed,—that is, allowed under previous laws. We must therefore look to prior legislation for authority to collect fees for testimony. By subdivision ten of Section 2238, Revised Statutes, "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 pre-emption and homestead rights;" and subdivision eleven of the same section provides a like fee for testimony in establishing claims for mineral lands. The section cited contains other provisions relative to fees, but nothing affecting the question at issue; and certainly there is nothing in the language quoted which would justify the construction claimed and urged in argument by the appellants. The statute is so plain and unambiguous as scarcely to admit of construction. Its intent must be found in its language. The only reasonable construction is that which accords with its terms. Applying these rules we find no authority in Section 2238, Revised Statutes, for the collection of fees by the local officers for the examination of testimony by them; it allows fees "for testimony reduced by them to writing." No reasonable interpretation could broaden the meaning of these words, so as to make them include testimony reduced to writing by claimants themselves or their attorneys. The next act bearing upon the subject is that of March 3, 1877 (19 Stat., 403). This act has reference to but one class of proofs, and has been construed as taking them out of the restriction imposed by Section 2238, Revised Statutes. These are final homestead proofs made before a judge, or in his absence before the clerk of a court of record,—the act of 1877 providing that "the register and receiver shall be entitled to the same fees for examining and approving said testimony as are now allowed by law for taking the same." The practice has been to allow the same fees for examining these proofs as if the testimony had been reduced to writing by the officers themselves. The next act at all relevant is that of June 9, 1880 (21 Stat., 169). It is claimed that this act is a mere

enlargement of the act of March 3, 1877, and that, whatever may be said of other laws, it furnishes the authority for the collection of fees contended for. I do not so read it. It has relation solely to pre-emption and commuted homestead cases, and to certain proof therein made before the clerk of a court of record.

The contention is for fees for testimony prepared by *claimants or by their attorneys*, and sworn to before a local land officer. The laws cited by appellants and discussed *supra*, whether considered separately or as *in pari materia*, cannot, I think, be reasonably construed as authorizing the allowance of testimony fees in such cases. I find nothing either in the language or reason of the law which would justify so broad an interpretation. A law, or laws, allowing or providing for fees cannot be enlarged so as to grant fees by implication or inference. There must be plain authority for such allowance. Such authority I do not find for the allowance of fees as asked.

As already stated, fees for testimony are provided for in Section 2238, Revised Statutes, which allows fees for testimony reduced by local officers to writing. The only enlargement is that made by the acts of 1877 and 1880, which allow certain fees in connection with testimony taken before a judge or clerk of court. No mention is made in any act of testimony prepared by claimants or their attorneys, and the necessary conclusion is that there was no intention on the part of the law-makers to allow fees to local officers for such testimony. A different conclusion would be going outside of the language of the law, and certainly beyond its reason, for the purpose of forcing a claimant to pay a register and receiver for work which he himself had done. The writing of testimony is merely clerical work; the purpose of the law relative to fees for testimony is to compensate the register and receiver for such work when done by them, and the act of March 3, 1883 (*supra*), in effect so states. That portion of your decision which directs the repayment of fees collected for testimony prepared by claimants themselves, or by their attorneys, is affirmed.

This settled, the question recurs on the appeal of Caldwell & Smith from your refusal to direct payment to them of fees erroneously collected in cases in which they had acted as attorneys. They make such claim and demand recognition (1) on the general ground of their authority as attorneys, and (2) under the provisions of the *lex loci*, citing, among other local laws, Subdivision 3 of Section 6, page 32, Revised Codes, Dakota, 1877.

As to the first-mentioned ground of their claim, they aver that because they had been employed as attorneys in the preparation and presentation of the proofs, they are still attorneys for the collection of the money to be repaid to claimants; in other words, that the attorneyship did not terminate with the making of the proofs, but is continuous. The natural and almost, if not quite, necessary presumption, and, in the absence of evidence to the contrary, I may say conclusion, is that,

having been employed to do certain things, appellants' attorneyship ceased when those things had been performed. The preparation of the proofs was in its nature clerical, except that it involved some knowledge of forms and of the rules of evidence. Being of this character, I do not see how any authority as attorney could, without special arrangement to that effect, extend beyond the date of the completion of the work for which they were employed. It might as well be said that an attorney employed to draw a deed, a lease, or a contract, had under such employment a continuous power of attorney. Such a practice would on its face be fallacious.

As to the second claim—the effect of the *lex loci*—I find, upon reference to the Dakota laws, that Subdivision 3 of Section 6, on page 32 of the code, provides that an attorney and counselor has power “to receive money claimed by his client in an action or proceeding during the pendency thereof or afterwards, unless he has been previously discharged by his client, and upon payment thereof, and not otherwise, to discharge the claim or acknowledge satisfaction of the judgment.” The foregoing, invoked in support of appellants' claim, is, I think, entirely irrelevant, and can have no application to the case under consideration. Said statute would be effective in a case where suit is brought for the recovery of money, and would authorize the attorney in such case to receive the money. These attorneys were not employed for such purpose, but, as already indicated, they were employed for the performance of a specific duty, to wit, the preparation and presentation of certain proofs, and when that duty was performed the relation of counsel and client ceased. Any subsequent attorneyship must be under a new authority expressly conferred by the act of the principal.

But it is contended that in some cases appellants were under contract to make proofs for certain sums of money, and that repayment should therefore be made to them rather than to the persons who had been their clients, they having the first right to the money. I am unable to see the force of this reasoning. If contracts were made for certain gross sums, it must be presumed that the calculations on which the contracts were based included the fees which had to be and were paid for testimony. Therefore, whatever excess of payment there was in such cases was, as a matter of fact, paid by the claimants, and the repayment should be made to them and for their benefit. My conclusion, therefore, is that appellants have no such interest in the subject-matter in question as to give them a standing as appellants, and their appeal is therefore dismissed. Your decision is affirmed.

Feeling it but just that registers and receivers should derive all possible benefit from the act of March 3, 1883, I instruct you to prepare an order providing that all testimony for claimants in establishing pre-emption or homestead rights, or mineral entries, and in contested cases, shall be reduced to writing, under the direct supervision of registers and receivers, whenever such testimony is taken in towns where local offices are established.

PRIVATE ENTRY—LAND REDUCED IN PRICE.

WEIMAR ET AL. v. ROSS.

A private entry on land not subject thereto, because not re-offered after being reduced in price, is against law and invalid, and must be set aside, as ruled in *Sipchen v. Ross*; and the pre-emption applications (in this case) may be accepted as of their dates of filing, and duly proceeded with, leaving the general question involved in the *Sipchen* case for further consideration as other cases involving it are presented.

Secretary Teller to Commissioner McFarland, October 2, 1884.

I have considered the appeal of J. B. Weimar from your decision of March 7, 1882, rejecting his application of January 24, 1882, to file a pre-emption declaratory statement upon certain tracts in Sec. 29, T. 43, R. 35 W., Marquette, Michigan, alleging settlement the 21st day of the same month; also, the appeal of Patrick D. Murphy from your decision of March 9, 1882, rejecting his application of February 24, 1882, to file a like statement upon certain tracts in Section 36 of the same township, alleging settlement the 9th of the same month; and also the appeal of Nicholas Kirst from your decision of March 20, 1882, rejecting his application of January 31, 1882, to file a like statement upon certain tracts in Section 26 of the same township, and alleging settlement the 27th of the same month.

The question in the three cases being the same in each case, I consider them as one. You rejected these applications because the tracts were embraced in the prior private entries of John D. Ross.

A question similar to that involved in the present cases arose in the case of *Sipchen v. (the same) Ross*, wherein it was held by this Department, October 30, 1882 (9 C. L. O., 181), that, under the ruling of the Supreme Court in the case of *Eldred v. Sexton* (19 Wall., 189), the entry of Ross being unauthorized by law, and therefore invalid—because the land had not been re-offered since its reduction in price by the joint resolution of Congress of July 5, 1862 (12 Stat., 620)—must be set aside. This ruling harmonizes with that in the earlier case of *Wilcox v. Jackson* (13 Peters, 498), that land must be “legally appropriated” in order to its severance from the mass of public lands, and also with the later one in the case of *Belk v. Meagher* (104 U. S., 279), that a thing required to be done by law, but not done in accordance therewith, is as if not done.

As the applications now in question were for land embraced in the prior entries of Ross—illegal for the reasons stated in the case of *Sipchen v. Ross*—and the land was consequently unappropriated, the ruling in that case must also apply to these cases.

Upon request of parties claiming interests in lands affected by that decision, its application to the present cases, and others represented to be similarly situated, was suspended by my order of November 23, in

order to enable them to ask relief of Congress from the effect thereof. Such application was made at the last session, but the House Committee on Public Lands reported adversely thereto, believing that the proper executive officers or courts having jurisdiction should proceed to dispose of such cases according to law, and no further action was had thereon (H. R. Report No. 684, first session, Forty-eighth Congress).

As there seems no valid reason for further delay in the disposal of these cases, nor for continuance of the order of November 23 (which is hereby revoked), you will permit the applications of Weimar, Kirst, and Murphy (which seemed meritorious under the facts in each) to be filed as of the date thereof, and proceed with them in due course, leaving the question involved in Sipchen's case, and other questions, for future consideration as other cases may be presented, and as the facts of each may require.

Your decisions in the applications named are accordingly reversed, and the papers are herewith returned to you.

RAILROAD GRANT—HOMESTEAD SETTLEMENT.

SOUTHERN PACIFIC RAILROAD COMPANY (BRANCH) *v.* LOPEZ.

Settlement on unsurveyed land (within the granted limits of this road) at the time the company's right attached, with a view to homesteading it when surveyed, is such a claim as excepted the land from the grant.

Sec. 3, act of May 14, 1880, is not to be construed as operating so as to divest rights acquired under other laws prior to its enactment.

Secretary Teller to Commissioner McFarland, October 2, 1884.

I have considered the case of the Southern Pacific Railroad Company (Branch Line) *v.* Jose Juan Lopez, involving the S. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of Sec. 25, and the N. $\frac{1}{2}$ of NE. $\frac{1}{4}$ of Sec. 36, T. 5 N., R. 17 W., S. B. M., Los Angeles district, California, on appeal by the company from your decision of May 19, 1881, holding Lopez's homestead entry thereon for approval for patent.

It appears that the land is within the granted limits of the road, plat of which was filed April 3, 1871, and withdrawal thereunder made May 10, 1871. Township plat was approved July 17, 1880. On September 20, 1880, Lopez made said homestead entry No. 640, claiming under the act of May 14, 1880 (21 Stat., 140). His final proofs, on February 16, 1881, showed settlement in December, 1866, and the necessary qualifications, residence, etc., to entitle him to patent, and thereupon final certificate No. 275 was issued to him.

Section 3 of the act of May 14, 1880, allows to a homestead claimant, on either surveyed or unsurveyed land, "the same time to file his application that is now allowed to settlers under the pre-emption laws to put their claims on record," and declares that "his right shall relate back

to date of settlement the same as if he had settled under the pre-emption law." This act introduced several new features into the homestead law, and among others the initiation of a homestead claim by settlement, whether the land is surveyed or unsurveyed. Prior to the passage of the act, the only lawful initiation of a homestead claim was by an entry or filing (except in cases coming under Section 2294, Revised Statutes), and there was no right of homestead upon unsurveyed land. In granting these additional rights to homestead settlers, it is not to be supposed that Congress intended the act to operate so as to divest rights already acquired under other laws; and hence it cannot be held that, in the case before me, it clothed Lopez with any right against the Railroad Company superior to that which he had at date of the definite location of their line, or that it destroyed any vested interest which they may have thereby acquired in the land. If he had no right to the land at said date, it went to the Railroad Company under the grant, and the act referred to had no effect on it.

The company claim that it did so go to them under the grant. The act of July 27, 1866 (14 Stat., 292), granted only such lands as were "not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or *other claims or rights*" at date of definite location; and provided that "whenever prior to said time any of said sections or parts of sections shall have been *occupied by homestead settlers*, pre-empted," etc., lien lands might be taken. Now a homestead entry, which must be made on surveyed lands, would be within the descriptive terms "other claims" without doubt; but the question material to the case before me, wherein the land was not surveyed, is whether a homestead settlement on unsurveyed land, with a view to entering it when surveyed, is within said terms. I think it is. Construing together the granting words and those respecting the lieu land selection, it is evident that one of the "other claims or rights" excepting land from the operation of the grant was "occupation by homestead settlers." The word "occupied" and the idea conveyed by it were foreign to the homestead law at date of this act, as an essential element in the reservation of land. I need not recite the numerous decisions of the courts and of the Land Department, which settle the principle that under the homestead law it is the "entry" which reserves land (except for the short period during which it is reserved by settlement under the act of May 14, 1880), and not any occupation by the claimant before or after it. The language of the granting act is therefore peculiar in this respect, and we are to suppose that it was used deliberately, with knowledge of then-existing law, and for a special and important purpose. We must interpret it in accordance with this evident purpose. Congress was aware that by this act it was making grants of lands far beyond the line of the government surveys, in regions occupied and to be occupied largely by settlers awaiting the advent of the surveyor to prefer their claims. By Section

6 the homestead law was extended to the even sections after survey, and expressly withheld from the odd sections before and after survey, and yet in Section 3 land "occupied by homestead settlers" was excepted from the grant. Congress knew that unsurveyed land could not be "entered" as homesteads; it had in terms prohibited homestead "entry" on these lands; it was aware that only by such "entry" could a claim be appropriated and reserved from the grant, without express exception; and therefore in the use of the words "occupied by homestead settlers" it intended to make such express exception, and to indicate a different kind of appropriation by a class of settlers not within the letter of the homestead law, though clearly within its spirit, namely, those who had made a home on the public domain in advance of the surveys, with the intention of subsequently claiming it under said law. If this was not the purpose, then the employment of the peculiar language referred to was a vain and useless thing; and such a thing we are not to suppose Congress has done (92 U. S., 733).

It therefore follows that the land claimed by Lopez, whose proofs are not questioned in any particular, and who preferred his claim promptly upon survey, was "occupied by a homestead settler" when the grant to this company took effect, and hence excepted from the operation of the grant.

Your decision is affirmed.

FEES—REDUCING TESTIMONY TO WRITING.

CIRCULAR.

WASHINGTON, D. C., October 3, 1884.

Registers and Receivers, United States Land Offices :

GENTLEMEN: It is ordered that hereafter all testimony for claimants in establishing pre-emption or homestead rights, or mineral entries, and testimony in contested cases, shall be reduced to writing under the direct supervision of registers and receivers, whenever such testimony is taken in towns where local offices are established.

Very respectfully,

L. HARRISON,
Acting Commissioner.

Approved October 4, 1884.

H. M. TELLER,
Secretary.

TIMBER TRESPASS—PUBLIC LAND.

HENRY WILLIAMS.

In view of the fact that the trespasser was misled as to the character of the land and his rights, and of the improbability of maintaining a civil or criminal action against him, his proposition to pay \$2.50 per acre stumpage value, \$2.50 per acre for the land, and the expenses of watching and caring for the wood, may be accepted.

Secretary Teller to Commissioner McFarland, October 4, 1884.

I am in receipt of your letter of the 26th ultimo, and the several documents therein enumerated, relative to the alleged trespass by Henry Williams, of Sweetwater, Nevada, in cutting cordwood from certain described public lands in California.

In view of the facts set forth, especially that Williams believed said land to be unsurveyed (such belief being based upon statements made by Mr. Garrard, deputy United States surveyor in that locality), and that he understood the land to be mineral land (as affidavits from B. T. Brown, district mining recorder, and other parties declare it to be, the records of your office to the contrary notwithstanding), and that he believed that, in any event (the land being in the immediate vicinity of mineral land) he had a right to cut timber therefrom for mining and domestic purposes; and in view of your suggestion as to the impossibility, under the circumstances, of maintaining either criminal or civil action against the trespassing party, I concur in your recommendation that Williams's proposition be accepted, to wit: That he pay for the wood its stumpage value of two dollars and fifty cents (\$2.50) per acre, making a total of three hundred and twenty dollars (\$320) for the fractional sections trespassed upon (aggregating 128 acres), and two dollars and fifty cents (\$2.50) per acre for the land itself under the act of June 3, 1878, and that he pay all expenses incurred in watching and caring for said wood. You will notify the special agent and the proper receiver of public moneys accordingly.

PRE-EMPTION—FINAL PROOF.

INSTRUCTIONS.

The questions and answers in the printed forms for pre-emption proof must be read over to the witnesses by the officer taking the proofs; he cannot otherwise properly make the required certificate.

Such officer is required to test the reliability and the extent and means of knowledge of claimants and witnesses by cross-examining them.

Commissioner McFarland to register and receiver, Olympia, Washington Territory, October 6, 1884.

I am in receipt of information to the effect that you and other officers in your district before whom testimony in pre-emption cases is taken are not in the habit of asking each question in the printed blanks furnished

for taking testimony in such cases, but simply ask the affiant if he has read the affidavit and if that is his signature, such affidavit usually being signed when submitted, and then the party is sworn.

It is expected that each question and answer in such blanks will be read to the parties making the affidavit by or in the presence of the officer before whom such affidavits are made. Your attention is called to the notes appended to the forms of proofs prescribed in the general circular of this office, which require the officer taking proofs to certify over his official signature that the questions and answers were so read. It is not permissible for registers and receivers or other officers to make that certificate when the questions and the answers have not been read to the parties in the presence of the attesting officer, nor should proofs made otherwise be accepted by you.

Officers taking affidavits or proofs in public land cases are also required to cross-examine claimants and witnesses to test the reliability of their answers and the extent and means of the information of witnesses.

See Secretary's decision of January 30, 1884, in case of Henry Buchman (3 Rep., 275); also office instructions of April 3, 1884, to register and receiver, Huron, Dakota Territory (3 B. L. P., 253), and to register and receiver, Humboldt, California, August 19, 1884 (3 L. D., 84).

Registers and receivers are expected to strictly comply with these instructions, and to advise all officers taking affidavits or proofs in public land cases of said requirements.

PRACTICE—APPEAL; INTERVENOR.

OJO DEL ESPIRITU SANTO.

Notice and grounds of appeal must be filed in the General Land Office, and served on the opposite party, within the time required by Rules 86 and 87.

One not a party to the record will not be recognized as appellant, nor as petitioner for rehearing, unless he first discloses on oath his interest in the case.

*Assistant Commissioner Harrison to surveyor-general, Santa Fé, N. M.,
October 7, 1884.*

* * * It appears from your letter of August 12, 1884, that you notified the parties that the extension of time for appeal beyond October 1 could not be recognized, and that you forwarded to them, in each case, a copy of said office letter; (3 L. D., 59).

Under date of September 3, ultimo, H. M. Atkinson, as attorney for Mariano S. Otero and Pedro Perea, transmitted to this office their petition having reference to the survey aforesaid, and at the same date, as appears, filed with you an appeal of the same parties from the decision of this office of June 14, 1884, aforesaid (2 L. D., 425).

Said petition is in the name of said parties as "part owners of said grant," and sets forth upon information and belief that the survey to

which said decision relates is incorrect in other respects than that to which the amendment is directed, and that they purpose to forward proofs to substantiate their allegations—(the non-production of which with their petition they excuse)—said petition being directed, apparently, to the procuring of a review of the case in this office and the extension of the limits of the claim. It suggests that the appeal of the petitioners be held in abeyance for forty days to enable them to procure and forward their proofs. It is signed "Mariano S. Otero, Pedro Perea, by Henry M. Atkinson, their atty. in fact," and is only verified by the oath of said attorney, who deposes "that the matters and things set forth in the foregoing petition he believes to be true from information obtained relative thereto from credible parties."

First. The first question presented by this state of the proceedings is as to the validity of the appeal. Rule 86 provides that "notice of an appeal from the Commissioner's decision must be filed in the General Land Office, and served on the appellee or his counsel, within sixty days from the date of service of notice of such decision." Rule 87 allows ten days additional when the notice is given through the mails by the register and receiver or surveyor-general. The notice in this case was given by the surveyor-general, by mail, June 25. The seventy days allowed for appeal by the two rules referred to, therefore, expired September 3. The notice of appeal bears date September 23, and was received and filed in this office September 30, twenty-seven days after the time allowed by the rules. . . . Rule 86 requires that, besides being filed in this office, the notice of appeal shall be "served on the appellee, or his counsel, within sixty days from the date of service of notice of such decision." Rules 93, 94, 95, and 96 prescribe the manner of service of such notice, and of making proof of the same. In this case no notice is alleged or shown to have been given. Rule 102 provides that "no person not a party to the record shall intervene in a case without first disclosing on oath the nature of his interest." The appellants are not parties to the record, nor is either of them a party thereto, the first appearance of their names in any proceeding in the case being in the petition and appeal aforesaid; and they have not, nor has either of them, disclosed on oath the nature of their interest, or of the interest of either of them, in the case or in its subject matter.

I must hold the appeal not well taken, it not having been filed in time, the parties thereto not being qualified to intervene in the case by reason of failure to make proof of interest as required, and not having shown service of notice on any party as appellee.

Second. The appeal (which, if held valid, would take the case from the jurisdiction of this office,) being dismissed, the petition aforesaid remains to be considered. The same objections apply to its reception as to the appeal, under rules 102 and 99,—the petitioners not having disclosed their interest on oath, nor accompanied their petition with proof of service on any opposing party. The petitioners only allege

part ownership. The grant in the case was made to Luis Maria Cabeza de Baca, and the claim was confirmed to his numerous heirs, whose names are set forth in their petition to the surveyor-general for confirmation. Besides, there are the conflicting claims of Ignacio Chaves on the west, and of the Pueblos of Zia, Santa Ana, and Jemez overlapping the Ojo del Espiritu Santo claim,—both under grants senior to that of the latter, and, though unconfirmed, favorably reported to Congress for its action. The owners of these claims, as well as the co-owners of the petitioners in the Ojo del Espiritu Santo claim, should have been served with notice of the proceeding and copies of the petition; and for want of proof of such service and of the disclosure by the petitioners of their interest on oath, the petition cannot be received.

The petitioners are, however, at liberty to re-file the same, accompanied by the proper proofs, if they choose to do so.

HOMESTEAD—CONTEST.

KINCAID v. JEFFERSON.

Until the government takes some action to enforce the forfeiture of a homestead entry, contest against it may properly be allowed, although brought after the expiration of seven years from the date of the entry.

Where final proof has not been made in seven years, the local officers are required to promptly notify claimants that thirty days will be allowed them wherein to show cause why their entries should not be canceled.

Commissioner McFarland to register and receiver, The Dalles, Oregon, October 7, 1884.

I have received your letter of August 12, 1884, transmitting the record of contest in the case of John L. Kincaid *v.* Thos. Jefferson, involving the W. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of Sec. 34, T. 1 S., R. 23 E.—homestead entry No 25, dated Nov. 18, 1875.

At the date of filing contest, April 26, 1884, more than seven years from date of entry had elapsed. It has been sometimes ruled that contest should not be allowed after the expiration of such time, because the entry is then subject to cancellation for failure to make proof, and a contest is not necessary in order to clear the record of the forfeited entry. It is my opinion, however, that until the government takes some steps to enforce the forfeiture, contest may properly be allowed.

In the present case contest was brought on the ground of abandonment; notice by publication; no appearance by claimant. The evidence shows that Kincaid never resided upon, improved, or cultivated the land. Your decision is in favor of contestant, and the same is affirmed, and the entry canceled.

Your attention is called to the fact that nearly a year and a half had elapsed after the expiration of seven years from date of entry in this case, and no steps toward canceling the entry for failure to make proof had

been taken, notwithstanding your explicit instructions under circular of December 20, 1873, which require registers and receivers in every case when proof has not been made at the expiration of seven years to notify the party of his non-compliance with the law, and that thirty days from service of notice will be allowed him to show cause why the claim should not be declared forfeited, and the entry canceled.

A form of notice for this purpose is furnished, and registers and receivers are required to forthwith report to this office upon the expiration of said thirty days.

You are enjoined that these rules must be strictly complied with, and registers and receivers should be careful to see that delay is not permitted to occur in giving the required notices and forwarding their reports.

TIMBER TRESPASS—SETTLER'S CLAIM.

J. HUNTLEY.

Down timber on unsurveyed public land may be used by an actual settler thereon under the pre-emption or homestead law.

Commissioner McFarland to J. Huntley, Ellensburg, Oregon, October 10, 1884.

SIR: I am in receipt of your letter of the 23d instant making inquiries in regard to the disposal of "down" timber on unsurveyed land.

You are informed that since settlement upon unsurveyed lands may be made the basis of a homestead or pre-emption entry to the extent of 160 acres, a person occupying and claiming such land under said laws is deemed entitled to the use of the timber. Actual settlers will not be interfered with in taking so much timber as they may need for their own use and the support of their improvements.

You are, however, informed that existing restrictions in regard to the taking of public timber apply equally to unsurveyed as to surveyed lands.

PRIVATE CLAIM—MEXICAN GRANTS.

EL TAJO GRANT.

Instructions concerning investigation and report by the local officers, upon a Spanish or Mexican grant in New Mexico, under act of July 22, 1864.

Commissioner McFarland to surveyor-general, Santa Fé, New Mexico, October 10, 1884.

In your letter of August 8th last, relating to the El Tajo claim, originating under an alleged Spanish or Mexican grant to Diego de Padilla, you recommended an investigation of said claim.

Referring to said recommendation, your attention is called to the 8th Section of the act of July 22, 1854 (10 Stat., 308), and the instructions

of this office of August 21, 1854 (Annual Report G. L. O., 1854, p. 19), issued in pursuance of said act. By said section your office is authorized and charged with the duty to ascertain the origin, nature, character, and extent of all claims of this class in the Territory of New Mexico; empowered to issue notices, summon witnesses, administer oaths, and do all other necessary acts; and required to make a full report on all such claims, with the decision reached as to the validity or invalidity of each, to be laid before Congress for its action. This act, and the instructions aforesaid, prescribe the only means of investigation in such cases.

It appears from statements in your letter that in 1872 Franz Huning and brother, claiming to derive title from the son or sons of Padilla, filed papers and proofs in your office relating to said claim; and I infer therefrom that they then made, or intended to make, presentation of their claim for investigation and report under the act of 1854 aforesaid. As the public surveys are being extended over lands possibly covered by this claim, and settlements of the same are likely to follow, which will lead to complications and embarrassments in case the validity of the claim shall be finally established, it is highly important that its right to recognition and its approximate limits should be determined as soon as practicable, in order that it may be known whether the reservation from disposal by the United States declared by said act applies to said land in favor of said claim, and if so the extent of such reservation.

If, therefore, upon inspection of the papers and proofs filed by Huning and brother, as aforesaid, it appears that they made presentation of the claim under the act of 1854, and in such form as to entitle it to consideration under the provisions of said act, you will proceed to examine the case upon the papers and proofs presented and such other documents relating thereto as you may find in the archives in your office, and decide and report the same, with triplicate transcript of the record, in the usual manner.

As the case has been so long suspended, or held (as the case appears), without action, it is suggested that you notify the claimants of your intention to examine and report upon the claim, appointing an early day when they may appear and present further proofs, if they desire to do so. Besides the validity of the original grant, their ownership or title will be subject to inquiry.

You may also call and examine witnesses, or introduce other proofs on the part of the United States, if any are known to be available. Though the claim if found valid cannot be definitely located till after confirmation, as a part of the inquiry you will endeavor to ascertain approximately, or as nearly as possible, the location and boundaries or limits of the same, and advise this office thereof to the end that the land covered by the claim may be withheld or withdrawn from settlement or disposal, pending final action thereon.

OREGON DONATION—ERRONEOUS PATENT.

JOHN CROSBY.

Directions for the presentation of a case for reissue of patent, where, by error of description, it excludes land not within, and includes land without, the true limits of the claim.

Assistant Commissioner Harrison to register and receiver, Oregon City, Oregon, October 10, 1884.

I am in receipt of the register's letter of the 26th ultimo, transmitting a patent, dated November 13, 1865, issued on certificate No. 729, for the donation claim No. 40, of John Crosby and his wife, Rachael Crosby, of Multnomah county, Oregon.

There is also transmitted with said patent the affidavit of Hannah M. Smith. In this affidavit Mrs. Smith swears that she is the present owner of said tract of land, "except a small tract of the same, which she conveyed to one James M. Stott, on or about the 20th day of March, 1883, and which said small tract she is desirous, if need be, to further confirm to said James M. Stott." It appears, by a certificate attached to said patent, that the same has been made a matter of record in the county of Multnomah; Oregon, the county where the land patented is situated.

Mrs. Smith now desires to surrender said patent and have a new one issued in lieu thereof, for the reason that the present patent describes the initial point of the survey of the aforesaid claim to be 9.01 Chains north and 4 Chains west of the southwest corner of the southwest quarter of Section 22 (in township one, north, of range three, east), whereas the official survey shows that this point is 9.01 Chains north and 4 Chains east of said corner. This error in the description of the initial point of the official survey of said claim makes the patent exclude lands upon the east covered by said survey, and include lands upon the west not claimed, which lie wholly without the limits of the donation claim.

I have, therefore, to instruct you to return to the party or parties in interest the aforesaid patent, which is herewith inclosed, and advise them to execute thereon a deed of relinquishment to the United States of all the land which is included in said patent which lies outside of said claim as officially surveyed, and to cause said relinquishment to be properly acknowledged and recorded in the record of deeds of said Multnomah county. You will also advise the persons interested that they must furnish this office with a properly executed abstract of title prepared by the custodian of the records of deeds of the aforesaid county. After the deed of relinquishment is recorded it should be certified by the proper officer, and the patent returned here through your office, accompanied by the abstract of title herein referred to, and if the parties making the relinquishment are the proper persons to execute

the same, as shown by said abstract, proper action will at once be taken by this office, with a view to the issuance of a new and correct patent, in accordance with the official survey of the claim in question.

REGISTERING MAIL MATTER.

CIRCULAR.

WASHINGTON, D. C., October 11, 1884.

Surveyors-General, Registers and Receivers, and Special Agents :

GENTLEMEN: My attention having been called to the fact that in many instances undue amounts for registration fees on letters and packages have been expended, you are notified that hereafter you will register such matter only as may be specially required to be registered by instructions of this office.

The general correspondence of your office with this office or the public is not required to be registered, and such registration will not hereafter be paid for by the United States.

The practice of transmitting official returns in registered packages will be discontinued.

Paragraph 40 of circular of September 15, 1883, requiring certificates of deposit on account of surveys to be transmitted in registered packages, is rescinded.

Notice of hearings in contest cases required by Rule 14 of practice to be mailed by registered letter are to be sent by contestants, who must furnish proof thereof, and are not to be registered at the public expense.

Notices of hearings and decisions in cases where hearings are ordered on behalf of the government, will be registered as a matter of evidence. No other registration fees will be paid by you without further authority.

Very respectfully,

L. HARRISON,
Acting Commissioner.

Approved October 15, 1884.

M. L. JOSLYN,
Acting Secretary.

HOMESTEAD—CULTIVATION.

CHARLES C. WATERS.

Both residence and cultivation are required in homestead cases, except in adjoining farm homesteads. In grazing countries, grazing stock has been held equivalent to cultivation.

*Asst. Commissioner Harrison, to Chas. C. Waters, esq., Little Rock, Ark.,
October 11, 1884.*

I am in receipt of your letter of the 4th inst., in which you state that you are preparing an argument in a case before the courts involving the question "is a homesteader required both to reside upon and cul-

tivate" the land embraced in his entry. You refer to the language, especially to the word "or," used in Section 2291, U. S. Revised Statutes, and ask if there have been any Federal Court decisions on that point, etc.

In reply I have to state that it has been uniformly held by this office and by the Department proper that both residence and cultivation are required in homestead cases. Under date of October 18, 1871, Assistant Attorney-General Smith, in the case of Abraham Rider (1 C. L. L., 233), held that the word "or" in Section 2 of the act of May 20, 1862 (Sec. 2291, R. S.), was intended to apply to that class of entries designated as "adjoining farm" homestead entries, and that both residence and cultivation are required in other cases. October 3, 1880, Secretary Schurz, in submitting a case to the Attorney-General for confirmation under Sections 2450 to 2451, Revised Statutes, held that stock raising and dairy productions are so akin to agricultural pursuits that, in grazing countries, use of the land for that purpose, with proof of residence, is a satisfactory compliance with the homestead laws, which opinion was concurred in by Attorney-General Devens.

This uniform ruling or construction of law has been confirmed by Congress in subsequent enactments. See act of June 8, 1872 (Secs. 2305 and 2308, U. S. Rev. Stat.), and act of March 3, 1879, granting additional homestead rights to settlers on lands within railroad limits, which provides, . . . "and the residence and cultivation of such person upon and of the land embraced in his original entry shall be considered," etc. I will refer you to the cases of *U. S. v. Thos. McEutee*, U. S. Dist. Court of Minnesota (4 C. L. O., 138), and *Bellinger v. White* (5 Neb., 399.)

FINAL PROOF—NOTICE; PROTEST.

INSTRUCTIONS.

Publication for thirty days of notice of final proof by claimant, and the thirty days' notice by contestant required by Rule 8, are in harmony. The claimant must be prepared to defend his claim against all charges and counter-claims, with right to postponement or adjournment if necessary. Non-appearance under the notice does not bar contest under Rules 4 to 6, if satisfactory reasons therefor are given.

Commissioner McFarland to register and receiver, Gunnison, Colorado, October 11, 1884.

I am in receipt of your letter of the 25th ultimo referring to mine of the 17th ultimo; (3 L. D., 112). You desire to know whether the instructions that evidence should be taken in protest cases at the time set by notice for taking proofs are to be understood as superseding Rule 8 of published Practice, requiring notice of thirty days to be given of all hearings.

You are advised that there is no conflict between said instructions and the rule referred to. In cases of contest instituted upon allegations against an entry, contestant gives notice of thirty days to claim-

ant. When claimant advertises his intention to make proof he gives a notice of thirty days. The required notice is therefore given in both classes of cases. Claimant having by his notice invited objections to his entry, and a time and place being set where any adverse claim may be asserted, he is expected to be prepared to defend his claim against all charges and counter claims which may be presented. If more time is necessary to obtain evidence, a postponement may be had in the usual manner or by consent of parties, as in ordinary contest cases, or an adjournment to a future day to the local office can be had if parties so desire.

But non-appearance under such notice by an adverse claimant does not bar his right to institute a contest against the entry under Rules 4 and 6 of Practice after entry has been made upon a showing of sufficient cause, and stating satisfactory reasons why he did not appear at the time set for making proof. And an entry may in the same manner be contested for fraud, or for failure to comply with the law, at any time before patent issues.

TIMBER TRESPASS—SETTLER'S CLAIM.

W. B. PATTEE.

For trespass upon a homestead claim, suit must be brought by the settler; but such trespass is also an offense against the United States, for which the offender is liable.

Commissioner McFarland to W. B. Pattee, Florence, Wisconsin, October 11, 1884.

SIR: I am in receipt of your letter of the 8th instant inquiring as follows: "If a lumberman cuts pine and removes it from a homestead while the homesteader is absent during the winter months, what redress has the homesteader?"

You are informed that the homestead settler must seek his individual redress in the local courts. Such trespass is, however, an offense against the United States, and the trespasser is equally as liable as if the timber was cut from unentered land.

PRIVATE CLAIM—INDEMNITY SCRIP.

THOMAS MEAGHER.

The scrip having been assigned to an unknown person, the name erased, and that of the claimant inserted, the latter is required to show his title and right of possession, and to account for the said erasure.

Assistant Commissioner Harrison to register and receiver, Duluth, Minn., October 13, 1884.

Upon an examination of the assignment of certificate of location M 37, subdivision No. 1, issued by this office August 2, 1879, in part satisfaction of the claim of the cities of Baltimore and New Orleans, under

a decree of the Supreme Court of the United States, and applied in payment of commuted homestead entry No. 2079, of Thomas Meagher for the SE. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of Sec. 21, the SW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Sec. 22, the NE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of Sec. 28, and the NW. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of Sec. 27, T. 62 N., R. 23 W., Minnesota, from James Austin, the assignee of the said confirmees, it is found that the scrip was assigned to some person unknown, and the name erased and that of Thomas Meagher substituted.

You will please require Mr. Meagher to show, by affidavit, how he came in possession of said scrip, and to account for the erasure in the body of said assignment, upon the receipt of which you will transmit the same to this office.

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TIMBER CULTURE—DEVOID OF TIMBER.

BOX *v.* ULSTEIN.

An "adequate supply of timber" exists, within the meaning of the rule in *Blenkner v. Sloggy*, and bars a timber-culture entry, when on a section there are, or probably will be, ten acres of trees, or sixty-seven hundred and fifty trees, living and thriving.

That many trees are small, and others burned off, or cut off, does not change the fact that nature has already done for the section what the timber-culture law was designed to do.

Acting Secretary Joslyn to Commissioner McFarland, October 11, 1884.

I have considered the case of William Box *v.* Carl Ulstein, involving timber-culture entry No. 2279, on the NE. $\frac{1}{4}$ of Sec. 31, T. 153, R. 43, Crookston district, Minnesota, on appeal by Box from your decision of November 28, 1883, sustaining the entry.

This contest was brought on the allegation that the land was not devoid of timber, and, therefore, not subject to timber-culture entry. After hearing, the local officers recommended cancellation of the entry for the following reasons, to wit: "From the testimony introduced, we find that said section contains groves of natural timber, covering not less than twenty-five acres of its area, the timber being of such kinds as are used for domestic purposes in that vicinity." In disapproving their recommendation your office remarks that "your [their] decision of May 25, 1883, was in accordance with the rulings then in force; but in view of the decision in the case of *Blenkner v. Sloggy* (2 L. D., 267), I am of the opinion that Mr. Ulstein's entry should remain intact." In said case the finding of fact was that there were five hundred good timber trees growing in one corner of the section, in the bend of a creek, and so situated that there was no prospect of their spreading to any other part of the section, which was wholly prairie. The rule laid down was that "the question as to whether a section is devoid of timber is to be determined by ascertaining whether nature has provided, what in time will become an adequate supply [of timber] for the wants of the

people likely to reside on that section." The rule was applied to the facts as above recited, and the entry was sustained.

The facts in the case before me are quite different from the foregoing. Here it appears that, whilst the section is mostly prairie, there is a stream crossing it from northwest to southeast, along whose banks trees grow thickly; that this stream overflows its banks each year, making in the prairie what Ulstein calls "sink holes," wherein flourish groves of trees; and that this timber covers some twenty-five acres or more of the section. The trees, according to Ulstein's own testimony, are willow, poplar, balm of Gilead, and oak, all recognized as timber by the Land Department. Many of both the poplar and oak trees are shown to be from six to thirty-six inches in circumference, and from three to thirty feet in height. Mr. Ulstein called most of this timber "brush," but admitted that it was "pretty heavy," and that it "consists of willow, poplar, balm of Gilead, and a little oak from one foot up to twenty feet high, and from two to six inches around." Other witnesses showed that this "brush" consisted largely of vigorous, thrifty oak saplings, of which over one thousand were counted in one grove of eight acres; that there were six groves on the section, which all contained, in addition to the oaks, poplars and other trees in a generally healthy condition, and that in the whole there was not more than one acre of what could properly be denominated "brush." The finding of the local officers, above recited, is therefore fully justified by the evidence obtained at the hearing.

The question, then, is, has nature in this case provided what in time will become an adequate supply of timber for the inhabitants of the section? I think that we find the proper standard of "an adequate supply" in the timber-culture act, which provides for the planting of ten acres to timber, and for the existence of six hundred and seventy-five living and thrifty trees to the acre at date of final proof. Sixty-seven hundred and fifty trees on a section, or the probability that from the existing natural supply there will be that number in the future, is clear proof that the land is not devoid of timber. In the case before me there is no estimate of the aggregate number of trees and saplings now growing, but I am convinced from the testimony as a whole that there are more than sixty-seven hundred and fifty which will make timber trees.

It is in evidence, and strongly urged, that most of these trees are small and young, and that some of them have been injured or destroyed by fire. But this does not change the fact that nature has already done all that the timber-culture act was designed to accomplish; that is, nature has already provided at least twenty-five acres of land in that section capable of producing, and actually producing, good timber trees. What she has done heretofore it is to be presumed she will do hereafter. Wherefore the timber-culture act is not to be called into action, when it appears that nature has supplied ten acres of good timber-producing land in a section, though at any given time it may appear that most of the trees are young, or that they have been burned off or cut off.

It is urged by counsel for Ulstein that most of the trees on this section are poplar or cottonwood, and that at date of this entry trees of the poplar family were not regarded as timber trees. This is an error. The entry in question was made November 26, 1881, and by instructions of December 4, 1879 (2 C. L. L., 670), this Department directed that such trees be classed as timber trees.

Your decision is reversed, and you are directed to cancel Ulstein's entry.

CUSADEN *v.* PERLEY.

Registers and receivers may not require the parties, or either of them, to appear before them—nor may they take supplementary testimony—when they have directed the testimony to be taken by some other officer.

Acting Commissioner Harrison to register and receiver, Gainesville, Florida, October 14, 1884.

I am in receipt of your letter of the 8th instant, in the matter of the contest of Arthur W. Cusaden against homestead entry No. 9951 by Frank L. Perley, stating it to have been your practice, in cases where testimony is authorized to be taken before another officer than yourselves, to require the parties to also appear before you at the time set for hearing at your office, and to dismiss contests when contestant fails so to appear.

You are advised that this practice is erroneous. Under amended Rule of Practice 15, testimony in contest cases is authorized to be taken elsewhere than at the land office expressly for the purpose of saving parties the expense of going to the land office. When testimony is so taken, your duty at the "hearing" set before you is simply to consider and act upon the testimony taken before the designated officer. You cannot require the parties, or either of them, to appear before you after you have directed the testimony to be taken by some other officer, nor can you receive supplementary testimony offered by either of the parties after the taking of testimony before the designated officer has been closed.

BOUNTY LAND—CANCELED WARRANTS.

INSTRUCTIONS.

Registers and receivers are each entitled to one per cent. of the amount received, by the local or general land office, for canceled military bounty-land warrants; deposits for such purposes will hereafter be made in the proper local office, if there is one in the State, and the receiver will receive and account for such moneys as receipts from other entries of lands are received and accounted for.

Acting Commissioner Harrison to register and receiver, Des Moines, Iowa, October 15, 1884.

I am in receipt of the register's letter of July 26 last, and the letter of the receiver dated Aug. 2, 1884, and in reply thereto have to state

that the register and receiver are each entitled to one per cent. of the amount received on account of cash substituted for canceled military bounty-land warrants, provided that the money is received by the receiver or deposited through this office to his credit.

I have further to state that the practice heretofore prevailing, of allowing such moneys to be deposited through this office in States where there is a local office in existence will cease, and any substitution of cash for canceled warrants will be made through the proper local office, and the receiver thereof will receive and account for such moneys as receipts from other entries of the public lands are received and accounted for.

PRIVATE CLAIM—SECOND PATENT; ACCEPTANCE.

THE MORA GRANT.

Patent omitting certain reservations was issued, but was recalled before delivery and cancelled; a new patent issued, reserving to the United States the occupancy of military and timber reservations, and buildings and improvements thereon, which was received without protest, except as to reservation of land: held, that the protest did not apply to the reservation of buildings and improvements.

Second patent having been accepted with full powers, all objections not then asserted were waived, and, said patent being valid and outstanding, application for delivery of the canceled patent is denied.

*Acting Commissioner Harrison to O. D. Barrett, esq., Washington, D. C.,
October 15, 1884.*

I am in receipt of your letter of the 25th ultimo, requesting, as attorney for the owners of the Mora grant, in New Mexico, that the patent issued under date of June 22, 1876 (subsequently canceled and now on file here) be delivered to you.

A résumé of the leading facts in the case is necessary to an explanation of my views in the matter of your demand. The Mora grant, reported as No. 32 (José Tapia *et al.* grantees), was confirmed by Section 3 of the act of Congress approved June 21, 1860 (12 Stat., 71). It was surveyed in the months of July and August, 1861, by deputy-surveyor Thomas Means (area 827,621.01 acres), which survey was approved on August 5, 1871, by T. Rush Spencer, then surveyor-general for the Territory of New Mexico.

A conflict existed between the Mora grant and the claim of John Scolly *et al.*, as favorably reported by the surveyor-general; but the extent of this interference was not at that time a matter of certainty, as the exterior boundaries of the Scolly grant had not then been surveyed.

The military establishment of Fort Union, including a large timber reservation, was entirely within the limits of the Mora grant, as surveyed. The necessities of the public service demanded the continuance of the post of Fort Union, as was strongly represented to the Secretary

of the Interior by the military authorities. This office, upon the papers before it, made a full report in the case to the Department under date of May 19, 1876, holding that the claimants under the Mora grant were entitled to a patent for the lands embraced in said approved survey, "reserving, however, from said patent the lands within the exterior limits of said survey reported for confirmation in favor of John Scolly *et al.*," etc.

Accordingly, under date of June 22, 1876, a patent was issued to Tapia and the other grantees, with the usual reservation as to the rights of third persons, with a further reservation of the land that might be found to be embraced in said Scolly claim, but with no reference whatever to Fort Union or its appurtenances,—which possibly was an oversight, as it is reasonable to suppose the government would protect its own interests. This instrument was transmitted to the surveyor-general for New Mexico for delivery on June 28, 1876, was recalled by telegram and also by letter dated July 11, 1876, and was returned with the surveyor-general's letter of July 25, 1876.

In the mean time (July 19, 1876) the Secretary of War filed in the Department an "appeal" from the aforesaid office decision of May 19, 1876, and requested a review of the case, etc. The papers were forwarded to Hon. Secretary Chandler, who, under date of August 12, 1876, returned the same, stating that "although the communication of the Hon. Secretary of War is denominated an appeal, it is not strictly such, but rather a notice to this Department that the issue of said patent may embarrass his Department by reason of the fact that Fort Union, a military post of the United States, is situated upon said grant"; that "since the date of the Hon. Secretary's letter, however, and after personal conference with him, an exception has been inserted in said patent, which, in my opinion, and as I understand in the opinion of the Hon. Secretary, will secure to the United States its rights in said post, and buildings and property of the government thereto"; . . . "and the papers are herewith returned in order that the patent when issued may be delivered to the parties entitled thereto."

On August 15, 1876, the original patent referred to was canceled in this office, and on the same day and date a second and amendatory patent for the Mora grant was issued, which was transmitted to the surveyor-general, at Santa Fé, on the 19th of the same month, and was delivered by said officer to Thomas B. Catron, as part owner of the claim and attorney for co-owners. The amendatory patent, dated August 15, 1876, as above set forth, was similar in all respects to the first patent, except that in the granting clause the following stipulation was inserted, viz: "and with the stipulation that the United States herein expressly reserves to itself the buildings and improvements situated on the Fort Union military and timber reservations as at present established, together with the possession and use of the same, and the right to remove said buildings and improvements upon the discontinuance or abandonment of said reservations by the United States."

Hon. S. B. Elkins, as part owner in the grant and attorney with Mr. Catron for co-owners, represented the case before this office in person, and not only made no objection to the cancellation of the first and issuance of the second patent containing said stipulation as to the Fort Union property, but held that the maintenance of said military post for a time upon said grant would be a benefit to the inhabitants.

It is unnecessary to discuss here the right (so often sustained by the courts) of this office to issue a second patent under certain circumstances and conditions. I will, therefore, refer now to the acceptance of the Mora patent dated August 15, 1876, by Thomas B. Catron for himself and co-owners. You have been furnished with a certified copy of Mr. Catron's receipt, and will perceive that he first, over his own signature, acknowledges the receipt of the instrument from the surveyor-general under date of Aug. 31, 1876. Upon the same paper, and over his own signature for himself "and as agent for the other owners in said grant," he accepts "said patent under protest, claiming and reserving the right to claim and insist in all legal ways that I and the other owners of said grant are the owners of the whole of said grant and tract of land as surveyed, except so much thereof as may be patented by the government in favor of the owners of the grant to John Scoley and others, and that no part of the land included in the survey in said patent can be legally reserved to the government of the United States, and that no right is in anywise admitted or acknowledged to be in the government of the United States to any part or portion of the land in said survey contained."

Mr. Catron, it will be seen, confines his objections to adverse claims to the land conveyed by the government. He makes no allusion whatever to the reservation by the government of the buildings and improvements at Fort Union, or its right to remove the same upon the discontinuance or abandonment of the post. Speaking of the lands which cannot legally be reserved by the government, etc., Mr. Catron is evidently referring to a possible sequestration or permanent reservation of such lands without compensation, and is not denying the right of eminent domain in the United States. Hence the language of said "protest," as quoted, is supererogatory, applying to nothing contained in the patent, affirming nothing not admitted by that instrument, and, being a vain thing, has no force. Mr. Catron accepted the patent (with full powers), and must be held to have waived any and all objections thereto not then asserted; (see *Le Roy v. Jamison*, 3 Sawyer, 369). In the above cause, and in that of *United States v. Schurz* (102 U. S., 378), the manner in which title to lands by patent from the United States becomes vested, and passes by the record, is fully set forth.

There being a valid outstanding patent for the Mora grant, accepted by the grantees, I am of the opinion, and so decide, that the canceled patent should remain a part of files of this office, that it is an instrument which was vacated on account of a clerical error or omission in its

granting clause, and that its possession is not necessary to the protection of the interests of the grant owners in the land confirmed to them. Your application is accordingly denied.

PUBLIC OFFERING—ISOLATED TRACTS.

JOSEPH W. FORDNEY.

Sec. 2455, R. S., is not applicable to localities where there remains a considerable quantity of unoffered lands.

It is not the policy of the Land Department to open public lands, and particularly timber lands, to cash purchase through public offerings.

Acting Commissioner Harrison to register and receiver, Marquette, Michigan, October 18, 1881.

GENTLEMEN: I am in receipt of the register's letter of the 6th instant, relative to an application made by Joseph W. Fordney to have certain described lands, aggregating more than 1,000 acres, offered for sale under the provisions of Section 2455 of the Revised Statutes, which gives the Commissioner discretionary authority to offer, upon published notice of thirty days, such isolated tracts as in his judgment it would be proper to expose to sale in that manner. This act is not deemed applicable to localities in which there remains a considerable amount of unoffered land, as in the present case.

It is not the policy of the Land Department to open public lands to cash purchase, through public offerings. The tendency of modern legislation and the demands of public sentiment are that public lands shall be retained for actual settlement and occupation.

It is alleged that the lands which Mr. Fordney desires to have offered are not available agricultural lands, but are only valuable for timber.

I have recommended to Congress a legislative reservation of all timber lands of the United States, until some measure may be perfected by which such portion of the same, as it may be found expedient to dispose of, can be sold at a price more commensurate with the value of the timber than can be realized under the ordinary methods of disposing of public lands. It is not my judgment that it will be proper to expose the land applied for to public sale as requested.

MINING CLAIM—ADVERSE CLAIM; ASSIGNMENT.

JACKSON MINING COMPANY.

Where a part of the ground embraced in the entry is entered by virtue of an assignment to the applicant by an adverse claimant, who has been successful in the courts, the applicant as to that portion of his claim stands in the place of his assignor, and must show five hundred dollars expenditure thereon.

Acting Commissioner Harrison to register and receiver, Eureka, Nevada, October 18, 1884.

In re mineral entry No. 670, made December 3, 1883, by the Jackson Mining Company upon the "Tinnie" lode claim, the record shows that

said claim was located May 6, 1876, by applicant's grantor; who claimed 1,200 linear feet, running almost due north and south.

An adverse claim, asserting prior right to the southern 600 feet thereof was duly filed, suit commenced within the statutory period, and judgment rendered in favor of the adverse claimant. After judgment rendered, the ground held thereunder was assigned to applicant for a valuable consideration (\$2,500), as is duly evidenced by the record; upon which showing you allowed entry for the entire claim, namely, 1,200 linear feet.

The record, as it now stands, shows improvements only on the northern 600 feet of said entry. Section 2326, Revised Statutes, requires that "the party entitled to the possession" . . . "may, without giving further notice, file a certified copy of the judgment-roll with the register of the land office, together with the certificate of the surveyor-general that the requisite amount of labor has been expended or improvements made thereon," etc. The statute refers specifically to ground judicially adjudged by a court of competent jurisdiction to belong by right of possession to the adverse claimant. The applicant being the assignee of such party, as to the southern 600 feet of said claim, stands in the same position before this office as his assignor, and must under the statute cited furnish evidence of \$500 worth of improvements on that portion of his claim formerly in controversy, in the manner prescribed by Paragraph 37, Official Regulations.

TIMBER CULTURE—RELINQUISHMENT.

EVA BROWN.

Where one purchases of a timber-culture entryman his relinquishment, it may be made the basis of an entry by filing it with an application for the land, but it may not, by retaining it, become the basis of a contest by the purchaser. *Greene v. Graham* distinguished.

In this case the contestant, who acted ignorantly, but in good faith, may, as there is no adverse claim, enter the land.

Acting Secretary Joslyn to Commissioner McFarland, October 20, 1884.

I have considered the case presented by the appeal of Eva Brown from your decision of April 28th last, rejecting her application to make timber-culture entry of the SE. $\frac{1}{4}$ of Sec. 21, T. 116, R. 67, Huron, Dakota.

The tract described was originally entered by John F. Douglas, October 20, 1882, under the timber-culture act of June 14, 1878. On August 24, 1883, Eva Brown instituted contest against said Douglas, alleging as a reason that he "had made and executed a relinquishment of said tract, and holds the same for sale and speculation." This relinquishment Brown obtained and filed with the register and receiver.

Attached to the relinquishment is an affidavit by Douglas "that he is the same John F. Douglas that made timber-culture entry on the SE. $\frac{1}{4}$ of Sec. 21, T. 116, R. 67; that he has executed a relinquishment for the same, and that he has received only fourteen dollars for executing said relinquishment; that he made said entry in good faith, but was not able to comply with the law in regard to breaking and cultivation." The relinquishment, the above affidavit attached thereto, and the jurat following the affidavit, all bear the same date with Brown's affidavit initiating contest, namely, August 24, 1883; but there is nothing among the papers to indicate when it was filed in the local land office further than an incidental remark in the brief of Brown's attorney, that it was "subsequent" to the initiation of contest.

The register and receiver refused to cancel Douglas's entry, but (November 24, 1883) transmitted the papers in the case to you. On the 28th of April last you directed cancellation of Douglas's entry, but dismissed Brown's contest, stating that "the allegation that a party has relinquished his entry is not of itself a sufficient ground of contest in a case where the entry is not subject to forfeiture for failure to comply with the law"; at the same time directing the register and receiver "to hold the land subject to entry by the first legal applicant," and also retaining Brown's application to enter, thus practically denying her the preference right to enter the tract. From this decision Brown appeals.

The attorney for the contestant, Brown, lays great stress upon the decision in the case of *Greene v. Graham* (7 C. L. O., 105), in which it was decided by this Department that a person making a timber-culture entry "may relinquish his claim at any time. If the relinquishment is filed in the proper office, the entry becomes subject to immediate cancellation, whether before or after the expiration of one year. If it is not so filed, but is retained by the person in whose favor the sale and relinquishment are made, such sale and relinquishment become proper matter for inquiry upon an application therefor, based on satisfactory reasons; and a contest should be allowed to ascertain the truth of the allegations." He argues that as Brown retained (for a certain time) Douglas's relinquishment, the case becomes a proper matter for inquiry, and a contest should be allowed.

An examination of the case of *Greene v. Graham*, however, at once shows that it is in no respect parallel to the one now under consideration. (1.) In that case Greene filed an affidavit with the local officers alleging that Graham had sold (not that he was offering for sale) his relinquishment. (2.) Such sale was alleged to have been made, not to Greene, who brought the contest, but to one Wass. The decision of the Department was that a third person (and not the purchaser), who could adduce satisfactory reasons for believing that such transfer had been made, might be allowed to contest in order to discover whether there really had been such a relinquishment and sale; but for the purchaser of a relinquishment, into whose possession it had actually come and

remained, to insist upon a contest in order to discover its whereabouts would be as absurd as it would be unnecessary. (3.) Furthermore, it is such third person (should his allegations be found correct), if anybody, and not the purchaser of the relinquishment, who would be allowed preference entry of the land.

If Brown had obtained possession of the executed relinquishment and filed it at the time of making application to enter, (there being no other contest pending at the time), her application should have been allowed; but failing to file the relinquishment upon making her application to enter, she had at the time of such application no statutory ground of contest; (see *Bailey v. Olsen*, 2 L. D., 40). Nevertheless, under the circumstances—having done the best she knew to secure the desired right, and no other right having intervened, but the question being one entirely between the applicant and the United States—I see no reason why she should not be allowed the benefit of being considered the first legal applicant, and so direct.

TIMBER CULTURE—SECOND ENTRY.

JOHN A. ADAMSON.

A timber-culture applicant is bound under the law to know that the land is subject to entry; if he enters land not devoid of timber, or covered by another claim of record not a bar to entry, or occupied and improved by another without claim of record, he exhausts his right, and will not be allowed another entry.

The practice of making entries, selling relinquishments of such entries, or compelling prior claimants to buy off a contest, and then applying for new entries because of alleged prior rights, has become an abuse which demands a strict enforcement of the law.

Acting Commissioner Harrison to register and receiver, Valentine, Nebraska, October 22, 1884.

I am in receipt of your letter of June 30, 1884, transmitting the application of John A. Adamson to be permitted to relinquish timber-culture entry No. 1323, made by him April 24, 1884, for the E. $\frac{1}{2}$ of SW. $\frac{1}{4}$, and S. $\frac{1}{2}$ of SE. $\frac{1}{4}$, of Sec. 7, T. 31, R. 28 W., and to be permitted to make a new entry, with credit for fees and commissions already paid.

Applicant states in his affidavit, corroborated by witnesses, that one Simeon Morgareidge has been living on and improving the land since October 2, 1883, his improvements consisting of one dwelling-house 14 x 20 and a wing 12 x 16, one stable 12 x 20, one cattle corral in a circle of 100 feet, milk house 8 x 10, henery 6 x 8, one well, and seven acres planted to corn, potatoes, and vegetables, and that affiant was not aware when he made his timber-culture entry that there were improvements upon the land.

The timber-culture law prohibits more than one entry by the same person. When one entry has been made, the person has exhausted his right.

The only exception to the rule is where the entry is invalid through some fault on the part of the United States, and not on the part of the entryman. If the land is not of the character authorized to be entered, the fault of making such entry lies with the entryman, because he is bound under the law to know that it is subject to timber-culture entry, and is required to make oath to that effect. If he swears falsely the fault is his own, and he cannot be allowed, in violation of law, to make a second entry, because the first was illegal through his own acts. The oath of the entryman is "that the section of land specified in my said application is composed exclusively of prairie lands, or other lands devoid of timber." He cannot make such affidavit honestly and in good faith, unless he has seen the land and knows its character to be that to which he testifies. If he makes such affidavit without knowledge of the facts he must abide the result. A false affidavit cannot be condoned by the allowance of another entry.

If there is a prior claim of record to the land applied for of a nature not to be a bar to an entry, and a timber-culture entry is made of that land, the entryman takes his risk of a final adjudication, and exhausts his rights, however the contest may be decided. If he makes entry of a tract of land upon which some other person is living and has improvements, although not having a claim of record, the fact of such occupation and improvement is notice, and the entry is made at the same risk as in case of a claim of record. In the present case the person alleged to be in occupation of the land has no claim before this office. There is no evidence that his occupation is based upon a settlement right recognizable under the public land laws, or that the alleged occupant is qualified to assert a claim to the land. The use of public land for a cattle ranch, apart from a bona-fide settlement claim, is not an authorized use, nor is such use a bar to the legal claim of another.

If Mr. Adamson made his timber-culture affidavit with that knowledge of the land which he was required by law to have, he knew of the existence of the improvements, if any there were at the date of his entry. In that case he is not now entitled to another entry. He may prosecute his counter-claim or not as he sees fit, but he has exhausted his timber-culture right. If he did not know anything about the land which he entered, or whether it was occupied or claimed by another by virtue of actual settlement, he took the risk of there being such claim, in addition to the further risk of testifying contrary to the facts in regard to the character of the land. Whether, therefore, he had actual knowledge of the existence of alleged improvements or not, makes no difference. He was bound to know, and I have no authority to extend the law to allow a second entry to cure his own default.

The practice of making entries under this act and other acts, selling relinquishments of such entries in the market, or compelling or attempting to compel prior claimants to buy off a contest, and then applying for new entries because of the existence of alleged prior rights, or for

other causes wherein the default (of defective entry) lies with the entryman, has become an abuse of such grave extent and character as to demand a strict enforcement of the law in all classes of applications for second entries or filings.

While there is nothing in this case to indicate any greater degree of improper conduct on the part of the entryman than that of making his entry without the knowledge of the land which he was required to have under the law, that of itself is sufficient to show that the defect in his entry, if any defect exists, is one of his own seeking, and hence that he is not entitled to the relief asked for. His application is accordingly denied.

PRE-EMPTION; HOMESTEAD—FINAL AFFIDAVIT.

CIRCULAR.

Hereafter, if the final affidavit required in Sec. 2262 or 2301, R. S., is made before a judge of probate who is by law clerk of his own court, he must certify as "*ex officio* clerk."

WASHINGTON, D. C., October 24, 1884.

Register and Receiver:

GENTLEMEN: The act of June 9, 1880, provides that the affidavit required to be made by Sections 2262 and 2301, Revised Statutes of the United States, may be made before the clerk of the county court, or of any court of record of the county and State or district and Territory in which the lands are situated; and if said lands are situated in any unorganized county, such affidavit may be made in a similar manner in any adjacent county in said State or Territory; and the affidavit so made and duly subscribed shall have the same force and effect as if made before the register or receiver of the proper land district.

Where such affidavits shall hereafter be made before a judge of probate who is by law also the clerk of his own court, the said judge must certify in his clerical capacity as "*ex officio* clerk." You will see that this requirement is complied with in all cases hereafter, and will not transmit papers to this office when the attestation is imperfect but will return the same for correction.

This order will not apply to cases already transmitted in which the affidavits have been certified by the judge in his judicial capacity.

Very respectfully,

L. HARRISON,
Acting Commissioner.

Approved October 27, 1884.

M. L. JOSLYN,
Acting Secretary.

PRE-EMPTION; HOMESTEAD—FINAL PROOF.

INSTRUCTIONS.

Final proof notices must be published in the newspaper proper and not in a supplement.

Acting Commissioner Harrison to register and receiver, Independence, Kansas, October 30, 1884.

It is required that all publication notices shall be published in the newspaper proper and not in supplement form, and you will take proper action to the end that this requirement shall be complied with.

Advise publishers that hereafter, in addition to the requirements of circular of July 31st, 1884 (3 L. D., 52), the affidavit of publication must show that the notice was published in the newspaper proper, and not in a supplement. Should a publisher refuse to comply with this order you will cease to regard his paper as a "reputable paper," within the meaning of said circular.

PRE-EMPTION; HOMESTEAD—FINAL PROOF.

INSTRUCTIONS.

The law requires that publication of final proof notices shall be made in papers nearest the land, and claimants or their attorneys have no authority to change the requirement.

All proofs heretofore made upon publication in newspapers other than those nearest the land must be rejected.

Acting Commissioner Harrison to register and receiver, Lakeview, Oregon, October 30, 1884.

I am in receipt of register's letter of the 17th inst., in reply to my telegram of the 16th. He states that his rule is to designate a paper for the publication of final proof notices nearest the land described, but that this rule is modified when claimants or their attorneys desire a different paper in the district designated, and in such instances that it is frequently the request that he designate the paper published at Lakeview.

You are advised that the modification spoken of is without authority and contrary to the purpose of the law. Notices are not published for the advantage of claimants or their attorneys, but for public information. It is the requirement of law that notices shall be published nearest the land. It is the intention of the law that notices shall be published in a newspaper having a general circulation in the vicinity of the lands claimed. The purpose is that public notice shall there be given of intention to make proof in order that adverse claimants or other parties may have opportunity to assert their own claim or to object to the proof

offered. The purpose of the law is defeated when the publication does not amount to the public notice contemplated and required.

The register's action in designating the Lakeview paper for publishing notices for localities at great distances, where the Lakeview paper has no general circulation, or where it does not circulate at all, and where there is no ready communication with Lakeview, is a defeat of the law, and such publication is not the notice required by law. The fact that parties or attorneys desire notices published away from the land creates a presumption of fraudulent intent, sufficient to put you upon guard and inquiry in respect to the character of the entry.

All proofs heretofore made upon such publication must be rejected for insufficiency of notice. You will not accept such proofs hereafter, nor permit similar publications in future.

HOMESTEAD—AMENDMENT OF ENTRY.

JOHNSON *v.* GJEVRE.

A pending application to amend a homestead entry reserves the land from any other appropriation, until the application is disposed of.

Acting Secretary Joslyn to Commissioner McFarland, August 20, 1884.

I have considered the case presented by the appeal of Endre J. Gjevrev from your decision of November 6, 1883, wherein you held that his homestead entry for the S. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of Sec. 31, and the S. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of Sec. 32, T. 159, R. 56, Grand Forks, Dakota, should be canceled.

July 5, 1881, Gjevrev made entry of the S. $\frac{1}{2}$ of N. E. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ of Sec. 31, T. 159, R. 56. May 23, 1882, you allowed him to amend his entry so that it covered the S. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ of Sec. 31, and the S. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of Sec. 32, T. 159, R. 56. The application on which this amendment was allowed was dated February 13, 1882, and set forth that, through the mistake of the party preparing his application to enter, his entry had been made to cover land that he did not intend to enter, that his improvements were upon the land he wished to embrace within the amended entry, and that said land was vacant and properly subject to such entry.

February 25, 1882, while Gjevrev's application to amend was pending, the local office allowed Hans Johnson to make homestead entry for the E. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ and S. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of Sec. 32, and S. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of Sec. 31, T. 159, R. 56; and when you permitted the amendment of Gjevrev, the records of your office did not show the Johnson entry.

November 23, 1882, your office, having discovered the conflict between the two entries, ordered a hearing to ascertain the merits of the case. On the evidence you held the amended entry for cancellation so far as

it conflicted with Johnson's entry, your action being based mainly on the conclusion that Gjevre had not acted in good faith.

Prior to the survey of the land, Gjevre, in the summer of 1880, began the erection of a house on what proved to be the N. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of Sec. 32, and broke about two acres of land, part of said breaking being on the land last described, but the greater portion upon the S. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of Sec. 32, one of the forties in dispute. Gjevre did not complete his house, for it transpired that another party applied to enter the forty (upon which said house was situated) prior to Gjevre's entry; wherefore he abandoned said tract to avoid a contest. The only improvements on the land in controversy are comprised in a small amount of breaking done by Gjevre. Johnson has made no attempt to utilize the land, except to cut grass therefrom, as Gjevre has also done. To explain his delay in applying for permission to amend, Gjevre testifies that he did not look at his papers when they were returned from the local office, but supposed, up to within a very short time prior to February 13, 1882, that his entry covered the land he had proposed to enter, and that he never had intended to take the two west forties embraced within his first entry, as said land was comparatively worthless.

Johnson offered evidence showing that Gjevre was well aware of the true situation long prior to the time when he applied to amend, and that he (Johnson) intended to enter the land in dispute. Gjevre, however, squarely denies any such knowledge, and the testimony on that point fails to convince me that the amendment was an afterthought on the part of Gjevre.

The local office erred in allowing Johnson to include this land in his entry, for at that time said land had been practically withdrawn by the application of Gjevre to amend. While it is true that the right thus asked for lay within the discretion of the officers charged with the disposition of the public lands, dependent upon the proofs, it is also true that, if Gjevre could fairly show his original intention through mistake or accident to have been defeated, the right to make such change would be conceded, subject to any superior rights intervening prior to such application. Hence, while that matter was under investigation, the land was reserved from any other disposition.

I am of the opinion that Gjevre has shown entire good faith in this matter, and that his amended entry should be allowed to stand. This conclusion is, it seems to me, unavoidable when it is remembered that his first acts of settlement were begun upon one of the tracts now in controversy, and that no subsequent act, save that of entry, denoted an intention to abandon the same. Your decision is therefore reversed.

*RAILROAD GRANT—RESERVATION; PRICE OF LAND.**CLARK v. NORTHERN PACIFIC RAILROAD COMPANY.*

The lands of the Crow Indian reservation, released under a treaty made before but ratified (April 11, 1882) after definite location, were excepted from the grant to the Northern Pacific Company.

Where the statute, providing for indemnity, requires the double-minimum price to be paid for the even sections, but fixes no price for the odd sections, lands in either odd or even sections, which may afterwards be disposed of, must be sold at the double-minimum price, saving however the rights of settlers prior to withdrawal.

Secretary Teller to Commissioner McFarland, September 17, 1884.

I have considered your letter of 20th ultimo, respecting the price to be charged for lands within the granted limits of the Northern Pacific Railroad, released from reservation for the Crow Indians by act of Congress April 11, 1882, (22 Stat., 42), ratifying the agreement made June 12, 1880, with said Indians.

The even sections along said line are fixed by law at \$2.50 per acre, being alternate reserved sections along the line of a land grant road, and your ruling to the effect that, where the odd sections by reason of being in a state of reservation at date of definite location are excepted out of the grant, such exception operates to destroy the alternation of the even sections and thus preserves the single minimum price of \$1.25 per acre is error. The grant is of quantity to be taken in place where the lands are in condition to pass by the grant at definite location, with indemnity for the alternate odd sections exceptionally taken out of the grant by sale, reservation, pre-emption claim, or otherwise. It may be that a single quarter section is thus excepted; it may be a whole section; it may be several sections; and it may be a large tract: but the principle is precisely the same. It is in each particular case an alternate odd section that, but for the exceptional condition as expressed in the grant, would pass.

So the alternation of the even sections depending upon the same conditions is alike preserved, and the legal price is \$2.50 per acre as fixed by law. See the case of Robert C. Hite, decided by this Department 20th of May last (2 L. D., 680).

Respecting the odd sections opposite the line of definite location of June 27, 1881, you hold that they are excepted from the grant by reason of the reservation for Indian purposes, as, although the agreement was made in 1880, Congress did not ratify it until April 11, 1882, after the date of such location. I have before me, involving this question, the case of Benjamin V. Clark v. N. P. R. R. Co., on appeal from your decision of September 29, 1883, awarding to Clark the S. $\frac{1}{2}$ of NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Sec. 29, T., 1 S., R. 11 E., Bozeman district, Montana.

Although the legislative intent in this case may not be entirely free

from doubt, in that it was one of the well-understood purposes of said agreement to afford opportunity for a speedy location and construction of the road without trespassing upon the rights of the Indians, yet, in view of the doubt, and of the fact that when the definite location was made the release had not become such as to restore the lands to the public domain, I concur in your opinion and affirm your decision,—the law of the case having been substantially settled by numerous decisions of the Department and the courts.

The question, then, recurs upon your recommendation of 20th ultimo to increase under Section 2364 of the Revised Statutes the price of the odd sections to be disposed of within the granted limits. That section provides that, "Whenever any reservation of land is brought into market, the Commissioner of the General Land Office shall fix a minimum price, not less than one dollar and twenty-five cents per acre, below which they shall not be disposed of." There is no doubt of your authority to fix such price, under this statute, and as the same reason applies for the increase as pertains to the even sections, and as it would secure complete uniformity along the whole line within common limits, I approve your recommendation.

Without this express provision, it may be said in general, as being well settled law, that where a thing is within the reason of a statute it will be considered as within the letter, although not specially mentioned, notwithstanding the converse doctrine that "*expressio unius est exclusio alterius.*" It is said that "where a statute is imperative no reasoning *ab inconvenienti* should prevail; but unless it is very clear that violence would be done to the language of the act by adopting any other construction, any great inconvenience which might result from that suggested may certainly afford fair ground for supposing that it would not be what was contemplated by the legislature, and will warrant the court in looking for some other interpretation"; (Broom's Legal Maxims, 186). This is in explanation of the declaration that "the law will sooner suffer a private mischief than a public inconvenience," (*ibid.*), and its application must be much more forcible where both the public and the private convenience will be best subserved by holding all disposable lands, in like situation and within common limits, at the same uniform price fixed by law for the major portion of such tracts.

And this is in harmony with other laws. The greater number of acts raising lands to the double-minimum within railroad limits prescribe "that the sections and parts of sections which remain to the United States shall not be sold, when sold, for a less price than two dollars and fifty cents per acre." It is therefore entirely consonant to reason and good construction, where a grant is made declaring that the alternate even sections reserved to the United States shall not be sold for less than \$2.50 per acre, with added provisions excepting out of the grant such odd sections as may fortuitously happen to be found in certain designated conditions, without mentioning the terms upon which such

odd sections shall be disposed of, to hold that as the Department is constructively authorized to treat them as public lands in the same category as the even sections, and to dispose of them in the same manner, they should bear the same price. It never could have been the intent of Congress to fix different prices for lands lying side by side in common limits and governed by the same rules of disposal, basing the difference on the fact of one section bearing an odd and the other an even number in designating them descriptively for purposes of survey and identification merely.

I accordingly decide that the law should be so construed, and direct that, for future disposal within railroad limits, where the statute requires the double-minimum to be paid for the alternate sections you hold all the lands at such price, thus producing perfect uniformity in all respects as to the tracts in the same circumstances, observing, of course, the right of settlers before withdrawal to pay at the minimum price as provided by law.

FEES—REDUCING TESTIMONY TO WRITING.

CIRCULAR.

Acting Commissioner Harrison to registers and receivers, October 4, 1884.

From and after the receipt of this circular, all testimony for claimants in establishing pre-emption or homestead rights, or mineral entries, and in contested cases, must be reduced to writing under the direct supervision of registers and receivers whenever such testimony is taken in towns where local offices are situated; but registers and receivers are not entitled to any fees for examining and approving testimony in pre-emption cases where the proof is taken before a judge or clerk of a court.

All fees received for examining and approving testimony not reduced to writing by you (except in final homestead proofs made before a judge or clerk of a court), and the fee of one dollar deposited with the register for giving notice of the cancellation of an entry when no cancellation was made, must be at once returned to the person paying the same, or to his agent upon his presenting the proper authority entitling him to receive it.

You will give these instructions the widest circulation possible, without incurring any expense whatever upon the part of the United States.

(Approved October 6, 1884, by Secretary Teller.)

General Land Office
SECOND ENTRIES AND FILINGS.

CIRCULAR.

Acting Commissioner Harrison to registers and receivers, October 23, 1884.

The very large number of applications for changes of entry and filings and for new entries or filings under the pre-emption, homestead, timber-culture, and other acts, render it necessary to advise you that the allowance of such applications is, as a rule, without authority of law.

It occasionally happens that an error has been made in the description of land applied for, but that such error is as universal as would be implied by the frequent applications for a change to another tract is not to be presumed.

You will exercise the greatest care and discrimination in accepting such applications, and you will hereafter in every case require applicant to prove that the tract was erroneously entered by a mistake of the true numbers of the tract intended to be entered; and that every reasonable precaution and exertion had been used to avoid the error, and showing particularly how the same occurred. You will require corroborative testimony upon these points. The affidavit of the party in interest uncorroborated by other testimony will not be deemed sufficient.

You will also require satisfactory evidence, by sufficient affidavit or affidavits, that applicant has not assigned, transferred, sold, or disposed of, nor agreed to sell, assign, transfer, or dispose of, any right or interest under said alleged erroneous entry or filing, nor received or been promised any consideration whatever for abandoning said land or for relinquishing his claim thereto, and that he has not executed any relinquishment thereof, nor agreed to do so, and that his application for a change of entry is not made for the purpose of enabling any other person to enter the originally entered tracts.

In the case of a pre-emption entry or filing, or a homestead entry made upon allegation of existing residence upon the land, applicant will be required to prove to your satisfaction that he was actually residing upon the tract to which change is desired, at the date of such filing or entry, and that he intended to enter that land, and did not know that his application or filing embraced other or different land.

You are authorized to reject applications for insufficiency of proof, or when you are satisfied that the same is not made in good faith or that no actual mistake has occurred. If appeal is taken you will transmit the testimony with your opinion in writing. In all other cases you will transmit the testimony, together with your joint written opinion both as to the existence of the mistake and the credibility of each person testifying, and your recommendation in the case.

You will bear in mind that every person is restricted by law to one entry under the pre-emption, homestead, timber-culture, timber-land, and desert-land laws.

Applications for second entries or filings, or changes amounting to second entries or filings, under these laws should not be allowed where the defect in the original entry or filing was one that the party himself might have avoided by the exercise of due diligence and proper compliance with law. Non-compliance with law, or alleged ignorance or misinformation in regard to the requirements of the public land laws, or want of a proper examination of the land, or the alleged existence of prior adverse claims of which the subsequent entryman had notice, or was bound to take notice, are not valid reasons for changes of entry or for the allowance of new or second entries or filings for different land.

The existence of a pre-emption filing or declaratory statement for a tract of land, proof not having been made, is not a bar to the entry of the land by another person, and is not sufficient ground upon which to base an application for a change of entry or for a new entry of other land by a party who has made entry over such filing. You will not receive or transmit to this office applications based upon that ground.

Second pre-emption filings for different land are not permissible when the land originally applied for was subject to pre-emption at date of filing, and applications for such second filings will not be received or transmitted.

(Approved October 25, 1884, by Acting Secretary Joslyn.)

PRE-EMPTION—SETTLEMENT.

HOWDEN v. PIPER.

An act of settlement must consist of some substantial and visible improvement of the land, having the character of permanency, with intent to appropriate it under the law. The mere intention to perform such acts at a future day is not a substitute for their actual performance, and the law will not recognize it as the foundation of a pre-emption claim.

"Picking" to the depth of an inch a piece of ground six by eight feet (which was subsequently plowed up), and erecting two boards in the form of a cross (which were directly blown down), were not acts of settlement.

Acting Secretary Joslyn to Commissioner McFarland, October 27, 1884.

I have considered the case of Benjamin F. Howden *v.* James R. Piper, involving the N. E. $\frac{1}{4}$ of Sec. 14, T. 112, R. 62, Huron, Dakota, on appeal by Piper from your decision of February 21, 1884, holding his filing for cancellation.

Howden filed declaratory statement on February 14, alleging settlement February 11, 1882, and Piper filed declaratory statement June 14, alleging settlement March 30, 1882.

The testimony shows that upon the day of Mr. Howden's alleged settlement, one Schawb took him and two others in a wagon for the purpose of locating each upon government land. The three each took

boards and a pick with them, for their respective purposes. They were driven upon the land now in question, (as also upon tracts on which the others claim to have settled), when Howden "picked" about a half hour upon a piece of ground six by eight feet to the average depth of about one inch. No excavation was made, but he calls this the commencement of a cellar. He then erected two boards at a different place, in the form of a cross, about eight feet high, "to show," as he says, "that the land was taken;" or, as another witness says, "to attract attention to his settlement;" or, in the words of another, "to give notice to other parties that he claimed the land." Nothing further was done upon the land in the way of settlement. The parties then left this land, visited the other tracts with apparently like purpose and conduct, and returned to town. Shortly afterward Howden went to his former home in Iowa for the purpose of bringing to Dakota his team and farming implements, intending an early return, but was there detained by bad weather, so that he did not again reach Dakota until April 17. He went on the land about May 1, erected during that month a house (which he has since continuously occupied) and out-buildings, broke several acres (plowing directly over the "cellar"), and sowed wheat.

Piper purchased March 30 an unoccupied shanty then on the tract, which he removed to a different part, and plowed five acres, which he afterwards increased to seven and a half acres. He testifies that he did not know of Howden's claim at this date, or of his alleged improvements, and it is in proof that he sowed five acres to crop before Howden's return to the land. He repaired the shanty soon after its removal and commenced residence therein, which, however, was not continuous by reason of his work elsewhere for means of personal support and improvement of the tract; but he frequently slept and ate upon it, and his absences were not sufficient to show its abandonment, or to require forfeiture of his claim for non-residence.

Howden's improvements are the most valuable, but this fact cannot determine their respective rights. Both parties appear to have acted in good faith (Piper since March 30, and Howden since about May 1), and the only question involved is that of their priority of settlement. The local officers awarded the tract to Piper because, in their opinion, Howden's sixty days' absence in Iowa constituted an abandonment. There evidently was no such intent on his part, and the facts do not warrant such conclusion. His absence was for a legitimate purpose, and was not sufficiently long to defeat his claim had he made a valid settlement.

I think, also, that your conclusion that Howden was the prior settler is not supported by the facts. Pre-emption is based on acts of settlement. These consist of some substantial and visible improvement of the land, having the character of permanency, with intent to appropriate it under the law. But the mere intention to perform such acts at a future day is not a substitute for their actual performance, and the law

will not recognize it as the foundation of a pre-emption claim. The intent honestly to appropriate the land, and the acts necessary to constitute settlement, must harmonize. I find in the conduct of Howden upon February 11 nothing beyond intent, and a purpose to prevent other settlement on the land during his absence. The "picking" of this small plot of ground (not exceeding one inch in depth, visible to passers-by on close inspection only, and obliterated by the first plowing) was not a cellar, nor the commencement of one (the house, subsequently built, being at a different place); nor was the erection of the two boards (directly blown down) any part of a building, fence, or permanent improvement, or so intended. These acts did not constitute a settlement by Howden, but indicated an intent only to reserve the land for his future settlement. But a reservation of this character is unknown to the pre-emption law. Actual settlement, only, reserves public land, and this Howden did not make until May 1, at which date Piper was on the land with his house, breaking and sowing ground, and claiming it as a pre-emptor. I regard Howden as an excursionist merely and not a settler on February 11, 1882, and Piper as the prior settler. I therefore reverse your decision and allow Piper's filing to stand, directing (both parties having submitted final proofs) that of Howden to be canceled.

RAILROAD GRANT—CONFLICT WITH OCCUPANT.

TEXAS & PACIFIC RAILWAY COMPANY *v.* HANCOCK.

Land "occupied" by a qualified pre-emptor (by settlement, improvement, and residence) at date of the withdrawal on preliminary line in 1871, (the plats not being filed until 1879), was excepted from the grant to this company, (the road not yet being definitely located), though the occupant shortly afterward abandoned it.

Acting Secretary Joslyn to Commissioner McFarland, October 27, 1884.

I have considered the case of the Texas & Pacific Railway Company *v.* William Hancock, involving the NW. $\frac{1}{4}$ of Sec. 31, T. 15 S., R. 2 E., S. B. M., Los Angeles district, California, on appeal by said company from your decision of March 20, 1884.

The tract is within the twenty-mile limits of the grant, by act of March 3, 1871, to said railway company. The line of the road has not yet been definitely located. The lands in the odd-numbered sections were withdrawn upon a preliminary line on October 15, 1871.

May 19, 1882, said Hancock made application at the district land office to make homestead entry for said tract. His application was rejected, on the ground that the land had been withdrawn for benefit of the company, and that his settlement was made subsequently to the said withdrawal. Hancock appealed to your office, filing certain *ex parte* affidavits setting forth that one Newton Bailey, a qualified pre-emptor, settled upon said tract in the spring of 1871, claiming

the same as a pre-emptor, and continued to reside thereon until some time in 1872. By letter of January 2, 1883, you directed the register and receiver to order a hearing to ascertain the status of the land at the date of the railroad withdrawal, and to inquire into the qualifications of said Bailey as a pre-emptor; which hearing was had July 5 ensuing. Upon the testimony then taken, the register and receiver decided against the validity of Bailey's claim at the date of the railroad withdrawal. From their decision Hancock appealed; and you, on November 22, 1883, reversed the decision of the local officers, deciding that the tract in question was not, at the date of the withdrawal, subject thereto, and directing that Hancock be allowed to make homestead entry for the same.

On the 21st of January, 1884, the resident attorney for the railway company applied for a reconsideration of your said decision, alleging that he was advised by a letter from your office, dated August 1, 1883, that a hearing had been ordered to test the right of one H. M. Johnson, devisee and executor of Adeline Smith, to the N. $\frac{1}{2}$ of N. E. $\frac{1}{4}$, and the N. $\frac{1}{2}$ of N. W. $\frac{1}{4}$, of said Sec. 31, on application made to the local office January 16, 1883, by said Johnson to make pre-emption filing for said land; that it was alleged that said Smith had claimed and cultivated the land from 1874 until 1880, when she died; that the affidavits presented by Johnson tended to show Bailey's occupation of a portion of the same tract, (the west eighty acres of the strip claimed by Johnson, being identical with the north eighty acres of the quarter-section claimed by Bailey); that the hearing held in July, 1883, was without notice to said Johnson; that the testimony in the Hancock case is not sufficiently distinct in showing the connection of Bailey with the N. W. $\frac{1}{4}$, or his qualifications as a pre-emptor; that he never claimed the land in the district land office; and that "the withdrawal for the Texas & Pacific Railway Company, October, 1881, took effect upon the land notwithstanding the occupancy of a party who never filed a pre-emption claim."

After a reconsideration of the whole matter, your office, March 20, 1884, declined to revoke your decision of November 22 preceding; whereupon the attorney for the company appeals to this Department.

I have carefully examined the testimony taken at the hearing before the register and receiver. From said testimony it appears that Bailey was a qualified pre-emptor; that he settled on the land in the spring of 1871, built a house, dug a well, cleared and improved about fifteen acres (his improvements being worth about \$150) and maintained a residence thereon, with his wife and three children, during the years 1871 and 1872. Furthermore, the testimony is distinct in showing the connection of Bailey with the N. W. $\frac{1}{4}$ of the section in dispute. Bailey could not assert his pre-emption claim, from the fact that the township plat of survey was not filed in the district office until October 28, 1879. But his claim comes within the list of lands excluded from the grant to

the company by act of March 3, 1871 (16 Stat., 573), by reason of "having been sold, reserved, *occupied*, or pre-empted."

This covers all the objections adduced as ground of appeal from your decision by counsel for the railway company, excepting such as pertain exclusively to matters in dispute between Hancock and Johnson, which are not pertinent to the present case. Should a contest arising between them be hereafter submitted to this department, their respective rights will then be determined.

I affirm your decision rejecting the claim of the Texas & Pacific Railway Company and permitting Hancock to make entry for the land in question.

RAILROAD GRANT—HOMESTEAD CONFLICT.

SOUTHERN MINNESOTA RAILWAY EXTENSION CO. *v.* GALLIPEAN.

Lands in the granted limits covered by homestead entries of record at date of the grant and of definite location are excepted out of the grant. If said entries be subsequently canceled, the lands revert to the public domain.

Where contests by the company were pending, entries should not have been allowed until after final decision thereon.

Appeals should always be separately transmitted.

Acting Secretary Joslyn to Commissioner McFarland, October 30, 1884.

I have considered the case of the Southern Minnesota Railway Extension Company *v.* Alexander Gallipean et al., involving the right to certain tracts of land in the Worthington land district, Minnesota, on appeal by said company from your adverse decision of March 10, 1883.

The tracts in question are parts of odd numbered sections within the granted or ten-mile limits of the grant by the Act of July 4, 1866 (14 Stat., 87,) to the State of Minnesota to aid in the construction of railroads therein.

It is claimed by the appellees that the lands applied for were excepted from said grant, because at the date of said grant they were covered by homestead entries of record; and that when said entries were subsequently canceled, the lands embraced therein became public lands and subject to settlement and entry by the first legal applicant.

The applications and the entries upon which they are based are as follows: * * *

It appears that the company was duly notified, and under date of December 13, 1881, filed its protest against the allowance of said applications, claiming that said entries were void *ab initio*, and that under the departmental ruling in the case of Kniskern *v.* H. & D. R. R. Co. (6 L. O., 50) they did not except the lands covered thereby from said grant; that with few exceptions the tracts applied for have been awarded to the company, after regular hearings held under prescribed regulations; that the question of title, so far as relates to those tracts, is *res ju-*

dicata; and that, with five exceptions, parties have conditionally purchased from the company said lands, and have entered upon and improved the same, and are now occupying and claiming them in good faith.

By your decision of March 10, 1883, you rejected the claim of the company to all the tracts applied for, and you directed the register and receiver "to allow the desired entries and filings to be made, subject to appeal by the Southern Minnesota Railway Extension Company, and by any occupant or settler upon the lands in question, and to notify the company and the parties in interest accordingly."

In its appeal from said decision, the company assigns as error the same grounds as stated in its said protest. * * *

Before proceeding to consider the several appeals from your decisions, it is observed that the record shows a failure in many respects to regard the rules of practice and instructions established by your office and approved by this Department.

The reason given by the register and receiver for transmitting to you for instructions thirty applications from different parties for separate tracts of land within the limits of said grant is, that some of the applications are for tracts embraced in homestead entries made by soldiers when in the United States service, and that they are unable to determine whether the "parties were single persons or heads of families, or whether any member of their families ever resided upon or improved the homestead as required by the act of March 21, 1864." Section III of circular instructions of November 7, 1879 (Adjustment of Railroad Grants) clearly indicates the course to be pursued by the register and receiver in such cases.

Whenever an appeal is filed, either in the local office from the decision of the register and receiver or from your decision, each case should be transmitted separately. Any other practice tends to confusion and is contrary to the express directions of this Department; (*Griffin v. Marsh*, 2 L. D., 28).

In your decision of March 10, 1883, you rejected the claim of the company, and directed the register and receiver to "allow the entries to be made subject to appeal by the Southern Minnesota Railway Extension Company and any occupant or settler upon the land in question." The entries should not have been allowed until your decision rejecting the claim of the company had become final, either for want of an appeal or by a final adjudication by this Department. See *McGovern v. Bartels* (3-C. L. O., 70), and *Kerr v. Utah Wyoming Imp. Co.* (2 L. D., 727).

Section 1 of the granting act provides "that there be and is hereby granted to the State of Minnesota, for the purpose of aiding in the construction of a railroad from Houston, in the county of Houston, through the counties of Fillmore, Mower, Freeborn, and Faribault to the western boundary of the State, . . . every alternate section of land designated by odd numbers to the amount of five alternate sec-

tions per mile on each side of said road; but in case it shall appear that the United States have, when the lines or route of said roads are definitely located, sold any section or part thereof granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected" indemnity lands. The grant was accepted by the legislature of said State, and the lands in question granted to the Southern Minnesota Railroad Company. By the proviso in section four of the granting act, said road was required to be completed within ten years from the acceptance of the grant; and in case of default, "the said lands hereby granted and not patented shall revert to the United States." Said company having failed to complete the road within the time prescribed by the granting act, the legislature of said State, by act approved March 6, 1878, granted to the Southern Minnesota Railway Extension Company all the lands, rights, powers, and privileges granted and conferred upon said State by said act of July 4, 1866, appertaining to the incompleting line of the Southern Minnesota Railroad Company, under certain conditions therein expressed.

It appears that at the date of the granting act, the lands applied for were covered by homestead entries, which were canceled for abandonment subsequently to the time when, as held by your office and this Department, the right of said company attached.

In the case of *L. L. & G. R. R. Co. v. United States* (92 U. S., 733), construing a grant substantially the same as the grant in question, it was held that said grant "creates an immediate interest and does not indicate a purpose to give in future. 'There be and is hereby granted' are words of absolute donation and import a grant *in presenti*;" that "it covered all the odd sections which should appear on the location of the road to have been within the grant when it was made. The right to them did not, however, depend on such location, but attached at once on the making of the grant. It is true, they could not be identified until the line of the road was marked out on the ground, but as soon as this was done it was easy to find them."

The Supreme Court in *Newhall v. Sanger* (*Idem*, 761) cites the above case with approval, and says: "As the premises in controversy were not public lands, either at the date of the grant, or of their withdrawal, it follows that they did not pass to the railroad company."

The decisions of this Department seem to be in harmony with the above cases. In *Dalton v. So. Minn. R. R. Co.* (3 C. L. O., 179) Mr. Secretary Chandler held that a homestead entry of record at the date of the granting act, for the benefit of said company, excepted the tract therefrom.

To the same effect is the departmental decision in the case of *White v. H. & D. R. R. Co.* (6 C. L. O., 54), wherein it is also decided that the claim of the company that the case was *res adjudicata*, because the tract

in question had been applied for by another person whose claim was rejected and the land awarded to the company, can not be sustained. Said decision also states that "it matters not what the condition of the tract may have been at the time the grant to the company took effect (by definite location), so far as the tract in question is concerned no grant of the same has ever been made."

As none of the tracts applied for have been certified to the State, the title thereto still remains in the United States; (So. Minn. Railway Ext. Co. v. Kufner, 2 L. D., 492).

The precise question, so far as relates to the claim of the company, was decided by this Department in the case of *Graham v. H. & D. R. R. Co.* (1 L. D., 380), in which it was held, that an entry of record, which on its face is valid, reserves the land covered thereby from the operation of any subsequent law, grant, or sale, until a forfeiture is declared and the land is restored to the public domain in the manner prescribed by law.

Your decision of March 10, 1883, is accordingly affirmed. * * *

ALABAMA MINERAL LANDS.

NANCY ANN CASTE.*

The general instructions of April 22, 1880, revoking mineral withdrawals, and shifting the burden of proof from agricultural to mineral claimants, applied to the public lands in Alabama as well as to those in other States.

The act of March 3, 1883, providing for the sale of mineral lands in Alabama, had reference solely to such of those lands as had not been previously disposed of; entries—or applications, with satisfactory proof and tender of purchase money—previously made were valid appropriations of the lands which they covered, unless impeached for fraud in the usual manner, upon which the act had no retroactive effect.

Where at the date of filing or entry no mineral was known to exist, the fact that mineral is subsequently discovered will not operate to deprive a settler of the right to perfect his claim, in case he complies with all legal requirements in regard to residence, cultivation, and improvement of the land.

Lands covered by bona-fide perfected or inchoate settlement claims cannot be offered at public sale under said act.

Secretary Teller to Commissioner McFarland, April 3, 1884.

I have considered the case of Nancy Ann Caste, on appeal from your decision of October 1, 1883, rejecting her pre-emption proof made June 3, 1882, on the ground that the land, being vacant and having been reported as containing "valuable coal," must be offered at public sale under the act of March 3, 1883 (22 Stat., 487).

It appears that she filed declaratory statement, No. 581, October 14, 1881, for the N.W. $\frac{1}{4}$ of S.W. $\frac{1}{4}$ of Sec. 6, T. 17, R. 1, Montgomery, Alabama, alleging settlement October 3, 1881.

* This case was unintentionally omitted from the last volume.

The record before me shows that a number of tracts of land in that district, including the one under consideration, were reported by a special agent February 1, 1879, as "valuable coal." In consequence of that report, instructions were issued by this Department on August 2, 1879, as follows: "So far as the lands are mineral, they should be withheld from sale and disposal—no matter what their value at present may appear to be—until further legislation is had upon the subject. The lands not mineral in said district should be offered for sale and disposal in accordance with existing law."

On April 22, 1880, this Department directed (7 C. L. O., 36) that all general withdrawals of mineral lands should be revoked; that the then existing policy of throwing the burden of proof on agricultural applicants be reversed, and that a non-mineral affidavit filed by the applicant should be deemed sufficient; that when a person alleged the land to be mineral, he should be required to affirmatively prove the allegation. This revocation was held by your office to apply to the withdrawal of mineral lands in Alabama, directed by the instructions of August 2, 1879. On May 2, 1881, instructions were issued to the register and receiver at Montgomery, as follows: "Hereafter, whenever applications to enter lands which, prior to April 27, 1880, were withdrawn as mineral, are filed in your office, you will proceed as follows; if application be for entry under the homestead or pre-emption laws, you will allow the same, and, at the date of final proof, you will require the applicant to file his own non mineral affidavit, which will be considered sufficient unless the land is specifically alleged to be mineral. If the entry be under any other act, you will require the applicant to file his non-mineral affidavit, without publication or posting of notice, unless the land has been returned as mineral by the surveyor general, and allow the entry upon proper compliance with the law."

These instructions do not appear to have ever been revoked in form, although inquiry by special agents was instituted into alleged fraudulent appropriation of mineral lands in that State; and by letters of your office dated June 3, 1882, the district officers in Alabama were instructed that lands containing valuable deposits of coal could only be disposed of under the Coal Land Act of March 3, 1873.

This was the very day on which the claim of Miss Caste was proved up before the clerk of the court, and of course the instructions could not have reached the local office. Accompanying the final proof is a non-mineral affidavit executed by the claimant on the same day. Her witnesses also both testify to the absence of any indications of coal or mineral in the land, and swear that the same is more valuable for agricultural than mineral purposes. These papers appear to have been executed before the clerk of a court of competent jurisdiction, but there is nothing to show when they were filed in the district office, or that the requisite purchase money was deposited with the local land officers at any time in payment for the land. An application to purchase the

land was filed with those papers, which is certified by the register. On this paper is endorsed a memorandum as follows: "Deposited by P. J. S. \$50.00," apparently made by the receiver, the initials being those of that officer; other memoranda indicate that it passed through his hands.

The pre-emption proof shows the approval of the register, by his signature; but when it was approved does not appear. The certification of posting of notice in his office for thirty days is dated July 5, 1882, and is attached to the affidavit of the publisher of the newspaper in which the notice was published, the affidavit being dated June 30, 1882. All these matters indicate that on this date, July 5, 1882, the proof was complete in the local land office; but why the entry was not completed and reported to your office is not explained. Some explanatory affidavits respecting the claim were subsequently filed in behalf of the applicant; the last bearing date December 12, 1882; all having been made before the same clerk of court who took the original proof. There is no correspondence to show why they were filed.

The papers were not transmitted to your office until September 22, 1883, by the receiver, who stated as follows: "The enclosed proof appears full and complete, and pre-emptor made her proof within the twelve months as required by law, but final papers are not issued because under instructions contained in your letter (U) of August 2, 1883, in the case of declaratory statement filing of Richard E. M. Thompson (application to transmute his declaratory statement No. 349 to that of a homestead entry), where the land had once been classed as being valuable for mineral, you hold that the act of March 3, 1833, provides for the disposal of all the lands in the State of Alabama, theretofore reported to your office as containing coal or iron, at public sale by President's proclamation. You further hold that the mere filing of a declaratory statement is not sufficient to withdraw lands from the operation of the act. The land embraced in the enclosed proof is shown by the list furnished by your office as being valuable for coal; consequently there arises a doubt in my mind as to whether I would be justified in issuing final papers. I therefore submit the proof for your consideration and instruction."

This letter does not cover the period between the filing of the proof in the district office and the receipt of the instructions of August 21, 1883, referred to, and fails to show why the entry had not been duly reported, or rejected by the register and receiver, when final proof was made, or subsequently, prior to the act, which in the receiver's opinion bars the issue of the final certificate; and this opinion you have sustained by your decision from which this appeal is taken. Consequently I am unable to determine what facts or circumstances intervened to prevent the completion of the entry and its proper transmittal with the monthly returns of July, 1882, or at the expiration of such subsequent

period as may have elapsed pending the receipt of the additional proofs submitted by the affidavits referred to.

It is evident that the act of 1883 did not cause this suspension; for that act had not then been passed. It may have occurred through mere neglect of the district office to report the entry. The register's endorsement of approval shows that he was satisfied with the proof. That the present receiver was also satisfied when he transmitted the same is shown by his report, stating that "the enclosed proof appears full and complete, and pre-emptor made her proof within the twelve months as required by law." What was the opinion of the former receiver is not shown; but the endorsement under his initials of the deposit of \$50 would indicate that he was cognizant of the filing of the papers, and no objection to the sufficiency of the proof appears anywhere in the case. The only defect apparent is the omission to issue the proper certificate and receipts and make formal report of the entry. In any ordinary case it would be adjudged upon this showing that if the party paid or tendered the money for the land, her right vested at that date, and the failure to report the entry was a clerical error on the part of the register and receiver, and that the further failure of the receiver to account for the money would amount to official negligence, if not more serious misconduct. Her right to the land could not be affected by such failure. The correction of the error is ministerial merely, and when made relates to the date of payment, which if proved as indicated was prior to the passage of the Act of March 3, 1883. If without fraud, the entry, conforming (as it does) in all matters of proof to the instructions in force at its date, must be adjudged valid, and therefore a legal appropriation of the land.

"The Act of 1883 provides for the future disposition of public lands"; (*U. S. v. Pratt Coal & Coke Co., et al.*, C. C. Nor. Dist. Ala., June, 1883, 18 Fed. Rep., 708.) It has nothing to do with titles previously acquired. As before stated, such titles, unless impeached for fraud, are valid appropriations. Without proof of fraud, patent could not be withheld upon an entry made prior to its passage, merely because the act requires that before disposal of the public lands as agricultural, "all lands which have heretofore been reported to the General Land Office as containing coal and iron shall first be offered at public sale." That condition and restriction relates to the lands then public, for the *future* disposition of which, as we have heretofore seen, the act provides. If already disposed of, they were not public lands, but had passed into private appropriation, and do not fall within the descriptive terms of the law.

The entry in question is a pre-emption. The restrictions of the pre-emption law are liberally construed in the interest of actual settlers. The exception as to mines is contained in Section 2258 of the Revised Statutes, and is expressed in the following words: "Lands on which are situated any known salines or mines." The suggestion that possibly mines of coal may be found to exist upon a tract of land claimed by a

pre-emptor is without force if such mines are not known. This has been the uniform construction of the pre-emption law, in connection with the mining statutes, and is necessary to give full effect to all the words of the law. It is unreasonable, therefore, to seek for possible suggestion of mineral value to be hereafter discovered in the tract claimed. If it was proved beyond reasonable doubt by Miss Caste that no "known mines" existed upon the land—and her proof appears to have been direct upon this point—she was entitled to have her entry reported and approved, if payment was made as indicated.

As to the Act of 1883, it was not intended to change previous constructions of the law respecting mineral lands. It must be construed *in pari materia* with existing statutes on the same subject, as was held by me in the case of Cadle, July 16, 1883.* But, as before stated, if the circumstances and facts of this case shall establish the one fact, that upon sufficient proof the purchase money was accepted or tendered, the right to patent vested by such payment, and the act of 1883 has no retroactive operation upon it. And as to all future disposal, this statute goes to abrogate even the restrictions of the old law, by providing that the mines and mineral lands in the State of Alabama shall be rated agricultural lands for all purposes of such disposal.

The provision that all lands heretofore reported as containing coal and iron shall be offered at public sale before other disposal is made of them as agricultural lands, taken broadly, might possibly have been construed to require such sale even of lands to which inchoate rights had been asserted under the homestead laws. It was therefore further provided, as to such lands, that patent might issue without regard to the previous restrictions of the mineral law of 1872, upon proof of compliance "in all other respects" with the existing homestead law. As to such claimant, no question of mineral reservation can be raised.

* CORNELIUS CADLE, JR.

[Secretary Teller, July 16, 1883; (10 C. L. O., 135).]

Appeal from rejection of application (March 6, 1883) to purchase at private entry certain tracts in Alabama, "upon the ground that the lands have been reported to your office as containing coal, and must therefore be offered at public sale under act of March 3, 1883."

By the "Winter reports," made in 1879, certain tracts in this township were designated as containing "valuable coal"; after which came the entry, "Balance of public land in 24 N., 9 E., not valuable coal and non-mineral." All lands not in the former class, including those in controversy, were offered for sale February 28, 1880, as agricultural lands, under act of July 4, 1876.

"This act should be construed *in pari materia* with the previous law." Sec. 2318, R. S., reserves only lands "valuable for minerals." After an agent, specially detailed, has examined lands and reported them as not containing valuable coal, and your office has thus acted on the report, the Act of 1883 does not create a new suspension of them as mineral lands. The act only operated on lands withdrawn and designated as mineral, because more valuable for mining than for other purposes.

Decision reversed.

Have the parties complied with the provisions of the law "in all other respects?" is the only question to be considered. This must mean actual performance of subsequent conditions, without regard to original mineral character of the lands, although the same might have been reported as containing coal or iron; for the second proviso is a limitation upon the first, which requires the public offering only of such lands as had been so reported. Its purpose, therefore, must be the protection of those inchoate rights of actual settlers which in all other cases confer the privilege of final entry, against the necessity of competition with strangers at a public sale for their own homes and improvements.

When, therefore, it is found that the settler has presented his claim under existing rules, and offered his final proof within the requirements of the law,—and such proof shows the necessary residence, cultivation, and improvement to entitle him to the land, if there were no question of mineral character originally involved,—he should not be further restricted by anything in the act of 1883, if such settlement was duly made and filed for before its passage.

It is not intended by this ruling to decide, upon the present showing, whether or not Miss Caste has or has not made full compliance with the law. That is matter for your determination, under the usual rules, when her completed papers, if she shall be found entitled to have them reported, shall come before you, or in a proper proceeding to bring all the facts to your notice. If your records or information in your possession shall lead you to a reasonable doubt respecting her good faith, and to the belief that this claim was only intended as a cover for the appropriation of a valuable tract of mineral land in fraud of the law and for speculative purposes, and not for actual settlement, nothing herein is intended to restrict a full investigation, as well in this as in any other case, in order to a proper determination of her rights.

LOCAL OFFICES—ACCESS TO RECORDS.

ADOLPH MUNTER.

The public have a right of access to the records of local land offices for the purpose of obtaining information, or of making copies of the same, when the conduct of the public business will fairly permit.

Acting Secretary Joslyn to Commissioner McFarland, November 4, 1884.

I have considered the appeal of Adolph Munter from your decision of the 14th ultimo, approving the action of the register and receiver of the Spokane Falls land office, Washington Territory, refusing to allow him access to the records of the office for the purpose of making plats and transcripts of entries and filings of that part of the land district within the limits of Spokane county.

You approve the decision of the register and receiver upon the grounds, as stated by them, that they do not understand that the Secretary of

the Interior, in the Circular of May 29, 1884, intended to so construe the Act of March 3, 1883, as to take from the local officers the benefit that would accrue to them under said act, and to give the same to persons not interested in any tract of land and whose only desire for copies of the record of an entire county would be for the purpose of being used as the basis of an abstract of deeds of the county and for furnishing such information for a fee; and that to permit access to the plats and tract books for so long a time as would be necessary in making a copy of the records of so large a portion of the land district must, of necessity, interfere with the disposal of public business.

Your office circular of June 2 promulgated the decision of this Department of May 29, 1884 (2 L. D., 197), upon the application of said Munter for a modification of your instructions of August 20, and September 3, 1883, to the register and receiver at Montgomery, Alabama, refusing to allow any one to take copies of the plats, records, entries and filings, subject to the rule that the public business must not be interrupted nor unreasonably impeded. Mr. Munter was at that time engaged in the real estate business in the city of Montgomery, Alabama. In reply to a letter from the register and receiver of August 10, 1883, stating that attorneys and agents (and Mr. A. Munter in particular) are in the habit of making copies of the records, plats and transcripts of their offices for speculative purposes, and thereby disturbing the regular routine of official work, you advised the local officers that "prior to the passage of the act of March 3, 1883, it was customary for outside parties to be permitted to make plats or diagrams

but the act virtually inhibits such practice." Upon the application made by Mr. Munter for modification of your instructions, you refused your instance

record information than there pointed out. I still think it would be better administration to confine the promulgation of such information to the officers authorized by law to impart it." Mr. Munter applied to this Department for relief, and said decision of May 29, 1884, was rendered. It thus appears that the same objections were made by the local land officers at Montgomery, as are now interposed by the register and receiver at Spokane Falls.

It is difficult to see how any misunderstanding could arise in your office as to the meaning of said decision of May 29, 1884. It is therein expressly stated: "I do not regard the provisions of law requiring the land officers to give information and copies of records when requested, and allowing a fee for such service, as intended in any manner to exclude the public, or individuals interested in any tract of land or public record relating to the same, from free access to the information sought, subject only to the needs of the public service, which require that such access shall not interfere unnecessarily with the dispatch of the public business."

When any person desiring information applies to examine the public records of the local land office, the question is not what business is the party engaged in, or what effect will his examination have upon the amount of fees that may accrue to the register and receiver; but rather, will such examination interfere unnecessarily with the public business? If not, then the person so applying must be permitted to have access to the records, "as a matter of well recognized right." Mr. Munter's rights are no greater and no less than those of any other individual under like circumstances, and it is a matter of no moment whether he is a resident of Washington Territory or of the State of Alabama. He asks access to the records of the local land office for the purpose of making copies of the same only "when the conduct of the public business will fairly permit." This access he has a right to demand, and the register and receiver have no right to deny it.

Your decision is therefore reversed.

ALABAMA MINERAL LANDS.

JAMES A. JONES.

The act of March 3, 1883, was not intended to change previous constructions of law respecting mineral lands.

Said act conferred no rights except in cases where entries had been made prior to its passage; and all lands theretofore reported as containing coal and iron, which appeared upon the official records as vacant or free from claim, must be offered at public sale.

The act of May 14, 1880, does not apply to a homestead subject to homestead entry.

Act of May 14, 1880.

Decision
 Jones (21 D. 35), rejecting his application to make homestead entry of the E. $\frac{1}{2}$ of N. W. $\frac{1}{4}$, the S. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$, and the N. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$, of Sec. 2, T. 16 S., R. 6 W., Montgomery district, Alabama.

It appears that the application in question was received at the local office (per mail) March 17, 1883, together with the usual homestead and non-mineral affidavits, in the former whereof he alleges settlement upon the land in the year 1871, and that he has a dwelling house thereon and has cultivated one acre thereof, his improvements aggregating some twenty-five dollars. The register and receiver rejected his application, however, upon the ground that the tract had been reported as containing coal and was withheld from disposal except under the mining laws.

Jones appealed from said action, asserting an inchoate right under the provisions of Section 3 of the Act of May 14, 1880 (21 Stat., 140) to enter said tract by relation as of the date of his settlement in 1871 which right is protected by the act of March 3, 1883 (22 Stat., 487). But your office dismissed the appeal upon the ground that said tract

having been reported several years ago as valuable for mineral, and accordingly withheld from other disposal, appellant's position "is not a true one, as the act of May 14, 1880, has no application to a settlement on lands not subject to homestead entry, which was the condition of the land in question. Again, the act confers no rights except in cases of entries actually made. Congress has specially legislated for this class of lands, thereby cutting off or defeating any rights that ordinarily would have inured to the settler who had failed to file his application at the local office prior thereto."

While it is true that the act of May 14, 1880, does not apply to a homestead settlement upon lands not subject to homestead entry, it is not true, however, that the said act confers no rights save upon entrymen; or, in other words, that it confers no rights upon mere settlers who have not actually made an entry. Such view is precluded by the preamble of the statute, to wit: "An act for the relief of *settlers* on public lands." And the very language of Section 3 expresses a different intent: "That any *settler* who has *settled*, or who *shall hereafter settle*, on any of the public lands of the United States," etc. I take it that by your decision you intended to hold that the act of March 3, 1883, conferred no rights except in cases where entries had been made prior to its passage, and that all lands theretofore reported as containing coal and iron, which appear upon the official records as vacant or free from claim, shall be offered at public sale. In such a view I concur.

As to the act of 1883, it was not intended to change previous constructions of the law respecting mineral lands. It must be construed in *pari materia* with existing statutes on the same subject, as was held by me in the case of Cadle (3 L. D., 173). See also the Caste case (*Idem*, 169).

Jones having no entry of record at the date of the passage of the act of March 3, 1883, and having failed to perform the subsequent conditions prescribed by the homestead law, I am of opinion that he has no rights in the premises that can be recognized by this Department.

Barring the aforesaid correction, I affirm your decision, agreeably to the terms of the Cadle and Caste decisions.

PRIVATE CLAIM—SURVEY; RES JUDICATA.

HEIRS OF JOSEPH MAINVILLE.

A confirmed private claim was located by an approved survey, and another survey thereof which overlapped another claim was rejected; application for approval of the rejected survey was made in 1874, and denied, without exception or appeal; the validity of the former and the invalidity of the latter survey had also received judicial determination: held, on renewal of the application in 1882, without excuse for laches or new evidence, that the case is *res judicata*.

Acting Secretary Joslyn to Commissioner McFarland, November 7, 1884.

It appears that on January 6, 1874, Messrs. Williams and Tittman, attorneys-at-law, St. Louis, Missouri, applied to your office in behalf of

the heirs and legal representatives of Joseph Mainville, alleged to be owners of a tract of land two by forty arpens in size, situate in the Cul de Sac common fields of the city of St. Louis, for approval of a survey thereof, numbered No. 3309, made by U. S. deputy-surveyor Brown in 1839, which they claimed was reported for confirmation to Joseph Calvé's representatives, by recorder Bates's report of February 2, 1816, and confirmed by the Act of Congress of April 29, 1816 (3 Stat. 328).

They also allege that another survey of the same tract was made by the same surveyor, in the name of the same Calvé, numbered No. 1583, which was approved by surveyor-general Reed, and claimed to be in satisfaction of the confirmation to Calvé's representatives, which survey they alleged was erroneous, and should not have been approved; but that survey No. 3309 was the correct location of the confirmed tract and should be approved; and they asked opportunity to prove their allegations, and for patent under the last-named survey. Subsequently, under date of March 28, 1874, the same attorneys solicited the influence of Hon. Erastus Wells, M. C., then at Washington, in behalf of their petition, stating that Charles P. Chouteau, esq., who was the bearer of their letter to Mr. Wells, was one of the claimants, and that the subject matter was of much importance to him. Mr. Wells referred this communication to your office, and it had due consideration in connection with the other papers in the case.

Under date of April 18, 1874, the Commissioner held in his decision that it appeared from an examination of his records that the claim of Joseph Calvé's representatives for a tract of land (by virtue of a concession to Calvé made by the French government in 1768) of two by forty arpens, equal to eighty arpens, is entered as No. 185 in the report of February 2, 1816, of Frederick Bates, then recorder of land titles for the Missouri Territory, entitled "confirmation of village claims under act of Congress of the 13th of June, 1812," wherein it is described as an outlet (Big Prairie), St. Louis, and was confirmed to him for eighty arpens, and, subsequently, by the act of Congress approved April 29, 1816. The decision further states that it appeared that under this confirmation two surveys were made, each for two by forty arpens, namely, No. 1583, in the Grand Prairie common field, and No. 3309 in the Cul de Sac Prairie common field; and that survey No. 3309 is covered by survey No. 2498, under New Madrid location certificate No. 150, in the name of James Y. O'Carroll; and, also, as appeared from a letter dated July 30, 1845, from surveyor-general Conway to the Commissioner upon the subject of interference with the survey of the O'Carroll claim, that survey No. 3309 has never been approved, but on the contrary was considered to be null and void for want of confirmation. The decision also stated that this opinion of the surveyor-general seemed to have been acquiesced in and adopted by the General Land Office, as survey No. 2498, under the the New Madrid location certificates in the name of

O'Carroll, was patented June 10, 1862, in favor of Mary McRee as assignee in right of O'Carroll. In consideration of these facts, the Commissioner held that the matter had passed beyond his jurisdiction, and refused the application.

This decision of the Commissioner embraced all the material points raised by the application, affirming survey No. 1583, which was approved by the surveyor-general, and holding not only that survey No. 3309 had never been approved, but that it was covered by another survey, No. 2498, under which patent had issued. No appeal was taken from this decision, nor was objection made thereto, until eight and one-half years later, to wit, November 14, 1882, when another application for approval of survey No. 3309, and for a review of the Commissioner's decision of April, 1874, was filed in behalf of the same Charles P. Chouteau and heirs of Mainville.

No facts are presented by said application which were not presented, or might not have been, upon the former application. The large number of documentary papers now filed with the application has been, it is believed, of record from the earliest period of this controversy, and the able and elaborate argument of counsel accompanying the same presents only subject matter which has been heretofore fully considered and adjudicated. No excuse is made for the laches in filing the present application, except the allegation that it was supposed until recently that the Act of Congress of June 6, 1874 (18 Stat., 62), protected the applicants against the adverse claim under the New Madrid location patented in 1862. This act is entitled, "An Act obviating the necessity of issuing patents for certain private land claims in the State of Missouri and for other purposes." Whatever might have been the construction of this act by the applicants or their counsel prior to the October, 1878, term of the Supreme Court, it was then definitely construed in the case of *Snyder v. Sickles* (98 U. S., 203), and held only to dispense with the necessity of issuing patents in cases where the party interested was by law entitled to patent. Certainly, then, since rendition of this decision the alleged excuse would not seem meritorious, in view of the fact that the claim now made is in conflict with another patented claim, and that the applicants were not by law entitled to a patent, the former one being in force. I find therefore no reasonable excuse for the failure to appeal from the Commissioner's decision of April 18, 1874, or for the laches in filing the present application.

Your decision of July 30, 1883, from which the present appeal is taken rejects the application upon the ground that it is not within your power to reverse the action of recorder Bates, who was specially charged with the examination of private land claims, and who in adjudicating this claim acted within the sphere of his duty, and whose action was confirmed by Congress. You also express a reluctance (as well as the want of authority) to disturb the action of an officer had about three-

fourths of a century ago, when this matter was not beyond the reach of living witnesses competent to testify to the facts, which action has stood unquestioned during the greater part of that period. You also concur in the facts and conclusions stated by your predecessor in his decision of April, 1874, as further reasons for rejection of the application.

The validity of surveys Nos. 1583 and 3309 have been the subject of judicial consideration and decision. In *Page v. Scheibel* (11 Mo., 167), the validity of survey No. 1583 seems to have been expressly affirmed; the propositions of law therein decided seem to have been approved in *Guitard v. Stoddard* (16 How., 494); and in *Gibson v. Stoddard* (17 Mo. App., 1), the invalidity of survey No. 3309 seems also to have been expressly determined. Were, therefore, the question now before me *res integra*, I should feel constrained to respect these judicially expressed conclusions.

But grants like that in question do not attach to any specific tract until surveyed; the surveys are within the exclusive jurisdiction of your office, which has power to adjudge their accuracy preliminary to patent; and your action in their approval, rejection, or modification is a finality, unless upon appeal to this Department or under its supervisory powers it is otherwise directed; (*Magwire v. Tyler*, 1 Black, 195; *Snyder v. Sickles*, *supra*). The decision of Commissioner Drummond of April 18, 1874, covered all the questions now presented and was full and complete as to the law and facts of the case, as he understood them. There were no exceptions to or appeal from that decision, nor is there any newly discovered evidence. The applicants must consequently be held as consenting to his findings, and as waiving whatever rights they previously claimed, and the case as *res judicata*.

I feel less hesitation in this conclusion, upon grounds of public policy and a regard for the rights of innocent persons not parties hereto. It is understood that the tract in question is within the limits of the city of St. Louis, and is occupied by the homes of many individuals, and the business of different persons and corporations, many of whom, it is fair to presume, have made their investments since April, 1874, in the belief that their titles were unquestioned so far as the claim of the applicants is concerned. To now re-open this litigation, and thus cloud and unsettle their titles and interests and subject them to the expense and annoyance of further controversy, would not accord with those principles of equity and justice which this Department will enforce, unless otherwise influenced by the most meritorious considerations and upon the clearest legal rights.

PRE-EMPTION—SECOND FILING.

JOHN E. THACKER.

Where one made a pre-emption filing on a tract whereon there was a prior claim (under the belief that the prior settler would abandon), and afterwards voluntarily relinquished his filing (under the belief that he would not abandon), he may not make a second filing.

Acting Secretary Joslyn to Commissioner McFarland, November 8, 1884.

I have considered the appeal of John E. Thacker from your decision of January 4, 1884, refusing his application to make a second pre-emption filing.

It appears that one McLellan filed a declaratory statement January 30, 1883, upon the SW. $\frac{1}{4}$ of Sec. 12, T. 161, R. 53, Grand Forks, Dakota, alleging settlement the same day, and that Thacker filed a declaratory statement upon the same tract April 27, alleging settlement April 24, 1883. Thacker relinquished his filing December 1, 1883, but the relinquishment does not appear to have been filed until December 6, when the filing was canceled. Upon the same December 6, McLellan relinquished his filing and one Huchcroft entered the tract under the timber-culture law. Thacker now applies for leave to make another filing upon another tract, claiming that he made his original filing under the belief that McLellan intended to abandon the tract and not comply with the requirements of the law, and that he relinquished his filing when he learned the contrary rather than contest McLellan's filing. This is not sufficient reason for his allowance of a second filing. An offer of final proof by either party would have developed the facts and established the right of one. Thacker's relinquishment was a voluntary act and he must abide its consequences.

I affirm your decision.

TIMBER CULTURE—ILLEGAL ENTRY.

DAVID P. LITZ.

A second timber-culture entry which has been (by mistake) allowed on the same section, being illegal, does not bar the reception of a legal application; in such cases, however, the application must be suspended whilst the applicant tests the validity of the alleged illegal entry.

Acting Secretary Joslyn to Commissioner McFarland, November 10, 1884.

I have considered the appeal of David P. Litz from your decision of May 29, 1884, rejecting his application to file a pre-emption declaratory statement for the NW. $\frac{1}{4}$ of Sec. 3, T. 114, R. 71, Huron, Dakota.

It appears that November 9, 1883, one Steiner made a timber-culture entry upon the SE. $\frac{1}{4}$ of the named section; that subsequently, on the

same day, one Curtis was allowed to make a like entry upon the NW. $\frac{1}{4}$ of the same section; and that May 5, 1884, while both of these entries remained of record, Litz applied to file his declaratory statement upon the last named tract. His application was rejected by reason of Curtis's entry.

The second section of the act of June 14, 1878 (20 Stat. 113), relative to timber-culture entries, provides "That not more than one-quarter of any section shall be thus granted." The entry of Steiner, therefore, exhausted all the land in this section subject to timber-culture entry, and that portion covered by Curtis's entry was excluded from a like entry. Indeed the local officers report that the entry of Curtis was allowed "by mistake" and "is illegal." Unquestionably his entry was in violation of law, and no right was thereby acquired.

Your decision says, however, that, "admitting the fact that said entry is invalid, as long as it remains of record it is a bar to the land covered thereby being disposed of under the pre-emption or other land laws." I do not concur in this broad expression of the law. An entry which is illegal and void has no legal effect, and although it may be erroneously allowed to find place upon the record, is not a valid appropriation of the land and will not exclude it from further appropriation or at least from incipient appropriation. It is nominally, only, an appropriation, and not so in fact. As held in *Wilcox v. Jackson* (13 Peters, 498) land must be "legally appropriated" in order to its severance from the mass of public lands. If illegally upon the record as an appropriation, that question may be tested by any subsequent legal applicant, and pending the same his application should not be rejected, but suspended only to await the determination.

In the case of *Shanley v. Moran* (1 L. D., 188), this Department held that where a timber culture has been canceled and the contestant allowed (under the law) thirty days within which to enter, an entry by another party may be allowed within thirty days subject to the contestant's preferred right of entry; in other words that, although the contestant's preferred right of entry for thirty days is in the nature of an appropriation of the land for that length of time, another entry may be allowed during that time subject to the contestant's right. The present case is within the scope of that ruling, and I am not aware of any well-settled principle which should exclude an application to file for a tract upon which an entry has been illegally allowed, or exclude the applicant's right of appropriation upon determination of the illegality, from the date of his application.

The entry of Curtis was so manifestly in violation of law and therefore so clearly without a valid appropriation of the tract, that it should be canceled and the application of Litz be allowed.

I reverse your decision.

CONTEST—NOTICE; CERTIORARI.

NORTHERN PACIFIC RAILROAD COMPANY *v.* SCHOEBE.

Where A. acted as attorney for contestants in initiating contest, but B. acted as their attorney at the hearing, notice to A. of the decision is sufficient under Rules 44 and 106.

Certiorari will not lie where the petitioner has suffered no material injury, or where the petition fails to set forth wherein the petitioner has been injured.

Secretary Teller to Commissioner McFarland, November 11, 1884.

I have considered the petition of the Northern Pacific Railroad Company, filed by its resident attorney, asking for an order directing you to allow an appeal by said company from the decision of the register and receiver of the land office at Vancouver, Washington Territory, in the case of said Company *v.* Charles E. Schoebe, involving the latter's homestead entry, No. 5312, for the W. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$, the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, and Lot 1, in Sec. 17, T. 10 N., R. 7 W.

The allegations in said petition are, that at the hearing ordered by the local land officers, in accordance with instructions from your office, said company was represented by local attorneys; that notice of the decision of the district officers was sent to Paul Schulze, general agent of the company, at Portland, Oregon, and none was given to the local attorneys, who had the case directly in charge; that Mr. Schulze supposed that the notice to him was a mere matter of form, and that the local attorneys had also been notified; and that upon learning from your decision that no appeal had been filed from the decision of the district officers, Mr. Schulze immediately informed the local attorneys, and they promptly filed the necessary appeal and asked that the same be allowed. This request was refused by you on the 29th ultimo, on the ground that notice of said decision was sufficiently given to the company, and it must be bound thereby.

It appears from your said decision, that the protest against said entry and the request for a hearing were signed by said Schulze, and that, in the initiation of the contest, he acted not only as general agent, but also as attorney for said company. You also state in your decision of the 29th ultimo, that "it has been the uniform practice of the local officers in Washington Territory, in case of giving notice of any action they might take affecting the interests of the Nor. Pac. R. R. Co. to address the same to Paul Schulze, Portland, Oregon, and such notice seems to have been acted upon." If this be true, and it is not denied, it is difficult to see how Mr. Schulze could regard the notice of the decision adverse to the company "as a mere matter of form." It is not stated in the petition that the local attorneys were directed to take an appeal from said decision in case it should be adverse to the company, nor is it shown wherein "justice has not been done." At said hearing the register and receiver found from the evidence that Schoebe settled upon

said tracts, on August 9 or 10, 1870, which was prior to the date when the legislative withdrawal for the benefit of said company became effective, that he has continued to reside upon said tracts for more than five years from the date of said settlement, and that he has not relinquished his right to the same. It does not appear, therefore, that the company has suffered any material injury, and in such a case *certiorari* will not lie. See the Montague Placer Mine;* also the Dobbs Placer Mine (1 L. D., 578).

Again, the notice of the decision of the district officers was given to said Schulze, the attorney who initiated the contest, and, under Rules of Practice Nos. 44 and 106, is clearly sufficient. The failure of the company to appeal from the decision of the local officers must be considered a waiver of its claim. *Benson v. N. P. R. R. Co.* (7 C. L. O., 34); *Weber v. Western Pacific R. R. Co.* (6 C. L. O., 19); *Ergler v. Walker.*†

The petition fails to show absence of laches on the part of the agents of the company, and does not set forth wherein the company has been injured by the decision of the district officers; (*Hilliard on New Trials*, 698). It must, therefore, be denied.

SURVEYS—THE DEPOSIT SYSTEM.

INSTRUCTIONS.

When deposit of estimated cost is exceeded by actual cost of survey, additional deposits must be required. Township plats will not be filed, when surveys are made under the deposit system, until all costs are deposited.

Acting Commissioner Harrison to surveyor-general, Tucson, Arizona, November 12, 1884.

SIR: In reply to your letter of the 31st ultimo relative to the refusal of a depositor to make an additional deposit covering the excess of cost

* MONTAGUE PLACER MINE.

[Secretary Teller, March 22, 1883; (1 B. L. P., 53).]

“The application (of Ambrose, for *certiorari*) is deficient in the matter of statement, under the rule laid down in the case of *Wright v. St. Bernard M'g Co.*, (1 Rep. 90), there being no specific recital of your decisions upon the subject-matter, nor any copy of the decisions.” “But upon the broadest assumption set up by the petition, there is nothing which can result in material injury to Ambrose.” The petition is denied.

† ERGLER v. WALKER.

[Secretary Teller, April 12, 1883; (10 C. L. O., 34).]

“Both parties filed pre-emption declaratory statements, and, after hearing, the local officers . . . recommended that Mr. Walker be permitted to enter” the land. There was no appeal. Unless a case falls within the exceptions specified in Rule 47, “I do not understand that you are authorized to disturb, or in any way interfere with, an unappealed decision of the local officers.” *Ergler's case* does not fall within said exceptions. His appeal from your decision “cannot restore rights lost by failure to appeal from a decision of the local officers which has become final.”

of a survey above the amount originally deposited as the estimated cost thereof, I have to state that, inasmuch as the United States contracts with deputy surveyors to pay them a certain sum per mile for every mile or part of a mile actually run and marked in the field, deputy surveyors are entitled to the full compensation found to be due to them upon the adjustment of their accounts. This applies as well to surveys made under the deposit system as to those payable from appropriations, with this distinction: that for surveys under appropriations the deputies are compensated by the United States from the annual appropriations made by Congress, while for surveys under the deposit system they are compensated from deposits made by settlers.

As settlers are furnished with merely the estimated cost of any desired survey, that amount is not binding upon the surveyor. He is entitled to the mileage allowed by law for every mile or part of a mile run, and should the actual cost, upon the completion of the survey, be found to be in excess of the deposit made to cover the estimated cost, the settler should in all such cases be called upon for an additional deposit; and any failure upon his part to comply with such demand should cause the plat of the township, within which the land of the settler is situated, to be withheld from the local office until a compliance is had.

In cases of the above character you will note in your letters, transmitting the plat and field notes and account, the withholding of the register's plat, referring to this letter.

TIMBER CULTURE—RELINQUISHMENT; CONTEST.

BEERS *v.* MILLER.

One who makes and relinquishes a timber-culture entry (for another's benefit) exhausts his right under the law. One who contests and procures cancellation of a second and illegal entry acquires a preferred right of entry.

Secretary Teller to Commissioner McFarland, November 14, 1880.

I have considered the case of Charles A. Beers *v.* George T. Miller, on the appeal of Miller from your decision of May 3, 1884, holding for cancellation his timber-culture entry for the NE. $\frac{1}{4}$ of Sec. 35, T. 102, R. 61, Mitchell, Dakota.

May 9, 1879, Miller made entry, and March 21, 1883, Beers made affidavit of contest to the effect that the said entry was illegal, because Miller prior to making the same had exhausted his rights under the timber-culture law by making an entry thereunder in Iowa, which he subsequently relinquished. On this allegation Beers asked leave to contest and made formal application to enter the land. April 24, 1883, your office authorized a hearing, which was duly had July 24, 1883. In support of his allegations, the contestant offered testimony to the effect that Miller was the same man that in the name of "George Miller" made

a timber-culture entry in O'Brien County, Iowa, in 1878, and that afterwards Miller relinquished said entry for the benefit of one Sprague. The entryman did not offer any testimony in defense.

You state that the records of your office show that "George Miller" made entry for the N. $\frac{1}{2}$ of NW. $\frac{1}{4}$, Sec. 2, T. 95, R. 42 W, Iowa, June 28, 1878; that said entry was canceled for relinquishment November 7, 1878; and that a comparison of the signatures to the applications show them identical in handwriting and only differing as to the initial letter "T," which is omitted from the Iowa application. It is quite evident that the contestant has made out his case. If there was any doubt on the point it would disappear before the fact that Miller has remained silent under the charge so far as a denial of the same is concerned, and I therefore concur in your conclusion that the entry should be canceled.

Counsel for Miller, however, urge that if his entry is canceled that Beers will take nothing thereby as a successful contestant. In the case of *Buse v. Robert* (2 L. D., 290), this Department held that, although the timber-culture law did not specifically authorize a contest based upon an allegation that the land was not subject to entry on account of timber growing naturally thereon, yet if the contest has been accepted for the benefit of the government, and upon the proofs furnished at the expense of the contestant the entry has been declared invalid and canceled, then the contestant is entitled to a preference right under the act of May 14, 1880. In the case of *Caroline Halvorson* (*Idem*, 302), which arose upon an allegation similar to that in *Buse v. Robert*, the Department again held that the contestant was entitled to a preference right of entry. In the cases cited the entries were invalid, because the land was not subject to appropriation under the timber-culture law, while in this case the entry is invalid because Miller was not competent to appropriate the land under said law; but in one case as well as in the other a showing of the facts must result in cancellation of the entry, and I see no reason why the informant herein should not be entitled to the same benefit as allowed in the analogous cases already decided.

Your decision is affirmed, and the preference right of entry awarded to Beers.

RAILROAD GRANT—RELINQUISHMENT.

ATLANTIC, GULF & W. I. TRANSIT CO. v. BESSENT.

The relinquishment by this company in favor of actual settlers prior to March 16 1881, applies to lands within the indemnity limits.

Secretary Teller to Commissioner McFarland, November 14, 1884.

I have considered the case of the Atlantic, Gulf and West India Transit Company *v.* William V. Bessent, involving the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, and the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, of Sec. 31, T. 14 S., R. 24 E., Gainesville,

Florida, on appeal by said company from your adverse decision of January 31, 1883.

Said tracts are within the fifteen-mile indemnity limits of the Tampa Bay portion of the grant to said road. Bessent applied to make homestead entry of said lands January 17, 1883. The application was rejected by the local office, because the lands were upon an odd section within said railroad limits. Said company, on the 25th day of June, 1881, waived its right to all lands under said grant in favor of "all actual bona-fide settlers who made improvements prior to the 16th day of March, 1881;" (2 L. D., 565). The record contains proof that said Bessent became such bona-fide settler in July 1877, and made valuable improvements long prior to March, 1881. For this reason I affirm your decision directing the entry to be allowed.

HOMESTEAD—DESERTED WIFE.

MARY LEWIS.

A. made homestead entry in 1879, and complied with the law until April, 1883, when he deserted his wife and abandoned the land; his wife resided on and cultivated it until November following, when she removed to a neighboring town, in order the better to provide for herself and children, leaving thereon a part of her household goods; on February 29, 1884, A's relinquishment was filed, and B. filed a declaratory statement alleging settlement in the preceding January; A's wife applied for reinstatement of his entry on March 29, 1884; held that she had no rights under her husband's entry, but that she may enter in her own right under the rule laid down in the case of *Murphy v. Taft*.

Secretary Teller to Commissioner McFarland, November, 15, 1884.

I have considered the appeal of Mary Lewis, deserted wife of John T. Lewis, from your office decision of May 19, 1884, denying her application for reinstatement of her husband's homestead entry No. 3493 of the N. $\frac{1}{2}$ of SE. $\frac{1}{4}$, and SE. $\frac{1}{4}$ of SE. $\frac{1}{4}$, of Sec. 17, T. 35 N., R. 3 E., W. M., Olympia, Washington Territory.

John T. Lewis made said homestead entry October 21, 1879, and it was canceled February 29, 1884, for voluntary relinquishment. Whereupon, the same day, one Nelson Gorten filed declaratory statement No. 8298 for the tract in question, alleging settlement January 12 preceding.

It transpires through her application (embodied in a duly corroborated affidavit filed in the local office on or about March 29, 1884) that the said John T. Lewis made said homestead entry, and complied with legal requirements until April, 1883, when he abandoned the land and deserted her, and has not since returned; that about the time of his abandoning her he gave her a moiety of his personalty, and surrendered possession of his duplicate receipt and all the improvements upon the premises to her; that she and her five children continued to reside

upon and cultivate the tract until the latter part of July, 1883, when, owing to ill health, she went to visit a neighbor, while her children continued to reside upon and cultivate the land until November, 1883, when she removed to La Conner, (situate in the same county), in order the better to provide for herself and children; that in January, 1884, she learned that Gorten had taken forcible possession of her house upon the tract in question, which she had left locked, with part of her goods and chattels, and that thereupon, in February ensuing, she instituted an action in ejectment detinue against him, wherein judgment was rendered in her favor March 1 ensuing. Wherefore she applied for reinstatement of her husband's entry, but your office rejected her application upon the ground that said entry having been canceled, no right can inure to her by virtue whereof she can assert claim under the same.

Although I concur in such view, and approve your action rejecting her application, I cannot approve your further action allowing her to make entry in her own right "subject to any valid adverse claim," inasmuch as I think she should be permitted to make entry of the tract unconditionally, or subject to no adverse claim. Her allegations evidencing her good faith are uncontroverted, and should preclude any one else from initiating an adverse claim in the premises. It has been repeatedly and invariably held by this Department that no settlement right can attach to land covered by a homestead entry, and that a filing without previous settlement is a nullity. It has been shown that Gorten filed his declaratory statement February 29, 1884, the very day Lewis's entry was canceled, and that he alleged settlement January 12 preceding. It was not competent for him to settle as alleged (such settlement having been a trespass *vi et armis*), and hence his filing was a nullity. It is true that Mrs. Lewis has not made entry, but, having evidenced her entire good faith, I think her case falls within the reason of the rule established by the Department in the case of *Murphy v. Taft* (1 L. D., 113), and that such entry should be permitted thereunder.

ENTRY—FINAL PROOF; PAYMENT.

INSTRUCTIONS.

Final proof and payment must be made at the same time. Proofs presented without tender of payment must be rejected.

Commissioner McFarland to register and receiver, Fargo, Dakota, November 18, 1884.

It is reported by inspector Hobbs that at Fargo, "as in most of the Dakota offices," there are a large number of final proofs awaiting payment, and that at the date of his report (October 25, 1884) there were

one hundred and forty-five such proofs at your office. It is stated that these proofs are received from judges or clerks of courts, or notaries public, "with the understanding that some person who has agreed to furnish the money will come in and call them up and make payment," and that oftentimes there is a delay of several weeks (and sometimes months) before payment is made.

The practice referred to is irregular, and must be discontinued. There is no authority for receiving proofs in advance of action in allowing or rejecting an entry, and you have no authority to act upon entry applications until the party is prepared to consummate entry by making proof and payment. In other words, proof and payment must be made at the same time. Proofs presented without tender of payment must be rejected.

NEW MEXICO DONATION—SETTLEMENT.

FLORENTINO PADIA.

Where residence and cultivation were not begun by the donation (New Mexico) claimant on or before January 1, 1858, though other requirements of law were complied with, the claim is invalid. The case of Juan Rafael Garcia is affirmed.

Secretary Teller to Commissioner McFarland, November 18, 1884.

I have considered the donation claim of Florentino Padia, certificate No. 157, notification No. 272, under the act of July 22, 1854 (10 Stat., 308), involving the N. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$, the W. $\frac{1}{2}$ of S. E. $\frac{1}{4}$, and the S. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, of Sec. 6, T. 27 N., R. 34 E., Santa Fé, New Mexico, on appeal by Padia from your decision of September 12, 1883, holding said claim for cancellation.

The proofs show that Padia resided in New Mexico prior to the first day of January, 1853, and has so resided since then; that he is a citizen of the United States; that he settled upon said tracts March 1, 1875, and resided thereon continuously until the 14th day of August, 1880—the time of making his proof—and has made the necessary cultivation and improvement of the land.

You held the claim for cancellation because residence and cultivation were not begun on or before the first day of January, 1858. This holding is in accordance with the decision of this Department of November 23, 1882, in the parallel case of Juan Rafael Garcia (1 L. D., 287). The latter case was sent by your office to this Department for approval, and there was no appearance for Garcia. In the present case counsel has appeared for Padia and filed an elaborate and able argument in his behalf. I have carefully considered such argument, and have again reviewed the grounds of my former decision, but am unable to arrive at any different conclusion.

I accordingly affirm your decision.

HOMESTEAD—ACT OF JUNE 15, 1880.

CHRISTIAN G. LARSEN.

Since the act of June 15, 1880, applies only to transfers made prior to its passage, the transferee's entry in this case, which was based upon a transfer made after its passage, was illegally allowed.

Since the transferor is not an applicant for purchase, and since the transferee, subsequently to allowance of his entry, made valuable and permanent improvements on the land, and sold various parcels of it, the case may go to the Board of Equitable Adjudication.

Secretary Teller to Commissioner McFarland, November 19, 1884.

I have considered the appeal of Christian G. Larsen from your decision of September 19, 1882, holding for cancellation his cash entry No. 2325, covering the SW. $\frac{1}{4}$ of Sec. 34, T. 18 S., R. 8 E., Salt Lake City district, Utah.

The record shows that one Forbush made homestead entry of said tract on April 23, 1880, and deeded it to Larsen on December 1, 1880. Larsen's cash entry was allowed under Section 2 of the Act of June 15, 1880. Your decision holds that it was improperly allowed, for the reason that said act applies only to transfers made prior to its passage. In this I agree with you, after a very full and careful consideration of the subject, and affirm this part of your decision.

But the decision goes further and holds the entry of Larsen for cancellation, sustains the validity of Forbush's entry, and affirms the latter's right of purchase under the act of June 15, 1880. The record shows that Forbush is not an applicant to purchase under said act; that after the conveyance, which appears to have been made in good faith by both parties, he left the country, so that his transferee cannot now communicate with him; that a valuable consideration was paid for the transfer, which cannot now be recovered back; that Larsen went on the land, and has made improvements of his own thereon of the value of several thousand dollars; and that he has sold various parcels of it to third persons, and this in good faith and relying upon the action of the local officers in allowing the entry, and upon the act of June 15, 1880, which all parties supposed authorized the said transfer and entry by the transferee. He avers that he has no redress, unless the government will protect him.

I think that this case is one which contains all the elements of an equitable claim against the United States, and that the equities are very strong. It is a rule, recognized in various ways by the courts, that the interests of a bona-fide claimant are not to be prejudiced by the mistakes of officials. Section 2457, Revised Statutes, authorizes equitable adjudication "where the law has been substantially complied with, and the error of informality arose from ignorance, accident, or mistake, which is satisfactorily explained." The existing rules of the Board of Equitable Adjudication do not include this case, for the reason that they were

made prior to the enactment of the law under consideration; but they frequently recognize the plea set up by Larsen, namely, that the entry was made *bona fide* and in ignorance of the law. So that, as he has obtained a transfer of the character contemplated by the law and paid the required purchase money, he has substantially complied with the law; and, though not qualified under the act of June 15, 1880, I think that his entry will be confirmed by the Board of Equitable Adjudication.

Your decision is therefore modified, and you will please submit Larsen's entry to the Board.

HOMESTEAD—DESERTED WIFE.

MEESE *v.* MEESE.

A. made homestead entry in 1872, but abandoned his wife in 1877, and relinquished the land; he rejoined his family on the land, and procured B. to make homestead entry in June, 1877, and to hold the tract in trust for A.'s family; A. died in 1880, and B., who began to assert his sole ownership, resided with the widow (with her consent) until August, 1882, after which he forcibly maintained the residence: held that A.'s widow may make entry *nunc pro tunc*, subject, however, to confirmation by the Board of Equitable Adjudication.

Secretary Teller to Commissioner McFarland, November 19, 1884.

I have considered the claim of Annette Meese *v.* David Meese, involving the homestead entry made by the latter for the E. $\frac{1}{2}$ of N.E. $\frac{1}{4}$ of Sec. 2, T. 13, R. 8 E., Lincoln district, Nebraska, on appeal by Annette Meese from your decision of March 14th last, dismissing her contest.

The record in this case embraces several hundred pages of testimony, the most of which consists of irrelevant details of a bitter family feud. The portion of the testimony that does bear upon the case is of the most contradictory character. The following facts, however, seem to be conclusively proven.

May 8, 1872, John I. Meese made homestead entry of the tract, and at once took up his residence thereon, plowed the whole of it, set out an orchard and other trees, and built a house 24 x 24 feet, with five rooms, a cellar, etc. The house was built and the cellar and a well dug exclusively with money willed to his wife, Annette Meese, by her father and another relative. In the spring of 1877 Meese abandoned his wife, taking with him the four children. She learned his whereabouts, and went thither to obtain the children. A reconciliation ensued, and the entire family returned to live upon the tract. Prior to this, however, the husband had executed a relinquishment of the land, and the question arose how to regain legal possession thereof for the benefit of the reunited family. Finally it was arranged (upon consultation with an attorney) that John I. Meese's brother, David Meese, should make homestead entry of the relinquished tract, and hold the same in trust for his (John I. Meese's) family. David Meese made said entry June 20, 1877.

It was further arranged that the two brothers should cultivate the land in partnership, and David Meese (being an unmarried man) was assigned a room in the house as a sleeping apartment. This state of affairs continued until March 8, 1880, when John I. Meese died.

After the death of John I. Meese, David Meese for a time indicated and expressed to his brother's widow and other witnesses an intention to fulfill his agreement. But after a few months he began to usurp authority and claim ownership to an extent which alarmed Mrs. Meese, and she (November 9, 1880) applied at the land office to contest his claim. He succeeded, by fair but ambiguous promises, in satisfying her that he had no intention to defraud her, and she withdrew the contest, upon his paying the expenses. Afterward he more boldly renewed his claim, threatening to "boot her off the land" and "pitch her traps out doors," and offering to rent or sell the tract as soon as he should have "proved up." Mrs. Meese now tried more vigorous measures than before to get rid of his presence and belongings; she refused to board him, or to allow him to enter the apartment which he had until that time occupied (when about the place), and put her own furniture into the room. Thereupon (August 23, 1882) he and three other men forced open the room, tore up the carpets from the floor, removed the furniture, and assaulted and struck Mrs. Meese when she interfered. Then he built a kitchen at the side of the house, in which to board his hired men and himself, (Mrs. Meese having refused to board them), and made an outside stairway whereby to reach the room which he still insisted upon claiming as "his" sleeping apartment.

It is shown affirmatively that Mrs. Meese has never been absent from the tract a fortnight at any one time (except when she went after her children on the occasion when her husband abandoned her) during the twelve years and over that have elapsed since her husband made entry of the tract. Her entire property was invested in the house and improvements upon the land, which, with the land, David Meese now claims. He asserts that he bought said house and improvements of his brother; but it appears that the latter never mentioned it to his wife, nor to any one else; and the only proof of any such transaction is the unsupported assertion of David Meese (never made by him until recently) long after John I. Meese's death.

Your office, March 14th last, affirmed the decision of the local office awarding the land to David Meese.

In my opinion, the so-called settlement and residence of David Meese, made in a building owned and at the time occupied by another party who was a prior bona-fide resident upon the land—a settlement made clandestinely and under false pretenses, and a residence maintained through misrepresentation and fraud, so long as they would avail, and afterward by physical force and violence—is not such a settlement and residence as the United States homestead law contemplates. The appellant having evidenced her good faith in the premises, and no valid

adverse right intervened, I can see no objection to her being permitted to make entry of the tract *nunc pro tunc*, by virtue of her compliance with the legal requirements of the homestead law, subject, however, to confirmation by the Board of Equitable Adjudication.

CONTEST—DECISIONS.

LEIGHTNER *v.* HODGES.

Whether testimony is taken before the local officers or another authorized officer, the decision must be based on the facts shown by the official records as well as on those disclosed by the testimony.

Commissioner McFarland to register and receiver, Gainesville, Florida, November 20, 1884.

On June 22, 1884, a hearing was ordered in the case of John D. Leightner *v.* Stapleton Hodges, involving the SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, and SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, of Sec. 30, T. 14 S., R. 22 E., and hearing set before you on Dec. 8, 1884. * * *

All cases involve the records of the local office. In your examination of any case, whether the oral testimony is taken before you or before another authorized officer, it is of course a material part of your duty to consult your records, and you must make up your judgment upon the facts as shown by the record, together with facts brought out in the testimony taken for the purposes of the hearing. You are not expected nor would you be authorized to ignore facts of record, because testimony is taken before another officer. * * *

CONTEST—DEPOSITS; COSTS.

ANNA M. LIVINGSTON.

Both parties to a contest may not be required to deposit for the entire contest; the costs of transcribing a cross-examination must be paid by the party making it; vexatious and irrelevant cross-examinations should be promptly arrested by the local officers.

Commissioner McFarland to register and receiver, Tucson, Arizona, November 24, 1884.

I am in receipt of your letter of the 31st ult., transmitting the appeal of Anna M. Livingston from your ruling in the matter of deposits to secure costs in contest cases.

It appears that it is your practice to require parties to a contest to each deposit the estimated amount of costs, thus making a double deposit, and that the present appeal is taken with a view of obtaining the instructions of this office relative to said practice. It further appears that in

the case upon which this question has arisen you demanded a deposit of \$250 from each party, and subsequently an additional deposit of \$100 more from each, making a total of \$700 for the costs of a hearing to ascertain the facts in the matter of the alleged settlement, residence, and improvement of a pre-emptor. In respect to the extraordinary expense entailed in this case you state that you urged the attorneys for both parties, and especially the attorney for Mrs. Livingston, to confine the examination to relevant matters, but that the latter disregarded your suggestions, encouraged his witnesses to testify in detail to facts having no bearing upon the case, apparently for the purpose of involving the contestee in expense, and that the latter retaliated by conducting his cross-examinations in much the same manner, each party meanwhile boasting that he had the means to prolong the contest indefinitely. You further state that this contest continued for a whole month to the interruption of the general business of your office. You refer to this course of proceeding as justifying your ruling. It does not appear however that your ruling had the effect of terminating the protracted litigation, which only ceased when the means of one of the parties became exhausted.

You are instructed that you have no authority to require double deposits in any case. You may require contestants to deposit for a reasonable estimate of preliminary costs. Previous to taking testimony you may require both parties to deposit for a reasonable estimate of the cost (due by them respectively) of reducing the same to writing, and if the hearing is protracted you may require additional deposits from either or both as may be necessary. But excessive, unreasonable, or unnecessary deposits should never be required at any stage of proceedings. You may not, in any case, require both parties to deposit for the whole costs.

The matter of unnecessarily protracted hearings and the vexatious accumulation of costs, is one within the scope of your authority to prevent, and it is your duty, under the decisions and instructions of this office and Department to put a stop to such proceedings. "When it is clear that the line of cross-examination, or the testimony offered, is intended to vex, or delay, or cause unnecessary expense, . . . the local officers may, and they should, peremptorily end it;" (*Foster v. Breen*, 2 L. D., 232). Amended Rule of Practice 35* provides that

* RULE 35, AS AMENDED.

1. In contested cases and hearings ordered by the Commissioner of the General Land Office, testimony may be taken near the land in controversy before a United States commissioner, or other officer authorized to administer oaths, at a time and place to be fixed by the register and receiver and stated in the notice of hearing.

2. Officers taking testimony under the foregoing rule will be governed by the rules applicable to trials before registers and receivers; (see Rules 36 to 42, inclusive.)

3. Testimony so taken must be certified to, sealed up, and transmitted by mail or express to the register and receiver, and the receipt thereof at the local office noted on

“the costs of transcribing cross examination will in all cases be taxed to the party making the cross-examination.” This rule should, of itself, be sufficient to bar vexatious proceedings. Under it, neither party can force the other to incur unnecessary expense.

CONTEST—EX PARTE CASES.

INSTRUCTIONS.

Testimony must be taken at time and place fixed in the notice. In ex-parte contest cases testimony taken without notice must not be received or acted upon.

Acting Commissioner Harrison to register and receiver, Bismarck, Dakota, November 25, 1884.

I am informed by the report of inspector F. D. Hobbs that in ex-parte contest cases, where parties are cited to appear before you, it is your practice to allow testimony to be taken before a notary public or other officer on a day prior to that set in the notice, and on the day of hearing to accept that evidence, instead of taking testimony on that day according to notice.

You are advised that when testimony is authorized by you to be taken before some other officer than yourselves, the notice must state the time and place fixed for taking the testimony, and the name and official character of the officer who is designated to take it. When notice is

the papers, in the same manner as provided in case of depositions by Rules 29 to 32, inclusive.

4. On the day set for hearing at the local office the register and receiver will examine the testimony taken by the officer designated, and render a decision thereon in the same manner as if the testimony had been taken before themselves; (see Rules 50 to 53, inclusive.)

5. No charge for examining testimony in such cases will be made by the register or receiver.

6. Officers designated to take testimony under this rule will be allowed to charge such fees as are properly authorized by the tariff of fees existing in the local courts of their respective districts, to be taxed in the same or equivalent manner as costs are taxed by registers and receivers under Rules 54 to 58, inclusive.

7. The costs of transcribing cross-examinations will in all cases be taxed to the party making the cross-examination.

8. Where hearings are ordered by the Commissioner of the General Land Office in cases to which the United States is a party, continuances will be granted in accordance with the usual practice in United States cases in the courts, without requiring an affidavit on the part of the government.

9. When an officer designated to take testimony under this rule, or when an officer designated to take depositions under Rule 27, cannot act on the day fixed for taking the testimony or deposition, the testimony or deposition, as the case may be, will be deemed properly taken before any other qualified officer at the same place and time who may be authorized, by the officer originally designated, or by agreement of parties, to act in the place of the officer first named. (Circular of January 3, 1883.)

thus given, you can receive and act upon testimony taken in accordance with such notice, but you cannot receive or act upon testimony taken without notice.

HOMESTEAD; PRE-EMPTION—FINAL PROOF.

INSTRUCTIONS.

When a homesteader or pre-emptor advertises his intention to make proof, the adverse homesteader or pre-emptor of record must always be cited.

*Acting Commissioner Harrison to register and receiver, Bismarck, D. T.,
November 25, 1884.*

I am advised that a difference in practice exists at different local offices in respect to notifying adverse claimants, when homestead entrymen advertise their intention to make proof; and that, at your office, when there is an unexpired pre-emption filing for the land claimed by a homesteader, the pre-emption claimant of record is not specially cited in the published notice of homestead final proof.

Your practice is not in accordance with the instructions of this office, which are that adverse claimants of record should always be specially cited, both in homestead and pre-emption notices of intention to make proof. This rule is adopted as a matter of precaution, and the same should be observed by registers and receivers in all cases.

The matter of expired pre-emption filings is regulated by circular of April 2, 1881 (8 C. L. O., 8.)

CHIPPEWA SCRIP—FRAUD; RES JUDICATA.

HENRY T. WELLS.

Recital of facts relative to the origin and issue of Chippewa half-breed scrip, and its location within the Mille Lac reservation.

The case in question was decided in 1873; that the decision was erroneous, or that the Department has since held differently, is immaterial; since there is identity in the thing sued for, in the cause of action, in the persons and parties, and in the quality of the persons, the case is *res judicata*.

Secretary Teller to Commissioner McFarland, November 26, 1884.

I have considered the several matters referred to in your letter of March 9, 1883, "relative to certain locations made within the Mille Lac (Indian) Reservation, embracing Township 42 of Ranges 25, 26 and 27, and Township 43 of Range 27, N. and W., Minnesota." After stating that on April 18, 1871, fifty-seven pieces of Chippewa half-breed scrip, of eighty acres each, were located within said reservation; that September 1, 1871, at the request of the Commissioner of Indian Affairs, the local officers at Taylor's Falls were directed to give public notice

that all entries and locations in the reservation were illegal and not to allow further disposition of such lands; that January 24, 1872, all the locations and entries referred to were canceled on the records of your office and the local land officers so advised; that in September, 1879, Henry T. Wells, on appeal from the district officers' refusal to allow his application to purchase, submitted papers alleging that in 1872 he filed applications under the act of June 8, 1872 (17 Stat., 340), with the Commissioner appointed for that purpose, setting forth that he was the innocent holder of such scrip, purchased in open market, etc., and that he was entitled to the remedial provisions of the act of 1872, and that no action had been taken on said appeal; you ask, in view of my instructions of August 7, 1882 and February 13, 1883, directing the reinstatement of certain canceled soldiers' additional homestead entries on said lands, whether the said locations of Wells should not also be re-instated on the records in order that all claimants may have a standing before your office to enable them to be heard in defense of their respective claims. You also transmitted at the same time a protest from counsel for Wells against the re-instating of the additional homestead entries on account of the prior claim of Wells.

An answer to your inquiry necessitates a statement of the pertinent facts in the case.

The 7th Section of the treaty of September 30, 1854 (10 Stat., 1109), between the United States and the Chippewa Indians of Lake Superior and the Mississippi, gave to each head of a family or single person over the age of twenty-one years of the mixed bloods, belonging to the Chippewas of Lake Superior, eighty acres of land to be selected by him under the direction of the President, which should be secured to him by patent. In his letter of March 19, 1872, to the Commissioner of Indian Affairs, Secretary Delano directed that, in consequence of supposed frauds in the issue of scrip, issued under the provisions of this 7th Section, it (with a named exception) "be declared illegal, fraudulent and void, and all entries of land made with such scrip and unpatented should be canceled." Congress thereafter (June 8, 1872), apparently in view of this action of the Department, and intending also to protect the rights of bona-fide holders of such scrip, passed the act of that date authorizing the Secretary of the Interior to permit the purchase of lands located with claims arising under said 7th Section at such price per acre as he should deem equitable and just, but not less than \$1.25 per acre; "and that owners and holders of such claims in good faith be also permitted to complete their titles under such claims upon compliance with the terms above mentioned; provided, that it shall be shown to the satisfaction of the Secretary of the Interior that said claims are held by innocent parties in good faith, and that the locations made under such claims have been made in good faith and by innocent holders of the same."

This statute, although remedial in character, was evidently intended

to reach cases where, first, the scrip was located in good faith upon lands upon which valid scrip could have been located, but which locations, by reason of the invalidity of the scrip, were illegal; and, secondly, where the scrip was located in good faith upon lands on which it could not be legally located, but the land was otherwise subject to disposal; and under it Secretary Delano appointed a board of three commissioners (T. C. Jones, E. P. Smith and D. E. King) "to make such full investigation and report as would enable the Department to carry out the provisions of the act." The board met in August, 1872, and Henry T. Wells presented to it his claim, based upon ninety-two locations of Chippewa half-breed scrip, of which fifty-seven were within the Mille Lac reservation (as then supposed), and thirty-five were without it. The board found and reported November 25, 1872, that he was the innocent holder of the scrip and the locations of the same, and affirmed his right to enter all the land covered thereby which was outside of the supposed reservation, but they were divided in opinion respecting his right to the lands within the reservation, Messrs. Jones and Smith saying: "These entries are situated within the Mille Lac reservation, which is still occupied by the Indians, and the entries, as we understand, having been for this reason already canceled at the local land office, we have declined to consider any claim arising under them." Mr. King reported December 13, 1872, that "the power conferred upon the Secretary by the Act of June 8 is ample and conclusive upon all the lands referred to in the act," and that "he is hereby authorized to permit the purchase of these lands by these claimants as much as though they had been the only public lands belonging to the government."

These reports coming before Secretary Delano, he stated, in his decision of June 16, 1873, that he had "carefully examined the said majority and minority reports of the commissioners," and that "the parties in whose favor the commissioners have reported", as innocent purchasers in good faith, "will be and are hereby authorized to purchase the tracts embraced in Schedule A, accompanying the report of the majority of the commission;" and that "the claims placed by the majority of the commission in the Schedule marked B, accompanying their report, and which are rejected by them, are not, in my opinion, such as come within the true intent and meaning of the law, and their action in relation to said claims is hereby affirmed. All other entries of lands heretofore made with said scrip and not included in the favorable recommendation of said commission are hereby cancelled, and such lands are restored to market." Schedule B showed the claims of Wells, rejected by the commission.

I think it clear that by this decision Secretary Delano intended to and did decide upon all claims presented to the commission under the act of June 8, and that the act did not warrant application of its provisions to the claims of Wells. It is therefore immaterial that the only

objection entertained by any of the board to the allowance of Wells's claim was based upon an impression (even if erroneous) that the lands he sought to enter were within an actual reservation, and hence not subject in any manner to disposal; or whether Secretary Delano adopted the views of the board without consideration of whether the lands were in fact so reserved; or that Secretary Chandler, by his subsequent decision of March 1, 1877, in the case of Folsom, held that the Mille Lac reservation terminated by the treaties of March 11, 1863, and May 7, 1864, since which date the lands in question have been public lands of the United States, free and unincumbered of the Indian titles; or that in my letters of May 10, 1882, and February 13, 1883, to the Commissioner of Indian Affairs I re-affirmed Secretary Chandler's ruling as to the status of the land formerly within this reservation. If, as I think was the fact, Wells's whole claim was before Secretary Delano and passed upon in his decision, then that decision was final and conclusive, and the present claim is *res judicata* so far as this Department is concerned. It matters not that that decision may have been erroneous, or that the Department has since held differently. It is sufficient that it was a decision. And if, in that case as presented to Secretary Delano and that now before me, there is identity in the thing sued for, in the cause of action, in the persons and parties, and in the quality of the persons—concurrence in which four conditions must exist in order to make a matter *res judicata*, as also seems clear to me—it is not necessary to further examine the details of the case, or subsequent rulings of this Department or of your office not affecting this question, because Secretary Delano's ruling must be held to have determined Wells's entire claim. The authorities on this question are ample. Mr. Attorney-General Wirt said October, 1825 (2 Ops., 8), in discussing to what extent, if any, one Executive may review and unsettle the acts of its predecessors: "If it has such authority, the Executive which is to follow us must have the like authority to review and unsettle our decisions, and to set up again those of our predecessors; and upon this principle no question can be considered as finally settled. . . . Hence I have understood it to be a rule of action prescribed to itself by each administration, to consider the acts of its predecessors conclusive as far as the Executive is concerned."

Attorney-General Stanbery said (12 Ops., 355), "I take it to be a well-settled principle that the final decision of a case before the Head of a Department is binding upon his successors in the same Department, subject, however, to some equally well established exceptions; and these are where there has been a palpable error of calculation, or where new facts are brought forward, which show that the former decision was erroneous, and would probably not have been made if they had been shown at the time of the decision." (See also this same general doctrine announced by Attorneys-General Taney, Nelson, Toucey, Johnson, Black, Hoar, Akerman, and Bristow, in 2 Ops., 464; 4 Id., 341; 5 Id., 124; 9 Id., 101, 301, 387; 13 Id., 33, 387, 456). The same rule obtains in this

Department. See Secretary Chandler's opinion in Heirs of McConnell (2 C. L. O., 149), and my decision of October 22, 1883, in the case of Southern Minn. Ry. Ext. Co. v. Kufner (2 L. D., 492), and numerous others to the same effect. I do not find the case of Wells within any of the exceptions to the general rule named in any of these decisions, and must therefore hold his claim finally decided by Secretary Delano in 1873, and that I have no authority to review or disturb that action.

But even if Secretary Delano's decision were not conclusive, I should doubt my right to re-open the case, in view of the fact that Wells acquiesced in that decision from June 1873 to July 1877—at which latter date (after decision of Folsom's case) he moved for re-instatement of his claim—because prior to that date, in 1875, when the lands in question were vacant, the additional homestead applications involved in the case were filed and have been from that time persistently pressed. These claims intervened when the lands were subject to disposal, and I know of no principle which will allow their defeat (if otherwise legal) by that of Wells.

Replying therefore to your inquiry of March 9, 1883, whether the claims of Wells should not be re-instated, I answer that, for the reasons stated, they should not be.

LAKE—MEANDER LINES.

JAMES H. MAY.

Meander lines about a lake are not lines of boundary, and their metes and bounds must yield to the natural boundary; grants by the government of lands lying on its margin extend at least to the permanent water line of the lake.

Valentine scrip may not be located upon land occupied and within the corporate limits of a city.

Acting Commissioner Harrison to register and receiver, Olympia, Washington, November 28, 1884.

I have considered the appeal of James H. May from your action in rejecting his application filed December 11, 1883, to locate with Valentine scrip (E. 63) certain lands in Sec. 30 T. 25 N. R. 4 E., Willamette Meridian, Washington Territory, alleged to be unsurveyed and subject to appropriation.

The lands applied for lie along the shores of lake Union, in front of two certain donation claims, and between the meander line and the water edge, and comprise about thirty and one-half acres. Your action is based on the ground that the official plat of said township does not show any vacant land as described in the application. It is alleged by David T. Denney and Thomas Mercer, who appear as interveners, that the whole of the land applied for lies within the boundaries and granted limits of their donation claims and cash entry No. 635, and that the land is not vacant and unappropriated, but is owned, occupied and im-

proved by them and others, and is within the incorporated limits of the city of Seattle.

The official survey of Township 25 was made in 1855, the lines about the lake being meandered in the usual manner. The donation claims conform therewith. It is in evidence that the present water line of lake Union, along that portion of said lake which lies adjacent to the donation claims aforesaid, is now a distance of several feet further to the north and east of the meander line of the claims as originally surveyed; that a dam was in existence which extended across the outlet of the lake; and that by reason of the removal of the dam, and the filling up of brooks which emptied into the lake, the waters therein have receded the distance aforesaid. The land thus exposed is that applied for by Mr. May, and is claimed by the interveners as riparian owners under their respective entries and patents.

The field notes of the survey of the donation claims aforesaid, so far as the lake shore boundary is concerned, show that the line runs from a post on the shore thereof at the northeast corner of Mercer's claim, thence with the meanders of the lake to another post on the shore of the lake near the northeast corner of Denney's claim. It is not clear whether lake Union is a navigable body of water or not, but this fact in my opinion can make no difference as the riparian owners in either case, would take to the waters edge if no further. Counsel for the interveners insists that, under the patents issued to them by the government for the adjacent lands, they own all lands lying between the government meander line and the water. In this view of the law, I concur.

"When public lands border upon lakes and rivers, meander lines are run as means of ascertaining the quantity in the fraction subject to sale, and not as boundaries of the tract;" (*Railroad v. Schurmeir*, 7 Wall., 272). "The lake in this case was the great natural object, the sinuosities of which were described by the meander line. The metes and bounds of that line must, upon well settled principles, yield to the natural boundary." "The grants made by the government of the lands lying upon the lake are not limited by the meander line, but extend at least to the permanent waters of the lake;" (case of Reuben Richardson*).

* REUBEN RICHARDSON.

[Secretary Teller, July 11, 1883; (11 C. L. O., 284.)]

Appeal from denial of application to enter with Valentine scrip certain lands on the margin of Clear or Cedar lake, Indiana, lying between the official meander line and the water line. "An inland lake, two miles long and three-fourths of a mile wide, and is not navigable in the sense that its waters can be put to a public use for the purpose of trade or commerce." Bordering lands were surveyed in 1841 and were then sold. The application concedes "that there has been no material changes in the natural condition [height] of the water in the lake since the government survey."

"Meander lines are run as means of ascertaining the quantity in a fraction subject to sale, and not as boundaries of the tract"; (*R. R. v. Schurmeir*, 7 Wall., 272). "The lake in this case was the great natural object, the sinuosities of which were described by the meander line. The metes and bounds of that line must, upon well-settled prin

The views here expressed leave no land upon the borders of the lake subject to sale, and dispose of the case.

The other points raised by the interveners need not be considered further than to say, that I should hold the land applied for not subject to location with Valentine scrip, because occupied and being within the corporate limits of a city.

EL SOBRANTE RANCHO.

FRIDOLIN GRIM.

The statutory reservation for the El Sobrante claim was limited to lands lying between the five ranchos, San Antonio, Pinolé, San Pablo, Valencia, and Moraga, and did not extend to lands lying outside of the exterior boundaries of any of them and not between them.

Secretary Teller to Commissioner McFarland, November 28, 1884.

I have considered the appeal of Fridolin Grim from your decision of November 10, 1883, rejecting his application to file pre-emption declaratory statement for the NE. $\frac{1}{4}$ of Sec. 14, T. 1 S.; R. 2 W., M. D. M., San Francisco, California, the ground of your action being that at the date of the application the land was covered by soldiers' additional homestead entries. The plat of township survey, embracing the land in question, was filed July 30, 1878.

Appellant's application to file was offered April 27, 1883, he alleging settlement January 20, 1882. The soldiers' additional on account of which said application was rejected were filed July 30, 1878. Other filings have since been offered, all being prior to Grim's application.

The chief ground of appeal from the action of the register and receiver and your decision is the allegation that the tract was on the 30th of July, 1878, when the soldiers' additional were filed, a part of the El Sobrante private land claim; that it did not become public land until April 16, 1883, the date of the final action by this Department in that case; and that consequently it was not subject to entry July 30, 1878; the date of the additional entries. I had occasion carefully to consider the question thus raised in my decision of the 25th of July last, in the case of Joel Docking (3 L. D., 203). In that decision I affirmed yours of March 26, 1884, (*ibid.*), holding that the statutory reservation for El Sobrante claim was limited to lands lying between the five ranchos, San Antonio, Pinolé, San Pablo, Valencia, and Moraga, and did not extend to lands lying outside of the exterior boundaries of any of them and not between them. That decision controls this case. The land does not lie between

ciples, yield to the natural boundary; (*Forsyth v. Smale*, 7 Biss., 201; *Indiana v. Milk*, 11 Biss., 197). The grants made by the government of the lands lying on the lake are not limited by the meander line, but extend at least to the permanent waters of the lake." Whether they extend further will not be considered.

Decision affirmed.

the ranchos mentioned. On the contrary, it does lie east of the Moraga, that is, on the side most remote from El Sobrante.

More than this, it does not even lie within the exterior boundaries of the Moraga claim. It falls outside of what is known as the Higley survey of said rancho, which survey, I decided in the Docking case, (*supra*) located substantially the exterior boundaries of said rancho, as claimed.

I therefore decide that the land in question was not in reservation at the date (July 30, 1878,) when the additional homestead entries were made, but was public land subject to entry. This being the case, the allowance of said entries was proper. The land was appropriated thereby. The entries are still of record. Indeed, final certificates had issued on account of same prior to appellant's application and prior to his alleged date of settlement.

Your decision rejecting said application is affirmed.

CAPITAN GRANDÉ CAÑON (INDIAN) RESERVATION.

JAMES MEAD.

The lands in question, in Capitan Grandé cañon (which have recently been set apart as a reservation), were in 1853, long prior to the entry, occupied by the Indians with consent of the government, and under direction of the military authorities; since the cancellation of the entry was made by order of the Department, the appeal is dismissed.

Secretary Teller to Commissioner McFarland, November 28, 1884.

I have before me the appeal of James Mead from your decision of January 8, 1884, canceling his homestead entry No. 987, upon the N. $\frac{1}{2}$ of N. W. $\frac{1}{4}$, and the N. $\frac{1}{2}$ of N. E. $\frac{1}{4}$, of Sec. 22, T. 10 S., R. 2 E., S. B. M., Los Angeles district, California.

This is one of a number of cases of alleged wrongful appropriation of lands in the Capitan Grandé cañon, which have been occupied, with the consent of the government, by the Indian tribe bearing the same name since 1853, when the military commandant at San Diego assigned and allotted said canon for their use. By executive order of June 19, 1883, the tract was formally set apart as an Indian reservation. The Commissioner of Indian Affairs having brought these entries to my attention, I issued an order (June 7, 1883,) for their cancellation.

It was in pursuance of said order that you directed the cancellation of Mead's entry. His appeal from your action is therefore dismissed.

THE MORAGA GRANT.

JOEL DOCKING.

The claimed limits of Joaquin Moraga's grant (Laguna de los Palos Colorados) are to be determined with reference to the claim filed with the board of land commissioners, which, the evidence shows, was substantially located by the Higley survey, made in April, 1855. The grant was finally located within the exterior limits on August 10, 1878, by the approval of the Boardman survey and issue of patent. As the tract which Docking claims was not within the claimed limits of the Moraga rancho, as indicated by the Higley survey, it was subject to the soldiers' additional entries made on August 8, 1878, which barred his subsequent settlement in 1880.

Secretary Teller to Commissioner McFarland, July 15, 1884.

I have considered the appeal of Joel Docking from your decision of March 26 last, rejecting his application to file pre-emption declaratory statement, . . . for the reason that the land was covered by certain soldiers' additional homestead entries, filed August 8, 1878. . . . Your decision so fully and clearly sets out the history of the Moraga grant and claim . . . that I deem a recital here unnecessary. Concurring, as I do after careful consideration, in the conclusions of law and fact reached by you, I do not regard the case as calling for any extended argument on my part. . . . I am satisfied that the Higley survey locates substantially the exterior boundaries of said rancho, as claimed.

COMMISSIONER'S DECISION.

The appeal of Joel Docking from your action rejecting his application to file pre-emption declaratory statement for the S. E. $\frac{1}{4}$ of Sec. 32, T. 1 S., R. 2 W., M. D. M., is before me for consideration.

Docking, the appellant, applied to make his filing May 12, 1883, alleging settlement August 20, 1880, and his application was denied by you on the ground that the land was covered by certain soldiers' additional homestead entries, filed August 8, 1878. The ground of appeal is that at the date of the homestead entries the land was not subject to entry, being within the claimed limits of the rancho El Sobrante, the question of the location of said claim being then pending undetermined.

In my decision of November 10, 1883, in the case of Ernest Trelut (see 3 L. D., 228), it was held that the statutory reservation for El Sobrante claim was limited to lands lying between the five ranchos of San Antonio, Pinolé, San Pablo, Valencia and Moraga, and did not extend to lands lying outside of the exterior boundaries of any of them and not between them. That decision is applicable to this case, in as far as regards the claimed limits of El Sobrante, the tract in question not lying between the said five ranchos and therefore not reserved August 8, 1878, on account of the Sobrante claim.

It however is alleged to have been within the exterior boundaries of the Moraga rancho, "Laguna de los Palos Colorados," the location of which was at the time of said homestead entries pending undetermined, and therefore was not subject to entry at that date . . . The Moraga rancho was granted to Joaquin Moraga and Juan Bernal by Governor Alvarado, for three square leagues—*sitios de ganado mayor*—August 10, 1841, by the following specified boundaries: "At the north by the Arroyo

de San Pablo—San Pablo Creek—a straight line to the east, inclusive of an Ojo de Agua—spring of water—which lies contiguous to the Corral Antiguo; at the south by the establishment of San José; at the west by the Sierra—mountain ridge—up to the top of it, and at the east by the Cuchilla de las Trampas.” The claim was confirmed by the board of land commissioners, January 23, 1855, for three leagues, more or less, by the boundaries set forth in the grant; and at the same date the board ordered a transcript of the proceedings and decision to be filed in United States district court. The court by its decree of March 24, 1856, confirmed the claim by the same description of boundaries, reference to be had “to the original grant and maps contained in the *expediente* filed in this case,” but restricted the quantity to three square leagues and no more; and its decree became final by waiver of appeal, April 8, 1858, which ended the proceedings on title. Under instructions of the surveyor-general of March 7, 1855, issued upon the application of the attorney for the claimants, a preliminary survey of the claim was made by United States deputy surveyor Higley in April, 1855, the object of said survey being, as stated in said instructions, to segregate the claim from the lands of the public domain, and to locate it agreeably to its specific boundaries. As this survey is an important incident in the determination of the question raised by the appeal with reference to Moraga, its history will be here briefly stated.

The act of March 3, 1851 (9 Stat., 631), organized the land commission, and created the machinery for the adjudication and patenting of private claims in California originating in Spanish and Mexican grants. The thirteenth section made it the duty of the surveyor-general to cause all such claims, which should be finally confirmed, to be accurately surveyed, and to furnish approved plats of the same, upon which patents should issue. An item in the civil and diplomatic bill passed August 31, 1852 (10 Stat., 91), made appropriation for surveys of unconfirmed claims which had been presented to the land commissioner in good faith; but provided that the authority thereby conferred on the surveyor-general should only apply to such unconfirmed claims as, in the gradual extension of the lines of the public surveys, he should find within the immediate sphere of his operations, and which he should be satisfied ought to be respected and actually surveyed in advance of confirmation. It appears from reference made in a letter of instructions of this office to the surveyor-general of February 19, 1853, that early in the history of the land commission, the commissioners, in some cases, issued orders for initiatory surveys upon application of claimants (and it is presumed at their expense, and probably to aid them in presenting their claims), but had discontinued the practice. The surveyor-general, however, decided to continue making surveys of unconfirmed claims, when applied for by parties interested, without the order of the commissioners therefor; but, being in doubt as to the propriety of treating claims which had not been confirmed by the land commission, but were liable to be confirmed, or were pending on appeal, as unconfirmed, declined to make surveys in such cases. This office, however, by the letter of instructions aforesaid, approved the conclusion of the surveyor-general as to surveys of unconfirmed claims, and advised that claims confirmed by the commission, but still not finally determined, should be regarded and treated, in regard to preliminary surveys thereof, as unconfirmed claims.

At the time the Higley survey was made, the Moraga claim had been confirmed by the land commission, and by operation of the statute was pending on appeal to the district court. There is nothing to show that

the lines of the public surveys were being extended in the vicinity of the claim; indeed, the plat shows no symptoms of contiguous public surveys; and while the survey was not authorized by the clause aforesaid in the act of August 31, 1852, it certainly was by said instructions.

The record also shows that in July, 1858, after the confirmation of the claim by the decree of the district court aforesaid, a survey of the claim, limited however as to quantity, was made by United States deputy-surveyor La Croze, which was approved by the surveyor-general November 20, 1860, published under the act of June 14, 1860, and, on objections, ordered into the United States district court August 29, 1859. This survey was rejected by a decree of the district court, rendered on the twenty-seventh day of July, 1874, which also directed how the survey should be made, and specified in detail the boundaries fixed by the decree of confirmation as the exterior limits within which the three leagues confirmed should be located. This decree was affirmed, by a decree of the United States circuit court, December 4, 1874, which terminated the judicial proceedings upon survey.

A new survey was accordingly made by United States deputy-surveyor Boardman in 1875, which was approved by the surveyor-general December 20, 1877, and by this office by its decision of April 13, 1878. On appeal from said decision to the department, the Secretary of the Interior, under date of August 9, 1878, held that said survey was made in substantial compliance with the decrees of the district and circuit courts, that there was no error in the decision of this office aforesaid, and *pro forma* dismissed said appeal. The survey was thereupon finally approved by this office August 10, 1878, and patent issued of that date. This was the termination of the proceedings on survey, and the final location of the claim.

By the act of March 3, 1851 (9 Stat., 631), in effect, and the sixth section of the act of March 3, 1853 (10 Stat., 246), in terms, "lands in the State of California . . . claimed under any foreign grant or title" were reserved from entry as public lands of the United States. Pending proceedings for the confirmation and location of such claims, the decision of the courts and the practice of the Land Department have conformed to this rule, which is fully declared and enforced in the case of *Newhall v. Sanger* (92 U. S., 761), and in *Van Reynegan v. Bolton* (95 U. S., 33), and which applies as well to grants for quantity within exterior boundaries containing larger area as to those by boundaries without specification of quantity. In the present case, which was a grant for three leagues within larger exterior boundaries, it becomes necessary to locate those boundaries in order to ascertain and determine whether the tract in question fell within them as surplus resulting from the final survey; for if determined affirmatively, it did not become public land until the approval of said survey and the issue of a patent thereupon, August 10, 1878.

The northern, eastern, and western boundaries are correctly represented by the Higley survey, but the southern boundary, which is described in the grant and confirmation as the establishment of San José, as located by said survey, seems to be controverted. The boundaries of the establishment of San José, if it ever had any, are not designated by any permanent marks on the ground nor by natural objects; and inasmuch as the lands which formed the areas of missionary occupation were within the control of the government and subject to grant, and consequently liable to change from time to time, it is difficult even to approximately locate them. The said sixth section of the act of March 3, 1853, as construed by the decision of the Supreme Court of the

United States in the case of *Newhall v. Sanger* (*supra*) reserved until the grant in this case was finally located, only such land *as was claimed*; and it follows, therefore, that the sense in which the words, establishment of San José, are used as a boundary, must be determined with reference to the claim filed before the board of land commissioners and the United States district court in the proceedings upon title.

According to the grant, the boundaries contained three leagues of land, a little more or less. The record shows that the petition for its confirmation was made by Joaquin Moraga, one of the original grantees. * * *

It will be observed that the witnesses testify with great particularity as to the boundaries claimed by Moraga, that they embrace about three leagues of land, not to exceed three and one-half; and such was the judgment of the commissioners, which is entitled to much consideration in view of the authorities hereinafter cited, as will appear from the following extract from the opinion delivered in the case: "The proof shows a full compliance with the conditions of the grant, and the boundaries are described in the grant and delineated on the map to which reference is made with sufficient certainty to obviate any difficulty in their identification and location. It is also in proof that the quantity of land embraced by them is about three leagues, not exceeding three and a half;" (Decisions of Board, Vol. 2, p. 461.)

In *U. S. v. Fossatt* (21 How., p. 445), the Supreme Court, in speaking of the powers and duties of the board and courts under the act of 1851, said: "But, in addition to these questions upon the validity of the title, there may arise questions of extent, quantity, location, boundary and legal operation, that are equally essential in determining the validity of the claim." This doctrine was reaffirmed in the *Fossatt* case (2 Wall., 707). In *U. S. v. Sepulveda* (1 Wall., 107; 108), the Court said: "It is true, for the determination of the validity of claims presented, some consideration must have been had of their extent, location and boundaries. The petition of the claimants must necessarily have designated, with more or less precision, such extent and location."

The map "A. P. L." referred to in the testimony and the decrees of confirmation for a more particular description of boundaries is the *diseño*. It represents the grant as nearly surrounded by mountains. On the east is the well defined mountain ridge called "Cuchilla de las Trampas." At the point which may be taken as the southeast corner, the range makes a bend bearing a little south of west, and from thence the boundary is represented as a succession of hills or mountains extending nearly the width of the area represented. In the southeastern corner and where the Las Trampas makes the bend, the Las Trampas creek has its rise. This is regarded as a very important feature in locating that corner, as the source of said stream is found by an examination of the diagram of T. 1 S., R. 2 W., M. D. M., transmitted by the surveyor-general of California, pursuant to my letter of September 12, 1883, calling upon him to locate the Cuchilla de las Trampas in connection with the public surveys, the one branch about sixty chains and the other about twenty chains north of the southeast corner of the Higley survey, and within its eastern and southern boundaries, thus showing reasonable conformity with the *diseño* as to the location of that corner. At this corner said diagram also shows that the Cuchilla de las Trampas makes a bend and extends thence in a northwesterly direction, instead of southwest as shown by the *diseño*. According to the *diseño* Moraga's improvements are located almost due west of the southeast corner on the western bound-

ary at the base of the mountain, and at a short distance from the southwest corner. The Higley survey locates the house of Moraga in about the same relative position; and as the southern boundary of said survey from said corner follows the general direction of the *diseño*, passing over a succession of hills as delineated thereon, it follows that said boundary is correctly located. Said survey embraces an area of 20,464.91 acres, equivalent to 4.61 leagues, or little more than a league in excess of the quantity embraced by the boundaries, as stated in the testimony of the witnesses and opinion of the board as aforesaid.

Holding, as I do, that the Higley survey locates substantially the exterior boundaries of the rancho Laguna de los Palos Colorados, *as claimed*, and it appearing that the tract in question is excepted from said survey and was public land on the eighth day of August, 1878, when it was entered with certain soldiers' additional, I affirm your decision rejecting the filing of Joel Docking.

I have great difficulty in determining the south line of the Moraga *claim*. The *diseño* is quite indefinite. The connected diagram of November 24, 1878, would seem to indicate the south line to be south of the Higley survey; but this is not of a controlling character. The circuit court in its final decision on appeal does not in terms limit the claim to the Higley survey. I attach little or no importance to the stipulation, as it was not acted upon or even referred to in the final decision. I shall therefore decide no other cases involving the question passed on herein, until the losing party shall have time to have this case brought before the Secretary on appeal and decided.

CONTEST—CONFLICTING APPLICATIONS.

EDWARD F. FRITZSCHE.

One Whiting filed a contest against Elmer's homestead entry, alleging speculative entry and relinquishment; he afterwards petitioned to withdraw it on the ground of irregularity, but asserted that a relinquishment had been made and was on the market for sale; the Commissioner held the contest allegation to be sufficient, and ordered a hearing; pending said action Fritzsche filed his application of contest, which was rejected because of the prior contest of record: held that, as Whiting's contest allegation has been duly adjudged sufficient, it was a bar to Fritzsche's contest.

Secretary Teller to Commissioner McFarland, November 4, 1884.

I have considered the appeal of Edward F. Fritzsche from your decision of December 29, 1883, affirming the action of the register and receiver rejecting his application to contest homestead entry No. 2798, for the NW. $\frac{1}{4}$ of Sec. 12, T. 112 N., R. 65 W., Huron, Dakota, made April 2, 1883, by William S. Elmer.

The record shows that one Wilford B. Whiting initiated a contest against said entry on September 11, 1883, alleging that the same was made for speculative purposes, and had been relinquished, as the contestant is informed and believes. October 11, 1883, the register and receiver transmitted to your office the petition of said Whiting, stating that said contest of September 11 was irregularly instituted by him,

and is therefore withdrawn, and also alleging that a relinquishment of said entry was in existence and on the market as a matter of common sale, and that said Elmer had abandoned said tract.

On October 29, 1883, you advised the local land officers that the grounds of contest were sufficient, and directed them to order a hearing in accordance with your instructions to the register and receiver at Aberdeen, Dakota Territory, a copy of which you inclosed. It also appears that on October 5, 1883, one C. A. Blake, as attorney for the contestee, moved to dismiss said contest on the ground of the insufficiency of the allegations in the affidavit, which motion was overruled by the register and receiver, and from their decision no appeal has been taken. On October 23, 1883, the register rejected the affidavit for contest offered by said Fritzsche, because of the pending contest of Whiting, and, on appeal, you affirmed their decision, as above stated.

It is insisted by the counsel for the appellant, that the affidavit of contest filed by said Whiting is insufficient, because the affiant swore to "his information and belief," and that said petition filed October 9, 1883, was treated by you as a nullity, and had no legal effect.

The authorities relied upon by the attorney for the appellant are cases involving timber-culture entries, wherein it is held that a pending illegal contest is no bar to a subsequent contest, and that in order to give the register and receiver jurisdiction the contestant must file an application to enter the land when he commences his contest. Such is the ruling in *Bivins v. Shelley* (2 L. D., 282), *Hoyt v. Sullivan* (*Idem*, 283), and *Herriman v. Herriman* (*Idem*, 297). In the case at bar, however, the contest involves a homestead entry, and there is no rule or statute requiring the contestant to make application to enter the land at the date of commencement of contest. In the departmental decision of *Houston v. Coyle* (*Idem*, 58) the law and practice regulating contests of homestead entries is elaborately discussed. It is there held that "any question involving the sufficiency of the information upon which the local office elected to proceed disappears from the moment that notice is issued to the settler. It is by notice to the homestead settler that jurisdiction is acquired, and not by virtue of any affidavits upon which such citation was issued; and this Department will not here review the sufficiency of the information."

Whiting's contest having been initiated prior to the application of the appellant, and the information having been adjudged sufficient, both by the local land officers and by yourself, it follows that, under Rule of Practice No. 53, the application of the appellant must be rejected.

Your decision is accordingly affirmed.

7747 LAND—14

*TIMBER ENTRY—PRE-EMPTION CONFLICT.**SHOWERS v. FRIEND.*

The timber land act, declaring that "nothing herein contained shall defeat or impair any bona-fide claim," is to be construed as meaning that a timber claim shall not defeat or impair a prior valid claim.

The case of Rowland v. Clemens decided that a timber claim may not impair a prior prima-facie valid pre-emption claim, and not that it may not defeat or impair a prior invalid claim.

In this case, the evidence shows that the pre-emptor had not for fifteen months after date of his alleged settlement, and up to date of the timber application, resided on, cultivated, or improved the tract; his filing is therefore forfeited, and the timber application may stand.

Acting Secretary Joslyn to Commissioner McFarland, November 24, 1884.

I have considered the case of Jacob Showers, jr., v. William Friend, involving the right to Lots 6 and 7, and the E. $\frac{1}{2}$ of SW. $\frac{1}{4}$, of Sec. 6, T. 2, R. 2 E., Humboldt, California, on appeal by Friend from your decision of March 19, 1884, rejecting his application to purchase the lands.

The record shows that Showers filed pre-emption declaratory statement October 10, alleging settlement October 8, 1881, and that Friend filed a sworn statement and published notice December 16, 1882, of his application to purchase the same tracts, as timber land, under the act of June 3, 1878 (20 Stat., 89). Showers, claiming to have a valid adverse claim to the tracts, protested against Friend's right of purchase, and thereupon a hearing was held under the proviso to Section 3 of the act, to determine their rights. The local officers found, under the testimony, that Showers had no valid claim, for want of compliance with the pre-emption law in respect to residence, cultivation, improvement and good faith, and awarded the land to Friend. Your decision found it unnecessary to examine the testimony, because under your construction of my decision of March 7, 1884, in the case of Rowland v. Clemens (2 L. D., 633), Showers having a claim of record at the date of Friend's application, the land was not subject to purchase under said act. You therefore rejected his application.

Although some expressions in that decision might, by themselves, bear the construction you place upon the whole decision, it was not intended thereby to make it of general application under a state of facts wholly different from those involved in that case. In the case of Rowland, the issue was as to the character of the land and whether it was subject to a timber entry, no question being made as to the bona-fides of either party. In the present case the sole question respects the bona-fides of Showers, and whether he had a valid claim at the date of Friend's application. If he had not, then the land was legally vacant and subject to other disposition. The first section of the act of June 3 provides, "That nothing herein contained shall defeat or impair any bona-fide claim under any law of the United States." By fair implica-

tion this provision may be extended to mean that, although a subsequent claim shall not defeat or impair a prior valid claim, a subsequent valid claim may defeat or impair a prior invalid one; or, in other words, that although a claim may have a status of record, yet, if illegal or invalid for any reason, it is not such an appropriation of the land as will prevent other disposition of it upon a proper showing; and to test such questions arising under the act of June 3, 1878, express authority is granted parties by its 3d Section. The real question decided in the case of Rowland *v.* Clemens was only that this Department will not allow a timber claim under the act of June 3, 1878, to impair a prior *prima-facie valid* pre-emption claim, and not that such timber claim might not defeat or impair a prior *invalid* claim, founded in bad faith and wanting in all essential respects with compliance with the law. No mere *prima-facie* case can stand in the face of testimony showing its invalidity, and hence the only question in the present one is, whether or not Showers had a valid subsisting pre-emption claim at the date of Friend's application.

I have examined the testimony, which is reported by the local officers with substantial accuracy, and concur with them in the opinion that he had not. About fifteen months had elapsed between the date of his alleged settlement and the application of Friend, and it satisfactorily appears that he had not at the date of such application complied with the requirements of the pre-emption law in respect either of residence, cultivation, or improvement; but that his object was to acquire a valuable tract of timber land at the price of ordinary agricultural land, rather than purchase it under the increased price of timber lands. I think his filing subject to forfeiture, and that the application of Friend should stand, and so direct.

Your decision is modified accordingly.

FINAL PROOF—DUTY OF LOCAL OFFICERS.

INSTRUCTIONS.*

Final proof must be made "to the satisfaction of the register and receiver," whose authority is unrestricted, and whose official obligation requires of them faithfulness and vigilance in scrutinizing and testing, by their personal knowledge and otherwise, the accuracy and reliability of all proof, and particularly in *ex-parte* cases.

Commissioner McFarland to register and receiver, Aberdeen, Dakota, April 3, 1884.

I am in receipt of your letter of the 21st ultimo, stating that the practical effect of office letter (G) of October 15, 1883, in the case of Alonzo C. Fairbrother, is to render the discharge of your duties in receiving

* Unintentionally omitted from the last volume.

final proofs in pre-emption cases purely mechanical; that you construe said letter as leaving you no discretion in accepting proofs that are "fair on their face," unless some person should file an affidavit attacking such proof. You state that you formerly interrogated parties and witnesses outside of the written proof, and the affiants usually stated the facts frankly, and you could then exercise your judgment in refusing proof that ought not to be received; whereas you are now compelled to receive their written answers without oral examination. You instance as follows: "Parties reply 'yes' to the direct question as to continuous residence, because they claim this is a conclusion and not an act, when in fact they have merely visited the land once or twice a week."

The pre-emption laws require that proof shall in every case be made "to the satisfaction of the register and receiver." It is not proposed by the rules of this Department to restrict the authority nor to limit the official obligation of registers and receivers to faithfully and vigilantly exercise the duties imposed upon them by law. It is both their right and their duty to see that proofs are made to their "satisfaction," and to reject proofs not so made. In the case of Henry Buchman (3 L. D., 223), the Secretary of the Interior observes that registers and receivers "as agents of the government should especially protect its interests when there is no adverse claimant to elicit the facts"; and again: "When there is no trial, and the proofs are wholly ex-parte, this duty requires from them double watchfulness." The necessity of protecting the public lands from illegal appropriation is a matter that I have especially called to the attention of Congress. It would be strange if, while asking additional means from Congress to this end, the means provided by existing laws should be rejected or ignored by this office or by local officers.

It is the duty of officers taking proofs to test by oral examination the correctness of statements made in ex-parte cases; to ascertain by close inquiry the exact facts from which proper conclusions may be drawn; and, when witnesses are testifying, to examine them as to their means of information and the nature and extent of their knowledge of the facts. Any other information within your personal knowledge, or however derived, should be availed of in any proper manner and for whatever worth it may possess. It is not necessary that charges, supported by affidavit, should be made in order to put you upon inquiry in respect to the good faith of claimants. You are put upon that inquiry in every case by virtue of your official duties and responsibilities, whether charges are made or not.

It is not an unusual matter of complaint that entries are allowed by local officers when it is asserted that it was reasonably within their personal knowledge, or that they must have had good cause to believe, that the entries were fraudulent or fictitious, or not made in good faith, or when they might have so ascertained by due diligence. This office will not "rebuke;" but it commends, and enjoins, as an imperative duty

of registers and receivers, the exercise of their authority to thoroughly scrutinize and test the accuracy and reliability of all proofs presented for their acceptance. Merely formal answers to the interrogatories contained in the printed forms should not be deemed satisfactory without the test of such scrutiny, and sufficient cross examination. The printed forms were designed for the purpose of facilitating business, but were never intended to preclude further inquiry, nor to interdict a verification of the correctness of the answer made.

In the matter of pre-emption entries by non-residents, to which reference is made in your letter, you are authorized to put such inquiries and make such examinations as will enable you to judge of the good faith of the party. The fact that the family of a pre-emptor does not live upon the land, and perhaps not in the same State or Territory, does not necessarily impeach the good faith of the entryman, but is a circumstance of which you should take cognizance as one of the elements to be considered in the case, especially when good faith is questionable.

You will be guided by the foregoing views hereafter, without regard to anything in the decision in the case of Fairbrother, referred to by you, from which you drew contrary deductions.

SOLDIERS' HOMESTEAD—SETTLEMENT.

MILNE v. ELLSWORTH.

On December 15, 1882, circular instructions changed the ruling which had protected a claimant under the soldiers' homestead law from contest for six months after entry; a contestee, who initiated the claim while said ruling was in force, is protected by it.

Secretary Teller to Commissioner McFarland, December 1, 1884.

I have considered the case of Kate Milne v. Eleanor M. Ellsworth, involving the SW. $\frac{1}{4}$ of Sec. 32, T. 113, R. 60, Huron, Dakota, on appeal by the contestant from your decision of January 11, 1884, dismissing the contest.

It appears that Mrs. Ellsworth, a soldier's widow, filed her declaratory statement on July 7, 1882, and made homestead entry on December 14, 1882. On April 27, 1883, Miss Milne filed contest against it, alleging failure to make settlement and cultivation as required by Sections 2304 and 2309 of the Revised Statutes. The contest was dismissed by the local office, and by your office, on the ground that under rulings existing at date of the entry, it was not subject to contest on the ground stated.

Said ruling, as appears by your letter of the 21st instant on file in the case, was changed by circular of December 15, 1882 (1 L. D., 36), but until so changed it was in force and well known in all the land districts.

In the case of *Miner v. Marriott* (2 L. D., 709), wherein I overruled a long-standing practice in relation to adverse claims against mining locations, I remarked that "the rule of this decision should not operate to interfere with or take away any rights acquired under the law as it has heretofore been construed by your office. Until a rule is changed, it has all the force of law, and acts done under it while it is in force must be regarded as legal." Mrs. Ellsworth pleads that she is protected by the aforesaid ruling, which in effect interpreted the law as not requiring her to settle on and improve the land within six months after her filing. She is in a position to plead this protection, because she acquired the incipient right to the land in contest while the ruling was in force. Your decision is therefore affirmed.

DESERT LAND—ASSIGNMENT OF ENTRY.

DAVID B. DOLE.

Assignments of desert-land entries were (erroneously) authorized by instructions of March 12, 1877; said instructions were revoked April 15, 1880; upon the principle that the public have a right to rely on such official interpretations of the law, assignments made prior to date of said revocation, under said instructions, will be recognized, if not otherwise violating the law.

Where two entrymen assigned their entries (640 and 520 acres respectively) to one person, in 1879, he may prove up one of said entries only, under the ruling in the case of *Joab Lawrence*; but proof of reclamation by himself will be received; whatever title to the other tract remains is in the original entryman.

Secretary Teller to Commissioner McFarland, December 1, 1884.

I have considered the appeal of David B. Dole from your decision of September 13, 1884, declining to accept his final proofs offered December 22, 1883, upon desert-land entries Nos. 52 and 53, made respectively by Charles H. Bussard and Mary Hunt April 16, 1878, upon certain tracts in the Cheyenne, Wyoming, land district, and holding the entries for cancellation for non-compliance with the law by the entrymen, and for attempted conveyance of title before patent in fraud of the law.

It appears that these entries were each assigned March 3, 1879, by the entrymen to one Irvinson, and subsequently (at a date which does not appear) by Irvinson to Dole. No improvement of the tracts was made by either of the entrymen; that made was made by Irvinson or Dole.

Your circular instructions of March 12, 1877 (4 C. L. O., 22), under the desert-land act of March 3, 1877 (19 Stat., 377), required the local officers, after proof of the desert character of the land, the filing of the proper declaration, and the payment of a certain sum of money, to issue a certificate to the declarant, stating, among other things, that if within three years therefrom the declarant "or his assignee or legal representatives" should reclaim the land as required by the act, and pay an

additional sum of money, "he or they" should be entitled to a patent for the land. They also provided that, at any time within three years from the date of the certificate, "the proper party" might make the required proof. I understand from this that your office recognized the right of assignment of a desert-land entry, and that the assignee might make the proof required of the entryman and become entitled to a patent in his own name. Although I find nothing in the act to warrant so broad a construction of its provisions—especially as it expressly provides that the declarant shall make oath that he intends to reclaim the land and that upon proof of reclamation patent shall issue to him, and as the right of assignment is not directly authorized—yet these instructions had the force of law, and parties had the right to assume that this was the legal construction of the act, and that assignees of such entries would be protected in their purchases and have the rights of entrymen. I think it immaterial that the construction was erroneous and unwarranted, so long as it was the official announcement of the law by the Land Department. These instructions continued as the rule and practice of your office until April 15, 1880, when Secretary Schurz ruled, in the case of S. W. Downey (7 C. L. O., 26), that desert-land entries were not assignable. I concur in that ruling, except as to that part which says "there is no discretion either in this act, or by any other law, which authorizes me to treat such claims as assignable, because the assignment was made under a misapprehension." I do not understand that a party acts under a misapprehension of the law, so as to lose any right, when he acts under its official interpretation. The misapprehension in such case is upon the part of the interpreting authority, and not upon him who in the prosecution of a claim conforms to such interpretation. A different rule would permit every person to construe the law for himself; and hence, your office being a proper exponent of this law, entrymen and their assignees acting under such exposition should not be required to forfeit any right by subsequent construction inconsistent with the first.

The ruling of Secretary Schurz has governed this Department and your office since its date. I think therefore that assignments made prior to that date, under your instructions, should be sustained; and I should sustain both those now in question, made prior thereto, were there no further provision of the act of March 3, 1877, requiring a different ruling. This statute provides "that no person shall be permitted to enter more than one tract of land, and not to exceed six hundred and forty acres, which shall be in compact form." In my decisions of April 24 and June 30, 1884, in the case of Joab Lawrence (2 L. D., 22), it was held that as the acquisition of desert land by one person is directly limited by the act to 640 acres, one person may not acquire by circumvention and indirectly a larger acreage of such land. The same ruling must apply in this case. After different persons have acquired title, each to 640 acres, they may undoubtedly sell or assign their rights to the same person, so

that he may own a much larger acreage than 640 acres. But so long as the title remains in the government, the law in respect to the land must be enforced, and no one may be allowed to acquire, directly or indirectly, more than the acreage to which he is expressly restricted. That is sought to be done in the present case. The land embraced in Bussard's entry covers 640 acres, and that in Hunt's 520 acres, the two aggregating 1160 acres. Recognition of these assignments would therefore allow to Dole 520 acres more than the act permits one person to acquire, and would contravene an express provision.

As an assignment of an entry prior to April 15, 1880, is held valid under the views here expressed, it would be a vain thing to admit the legality of the assignment, and then, refusing to allow the assignee to reclaim the land, to exact the reclamation from the entryman. Your decision, however, directs cancellation of these entries in part "for non-compliance with the law by the entrymen." It is true that the act requires reclamation by the entryman; but when an assignment is recognized, the assignee should be entitled to all the rights of the entryman. To cancel the entry because he, and not the entryman, has done the work, would be wholly inconsistent with the right which the assignee has been permitted to acquire under the assignment.

I think Dole should be protected so far as the law will permit. This may not extend beyond his acquisition of 640 acres. I therefore modify your decision, and allow him to elect in writing, within sixty days from notice hereof, under which of these entries he will claim; that one he will be allowed to perfect. As to the remaining tract, if the assignment is void, then the title, whatever it may be, that is created by the partial compliance with the law, must still remain in the entryman; but what his rights are cannot be definitely determined until an attempt is made to make final proof by the entryman, or by a direct attack on the *bona fides* of his entry. But as the law requires patent to issue to the entryman, it will so issue in this case regardless of the assignment.

Your order, therefore, cancelling the remaining or other tract is reversed, and the entry will stand for final proof.

PRE-EMPTION ENTRY—CANCELLATION; APPROPRIATION.

HENRY CLIFF.

The Commissioner canceled a pre-emption entry for fraud (the proofs showing a violation of Sec. 2260, R. S.) without hearing, but allowed A., the entryman, sixty days wherein to show cause for reinstatement, and directed that in the mean time no other disposition of the land should be made; before A.'s refusal to show cause, and before the expiration of the sixty days, B. made application to locate a warrant on the land: held, (1) that the Commissioner had authority to order that no other disposition of the land should be made pending determination of the entry's legality; (2) that, by reason of said order, the entry had the same force and effect as if the order of cancellation had not been made; and (3) that entries of record prima-facie valid appropriate the lands covered thereby, which are not subject to further appropriation whilst the entries remain uncanceled.

Secretary Teller to Commissioner McFarland, December 2, 1884.

I have considered the appeal of Henry Cliff from your decision of January 17, 1884, affirming the action of the register and receiver, Marquette, Michigan, rejecting his application of August 24, 1883, to enter with Porterfield warrant No. 87, Lots 1 and 2 of Sec. 32, T. 41 N. R., 16 W.

The record shows said tracts were embraced in Joseph Walsh's pre-emption cash entry No. 11943, made May 25, 1881, for the NE. $\frac{1}{4}$ (fractional) of said Section 32, based on pre-emption declaratory statement No. 468, filed October 9, 1880, alleging settlement October 5, preceding, and that said entry was canceled by your letter of August 16, 1883. In said letter you directed the local land officers to notify Walsh of said cancellation and allow him sixty days within which to show cause why his entry should be reinstated, and "in the mean time to allow no disposition of the land." "In the event of an application for reinstatement within the time named," it proceeded, "you will forward the same with the accompanying papers to this (your) office and await instructions; otherwise, at the expiration of the sixty days allowed, the land will be held as open to entry by the first legal applicant." You canceled said entry upon the report of special agent L. J. Barnes, alleging that it was speculative and fraudulent, and because Walsh testified, in his pre-emption proof, that he had left or abandoned a residence on land of his own to reside upon the land embraced in said entry.

It appears that Walsh, after obtaining his certificate of entry, leased a portion of the land (Lots 1 and 2) covered by his said entry to the Delta Lumber Company, and that said company has put upon said Lot 2 improvements valued at seventy-five thousand dollars. In response to the notice from the register and receiver to show cause why his entry should be reinstated, Walsh filed his affidavit, dated October 30, 1883, admitting that he removed from land of his own to settle upon said tracts, and declining to show cause why his entry should be reinstated. In said affidavit Walsh earnestly denies the allegations of fraud made in said report, and solemnly avers, and offers to prove, that his settlement and entry were made in good faith, and that he was not told by the local land officers, and did not know, that removing from his own land in the same State disqualified him from making a pre-emption entry for said land.

You rejected Cliff's application on the ground that the lands applied for were not subject to entry pending the determination of the rights of Walsh.

The contention is that said entry did not except the lands covered thereby from entry and purchase under the laws of the United States, and had no force or validity whatever; and that the cancellation of said entry, subject to the right of Walsh to show cause for reinstatement within sixty days, although the register and receiver were directed not to allow any disposition of said land, operated to render said tracts subject to location with said Porterfield warrant.

It must be conceded that at the date of Cliff's application the entry of Walsh had the same force and effect as if the order of cancellation had not been made. By the express terms of said order, it did not become final until the entryman declined to show cause, or until the expiration of the sixty days allowed to make such showing. Under the present ruling of this Department, entries of record prima-facie valid appropriate the lands covered thereby, and, while they remain uncanceled, the land is not subject to further entry; *Graham v. H. & D. R. R. Co.* (1 L. D., 380); *Whitney v. Maxwell* (2 L. D., 98); *McAvinney v. McNamara*,* *Davis v. Crans et al.*† The allegations of fraud are strenuously denied and no hearing was had to establish the same. See *Le Cocq* cases (2 L. D., 784). The register and receiver accepted the proofs, received the purchase money, and issued to Walsh the certificate of entry for the lands claimed. I am of the opinion that you had the authority to direct that no other disposition of the land be allowed pending the determination of the legality of said entry.

Under this view of the case it will be unnecessary to consider whether said warrant can be located upon lands claimed by another under an

* *MCAVINNEY v. MCNAMARA.*

[Secretary Teller, October 26, 1883; (10 C. L. O., 274).]

"Each party filed declaratory statement July 8, alleging settlement May 29, 1882. The tract was formerly embraced in the homestead entry of one Toole, which was canceled on the local records June 7, 1882. . . . It is well settled that a homestead entry is an appropriation of the land covered thereby, pending which no pre-emption right can attach. If, however, a person, is on the land claiming it as a pre-emptor when the former entry is extinguished, no new act of settlement is necessary to constitute him a settler"; (*Peterson v. Kitchen*, 2 C. L. O., 181). . . . Your decisions "are based on the alleged *residence* of the parties on the land prior to cancellation of Toole's entry; but, as held in *McInness v. Strevell* (9 C. L. O., 170), residence is not essential to an original pre-emption settlement; there may be a valid settlement without residence, but residence must follow settlement within a reasonable time thereafter."

† *DAVIS v. CRANS ET AL.*

[Secretary Teller, March 12, 1884; (11 C. L. O., 20).]

Davis applied at local office to make a homestead and a timber-culture entry on August 25, 1881; application rejected because tracts in limits of a railroad grant; Davis appealed, and December 3, 1881, the Commissioner reversed the action; the company appealed, and February 14, 1883, the Department affirmed the decision; Davis made the entries March 6 and 7, 1883; on March 12, 1883, and afterwards, Crans and three others filed pre-emption claims on the tracts, alleging settlement from November 25, 1882, to January 4, 1883.

"A homestead or timber-culture entry is an absolute appropriation of the land, so long as it remains of record, and rights under said laws are initiated by entry and not by settlement. An applicant for permission to make an entry under either of said laws is not charged with any duty relative to the land until after his entry has been allowed. This being true, it follows that a legal application to enter under said laws withdraws the land embraced within such application from any other disposition until such time as the same may have been finally acted upon, and that, pending the determination of the question raised by the application, no adverse rights can be acquired by settlement; *Townsend v. Spellman* (2 L. D., 77)."

entry allowed by the local land officers, and upon which improvements have been placed of great value.

The record also shows that on November 8, 1883, the soldiers' additional homestead right of Ira E. S. Arnold was located on said Lot No. 1 (homestead entry No. 3162; final certificate No. 663, Marquette, Michigan), and that Edwin L. Thompson, trustee, on November 8, 1883, entered said Lot No. 2, with Valentine scrip, (R. R., No. 1, "E," 246). I do not deem it advisable to express an opinion whether the action of the register and receiver in allowing said location and entry was proper. You have not rendered judgment upon the validity of said location and entry, and this Department will not render a decision upon that question, until it is properly presented in accordance with the rules of practice.

Your decision is accordingly affirmed.

PIPESTONE RESERVATION—SEGREGATION SURVEY.

WILLIAM W. WHITEHEAD.

Where a treaty reserved from sale or appropriation, for the use of certain Indians, so much of a "pipe-stone quarry" as they were accustomed to frequent and use, the whole of the land containing said quarry was thereby withdrawn from settlement and exploration until the actual extent of the reservation was designated by survey.

Secretary Teller to Commissioner McFarland, December 3, 1884.

I have considered the appeal of William W. Whitehead from your decision of May 22, 1884, rejecting his declaratory statement for Lots 1 and 10 of the N. E. $\frac{1}{4}$ of Sec. 2, T. 106, R. 46, Tracy, Minnesota, for the reason that the tracts are within the limits of the Pipestone (Indian) reservation.

Under the treaty of April 19, 1858 (Rev. Ind. Treat., 855), ratified February 16, 1859, between the United States and the Yankton tribe of Sioux or Dacotah Indians, a tract known as the "red pipe-stone quarry" was reserved from sale or appropriation by the government, the 8th Article of the treaty stipulating that these Indians "shall be secured in the free and unrestricted use of the red pipe-stone quarry, or so much thereof as they have been accustomed to frequent and use for the purpose of procuring stone for pipes," and the United States agreeing to cause to be surveyed and marked "so much thereof as shall be necessary for that purpose, and retain the same and keep it open and free to the Indians to visit and procure stone for pipes so long as they shall desire." So much of the quarry as appeared necessary and proper for the purpose of the reservation was surveyed and marked, accordingly, upon the official plats.

The matter of this reservation was considered in the case of the United States *v.* Carpenter (111 U. S., 347), wherein it was held that after the treaty, until the survey was made and the actual extent of the reservation was thus designated, no part of the land containing the quarry could have been taken up by settlement or scrip location, the whole of such land being withdrawn from private entry or appropriation until the government had determined whether any portion less than the whole should be reserved.

The official survey shows that the tracts applied for by Whitehead are within the limits of the reservation, which, as held in my note of November 24, 1883, to the Commissioner of Indian Affairs, is not properly an Indian reservation, but a United States reservation, upon which certain privileges are guaranteed to the Yankton Indians. This distinction is immaterial for the present purpose, because in either case the tracts were not subject to Whitehead's declaratory statement.

I affirm your decision.

CLERK OF COURT; ILLEGAL ENTRIES.

INSTRUCTIONS.

The official acts of a special deputy clerk, appointed by the clerk of a judicial district, without authority of law, for the sole purpose of administering the oaths required in land claims, are null and void.

No desert-land or other application for entry should be allowed, unless the local officers are satisfied that it is regular and legal; if not satisfied—and they may rest on their own knowledge of persons and lands—they should reject it.

Commissioner McFarland to register and receiver, Miles City, Montana, December 3, 1884.

I am in receipt of a report by inspector F. D. Hobbs stating that he is informed by the register of his (the register's) belief that a large number of the desert-land entries made at your office are illegal. Reference is particularly made to entries in which the affidavits are executed before R. C. Webster, as deputy clerk of the district court. The character of the lands entered, and the methods of entry, are called in question. An investigation of alleged fraudulent entries in your district at the earliest opportunity is contemplated.

Apart from the merits of the cases referred to, the inspector's report calls for attention in respect to the official acts of Mr. R. C. Webster. It appears that Mr. Webster holds what purports to be a special appointment from Mr. Theophilus Muffley, clerk of the first judicial district, comprising the counties of Madison, Gallatin, Yellowstone, Custer and Dawson, empowering said Webster to act as deputy clerk of said court in and for the counties of Custer, Dawson, and Yellowstone, "for the sole and only purpose of administering oaths, taking and re-

ceiving applications for the entries of land claims, and taking final proofs in land cases, within the limits of the district of lands subject to sale at the United States district land office at Miles City, Montana, and for the purpose of duly certifying the same in due form of law. This document, of which a copy is furnished by inspector Hobbs, bears date November 28, 1883, and authorizes Mr. Webster to use the seal of the district court for the county of Custer, "but not to remove the same from the office of the clerk of the court at Miles City, nor from the custody or possession of Charles Douglass, deputy clerk for said Custer county." The inspector reports, upon information by the register, that Webster does not use the proper seal of the court, but one of his own, which differs in form from the court seal.

The inspector also reports the register's opinion to be that Mr. Webster's acts are entirely irregular. The register's opinion is undoubtedly correct.

Mr. Muffley states in the letter of special appointment, that he makes such appointment by virtue of the power vested in him "by the laws of the United States and the Territory of Montana." I am not aware of any law of the United States which authorizes such appointment, and an examination of the laws of Montana fails to disclose any such law. Section 134 of the Territorial revised statutes makes it the duty of the clerk of each judicial district to appoint a deputy clerk for each county of such judicial district, where courts are held outside of the county in which the clerk of the judicial district resides, "which deputy must qualify and give bonds as provided by law." Section 135 prescribes the duty of deputy clerks to be "to keep a full and complete record of the proceedings of such court in an office to be provided by the county commissioners, at the county-seat of the county where such court may be held, in the form and manner provided by law for the keeping of such records of proceedings," etc. It thus appears that one certain deputy clerk is authorized and required to be appointed, for each county in the judicial district, outside of the county in which the clerk of the judicial district resides. This is not authority for the appointment of two or more deputy clerks in each county, nor for the appointment of one deputy clerk for several counties, nor for the appointment of a deputy clerk in the county in which the clerk of the judicial district resides. The law authorizes the appointment of one deputy clerk in each one of the proper counties, and when the clerk of the judicial district has exercised this authority he has exhausted the law. The duties prescribed for deputy clerks show that they are to be actually deputy clerks of the court for the county; they must qualify, give bonds, have an office provided by the county, and keep the records of the court. A deputy who cannot do these things is not the officer authorized by the statute. It is apparent from the letter of purported appointment that a deputy clerk had already been appointed for Custer county, one

of the counties named in said letter; consequently Mr. Webster could not be appointed deputy clerk for that county. Mr. Webster is not a deputy clerk of the court for any county. He does not and cannot perform any of the duties of such officer. His letter of appointment must be held as without authority and utterly void. The clerk of the court cannot create officers unknown to the law. And he cannot invest unauthorized persons with power to do acts which the laws of the United States confine to certain specified officers, who are duly authorized.

Mr. Webster's acts are not in the nature of those of a deputy clerk of court, but are simply in the nature of those of an officer authorized to administer oaths generally. The clerk of the district court cannot empower a person to administer oaths generally. He has power to appoint certain specified deputies, and the law clothes such deputies with power to administer oaths. Mr. Webster is not one of such specified deputies, but holds a professed special appointment wholly outside of the provisions of any statute.

I have compared the impress of the seal used by Mr. Webster, in some of the cases attested by him, with the impress of the seal of the court, and find no observable difference. If, as stated, the seal used by Webster is in fact not the seal of the court, but one procured by himself, it would appear to be a fac-simile, and a forgery.

All cases in which the affidavits and proofs have been executed before R. C. Webster as deputy clerk of the district court must be rejected for illegality. You will accept no applications or proofs hereafter in any case in which the affidavits and proofs purport to have been so executed.

The inspector calls attention to a number of desert entries recently made for the apparent purpose of controlling the waters of certain streams, and states that the register doubted his authority to refuse the entries, which appeared to be prima-facie regular, although there were grounds for believing them fraudulent; and he states that he advised the register that entries could not be refused upon mere suspicion of fraud. The inspector erred in giving this advice. General circular of March 1, 1884, page 36, relative to desert-land entries, prescribes that before an entry can be allowed the required proof must be made to the "satisfaction" of the register and receiver. In every case of an entry of public land the applications, affidavits and proofs must not only be regular in form, but the local officers must be satisfied that the entry is legal. If they are not satisfied that it is their duty to allow the entry, they should reject it, stating the cause of rejection, and allow the usual appeal. Registers and receivers have the right and it is their duty to avail themselves of their personal knowledge of parties and lands, and of any information in their possession by which they are enabled to form an opinion in respect to the validity of entries: see case of Henry

Buchman;* special instructions to local officers (3 L. D., 211); instructions to Humboldt, Cal., officers (*Idem*, 84); to Olympia, W. Ty., officers (*Idem*, 133).

HOMESTEAD—ABANDONMENT.

CRONAN *v.* CRIBB.

The homestead settler, after beginning improvements, was led to believe (erroneously), as was generally believed, that the tract he had entered was within railroad limits, and thereupon left the land and remained absent for two years, when, on learning that it was not within railroad limits, he returned, and resumed residence and improvement, prior to initiation of the contest for abandonment; said contest is dismissed.

Secretary Teller to Commissioner McFarland, December 4, 1884.

I have considered the case of Thomas Cronan *v.* Robert Cribb, involving the latter's homestead entry of May 13, 1881, for the N. $\frac{1}{2}$ of SE. $\frac{1}{4}$, and S. $\frac{1}{2}$ of NE. $\frac{1}{4}$, of Sec. 9, T. 10, R. 25 E., Gainesville, Florida, on appeal by Cribb from your decision of December 19, 1883, holding his entry for cancellation.

This contest was commenced April 5, 1883, upon allegations of Cribb's abandonment of the tract, and the hearing was in June following. The case shows that shortly after his entry Cribb commenced to clear the land with the intention of making it his home, but upon information that it was railroad land—which supposed fact (the railroad company claiming it) was generally believed in the neighborhood—he discontinued his improvements, left the land, and sought employment elsewhere. This absence continued for about two years, when a friend addressed the local officers in his behalf, in order to ascertain its actual status. The register replied, under date of March 14, 1883, that it was "railroad reserve land," but soon thereafter corrected his statement, saying that

* HENRY BUCHMAN.

[Secretary Teller, January 30, 1884; (10 C. L. O., 355).]

Buchman's pre-emption final proof was rejected by the Commissioner, though there was neither protest nor contest against his application, on a report made by the local officers that "Buchman's claim is without merit," and that for several years he had lived and carried on business in a town some miles from the land.

"In my judgment it was not only eminently proper, but their duty requires a statement for your consideration of such facts, within their personal knowledge, as in their opinion show or tend to show fraud or non-compliance with the requirements of the law, in all applications to enter public land; and, as agents of the government, they should especially protect its interests when there is no adverse claimant to elicit the facts; (see 3 L. D., 86.) . . . A pre-emptor is not forbidden from carrying on business elsewhere than on the land, provided his actual residence is thereon; but the report in question tends to show that Buchman's residence was in fact in Tucson, and not on the land, and hence its manifest propriety. . . . Ordinarily, under such circumstances, the case might be returned for additional testimony."

it was government land. Thereupon—prior to commencement of the contest—Cribb returned to it, “made a field” which he set out to orange trees, planted vegetables, erected a house, and—after commencement of the contest—moved his family therein.

I am unwilling to hold on these facts, that Cribb’s absence from the land was an abandonment under the law. He is an illiterate man, unable to read or write, and was permitted by the local officers to make his entry when they appear to have supposed that the land had been granted to the company. When advised to the contrary, Cribb immediately returned to the land, resumed his improvements, and commenced his residence thereon as soon as he could erect his house. He appears to have acted in good faith, and there is no reason to believe he would have absented himself from the land, except under this official and popular misapprehension of its status.

I do not think a wise and equitable administration of the law requires, under these circumstances, a forfeiture of his claim—especially in view of the fact that the contestant has no claim of record, and has made no improvements on the tract—and also of his homestead right, which would follow. I therefore modify your decision and dismiss the contest.

HOMESTEAD—RELINQUISHMENT; CHANGE OF CLAIM.

NICHOL *v.* LITTLER.

B. procured a relinquishment of A’s homestead entry (W. $\frac{1}{2}$ of SE. $\frac{1}{4}$) in July 1879, and, without filing it, went upon the land, where he has since resided; C. began contest against A’s entry in December 1883, and made pre-emption filing on the adjoining eighty (E. $\frac{1}{2}$ of SE. $\frac{1}{4}$) January 10, 1884; B. filed the relinquishment January 17, 1884, and made homestead entry of the quarter; C. made homestead application for the quarter January 23, 1884, which was rejected, and thereupon he appealed; C. also made default at the hearing in February 1884, under his contest, which was dismissed: held (1) that the filing of A’s relinquishment was the result of C.’s contest, and, if the contest had been successfully prosecuted, would have given C. the preferred right of entry; (2) that C.’s rejected application for the land pending his contest was, in view of his subsequent default, an abandonment of the contest, which left the tract as if no contest had been commenced; (3) that C.’s homestead application for a tract whereon he already had a subsisting pre-emption filing was not allowable; and (4) that B’s entry for the entire quarter must be held intact, subject to C’s filing.

Secretary Teller to Commissioner McFarland, December 4, 1884.

I have considered the case of Robert Nichol *v.* Elisha Littler, involving the SE. $\frac{1}{4}$ of Sec. 24, T. 16, R. 20 W., Wa Keeney, Kansas, on appeal appeal by Nichol from your decision of March 17, 1884.

It appears that December 13, 1883, Robert Nichol instituted a contest against the homestead entry of one Thompson, made April 18, 1879, upon the W. $\frac{1}{2}$ of said SE. $\frac{1}{4}$, that hearing of the same was set for February 14 following, but that, Nichol not appearing, the contest was

dismissed for want of prosecution. It also appears that William Nichol, father of Robert, made homestead entry of the E. $\frac{1}{2}$ of said SE. $\frac{1}{4}$ on April 8, 1882, and that his relinquishment thereof, dated December 29, 1883, was filed in the local office January 10, 1884, by Robert, who intended by the two proceedings to enter the whole SE. $\frac{1}{4}$ upon cancellation of Thompson's entry; and to this end, he filed upon that day a preemption declaratory statement upon said E. $\frac{1}{2}$, in order to secure the same to himself pending his contest with Thompson for the W. $\frac{1}{2}$.

It also appears that July 29, 1879, Littler procured from Thompson a relinquishment of his entry upon said W. $\frac{1}{2}$, upon which tract he has since resided and made improvements. He retained this relinquishment, not filing it until January 17, 1884, at which time he was allowed to make homestead entry for the whole S. E. $\frac{1}{4}$, and at which date it is presumed (but does not appear) Thompson's entry was canceled. Prior to this time he had no claim of record.

Nichol applied January 23, 1884, to enter the whole SE. $\frac{1}{4}$ under the homestead law, but his application was rejected by reason of the prior entry of Littler.

Your decision held, on these facts, that the procuring and filing of Thompson's relinquishment by Littler was an independent transaction not resulting from Nichol's contest; that, consequently, Nichol did not acquire a preference right to enter said W. $\frac{1}{2}$ under the Act of May 14, 1880; and that Littler's entry for the whole SE. $\frac{1}{4}$ should stand subject to Nichol's pre-emption claim to said E. $\frac{1}{2}$.

I concur in your ruling that this procuring of Thompson's relinquishment did not result from the contest, but I think its filing did so result. Littler retained it in his own possession for three and one-half years, not filing it until after commencement of the contest. It did not take legal effect and change the status of the tract until placed on the records, and as it does not appear that Nichol knew of it at the date of his contest, (the record then showing Thompson's entry and claim), he had reason to suppose they were still maintained, and that a contest was necessary for their extinguishment. I find no reason to think the relinquishment would have been filed when it was except for this contest, and consequently that the results flowing from its filing would inure to the benefit of Nichol. If any one, Littler should suffer from his laches in not before filing the relinquishment, and not Nichol, who was misled into the expense of a contest by such laches. It appears, however, that prior to the day named for hearing of the contest (February 14, 1883) Nichol, January 23, 1883, applied to enter the whole SE. $\frac{1}{4}$ under the homestead law, which, in view also of his failure to prosecute his contest and his default thereat, must be held to be an abandonment thereof; and such abandonment would relate back to its initiation, leaving the status of the tract as if no contest had been commenced. Nichol has no right, therefore, by reason of the contest, and the claim of both parties must be determined upon other considerations.

Nichol made a pre-emption filing upon said E. $\frac{1}{2}$ on January 10, 1884, alleging settlement the same day, and also on January 23 applied to make homestead entry upon the whole SE. $\frac{1}{4}$, his filing being still in force. This is not allowable. One can not maintain a claim for the same tract at the same time, under the two laws. For this reason his homestead claim to said E. $\frac{1}{2}$ must be rejected and his right thereto rest solely upon his filing; and as Littler's homestead entry for the W. $\frac{1}{2}$ was prior to Nichol's homestead application for the same tract, and so far as appears was a valid entry, his claim to this tract (without reference to the relinquishment) must be held the superior one. I affirm your decision directing his entry for the whole SE. $\frac{1}{4}$ to stand intact, subject nevertheless to the rights of Nichol under his filing as respects the E. $\frac{1}{2}$ of said SE. $\frac{1}{4}$.

HOMESTEAD—NOTICE OF FINAL PROOF.

ST. PAUL, MINN. & MAN. R. R. CO. *v.* COWLES.

The usual statutory notice by publication of intention to make final (homestead) proof, by a settler within the indemnity limits of a railroad, is notice to the company, as to the public at large; the failure of the company to appear and protest, at the date set for final proof, bars subsequent objection to the Commissioner's action.

Secretary Teller to Commissioner McFarland, December 4, 1884.

I have considered the case of the St. Paul, Minneapolis & Manitoba Railway Company *v.* Orren M. Cowles, involving the right to the S. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ of Sec. 31, T. 137, R. 42, Crockston, Minnesota, on appeal by the company from your decision of December 14, 1883, awarding the land to Cowles.

The tract in question is within the twenty-mile (indemnity) limits of said railway, withdrawal for the benefit of which became effective February 15, 1872. One Antonio Djarley filed declaratory statement covering the tract in question, July 23, 1872, alleging settlement April 15, 1870. On July 9, 1877, said Cowles made homestead entry of the land, and in due time applied to make final proof. Your office, by letter of March 29, 1883, directed the local officers to "permit Cowles to make final proof on his entry, after due notice by publication, of which all parties claiming adversely will be required to take notice." In pursuance of the above instructions Cowles gave, on April 18, 1883, the proper notice, by newspaper publication, of his intention to make final proof June 1, 1883. On the last-named date he appeared, with his witnesses, and submitted his proof, which was in all respects satisfactory to your office. No one appeared to assert an adverse interest. Accordingly, by letter of December 14, 1883, you approved his entry for patent, and declared the case closed.

From this decision the company appeals, alleging that the Commissioner erred, first, "in permitting Cowles to make final proof on his entry after the usual notice by publication;" second, "in not notifying the railway company, or its attorney, of the application of Cowles;" third, "in holding that, as there was no appearance by any one asserting an adverse interest to the land in question, at the time when Cowles made his final proof, his entry is approved for patent"; fourth, "in holding that the land was subject under the homestead law"; and, fifth, "in not holding that the land was reserved from settlement or entry until the grant to the appellant company should be satisfied."

Referring to the first three assignments of error, it seems to me sufficient to say that, the entryman having done all the law requires in the matter of giving notification of his intention to make final proof, (see 20 Stat., 472), his rights—whatever they may be—cannot be prejudiced because of his not giving to any party special notice not required by law. The fact that, in case it should appear that the pre-emption claim had not attached at the date of the withdrawal, the railroad might eventually find insufficient land within its granted limits to satisfy the provisions of its grant, and that in such case, in order to make up the deficiency by selection of lands from within its indemnity limits, it might possibly, at some indefinite period in the future, desire to select this particular piece of land, was too vague and remote a contingent interest to entitle it to special notice of the pending hearing between the United States and the pre-emptor to determine, as between themselves, their respective rights on the 15th of February, 1872. As reasonably might every separate creditor—and indeed every individual who at some future period might become a creditor—of the pre-emptor demand special notification on the ground of possible future interest in the case; since if the tract were adjudged to belong to the United States it might reduce the amount of the pre-emptor's property to such an extent as to interfere with their obtaining from him the payment of his indebtedness to them. I can discover no reason why the general notice by newspaper publication, which is by the statute considered sufficient for the public at large, should not be considered sufficient also for a railroad company.

In regard to the last two assignments of error, it will be seen that they come under my ruling in the case of *Prest v. Nor. Pac. R. R. Co.*, made May 23 last, (2 L. D., 506). The tract in question having been, at the date of the withdrawal for the benefit of the company, embarrassed by a valid, subsisting pre-emption claim, upon the subsequent extinction of such claim the land reverted to the United States, and became again subject to entry by the first legal applicant.

I therefore affirm your decision approving Cowle's entry for patent.

PRIVATE CLAIMS—EL SOBRANTE; MORAGA.

ERNEST TRELUT.

Joaquin Moraga's claim, Laguna de los Palos Colorados, was approved and patented on August 10, 1878, until which date land within the lines of the Higley survey, but without the lines of the claim as patented, was reserved from other appropriation.

Secretary Teller to Commissioner McFarland, December 4, 1884.

I have considered the appeal of Ernest Trelut from your decision of November 10, 1883, rejecting his application to file pre-emption declaratory statement for the NE. $\frac{1}{4}$ of Sec. 22, T. 1 S., R. 2 W., M. D. M., San Francisco, California. Said application was made April 23, 1883, with allegation of settlement August 3, 1880.

It appears from the record in the case that soldiers' additional homestead entries covering the tracts above described were made as follows: The W. $\frac{1}{2}$ of said tract was entered in the name of Henry Slater, and the E. $\frac{1}{2}$ in the name of John B. Courtwright. Both these entries were made July 30, 1878, the day on which the township plat was filed. The existence of said entries was the ground of your rejection of Trelut's pre-emption application. The principal contention of appellant is that at the date the additional entries were made, the land described was not subject to entry for the reason that it was then claimed and reserved as a part of the El Sobrante grant.

Your decision holds to the contrary, namely, that the tract was never a part of the El Sobrante grant or of the statutory reservation for said claim. The same question here involved was before me in the case of Joel Docking, decided July 15, 1884, (3 L. D., 203), in which I held that the statutory reservation for the Sobrante claim was limited to lands lying between the five ranchos, San Antonio, Pinolé, San Pablo, Valencia, and Moraga, and did not extend to lands lying outside of the exterior boundaries of any of them and not between them. That decision is applicable to and controls this case. The land does not lie between the ranchos mentioned. On the contrary, it lies on that side of one of them (the Moraga) most remote from the Sobrante. It was therefore not in reservation on account of, and excluded from entry by, the El Sobrante claim at the date (July 30, 1878) when the additional homestead entries were made.

There is another branch of the case which very properly received attention in your decision. While not falling within the limits of the five ranchos mentioned and between them, you decided that the tract in question was embraced within the exterior boundaries of the Moraga claim, and was excluded therefrom by the final survey of said rancho which was approved and patented August 10, 1878; that until said date the tract was in reservation and not subject to entry, and therefore the entries made July 30, 1878, were invalid; but being of record said en-

tries were a bar to any other entry or filing including that of appellant. The question thus raised also received attention in my decision in the Docking case, cited *supra*. I there held that what is known as the Higley survey located substantially the exterior boundaries of the Moraga Rancho, as claimed. The tract under consideration, except a small fraction, which is not allotted and cannot be separated, falls within said survey. It was therefore on the 30th of July, 1878, when the soldiers' additional entries were made, and until the approval of the Moraga grant and the issue of patent therefor, August 10, 1878, in reservation, *sub judice*, and said additional entries were improperly allowed, and invalid, and should be canceled. They were, however, entries of record, and, while they so remained, the land was not subject to entry or filing by another; *Graham v. H. & D. R. R. Co.* (1 L. D., 380). Your decision rejecting Trelut's pre-emption application and dismissing his appeal is affirmed. The existence of the homestead entries being the only thing in the way of the allowance of said application, I see no objection, now that the record is cleared, to allowing Trelut, if he so desires, to again file for the tract, claiming settlement from the date of the cancellation of the additional homestead entries.

CALIFORNIA SCHOOL LAND—PRE-EMPTION; TRANSMUTATION.

GIOVANNI LE FRANCHI.

A pre-emption filing on a school section (California) may be transmuted to a homestead entry.

The failure of one who made settlement, under Sec. 7, Act of March 3, 1853, on a school section, prior to survey, to make pre-emption filing, proof and payment within the periods prescribed in Sec. 6, or in the general pre-emption law, is not (in the absence of an adverse claim) an abandonment of the claim. Title thereto does not inure to the State on such failure, but the settlement, being found to exist when the grant takes effect, appropriates the land and prevents its passing to the State then or afterwards, whatever its condition.

It is expedient to require all settlers under Sec. 7 to assert their claims by filing the usual notices within a reasonable time after survey, which time may be fixed by the Commissioner by proper regulation.

Secretary Teller to Commissioner McFarland December 4, 1884.

I have considered the appeal of Giovanni Le Franchi from your decision of April 24, 1884, rejecting his application to transmute his pre-emption filing for the SW. $\frac{1}{4}$ of Sec. 36, T. 7 N., R. 13 E., M. D. M., Sacramento district, California.

The township plat was filed in the local office March 30, 1878, survey in the field having been made November 5, 1877.

It appears that Le Franchi filed declaratory statement No. 6807 for said tract June 22, 1878, alleging settlement June 1, 1875. April 9, 1884, he applied to transmute his filing, but the register rejected his application upon the ground "that Section '16' is State school land,

and a claim thereto can only be perfected by the applicant under the pre-emption law, the same not being subject to homestead entry." Le Franchi having appealed from such action, you affirmed the same, holding his declaratory statement for cancellation upon the ground that it was competent for him to make proof and payment, or transmute his filing to a homestead entry, "within the period limited by law," but that, as he failed to do so, the title to the tract in question inured to the State under the school grant.

Now, as touching the ground of the register's denial of Le Franchi's application, to wit, that the tract in question is not subject to homestead entry, it will be observed, generally, that land subject to pre-emption is likewise subject to homestead claim; for the homestead law, Section 2289 of the Revised Statutes, declares that every person possessing the prerequisite personal qualifications "shall be entitled to enter one quarter-section or a less quantity of unappropriated public lands, upon which such person may have filed a pre-emption claim," etc. But so far as the intents and purposes of this case are concerned, it is unnecessary to consider such claimant's personal qualifications; see *Sherman v. Buick* (93 U. S., 209).

And with respect to your ground of objection, that Le Franchi's right to transmute had expired or lapsed by limitation of law, it will be observed that the manifest intendment of the 7th Section of the school grant of 1853, when construed *in pari materia* with the 6th Section thereof, precludes such view; unless we import other qualifying incidents to the exercise of such right than those expressed in the statute, which is not permissible, being inhibited by the fundamental canons of construction; see *L. L. & G. R. R. Co. v. U. S.* (92 U. S., 733).

I am aware that your decision was based upon the authority of your office decision of October 18, 1878, in the case of *Mette v. State of California* (5 C. L. O., 164), which holds contrariwise—albeit upon a different state of facts from those existing in the premises—and that that decision has been affirmed by this Department (May 27, 1879); but in view of other precedents hereinafter cited, such decision cannot, of course, be longer so regarded by this Department.

By virtue of the sixth section of the act of March 3, 1853 (10 Stat., 244), there were granted to the State of California Sections 16 and 36 in each township, for public school purposes; and, by the 7th Section of the said act, she was authorized to select other land in lieu of any portion of said sections "where any settlement, by the erection of a dwelling house or the cultivation of any portion of the land, shall be made upon the sixteenth and thirty-sixth sections, before the same shall be surveyed. And under the provisions of the act of February 26, 1859 (11 Stat., 385), as embodied in Section 2275 of the Revised Statutes, such settlements operate as a basis for lieu selection by the State. "This is very clear and explicit, and it would seem that the settlement, being found to exist at the time the grant to the State took effect, was

such an appropriation of the land as prevented its passing then or afterwards, whatever its condition, to the State under said act;" Perkins v. C. P. R. R. Co. (1 L. D., 357). Apropos of the foregoing are the following very apt utterances by the U. S. Supreme Court, through Mr. Justice Miller, in the aforesaid case of *Sherman v. Buick* :

"Whether a settler on these school lands must have all the qualifications required by the act of 1841, as being the head of a family, a citizen of the United States, etc., or whether the settlement, occupation, and cultivation must be precisely the same as required by that act, we need not stop to inquire. It is very plain that by the seventh section, so far as related to the date of the settlement, it was sufficient if it was found to exist at the time the surveys were made which determined its location; and, as to its nature, that it was sufficient if it was by the erection of a dwelling-house, or by the 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; and, being shown in the proper mode to the proper officer of the United States, the right of the State to that land was gone, and in lieu of it she had acquired the right to select other land agreeably to the act of 1826, subject to the approval of the Secretary of the Interior. But it is said that the right of pre-emption thus granted by the seventh section was subject to the limitation prescribed by the third proviso to the sixth section, namely, 'that nothing in this act shall be construed to authorize any settlement to be made on any public lands not surveyed, unless the same be made within one year from the passage of this act; nor shall any right of such settler be recognized by virtue of any settlement or improvement made of such unsurveyed lands subsequent to that day.' And such was the opinion of the Supreme Court of California. And that court, assuming this to be true, further held that the grant made by the act of the school sections was a present grant, vesting the title in the State to the sixteenth and thirty-sixth sections absolutely, as fast as the townships were surveyed and sectionized; *Higgins v. Houghton*, (25 Cal. 253). As a deduction from these premises, it held that the right to pre-emption on these lands expired with the lapse of the year from the passage of the act, and that no subsequent act of Congress could revive or extend it, even if it was so intended.

"But we are of opinion that the first of this series of propositions is untenable. The terms of the proviso to the sixth section, and those of the seventh section, if to be applied to the same class of lands, are in conflict with each other. The one says, that if settlement be made on land before the survey, which by that survey is found to be on the sixteenth or thirty-sixth section, the settlement shall be protected. The other says, that no settlement shall be protected unless made within one year after the passage of the act. In view of the well-known fact that none of these surveys would be completed under several years, the provision of the seventh section was a useless and barren concession to the settler, if to be exercised within a year, and, in the history of land titles in that State, would have amounted to nothing. This apparent conflict is reconciled by holding to the natural construction of the language and the reasonable purpose of Congress, by which the limitation of one year to the right of pre-emption in the sixth section is applicable alone to the general body of the public lands not granted away, and not excepted out of the operation of the pre-emption law of 1841, as the school lands were, by the very terms of the previous part of the

section; while Section 7 is left to control the right of pre-emption to the school sections, as it purports to do."

The said court reiterated the identical doctrine in the case of *Water & Mining Co. v. Bugbey* (96 U. S., 165), quoting in part the very language of the former decision, to wit:

"The language of the court is (p. 214): 'These things (settlement and improvements under the law) being found to exist when the survey ascertained their location on a school section, the claim of the State to that particular piece of land was at an end; and, it being shown in the proper mode to the proper officer of the United States, the right of the State to the land was gone, and in lieu of it she had acquired the right to select other land, agreeably to the act of 1826 (4 Stat., 179).'"

It is true that this latter case contains certain language which I have not quoted, but which was cited in the *Mette* decision, and also in the later one in case of *Charles W. Lowe*, affirmed by the Department June 22, 1880 (7 Copp, 66), as conveying a different meaning; but scrutiny of the facts in the several cases discovers that such impression is erroneous. "This seeming contradiction is reconcilable by a reference to the fact that Bugbey did not claim adversely to the State, but took title from the State; and the court said truly that he was under no obligation to assert his claim;" (Perkins case, *supra*). And again, in the case of *Mining Co. v. Consol. Mining Co.* (102 U. S. 167), the court say:

"The act of March 3, 1853 (10 Stat., 244), under which the right of the State of California to the school lands arises, *has been the subject of construction in this court more than once heretofore*, and the decision of the question before us requires a further critical examination of its provisions. . . . It seems equally clear to us that the land is excepted from the grant by the terms of the seventh section of the act of 1853. In the case of *Sherman v. Buick* (*supra*) we have said, in reference to this section, that it was unnecessary to decide whether the improvements found on the land when the survey was made, and the character of the person owning them, should be in all respects those which are prescribed by the general pre-emption law. We are now satisfied that this section prescribes its own rules on that subject, and that whenever, at the time these sections are ascertained by the government survey, there is either a dwelling-house or the cultivation of any portion of the land, on which some one is residing and is asserting claim to it, the title of the State does not vest, but the alternative right to other land as indemnity does. It is only necessary to look to what we have said in *Sherman v. Buick*, of the fact that Congress had in view the rapid settlement of the country and the long time which might elapse before it could be known by actual survey where these school sections would be found, to see that a liberal construction must be given to the language by which Congress expresses its purpose to protect these settlements, buildings, and cultivations, and that we have no right to add other qualifying incidents to the exercise of this right than those found in the statute. These are not the same required under the general pre-emption law, and we have no authority to import the latter into the new statute. Some of the expressions found in *Sherman v. Buick* and in *Water & Mining Co. v. Bugbey* (96 U. S. 165) are supposed by counsel to convey a different meaning; but in the use of the words 'pre-emption' and 'pre-emptor,' in reference to *this section of the statute*, it

was not designed to imply all that was meant by those terms in the act of 1841 and its amendatory adjuncts, but to convey the idea of a settlement and a settler according to the terms of the statute under consideration. Nor is there anything in the principle announced in the latter case, that, where a settler abandons his claim to hold the land against the State by virtue of such settlement or improvement, and acknowledges the title of the State by purchase, that (*sic*) his improvement or settlement cannot be set up by a third person to defeat the title of the State recognized by the United States, which conflicts with what we have just said or with the defendants' rights in the present case."

These cases grew out of claims under the California school grant, and it will be observed that in the last case cited the two former cases were discussed and explained, and the alleged open question touching the court's former construction of said grant was finally settled.

In a letter to you dated October 17, 1882, I declined to change the present rule of your office touching the listing of the State of California's indemnity school selections, which she is authorized to make pursuant to the provisions of section seven of the aforesaid act of 1853, in lieu of the 16th or 36th Sections, where the same or parts thereof are claimed by pre-emptors or homesteaders, before it shall have been ascertained whether or not such settlers have prosecuted their claims to patent. Although doubting the correctness or expediency of such rule, I preferred that the whole matter in question should be referred to Congress, and accordingly directed you to prepare a bill containing a certain provision requiring all settlers upon Sections 16 and 36 to submit final proof within a prescribed period. Such action not having been taken by your office, I deem it expedient to decide the legal questions involved in this case agreeably to the tenor of the aforesaid U. S. Supreme Court's decision, and to call your attention to the terms of said letter.

Although the aforesaid 7th Section is silent upon the subject of the submission of final proof, containing no provision therefor, I think it is unquestionably competent for the Land Department to regulate all such matters. And while it is manifest, in the light of the aforesaid decisions, that the claimant under the 7th Section in question can not be required to file his claim, or to make proof and payment, respectively, within the several periods prescribed therefor by Section 6, I nevertheless deem it expedient to require all settlers under Section 7 to assert their claims by filing the usual notices thereof within a reasonable time after survey; which period you may fix by proper regulation as soon as practicable. In the absence of an adverse claim, however, I do not regard a failure to make such proof and payment within the period prescribed therefor by the general pre-emption law as an abandonment of a claim under the 7th Section.

But independently of the foregoing considerations, the records of your office (the township plat and field notes) show that the said Section 36 is within a mineral belt, the same (*inter alia*) having been denominated

“as being more valuable for mining than for agricultural purposes.” Thus it appears that the tract in question “being mineral land, and well known to be so when the surveys of it were made, did not pass to the State under the school section grant;” *Mining Co. v. Consol. Mining Co. (supra)*.

This would be an additional ground for rejecting the State’s claim to said tract were she here upon appeal; but, at all events, it furthers the theory advanced herein, and operates equally to preclude Le Franchi’s claim in the premises, unless in a proper proceeding he be able to rebut such prima-facie presumption of the ineligibility of the tract in question for the purposes of his claim.

Your decision is therefore reversed.

MINING CLAIM—AGRICULTURAL CONFLICT.

MAGALIA GOLD MINING COMPANY v. FERGUSON.

The government, as well as the contestants, is interested in determining the character of a tract claimed both as mineral and as agricultural land, and a mere rule of practice (Rule 77) interfering must yield.

Due weight should be given to all the evidence, whether showing the absolute or relative value of the land for mining or agriculture. *Carron v. Curtis* and other cases compared and distinguished.

Where the tract was returned as agricultural and the mineral claimants have not shown that it is valuable for mining, but where the evidence shows that a portion of it was formerly embraced by a mining claim, that mineral claimants are working successfully a short distance northeast of it a vein which trends southwesterly and so continuing (as it is believed it does) will penetrate it, that it overlies a system of subterranean gold-bearing channels covered by lava and has the characteristic outcropping rock, and that the lava surface has decomposed and formed a very poor quality of sandy soil, the major portion of which is inarable without irrigation, a rehearing may be had at the expense of the mineral claimants.

Secretary Teller to Commissioner McFarland, December 5, 1884.

I have considered the case of the Magalia Gold Mining Company v. Andrew J. Ferguson, involving the NW. $\frac{1}{4}$ of Sec. 24, T. 23 N., R. 3 E., M. D. M., Marysville District, California, on appeal by the company from your decisions of August 2, 1883, and February 25, 1884, respectively, the former affirming the register and receiver’s action adjudging the tract to be agricultural, and the latter denying the company’s motion for review of the former decision.

The township plat was filed in the local office August 2, 1869, and the tract returned as agricultural. It appears that Ferguson made homestead entry No. 3000 of the tract May 23, 1881, and after due notice by publication he made final proof thereon October 7, 1882. Meanwhile, however, to wit, September 15, 1882, said company initiated contest against the entry to determine the character of the tract, which they alleged to be mineral. The register and receiver accordingly

withheld the issuance of final certificate, and ordered a hearing, which was duly had (agreeably to stipulation between the parties in interest) November 13, 1882, before the Superior Judge of Butte county (at Oroville), California, and the record of said proceeding was filed in the local office on the 18th. of the same month. Whereupon, on or about December 13 ensuing, the register and receiver adjudged the tract to be agricultural in character, and the company thereupon appealed upon the grounds, (1) that said decision was contrary to law, and (2) insufficiency of evidence to justify said decision. But by your decision of August 2, 1883, you affirmed the register and receiver's action, and upon the company's filing (in the local office), October 2 ensuing, a motion for review thereof, you denied the same by your letter of February 25, 1884, upon the ground that it had not been filed within the thirty days prescribed by Rule of Practice 77, nor based upon newly discovered evidence. Wherefore the company appealed upon the following grounds, to-wit: (1) that said decision of August 2, 1883, seems to have been made upon the theory that the channel trended in a northwesterly instead of a southwesterly direction, and that said decision assumed that there was no proof that the tract had ever been claimed as mineral, whereas such proof was in evidence; (2) newly discovered evidence; (3) inadvertence and ignorance on the part of the president of the company; and (4) prior peaceable possession of said tract by the company.

Your denial of said motion was based upon authority of Departmental decision in the case of *Richard v. Davis* (1 L. D., 139). It will be observed, however, that the circumstances of this case are such as to bring it within the category of exceptions to the general rule laid down by the Department in the case cited. This case falls rather within the reason of the rule more recently enunciated by the Department in *Caledonia Mining Company v. Rowen* (2 L. D., 714, 719), to wit: "It is not proper that the interests of the government should be jeopardized by such unyielding rules to the exclusion of the plain requirements of the statute. In the case at bar, the contest and the appeal present a question which the Secretary of the Interior is bound to decide under the law, namely, What is the character of the land? . . . The burden of proof, then, being on the mineral claimant in this class of contests, it is competent for him to show his rights, not only absolutely, but relatively, by proof of the inferior rights of the agricultural claimant; and, since it is a question in which the government is interested as well as the contestants, due weight should be given to all the facts in evidence."

But it is urged in Ferguson's behalf that the evidence adduced by the company is not direct proof of the character of the tract in question, but is merely problematic, or tending to prove "the strike or direction of the Burch and Barrett (or Magalia) channel by showing the general direction of other gravel beds in the vicinity." Such contention is based upon the cases of *Carron v. Curtis* (3 C. L. O., 130), and *Dughi v. Harkins* (2 L. D., 721), *inter alia*. It is true that the Depart-

ment has repeatedly held not only in the cases cited, but in many others, that, the tract involved having been designated as agricultural, the burden of proof is upon the mineral claimant traversing such character, who must rebut such prima-facie proof; but it will be observed that the facts in a majority of all these cases are wholly different in many essential particulars from those in the premises, which resemble in some respects those in the aforesaid Caledonia case.

I think that both you and the register and receiver erred in basing your respective decisions solely upon technical grounds, and upon the testimony touching the absolute mineral character of the tract; for, in so doing, you ignored that portion of the testimony containing evidence showing the relative rights of the mineral claimant "by proof of the inferior rights of the agricultural claimant"; (Caledonia case, *supra*). Both you and the register and receiver seem to have been misled by "Exhibit A" in mistaking the line of the company's tunnel, as delineated upon said plat, for the gold-bearing channel containing the so-called lead or lode. The evidence, however, shows contrariwise, to-wit, that the channel runs in a northeasterly and southwesterly direction, or obliquely to the course of the tunnel.

It appears that a portion of the Magalia company's claim (the old Burch and Barrett claim) was located in the year 1856, embracing, it is alleged, a portion of the tract in question; and, although they do not appear to have actually worked or developed said portion of their claim, they have nevertheless worked, and indeed they were working within a short time prior to the hearing, just northeast of said tract in the adjacent $\frac{1}{4}$ of Section 13, tapping their so-called lead by means of said tunnel, and pursuing the same *via* said channel in a southwesterly direction some six hundred feet, (the present or nearer end of said tunnel being equidistant from the north boundary line of the tract in question).

They have already developed \$185,000 worth of gold, and, estimating upon the basis of such development, it is claimed that the said lead will continue to produce at the rate of \$57 per cubic yard, or \$1,000 for every three feet developed. These developments having established the fact that said channel trends southwesterly towards the tract in question without sign of deviation, the mineral claimants assume that it would inevitably penetrate said tract, and upon this hypothesis they estimate the value of the same to be fictitiously enhanced. Although the evidence fails to establish the absolute mineral character of the tract, it nevertheless appears from certain expert testimony (introduced in support of the application in question, of which in such a case I deem it competent for the Department to take cognizance), that there exists a retiary system of subterraneous ancient or pliocene channels, which antedate the "volcanic age," when some ten thousand square miles of this region, extending from the west branch of the Feather river to the Little Chico creek, were overflowed by molten lava from two hundred to eight hundred feet deep. This eruption occurred after the formation

of these channels in the primitive or bed rock, and it is supposed to have commenced at Lassen Peaks, which were presumably the original volcanoes. And it is alleged that it has been demonstrated, by extensive explorations throughout that region, that these ancient or pliocene channels invariably trend to the southwest towards the Sacramento valley; that their courses are indicated by outcropping rim rock of green serpentine and porphyritic granite; and that wherever tapped these subterranean channels are found to be rich in gold, which is borne in pockets of alluvium or loose gravel, intercalated between the substratum or primitive or bed rock and the superincumbent lava. The NW. $\frac{1}{4}$ in question is intersected from northeast to southwest by such rim rock outcropping, and it is covered by such lava, which is four hundred and sixty feet thick, as shown by a sectional view of the Burch and Barrett channel (distant some six hundred feet north of the sectional line forming the north boundary line of the tract in question). And the surface or crust thereof has become rotten and decomposed by the action of the elements, forming a very poor quality of sandy soil composed of debris to the depth of from one inch to one foot, whereon spruce, pine, and some oak timber grows; but it is alleged to be the poorest farming land in California.

Now, as touching the agricultural character of the land, this may be shown both absolutely and relatively by the evidence. It is true the testimony is somewhat conflicting touching the susceptibility of the tract to cultivation, so that an issue of fact has been raised,—it having been alleged on the one hand that a certain portion thereof will produce a fair agricultural crop without irrigation, while on the other hand such allegations have been traversed. I think, however, that the preponderance of evidence sustains the latter contention, namely, that the major portion of the tract is inarable without irrigation. And the relative fact appears that there is only one man in the vicinage who makes his living by agriculture, his claim being "bottom land" some two miles distant, and very eligibly situated. Although ordinarily the mere proximity of a mine does not *per se* overcome the regular agricultural return of an adjacent tract of land, I am nevertheless of the opinion that a rehearing should be had, in view of the unique and almost anomalous state of facts disclosed by the record, and inasmuch as it has been the invariable policy of the government—as it is manifestly to its interest—to patent no mineral land under an agricultural claim, or, in other words, to patent no land until its true character has been determined. X

I deem it expedient therefore to direct that a hearing be ordered so soon as practicable upon due notice to all parties in interest, to the end that the true character of said land may be surely determined; albeit, however, at the company's expense, lest Ferguson's rights, if any, be impaired or damaged; for, after all, these conflicting claims may be adjusted agreeably to the rule laid down by this Department in the analogous case of Townsite of Rico (2 L. D., 567), since they may not

necessarily conflict, and the provision of Section 2330 of the Revised Statutes may be resorted to eventually.

Your decisions are accordingly vacated.

PRACTICE—SUSPENSION FROM ENTRY.

JOHN KIRKPATRICK.

While all action affecting these tracts, and a large number of others, embraced by what are known as "the Spencer entries," was suspended by the Commissioner, pending inquiry into their legality, the entries in question were allowed; they were allowed erroneously, and must be canceled.

Secretary Teller to Commissioner McFarland, December 5, 1884.

I have considered the appeal of John W. Kirkpatrick from your decision of May 31, 1884, canceling his timber-culture entry of February 4, 1884, for the S. E. $\frac{1}{4}$ of Sec. 5, T. 113, R. 75, and also the appeal of George S. Congdon from the same decision, canceling his timber-culture entry of February 4, 1884, for the N. E. $\frac{1}{4}$ of Sec. 8, T. 113, R. 75, both of said tracts being within the Huron, Dakota, land district. These appeals were transmitted with your letter of July 19, 1884.

It appears that the entries in question were allowed by the local officers after you had instructed them to suspend all action affecting these and a large number of other tracts embraced by what are known as "the Spencer entries," until after your determination of certain questions touching the legality of the latter entries. The entries of Kirkpatrick and Congdon were allowed pending such questions, and in view of their erroneous allowance you canceled them. Kirkpatrick and Congdon appeal therefrom for the reason that such cancellations were made without notice to them. However this may have been, they now have the benefit of their appeal, and I affirm your decision for the reasons therein stated.

PRIVATE CLAIMS—INDEMNITY SCRIP.

JOHN McDONOGH SCHOOL FUND.

Where the holder of three confirmed private claims, which conflicted with each other and with other claims of superior confirmation, platted and sold in place the land covered by the three claims surveyed together, it is held, on claim of indemnity for the interferences, that, as to the land so sold and in its relation to the superior confirmations, the purchasers become the legal representatives of the confirnee, and the sellers were not entitled to indemnity, but that they were entitled, under the Toups and St. Amand decisions, to indemnity for the quantity by which the three claims were diminished by reason of their interferences with each other.

Assistant Commissioner Harrison to U. S. surveyor-general, New Orleans, Louisiana, Dec. 6, 1884.

In the matter of the appeal of the trustees of the John McDonogh school fund, representing the city of New Orleans, from your decision

of September 15, 1884, denying the application of said trustees for certificates of location in satisfaction of certain private land claims confirmed to John McDonogh, the following appear to be the facts and proceedings making up the case, as now presented and pending before me, on said appeal, for consideration.

By the act of March 3, 1835 (4 Stat., 779), there were confirmed to John McDonogh private land claims B. No. 20 and B. No. 21, southeastern district of Louisiana, reported by the register and receiver September 5, 1835; claim B. No. 20 being for land situated on the bayou Des Familles, parish of Jefferson and district of Barataria, twenty arpents front on said bayou and forty arpents in depth, the claim having originated in an order of survey by Baron de Carondelet in favor of Louis Pelteau, September 3, 1794; (Am. State Papers, G. & S., Vol. VI, p. 675); and claim B. No. 21, being for twelve arpents front by forty arpents depth, on left bank of same bayou, in same parish and district, originating in an order of survey by Baron de Carondelet to Nicholas Domé, August 21, 1794; (*ibid.*). By the act of July 4, 1836 (6 Stat., 682), there was also confirmed to John McDonogh claim C. No. 86, of the report of the register and receiver of December 1, 1835, being for thirty acres front on the right bank of the bayou Ouacha, or Barataria, and one hundred and ten arpents, more or less, in depth; it having been acquired by McDonogh by purchase from Thomas Durnford, October 10, 1823. The title appears to have originated in a French or Spanish grant which had been lost, but the previous existence of which was proved. It also appears that the land was occupied and cultivated, under this claim of title, for some years before the United States acquired possession of Louisiana; (Id., Vol. VIII, p. 370.) These claims were located in place by surveys before 1856, in accordance with their several descriptions, as appears by the township plats, showing such locations, approved by surveyor-general McCulloch March 17, 1856.

It is understood that, by the will of John McDonogh and judicial proceedings in furtherance of the objects thereof, the right and title to portions of his estate, including the claims aforesaid, became vested in the city of New Orleans, as the foundation for the establishment of charity schools; that the execution of the trust has been committed, by the city, to the trustees of the John McDonogh school fund, the applicants and appellants in the present proceedings; and that the city had, before the pending application was made, sold and conveyed to numerous parties the lands covered by the three claims aforesaid as located by survey.

It is shown by the plats of the township surveys, and the decisions of the register and receiver, of November 7, 1883, and June 16, 1884, accompanying and referred to in your decision, that the three McDonogh claims largely conflict with confirmed claims of other parties, and also to a considerable extent with each other; and, upon the principle that the claims first confirmed have superior right, they hold, in the first

mentioned decision, that the claims conflicting with those of McDonogh have preference of location, and that they absorb all the land covered by the McDonogh claims, except Sections 51 and 55, in Town 15 south, Range 23 east, containing 64.51 acres; and in the decision last mentioned, that the McDonogh claims B. Nos. 20 and 21, being of earlier confirmation, are superior to claim C. No. 86, and that claim B. No. 20 as to Section 55, and claim B. No. 21 as to Section 51, must be recognized as valid claims to the exclusion of claim C. No. 86.

The application of the trustees of the John McDonogh school fund for indemnity certificates for the land within the limits of the located McDonogh claims, except said Sections 51 and 55, is made under a clause of the third section of the act of June 2, 1858 (11 Stat., 294), which provides as follows:

"That in all cases of confirmation by this act, or where any private land claim has been confirmed by Congress, and the same, in whole or in part, has not been located or satisfied, either for want of a specific location prior to such confirmation, or for any reason whatsoever other than a discovery of fraud in such claim subsequent to such confirmation, it shall be the duty of the surveyor-general of the district in which such claim was situated, upon satisfactory proof that such claim has been confirmed and that the same in whole or in part remains unsatisfied, to issue to the claimant or his legal representatives a certificate of location for a quantity of land equal to that so confirmed and unsatisfied."

In a letter of this office to the Department of September 11, 1879, relating to the conflicting claims of the children of Paul Toups and Daspit St. Amand, in which it was set forth that the commissioners authorized by the acts of March 2, 1805 (2 Stat., 324), April 21, 1806 (*Idem*, 391), and March 3, 1807 (*Idem*, 440), to pass upon claims in the eastern district of Orleans Territory, confirmed the Toups claim (*Am. State Papers*, Duff Green's Ed., Vol. II, p. 324), their decision being final by said last mentioned act; that the St. Amand claim (*Id.*, Vol. III, p. 225,) was confirmed by the act of May 11, 1820, (3 Stat., 573); that both claims were located by survey, the surveys showing their conflict with each other; that both claims were also confirmed, together, to Ambrose Lanfear (who had become the owner) by the act of Aug. 18, 1856, (11 Stat., 473), and patents issued to him therefor; that the surveys of the two claims showed an interference between them to the extent of 1690.45 acres; and it was thereupon submitted that as the Toups claim was first confirmed by the separate confirmation thereof mentioned, it had prior right of location, and that Lanfear as the owner of the St. Amand claim was entitled to indemnity for the quantity of land represented by said interference. The Secretary of the Interior concurred in this view, and the indemnity certificates issued to cover the interference were approved.

The above ruling has application to the present case, and under it you correctly held, (without however considering as to the extent), that the relief intended by the act of 1858 necessarily attached, though the two cases have essential differences. In the Toups case the only con-

test was between the Toups and St. Amand claims, both of which belonged to Lanfear. In the present case, besides the conflicts between the three McDonogh claims, those claims are in conflict with several superior claims held by other parties; and, as appears in the statement of the case by the counsel representing the present applicants, they, or the city of New Orleans which they represent, "sold and conveyed the land by several acts of sale to various persons." I understand, from the statement of the counsel aforesaid and what appears in the case, that the land so sold and conveyed was that included in the exterior lines of the surveys of the three McDonogh claims, and that it was platted and sold by parcels in place. A certified copy of a deed given on said sale by the mayor of New Orleans to Madam Winneford Hubbard is on file in the case, which shows that she purchased and received conveyance by said deed of Sections 59 and 60, in Town 15 south, Range 23 east, and Section 57, in Town 15 south, Range 24 east, said sections being part of the McDonogh claim C. No. 86, the claim last confirmed, no part of either of said sections being included in claim B. No. 20, or B. No. 21, previously confirmed; the consideration mentioned in said deed being \$4,817.40. By the sales referred to, the city of New Orleans, as devisee of John McDonogh, represented by the present claimants for indemnity, has taken possession of, appropriated, and received the proceeds for all the land covered by the three McDonogh claims, jointly surveyed. It does not appear what consideration was given, in the proceeding of appropriation, to the outside superior claims; but, having sold and conveyed and received the price of said land, the McDonogh claimants cannot certainly justly claim indemnity in respect of said outside conflicting claims. If those claims are to be asserted, it must be against the right of the parties holding under said sales; and if indemnity is to be awarded, it should in justice and equity, as well as by the law providing for such indemnity, be to the purchasers at said sale, or their assigns. The indemnity accorded by the Act of 1858, aforesaid, is given thereby "to the claimant or his legal representatives"; to the claimant, clearly, when he holds the title on account of which indemnity is awarded; and when he has parted with the title, to those who legally represent him as the holders thereof. Who are the legal representatives of John McDonogh, the claimant, in respect to the land so sold? Undoubtedly the holders of the McDonogh title thereto.

I agree with you, therefore, in your conclusion, that the present applicants, being only intermediaries between the claimant, John McDonogh, and the present holders of the title, are not entitled to indemnity on account of the land sold and conveyed as aforesaid. But in view of, and controlled by, the holding in the Toups case, I think they are entitled to indemnity to the extent represented by the several conflicts between the three McDonogh claims. Your decision is accordingly modified to that extent, and you are instructed to ascertain the quantity of land by which the area of the McDonogh claims has been

diminished by their interferences with each other, and to issue certificates of location in the usual manner—which will be in the name of the claimant, John McDonogh, and result to the benefit of the present applicants if they are legally entitled thereto—for the deficiency in quantity so determined, so as with the amount sold to make the whole quantity equal to what would have been received under the three claims if they had been capable of location without interference with each other, and had been so located by independent surveys.

RAILROAD GRANT—TERRITORIAL LIMITATION.

ALABAMA & CHATTANOOGA RAILROAD.

The location of a railroad within (and not without) a State determines the extent and location in the State of a grant of lands to the State for its benefit.

Under the grant to Alabama (six and fifteen-mile limits) authorizing the roads "to connect with the Georgia line of railroads", the road in question necessarily crossed the State line into Georgia and ran for some distance within six miles thereof: held that, for said portion, the company was not entitled to either granted or indemnity lands in Alabama.

Secretary Teller to Commissioner McFarland, December 6, 1884.

I have considered the appeal of the Alabama & Chattanooga Railroad Company from your decision of December 19, 1881, rejecting three certain lists of selections made by Mr. F. Y. Anderson, agent of said company. These lists embrace odd numbered sections in Alabama lying opposite to and within the six-mile and fifteen-mile limits of that part of said railroad which was located and constructed in Dade County, Georgia.

The act of June 3, 1856 (11 Stat., 17), entitled "An act granting public lands to the State of Alabama to aid in the construction of certain railroads in said State," granted to the State of Alabama, "for the purpose of aiding in the construction of railroads . . . from Gadsden to connect with the Georgia and Tennessee line of railroads, through Chattooga, Wills and Lookout valleys, . . . every alternate section of land, designated by odd numbers, for six sections in width on each of said roads", with the right to select indemnity within fifteen-mile limits. Congress by the act of April 10, 1869 (16 Stat., 45), revived and renewed "so much of the grant of lands made to the State of Alabama by the act of Congress, approved June three, eighteen hundred and fifty-six . . . as were granted to assist in the building of railroads 'from near Gadsden to some point on the Alabama and Mississippi State line, in a direction to the Mobile and Ohio Railroad, with a view to connect with the said Mobile and Ohio Railroad,' and 'from Gadsden to connect with the Georgia and Tennessee and Tennessee line of railroads

through Chattooga, Wills, and Lookout Valleys' . . . subject to all the conditions and restrictions contained in the act referred to."

Prior to 1868 the lines of road located in accordance with the routes indicated in the granting and reviving acts were owned by the North-east & Southwestern Railroad Company and the Wills Valley Railroad Company, respectively, but in 1868 the two roads were united under the ownership of the Alabama and Chattanooga Railroad Company. In locating the Wills Valley road it was run from Gadsden, through northeastern Alabama, to the State line, at a point about twenty-eight miles south of the north line of Alabama, where it crossed into Georgia; passing thence northerly into Tennessee it formed a junction with the Nashville and Chattanooga Railroad, near the city of Chattanooga.

It is claimed by the applicant herein that "the act of Congress clearly embraces that part of this railroad which is in Georgia, and which is also within six miles of unappropriated and unsold public lands which are in Alabama." In support of this proposition attention is called to the topography of the country through which the road (necessarily, under the requirements of the grant) was constructed, with the view of showing that it was impossible to construct said line so as "to connect with" the Tennessee roads without locating a considerable part thereof within the State of Georgia. It is also urged that, as that part of the road which was built in Georgia is as much a part of the road described in the act of Congress as that built in Alabama, its location would take the public lands in Alabama falling within the six-mile limits thereof. Considerable stress is also laid upon the fact that the granting act does not definitely name the northeastern terminus of the Wills Valley road, it being argued that as said act made a grant to aid in the construction of a road "to connect with" roads outside of Alabama, it therefore contemplated as the northeastern terminus such point of connection, and consequently made the grant broad enough to cover the lands now claimed.

If the company is entitled to receive these lands, it must be on account of their falling clearly within the terms of the grant. Under public grants nothing passes by implication. In the clear and explicit language of the statute must be found all that is conveyed by the grant, and where doubt arises the statute must be construed most strictly against the grantee, the courts holding that nothing is given, in such cases, except that which is clearly given; *Charles River Bridge v. Warren Bridge* (11 Pet., 420); *Dubuque & Pacific R. R. Co. v. Litchfield* (23 How., 66); *Rice v. R. R. Co.* (1 Black, 360). The grant was to the State of Alabama, "to aid," as the title of the act expressed it, "in the construction of certain railroads in said State;" and the first section of the granting act provided "that the lands hereby granted for and on account of said roads, severally, shall be exclusively applied in the construction of that road for and on account of which such lands are hereby granted, and shall be disposed of only as the work progresses, and the

same shall be applied to no other purpose whatsoever." The manner in which the granted lands were to be disposed of was specifically set forth in the fourth section of the act as follows: "The lands hereby granted to said State, shall be disposed of by said State only in manner following, that is to say, that a quantity of lands, not exceeding one hundred and twenty sections for each of said roads, and included within a continuous length of twenty miles of each of said roads, may be sold; and when the governor of said State shall certify to the Secretary of the Interior that any twenty continuous miles of any of said roads is completed, then another quantity of land hereby granted, not to exceed one hundred and twenty sections for each of said roads having twenty continuous miles completed, as aforesaid, and included within a continuous length of twenty miles of each of said roads, may be sold; and so from time to time until said roads are completed."

Here then is a grant to a State for the purpose of furthering certain internal improvements therein, and, aside from the express limitation found in the title of the act, it is only reasonable to assume that Congress intended the grant to be commensurate with the work done in the State. In keeping with this conclusion is the provision of the act making the disposition of the lands dependent upon the progress of the work, and the certificate of the governor to the effect that such progress has been made. To hold otherwise would, under the act, make it necessary for the governor of Alabama to certify to the completion of that part of the Wills Valley road which lies outside of Alabama and in Georgia, an obligation which from the very nature and purpose of the act could never have been contemplated. If the grant had been intended to mean what is now claimed for it, such fact should appear therein, expressed in terms that would admit of no doubtful construction, and in such case, methods both adequate and appropriate would have been provided for carrying into effect such a grant; this, too, under the assumption (very properly suggested) that Congress had full knowledge of the topographical features of the country through which the proposed road was to be located. Such a state of facts is, however, not found in this grant; for while it gave public lands to Alabama for the construction of roads located over eight different routes within the State, with the general location of said routes and the termini thereof more or less particularly described in each case, it provided but one method for the disposition of the lands so granted, and that method necessarily determined the quantity of lands granted by the length of the various roads in the State.

The act of September 20, 1850 (9 Stat., 466), made a grant of land to the States of Illinois, Mississippi, and Alabama, to aid in the construction of a railroad from Chicago to Mobile. In the State of Illinois the general line of the route was described in the act as beginning "at the southern terminus of the Illinois and Michigan canal," and as ending at "a point at or near the junction of the Ohio and Mississippi rivers;"

and the granting clause provided "that there be, and is hereby, granted to the State of Illinois, for the purpose of aiding in making the railroad and branches aforesaid, every alternate section of land designated by even numbers, for six sections in width on each side of said road and branches." The right to select indemnity was confined to a fifteen-mile limit, and the right of way granted through the State. The seventh section provided that, "in order to aid in the continuation of said Central Railroad from the mouth of the Ohio river to the city of Mobile, all the rights, privileges, and liabilities hereinbefore conferred on the State of Illinois shall be granted to the States of Alabama and Mississippi, respectively, for the purpose of aiding in the construction of a railroad from said city of Mobile to a point near the mouth of the Ohio river; and that public lands of the United States, to the same extent in proportion to the length, on the same terms, limitations, and restrictions, in every respect, shall be, and is hereby, granted to said States of Alabama and Mississippi, respectively." Under the section last quoted the States therein named claimed a quantity of land equal to the one-half of six sections in width, on each side of said road throughout its entire length, from Mobile to the Ohio river, to be taken wherever found in those States, within fifteen miles on each side of the road. Considering the question thus raised, Attorney-General Crittenden held August 7, 1862 (5 Ops., 603), that the grant in the seventh section was in severalty to Alabama and Mississippi, and said that, "although the railroad must pass through the States of Kentucky and Tennessee in its course from the city of Mobile to the mouth of the Ohio river, the statute has not mentioned either of those States, and there is no indication of any intention on the part of Congress to grant to the States of Alabama and Mississippi, or to either, a right of way through the States of Kentucky and Tennessee, or a right to survey and locate definitely a road through them. . . . The mere description given in the statute of the contemplated Central Railroad from the mouth of the Ohio river to the city of Mobile confers no such powers or rights to the one State to operate within the territorial limits of any other State. . . . The whole length of the railroad through and within the State of Alabama, when actually surveyed and definitely located within that State under the direction of the legislature thereof, must determine, and limit, and define, the extent of the grant to that State."

In the construction of the grant made by act of May 17, 1856 (11 Stat., 15), where lands were conferred upon Florida, to aid in the construction of a railroad "from Pensacola to the State line of Alabama, in the direction of Montgomery," and upon Alabama, for the construction of a road "from Montgomery, in said State, to the boundary line between Florida and Alabama, in the direction of Pensacola and to connect with the road from Pensacola to said line," Attorney-General Crittenden's decision, as cited above, was adopted and applied by this Department, November 7, 1857, it being held that "neither of said

States can select more land than has been granted to her, on account of the specific road or part of a road within her limits;" (1 Lester, 526).

Again, under the date of June 14, 1858, the Department had before it the claim of Alabama to the right of selecting lands within that State, "which lie between the six-mile and fifteen-mile limits of the route of the road, which has been located within the State of Florida, in view of the grant to the latter State, by the same act of Congress." This claim was preferred under the act of May 17, 1856, but was rejected on the ground that "the location of said road within Alabama, determines the extent and location of the grant of lands to that State;" (1 Lester, 530).

The case now in hand, so far as it rests upon an explicit grant, does not present any stronger claim to a favorable decision than those herein cited, and, as I see no reason for adopting a rule differing from that enunciated in said cases, I am of the opinion that said lists of selections should be rejected.

Your decision is affirmed.

DESERT LAND—FINAL PROOF.

CIRCULAR.

The depositions of witnesses in desert-land final proofs may be taken only before the register and receiver of the proper district, but those of claimants may be taken before a register or receiver, a United States commissioner, or a clerk of a court of record.

Commissioner McFarland to registers and receivers, December 10, 1884.

The regulations of this Office and Department (General Circular, March 1, 1884, p. 36) prescribe that the final proof in desert-land entries, "must consist of the testimony of at least two disinterested and credible witnesses, *who must appear in person before the register and receiver.*

These regulations do not expressly prescribe how the final affidavit of the claimant shall be made.

You are accordingly now advised that the final deposition of desert-land applicants (Form No. 4-372, General Circular, p. 99) may be taken before a register or receiver of the land district in which the land is situated, or before the clerk of any court of record, or before a United States commissioner.

The depositions of *witnesses* can be taken only before the register or receiver of the land office in which the lands are situated.

(Approved Dec. 11, 1884, by Acting Secretary Joslyn.)

FINAL PROOF—PROTEST CASES.

INSTRUCTIONS.

Notice of final proof invites objection from all persons, whether or not in interest; at the time fixed therefor, adverse testimony is to be taken, and the claimant and all witnesses may be cross-examined; each party must pay the costs of transcribing the testimony of his own witnesses on direct examination, and that of the witnesses on the other side on cross examination.

Commissioner McFarland to register and receiver, Humboldt, California, December 10, 1884.

The publication in a recent number of the "Land Owner" of my letter to you of January 31, 1883 (11 C. L. O., 249), being liable to create a misapprehension relative to the proper practice in cases where final proofs are offered and objection to the same is made by adverse claimants or others, I deem it proper to advise you that the instructions contained in said letter have, since the same were rendered (nearly two years since), been overruled and set aside by subsequent decisions and instructions.

Notice to make proof is an invitation to all persons to come in and show cause why proof should not be allowed. It is not necessary that an objector should be a prior party to the record. It is not necessary that he should be a party in interest. When any person appears at the time and place set for making proof, and desires to object to such proof, all the testimony in favor of and against the entry should be taken, and a decision rendered in the same manner as in contest cases. The claimant and his witnesses may be cross examined, and witnesses presented by an adverse party or by a protestant may be cross examined by claimant. Each party must in such cases pay the costs of reducing to writing the testimony of his own witnesses, and his cross examination of the witnesses of the other side.

See the following, among other decisions and instructions, namely, A. & P. R. R. Co. v. Forrester (1 L. D., 481); Vasquez v. Richardson;*

* VASQUEZ v. RICHARDSON.

[Secretary Teller, February 9, 1884; (10 C. L. O., 391).]

Richardson filed his declaratory October 24, alleging settlement October 20, 1881; Vasquez filed October 25, 1881, alleging settlement December 8, 1878; after duly published notice, Richardson tendered proof and payment June 6, 1882; Vasquez did not appear at the hearing, but subsequently protested and asked for a rehearing, which was allowed.

"Having made default at the hearing of June 6, without excuse, after duly published notice by Richardson, there was no warrant for allowing Vasquez a second hearing upon the same matter." Practice Rule 5 "must be held to apply to original hearings, and not to allow the re-opening of a case which has once been heard under regular proceedings." "Where a party fails to appear at a regular hearing, he waives his

Sorenson v. Robinson, July 15, 1884 (3 L. D., 276); A. & P. R. R. Co. v. Buckman (Idem, 276): to register and receiver, Gunnison, Col. (Idem, 112); to the same, Oct. 11, 1884 (Idem, 141); to local officers, Lakeview, Oregon (Idem, 355).

CONTEST—EXECUTION OF AFFIDAVIT.

WILLIAM R. SUTLEY.

An affidavit of contest against a timber-culture entry in Dakota, executed before the attorney of record for the contestant, is not therefor invalid under the Dakota code.

Traugh v. Ernst (where the question arose prior to issue of notice) and Sweeten v. Stevenson (where testimony, also, was taken before the contestant's attorney), in so far as they conflict with this decision, are overruled.

Assistant Secretary Joslyn to Commissioner McFarland, December 12, 1884.

I have considered the case presented by the appeal of William R. Sutley from your decision of June 23, 1884, suspending his timber-culture entry for the SW. $\frac{1}{4}$ of Sec. 8, T. 102, R. 59, Mitchell, Dakota.

November 27, 1878, Lyman T. Dunning made timber-culture entry for the land described, and July 21, 1880, Milton Marsden began a contest against the same, alleging non-compliance with the law, but filing with said contest no application to enter the land. March 10, 1881, the local office, considering the evidence submitted by Marsden, held the entry for cancellation. January 4, 1883, Sutley initiated a contest against Dunning's entry, setting forth as grounds therefor that Dunning had not complied with the law, and in an affidavit of the same date alleging that Marsden's contest was invalid on account of failure on Marsden's part to make application for the land. Accompanying Sutley's affidavit of contest was his application to enter the land in dispute.

March 23, 1883, you dismissed Marsden's contest under the rule in the case of Bundy v. Livingston (1 L. D., 179). Marsden appealed. July 13, 1883, Marsden withdrew his appeal and filed a petition asking that his contest might be re-instated, filing at the same time an affidavit of contest against Dunning's entry, together with an application to enter the land. August 11, 1883, notice issued on Sutley's contest, fixing the hearing on October 10, 1883. August 22, 1883, you denied Marsden's application for re-instatement, but held that the local office erred in allowing Sutley to begin a contest while Marsden's suit was pending, dis-

privileges, and has no further standing in the case, unless within a reasonable time thereafter he satisfactorily explains his default and has reinstatement."

There being doubt (founded on his own proofs) of Richardson's inhabitancy of the tract, the Commissioner's decision is modified, and R. is allowed to offer additional proofs at any time within thirty-three months after his settlement, after published notice thereof; Vasquez may offer his own final proofs, if he sees fit, or "substantiate his own claim, for the purpose of defeating that of Richardson, when the latter offers such further proofs."

missed Sutley's contest, and directed the local office to allow Marsden to proceed with the contest filed July 13, 1883, if he was the first legal applicant. September 25, 1883, you rescinded your action of August 22, 1883, in view of the decision in the case of *Bivins v. Shelley* (2 L. D., 282), allowed Sutley to proceed with his contest, and directed the dismissal of all other contests against Dunning's entry. On this decision the local office ordered a hearing in Sutley's contest for December 13, 1883.

October 10, 1883, Marsden filed a motion to have Sutley's contest dismissed, and his own allowed, on the ground that Sutley's affidavit of contest was sworn to before his attorney, acting as a notary public. At the time of filing this motion, Marsden filed also another affidavit of contest against Dunning's entry with an application to enter. After due notice to the parties interested fixing October 26, 1883, for the hearing of said motion, the local office on November 2, 1883, overruled the same. Marsden appealed. December 13, 1883, Sutley submitted testimony to support the allegations of non-compliance, upon which the local office held that Dunning's entry should be canceled. January 9, 1884, Sutley presented to the local office Dunning's relinquishment, whereupon the contested entry was canceled and Sutley allowed to make entry for the land. In your decision of June 23, 1884, you held that Marsden's motion to dismiss raised a jurisdictional question, which must be noticed whenever disclosed by the record, and therefore suspended Sutley's entry.

Although Marsden appealed from your decision of March 23, 1883, dismissing his first contest, he subsequently formally withdrew his appeal and elected to rely upon a petition for re-instatement. Your decision of August 22, 1883, denied the right to a re-instatement, but dismissed Sutley's contest and accorded to Marsden permission to proceed with a new contest. This decision was not allowed to stand, for on September 25, 1883, you reversed it, dismissed Marsden's contest and re-instated Sutley's contest. From this decision Marsden did not appeal, but thereafter sought relief through his motion to dismiss. Hence, it will be observed that the only question which is brought here is the one raised by the motion against the validity of Sutley's contest.

Your decision in this case was made to rest upon the cases of *Traugh v. Ernst* (2 L. D., 212) and *Sweeten v. Stevenson*.*

* SWEETEN v. STEVENSON.

[Secretary Teller, March 25, 1884; (2 B. L. P., 42).]

Contest against Stevenson's homestead entry, Booneville district, Missouri, alleging abandonment.

"Notice was by publication, based upon Sweeten's affidavit that the address of Stevenson was unknown, but without proof (as the publication alleges) that he had left the State." Under Rule 12, "the mere affidavit of the contestant that the address of the contestee is unknown is insufficient to authorize notice by publication; it must also appear that the contestant has used reasonable diligence and effort to ascertain such address; (*Ryan v. Stadler*, 2 L. D., 50)."

Contest was also irregular, in that no copy of the notice was mailed, or posted, as

The first-named of these cases came before you September 7, 1883, from the Huron district, Dakota. Traugh began a contest against Ernst's entry, and one McLeod at the same time applied to contest said entry. The local office holding the contests simultaneously initiated McLeod filed a motion to dismiss Traugh's contest on the ground that the affidavit of contest was insufficient, "it being sworn to before the attorney of contestant, he not being an official authorized to take oaths where the land is situated." You held that under the laws of Dakota the attorney was not qualified to administer the oath to the affidavit of contest, sustained the motion and dismissed the contest. Your decision was affirmed by the Department May 23, 1884.

The "laws of Dakota" referred to are: 1, Section 468 of the Dakota code, which provides that "an affidavit may be made in and out of this Territory before any person authorized to take depositions, and must be authenticated in the same way;" 2, Section 473 of the Dakota code, which provides that "the officer before whom depositions are taken must not be a relative or attorney of either party, or otherwise interested in the event of the action or proceeding." I do not think these statutes sustain the decision in Traugh's case. An essential difference exists between an affidavit and a deposition, as one is made without notice to the adverse party, while the other is made with such notice only. An affidavit is not evidence; it is merely a formal assurance of good faith on the part of the affiant; while a deposition, properly taken, is as much the evidence of the deponent as though he were in the presence of the court, and there subjected to an oral cross-examination. Thus an affidavit, whether appearing in the verification to a pleading, or in support of an interlocutory proceeding, is not, in fact or by intent, effective so far as the final judgment is concerned; but upon the matters appearing in a deposition the final judgment may safely rest. The uses then of the affidavit and deposition being so far separated, and the functions of one so trivial when compared with the other, it follows that we may expect to find a similar difference existing in the qualifications required of officers authorized to take them.

Referring to Section 468 of the Dakota code, quoted in the foregoing, it appears that an affidavit, so far as that Territory is concerned, may be taken "before any person authorized to take depositions." But one

required by Rule 14; and in that no copy of the appeal was served, or attempted to be served, as required by Rule 93. "The present rules of practice were made in order to the proper administration of the law, and for the protection of parties litigant in land matters. They took effect February 1, 1881. Attorneys who, from inattention to or ignorance of them, at this late day involve their clients in useless expense, would therefore seem to be without excuse."

"But, aside from the rules, the whole proceeding is further defective in that the affidavit of contest and the testimony were taken and sworn to before a notary public, who is the attorney of the contestant. As held in the case of *Traugh v. Ernst* (2 L. D., 212—affirmed by the Secretary May 23, 1884), one cannot be allowed to act officially and professionally in the same case."

qualification is specified, and by that qualification the officer who can take an affidavit is as absolutely pointed out as though he were mentioned by name in the statute. Who can take depositions in Dakota? Section 471 of the Dakota code provides that "depositions may be taken in this Territory before a judge, or clerk of the supreme court or district court, or before a justice of the peace, notary public, United States circuit or district court commissioner, or any person empowered by special commission." Here then are the persons who in Dakota may lawfully administer the oath that gives solemnity to the declarations contained in an affidavit. The power thus conferred rests equally with each officer named in the statute, and is in no manner limited by qualifying words. Sections 468 and 473 should not be confounded. The first declares who may take affidavits, describing such officer as the one named in section 471; the second is wholly confined to matters affecting the qualifications of officers to take depositions. If it had been the intent of the Dakota Legislature to say that "no person shall be qualified to take an affidavit who is not qualified to take a deposition," apt words could have been found to express such intent.

It has been seen however that affidavits and depositions differ widely in their legitimate functions, and herein is found the reason for imposing upon the person, who might from his official character be authorized to take depositions, an additional qualification in the form of a requirement that he shall also be free from the imputation of personal bias. The act of taking a deposition involves the exercise of judicial power. The officer before whom the same is taken is, for the time being, the lawfully deputed representative of the court; hence the Dakota statute, following the policy of the common law which never permits the judicial function to blend with the duties of the attorney to his client, has declared that an attorney for a party may not take his deposition. But the administering of an oath to a declaration, which from its very nature is not evidence, cannot be held to be a judicial act; and therefore I do not think the Dakota code, fairly construed, forbids an attorney to administer the necessary oath to a contest affidavit.

But the decision in the Traugh case is not applicable to the case now under consideration, because in that case the question as to the validity of the information arose prior to the issuance of notice thereupon by the local office. In the case of *Houston v. Coyle* (2 L. D., 58), which involved a homestead entry, the Department held September 26, 1883, that jurisdiction was acquired by notice to the settler, and said: "Any question involving the sufficiency of the information on which the local office elected to proceed disappears from the moment that notice is issued to the settler. . . . This Department will not here review the sufficiency of the information." This doctrine has since been cited and followed by the Department in the homestead cases of *Doty v. Moffatt* (3 L. D., 278), and *Hiram T. Hunter* (2 L. D., 39). In disposing of the Dakota homestead case of *Koons v. Elsner* (*Idem*, 65), where the affidavit of contest had been sworn to before the attorney of contestant, you

said, April 25, 1884, that "the very serious defect in the affidavit of contest . . . would seem to be cured under the ruling in *Houston v. Coyle* when you assumed jurisdiction." Under the timber-culture law but two things are specified as essential to a contest in order that jurisdiction may be conferred upon the local office, an application to enter and notice to the original claimant; so that the reasoning adopted in *Houston v. Coyle* may be applied to timber-culture contests with equal force. Such application of said rule was made in the timber-culture contest of *Glaze v. Bogardus* in the departmental decision of March 31, 1884 (2 L. D., 311). In the case of *McCall v. Molnar*, (see *Idem*, 265), which was a timber-culture contest, where the affidavit of contest had been executed before the contestant's attorney, your office April 21, 1884, applied the rule in *Houston v. Coyle* and refused to review the information upon which the citation issued. From the foregoing it will be seen that the rule in *Traugh v. Ernst*, as modified in its application by the decision in *Houston v. Coyle*, does not cover the facts in this case and is therefore not applicable.

Sweeten v. Stevenson was a Missouri homestead case, and this Department held therein, March 25, 1884, that "the whole proceeding is further defective in that the affidavit of contest and the testimony were taken and sworn to before a notary public who is the attorney of the contestant." Here then was a case entirely different from *Traugh v. Ernst*, for while there was nothing to show that the laws of Missouri forbade an attorney from administering an *oath* to his client, yet a due respect to the first principles governing the preparation of a deposition would render necessary the rejection of evidence taken as this was; and upon the finding of that fact mainly rested the decision, although it improperly applied your decision in the *Traugh* case as applicable thereto. When *McCall v. Molnar* came before this Department it was held June 27, 1884 (2 L. D., 265), that "in the absence of any provision in the local law or in the rules of practice adopted by the Department forbidding the attorney from acting as a notary public in the preparation of an affidavit for his client, I see no reason for declaring a contest illegal because based upon an affidavit of contest thus executed." Attention was also called to the fact that in the *Sweeten* case the evidence had been taken before the attorney, and that the decision therein was not intended to formulate a rule that would render inoperative contests already begun under a different practice.

It is apparent that *Marsden's* motion should have been overruled for two reasons: 1, *Sutley's* contest affidavit was not invalid because executed before his attorney; 2, Notice having issued upon the affidavit of contest it was not thereafter proper to review the sufficiency of the information therein contained.

The decisions in *Traugh v. Ernst*, and *Sweeten v. Stevenson*, so far as in conflict with the views herein expressed are overruled.

Your decision, therefore, suspending *Sutley's* entry is reversed, *Marsden's* motion is dismissed, and said entry re-instated.

RAILROAD GRANT—CONFLICT WITH OCCUPANT.

TEXAS & PACIFIC R. R. Co. v. GRAY.

At date of withdrawal for the company's benefit, the tract was settled on and improved by a person who had the qualifications of a pre-emptor, but who had filed no claim; held that, as the granting act, excepted lands "sold, reserved, *occupied*, or pre-empted," it did not pass to the company.

A third person asserting such occupation as a foundation for his own claim is not, at a hearing ordered to ascertain the status of the tract, required to show his own qualifications.

Acting Secretary Joslyn to Commissioner McFarland, December 12, 1884.

I have considered the case of the Texas & Pacific Railway Company v. Sarah Ann Gray, involving the right of the latter to make pre-emption filing for the W. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ of Sec. 35, T. 15 S., R. 5 E., S. B. M., Los Angeles district, California, on appeal by the company from your adverse decision of May 2, 1884.

The land is within the primary limits of the grant of March 3, 1871, to said road. The lands in the odd-numbered sections were withdrawn upon a preliminary line October 15, 1871. April 9, 1883, Sarah Ann Gray applied at the district office to make pre-emption filing for the land in question, alleging settlement February 28, 1883. Her application was rejected by the local officers on the ground that the land was within the limits of the withdrawal for the benefit of said railway company. Gray appealed to your office, and filed therein affidavits setting forth that said land was, at the date of such withdrawal, claimed, occupied and improved by a qualified pre-emption settler. Thereupon your office ordered a hearing to ascertain the status of the land at the date indicated. Upon the hearing the register and receiver held that the proof was insufficient to establish such a claim as would except the land from the railroad grant. From this decision Gray appealed to your office, which reversed the decision of the local officers; whereupon the company appeals to the Department.

The testimony shows that one John Sinclair, a citizen of the United States, and in other respects a qualified pre-emptor, a voter in that precinct, settled upon the land in question in 1870; that he had a house and barn thereon, and a garden of some four acres, and some fencing. The witnesses estimate the value of his improvements at from \$500 to \$700. Sinclair remained upon the land until 1873. The township plat of survey was filed in the district land office October 28, 1879. I concur with you in the opinion that Sinclair, at the date of the withdrawal for the company, had a valid claim to the land, such as he could have perfected, and which brought it within the list of lands excluded from the grant by act of March 3, 1871 (16 Stat., 573), by reason of having been "sold reserved, *occupied*, or pre-empted."

Counsel for the company argue that "it is error to award the land

to Gray, because she has not . . . proven her personal qualifications to pre-empt public land. . . . The law grants the pre-emption right only to the head of a family, a widow, or a single person over twenty-one years of age. It is not shown that Gray is one or more of these." If the proof at the hearing ordered had shown that the tract in question had passed to the company by the grant, the United States would not thereafter have felt called upon to dictate to whom and upon what terms the company should dispose of its land. On the other hand, since the tract did not pass to the company, it is not now competent for the company (being no longer an interested party) to constitute itself the protector and guardian of the government. I therefore affirm your decision permitting Gray to make pre-emption filing for said land.

PRE-EMPTION—SECOND FILING.

DOTEN *v.* DEREVAN.

The rule in *Lytle v. Arkansas*, protecting one whose rights have been prejudiced by the misconduct of a public officer, may not be extended so far as to justify a violation of law because of official misinformation.

A second filing is held to be illegal, although it is alleged that the land covered by the first filing was by mistake of the Land Department entered and patented to another person.

A second filing is held to be illegal, although it is alleged that the land covered by the first filing was abandoned upon the ruling of the register that the settler might thereupon lawfully make another filing.

Acting Secretary Joslyn to Commissioner McFarland, December 12, 1884.

I have considered the case of John S. Doten *v.* Joseph Derevan, involving the right to the W. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of Sec. 30, T. 41 N., R. 13 E., and E. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of Sec. 25, T. 41 N., R. 12 E., M. D. M., Susanville district, California, on appeal by Derevan from decision of April 12th your last, awarding the land to Doten.

December 17, 1877, Doten made homestead entry, No. 1437, for the tract in question. February 16, 1878, Derevan filed declaratory statement No. 2205 for the same tract, alleging settlement November 20, 1877. A contest ensued, and a hearing was held, August 15, 1878, at which it was proved that on November 20, 1877, Derevan hauled a load (650 feet) of lumber and deposited it upon the land, or by the side of the road opposite the land. December 23 ensuing Doten hauled lumber on the land, and began the foundation for a house, into which he moved January 8, 1878. December 25, 1877, Derevan began to build a house, into which he moved January 9, 1878. On the 11th of September, 1878, the register and receiver transmitted to your office the evidence, a summary of which (so far as regards the matter of settlement) has

been given above, expressing in conclusion the opinion "that the contestant, Joseph Derevan, has shown no occupation or settlement of the land until the 25th of December, 1877, and that the homestead entry of John S. Doten, the claimant, is prior, and that the said Doten should be entitled to the land."

May 27, 1880, your predecessor, Mr. Commissioner Williamson, decided that Derevan "connected himself with the land by entering thereon and depositing a load of lumber with which to build a house, with the intention, as shown by his subsequent acts, of claiming under the pre-emption law," and directed that the homestead entry of Doten should be allowed to stand subject to the prior right of the pre-emptor. July 20, ensuing, Doten filed an appeal; but his appeal was dismissed February 8, 1881, because not made within the period prescribed by the rules of your office. Afterward he made application for a rehearing, which your office overruled, May 7, 1881. September 5, 1881, Derevan published notice of his intention to make final pre-emption proof on the 15th of October ensuing. On the date last mentioned, Doten appeared at the local land office and filed protest, alleging that Derevan's settlement was made subsequently to his own; that Derevan had not cultivated the land in question, nor any part of it; and that, previous to Derevan's entry thereof he had had the benefit of the law granting the pre-emption right. "For these reasons" he prayed that a hearing be had to determine the facts in the case; and "upon this basis" your office June 13, 1882, ordered a hearing, which was held commencing August 23 ensuing.

The local officers evidently understood these instructions as a re-opening of the entire case; for, on the hearing, a large proportion of the very voluminous testimony taken bore upon the question of priority of settlement. October 16, 1883, the register and receiver rendered their decision, rejecting Derevan's pre-emption proof and awarding the tract to Doten. November 2, ensuing, Doten appealed; and your office, April 12, 1884, affirmed the decision of the local officers, and held that "the homestead entry by Doten was made prior to the settlement by Derevan, the D. S. claimant, and hence was an appropriation of the land covered thereby, pending which no pre-emption right could attach." The other points raised in Doten's protest are not referred to, either by the register and receiver or by your office.

The question of priority of settlement having been once tried at a hearing held for the special purpose of its determination, and having been decided by your predecessor (May 27, 1880), and an appeal from said decision having been made and dismissed and an application for a rehearing overruled, counsel for Derevan argue that said decision became final, hence that it was not competent for you to reopen and review that question, and that your decision (of April 12 last) reversing that of your predecessor upon that point, was unauthorized and

void; (citing the cases of *Eben Owen et al.** and *Robertson v. So. Pac. R. R.*† Without discussing this point, and omitting reference to several other questions raised by the protest, the evidence, and the arguments of counsel, the case can be decided, in strict accordance with both law and equity, upon entirely different grounds.

Of the several other questions raised in the protest, the evidence, and the arguments of counsel, I need refer to but one. Among the papers transmitted I find certified copies of two declaratory statements made by Derevan prior to that which he made in the present case, to wit: November 17, 1871, he made declaratory statement No. 8,069, Marysville district, California; November 27, 1874, he made declaratory statement No. 9561, same office. Both were upon offered lands. In explanation of the first of these entries Derevan states that after filing his declaratory statement and taking up his residence upon the land, the local officers by oversight permitted another party to make cash entry of the same tract; that he instituted contest for cancellation of the patent issued to the other party, but afterward, by advice of his attorney, "abandoned said contest as being hopeless, and relinquished his right and interest in said lands." In explanation of the second entry he testifies: "Before abandoning I wrote to L. B. Ayer, register of the Marysville office, and asked him if a man could file more than once. He stated to me that a person could file as often as he saw fit, provided he would abandon one

* EBEN OWEN, ET AL.

[Secretary Teller, April 19, 1882; (9 C. L. O., 111).]

November 30, 1874, the Commissioner (Burdett) decided the case of *Owen v. Stephens and Runyon*; no appeal was taken, except by Runyon, who had not appealed from the decision of the land officers. "He was thenceforth a stranger to the case, without right of appeal from your subsequent decision, and said decision of the land office became final as to him; (*Favry v. Lansdale*, 4 C. L. O., 179; *Benson v. Nor. Pac. R. R.*, 7 C. L. O., 34; *Johnson v. Towsley*, 13 Wall., 72; *Moore v. Robbins*, 96 U. S., 530; *Weber v. West. Pac. R. R.*, 6 C. L. O., 19)."

March 20, 1876, a motion for review was filed with the Commissioner (Burdett), which he did not consider; but his successor (Williamson) re-examined the case August 11, 1879, and reversed the decision. "One Commissioner of the G. L. O. has no authority to review a decision of his predecessor, which has become final." The case of *Jacob Vandament* (6 C. L. O., 171) is exceptional and impertinent; there the rule was relaxed because the Commissioner had neglected to send up the whole case, and the Secretary had acquired but a partial understanding of it. "The reason which permits a review by the Secretary of his predecessor's decision does not apply to the decision of bureau officers, because in the latter case the law makes special provision for the correction of error and the prevention of injustice by appeal therefrom to the Secretary." Said action of Commissioner Williamson is set aside.

† ROBERTSON v. SO. PAC. RAILROAD.

[Commissioner McFarland, August 25, 1883; (10 C. L. O., 233).]

"The decision in this case being final (by failure to appeal from predecessor's opinion), and the land having been selected by the railroad company thereunder, were the facts sufficient (which they are not) I could not, in view of the Department ruling in the case of *Eben Owen*, re-open the case and review it."

tract before filing on another." No letters, or extracts from the records, were produced in corroboration of these assertions.

It is true that in a few cases the Department has had occasion to apply the doctrine promulgated by the Supreme Court in the case of *Lytle v. The State of Arkansas* (9 How., 314), namely, "that where an individual in the prosecution of a right does everything which the law requires him to do, and fails to attain his right by the misconduct or neglect of a public officer, the law will protect him." The cases in which this decision has heretofore been applied are of two classes:

First, those coming directly under the literal rendering of the decision, where the public officer has refused the benefit of the law to an individual *who has complied with the law*. See my decisions in the cases of *Edward R. Chase*, December 12, 1882 (1 L. D., 111); *Schmidt v. Stillwell*, November 13, 1882 (*Idem*, 177); and *Marshall v. Ernest*, November 15, 1884 (3 L. D., 279).

Second, those in which the individual has failed to comply with the demands of office practice or department rulings, because of being misinformed or left uninformed regarding them through the error or negligence of government officers. See my decision in the case of *Gardner v. Snowden*, June 30, 1883.*

The doctrine cited above has been given a liberal construction in order to cover the latter case; but it must not be extended so far as to justify a *violation of law* because of official misinformation. While it is not to be presumed that every person is informed as to the practice

GARDNER v. SNOWDEN.

[Secretary Teller, January 30, 1883; (10 C. L. O., 173).]

Snowden settled in 1873 as the tenant of a railroad company, which relation still continues, and resided in a house belonging to the company within the limits of their right of way, which passes through the tract in controversy; in 1883 he was allowed to put a small shanty of his own on the land. "I do not think such occupancy can be held to confer a right of pre-emption, or to satisfy the requirements of the homestead law, with respect to the subdivision of the public lands over which the right of way passes; nor can it, especially in the face of an adverse settlement and asserted claim, be allowed to ripen into title for the tract." The decision of August 11, 1882 (1 L. D., 500) is recalled.

Gardner failed to make final proof and entry (pre-emption) within the time required by law, because the district officers would not permit him to proceed further pending the decision on Snowden's appeal. "Although this advice was erroneous, as the case stood, and he should have proceeded to publish his notice and make tender of payment, yet there may be ground in the peculiar circumstances of the matter for the ruling made by the district officers, inasmuch as the homestead of Snowden was of record and the proceeding was upon his notice offering final proof, Gardner appearing merely to deny the sufficiency of Snowden's right." The judgment of the local officers was for want of good faith in settling and non compliance with law, "and it may have been held by them that it was nevertheless necessary that the entry should be formally canceled before Gardner could be permitted to offer his final proof." "Gardner should not be prejudiced by the misleading advice of the local district officers, and his heirs (he having since deceased) may complete his entry under Sec. 2269, R. S."

X / and regulations of your office or of this Department, every person must be presumed to know the law. Moreover, while it is competent for your office or this Department to overlook, in its discretion and in the interests of equity, a violation of its own regulations, it can not authorize a violation of law. In other words, while the Lytle decision enables an individual who has been misled by government officials to secure a right which has been denied him, but which belongs to him under the law, it can not be successfully invoked to secure for him something that is not his right, because contrary to law. No right belonging to Derevan under the land laws of the United States has ever been denied him. On the contrary, the government officers have been unjustifiably generous in extending to him, for the third time, a privilege which the law expressly declares shall not be given him a second time, (Sec. 2261 R. S.; *Baldwin v. Stark*, 107 U. S., 463); and he cannot now, because of having been misinformed regarding the law—or, rather, upon his bare assertion of having been misinformed, at some other time and place, and by some other government official—be allowed again to exercise the pre-emption right, in defiance of the explicit, unambiguous language of the statute: “No person shall be entitled to more than one pre-emption right; . . . nor where a party has filed his declaration of intention to claim the benefits of said provision for one tract, shall he file, at any future time, a second declaration for another tract.” I therefore hold that Derevan’s pre-emption filing was invalid, in that he was not a competent person to make the same, and affirm your decision awarding the tract in question to Doten.

TIMBER ENTRY—PRE-EMPTION CONFLICT.

CROOKS *v.* HADSELL.

When a timber land declaratory is filed for land upon which a settler has a prior pre-emption filing and improvements, question concerning the character of the land is immaterial; the only matters which may be considered are the pre-emptor’s good faith and compliance with the law, which, in this case, will be tested by his final proofs.

In this case, (there being no allegation of bad faith or of non-compliance), the timber applicant was permitted to and did duly publish notice, the Commissioner allowed a hearing on the question of the character of the land, proof that it is timber land has been furnished, entry applied for, and the purchase money and fees tendered; wherefore the application for entry may remain on file subject to the pre-emption claim.

Acting Secretary Joslyn to Commissioner McFarland, December 17, 1884.

I have considered the case of William H. Crooks *v.* Sidney F. Hadsell, involving the S. $\frac{1}{2}$ of S. E. $\frac{1}{4}$, the N. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, and the S. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of Sec. 33, T. 5 S., R. 21 E., Stockton, California, on appeal from your decision of May 22, 1884, adverse to Crooks.

It appears that Hadsell filed declaratory statement for the tract described July 11, 1881, alleging settlement on the 7th of the same month. Crooks filed his application November 11, 1882, to purchase the same tract under the provisions of the act of June 3, 1878, known as the timber land act. The required publication of notice of his application was posted and published, and Hadsell was notified to appear on a certain day named prepared to show cause, if any, why Crooks should not be allowed to make final proof and payment for the land. He appeared at the time designated, and after a delay of one hour by reason of the non-appearance of Crooks, the hearing was allowed to proceed, the only testimony being that of Hadsell as to the character of the land, upon the taking of which, without cross-examination, the case was closed. Soon after, on the same day, Crooks appeared, with witnesses, and explained by affidavits the cause of his delay. It appears that Hadsell was, immediately upon the arrival of Crooks and his witnesses at the land office, notified of the fact, and requested to return to the office and allow the case to be re-opened and proceed to a full hearing. This he refused to do. Subsequently it was stipulated by counsel for the respective parties that a hearing should be had in the case on the 21st of May, 1883, which new hearing also appears to have been pursuant to a letter of February 24, 1883, from your office.

At the re-hearing Hadsell appeared by attorney only; consequently no further testimony was furnished by him or in his behalf. The testimony of witnesses for Crooks goes to show that the land is of such a character as to be properly subject to entry as timbered land. They were not cross-examined, counsel for Hadsell choosing rather to object to any action being taken in reference to Crooks's application to enter under the act of June 3, 1878, because of Hadsell's pre-emption filing and improvements upon the land; also on the ground that said land is not subject to entry under the timber law. Counsel for Crooks offered in evidence all testimony taken, tendered the purchase money and fees, and asked to be permitted to make entry under the act of June 3, 1878. The local office declined to accept the money or allow the entry, because the title to the land was in contest.

The question as to the character of the land is not a material one so long as Hadsell's pre-emption claim is under consideration. So long as his filing is of record the only matters to be considered are his good faith and compliance with the pre-emption law. These can and will be tested when he is called upon to prove up and make his entry. Should he fail to make the required proof, his claim will then fail, and Crooks may proceed to show the character of the land, and prosecute his case under the act of June, 1878. Said act distinctly states that nothing therein contained "shall defeat or impair any bona-fide claim under any law of the United States." In accordance with the views herein expressed you will direct that Crook's application be recognized subject to Hadsell's pre-emption claim.

TIMBER CULTURE—FINAL PROOF.

CHARLES E. PATTERSON.

Preparing the soil and planting the trees are acts of "cultivation," and the time therein consumed is a part of the eight years of cultivation required by the timber-culture law. Wherefore the law requires that there shall be 6,750 living and thrifty trees at date of final proof, of which one-half must have been actually growing for five years and one-half for four years.

Timber-culture entry was made in May, 1875, and the entryman planted eleven acres of trees (twelve feet apart) in the spring of 1876, replaced those which were missing in 1873, filled in with trees and cuttings (so that they were four feet apart) in 1879, and showed 11,500 living and thrifty timber trees at final proof in October, 1883: held that he has not fully complied with the law.

Assisting Secretary Joslyn to Commissioner McFarland, December 18, 1884.

I have considered the appeal of Charles E. Patterson from your decision of March 4, 1884, rejecting his final proof on timber-culture entry for the N.W. $\frac{1}{4}$ of Sec. 34, T. 112, R. 40, Redwood Falls, Minnesota.

Patterson made his entry May 17, 1875, and submitted final proof thereon October 10, 1883. The local office accepted the proof made, and issued final certificate No. 22. When the case came before you, the final entry was suspended on the ground "that the size of the trees, shown by the proof to be from one to three inches in diameter and from ten to twenty feet in height, is not sufficient to warrant this office in approving the case for patent." You also held the proof prematurely made, and suspended the entry pending "new final proof at the proper time." The entryman excepts to this ruling, because the evidence shows "that the claimant had more than the number required of living, thrifty, growing trees on the land embraced in his entry at date of final proof."

The proof shows that in the spring of 1876 he planted eleven acres to trees, setting them twelve feet apart each way. No more trees were planted until 1878, when he replaced such trees as were missing or dead. In 1879, said tract was "filled in" with trees and cuttings, so that the whole area was covered with trees standing four feet apart each way. It does not appear from the proof that any trees have been planted since 1879. With reference to the condition of the trees at the time of making final proof Patterson testifies: "There are now by count about eleven thousand five hundred trees growing and in good condition on said eleven acre tract, consisting of soft maple and cottonwood, which are from one to three inches in diameter, and in height from ten to twenty feet." The timber-culture act (20 Stat., 113) provides in the second section as follows:

No final certificate shall be given or patent issued for the land so entered until the expiration of eight years from the date of such entry. And if at the expiration of such time, or at any time within five years thereafter, the person making such entry . . . shall prove by two credible witnesses that he or she or they have planted, and for not less

than eight years have cultivated and protected such quantity and character of trees as aforesaid, that not less than twenty-seven hundred trees were planted on each acre, and that at time of making such proof there shall be at least six hundred and seventy-five living and thrifty trees to each acre, they shall receive a patent for such tract of land.

In the case of Benjamin F. Lake (2 L. D., 309), decided by your office April 25, 1884, this matter of final proof was discussed at some length, you holding therein that the preparation of the land and the planting of the trees are acts of cultivation, and that the time authorized to be so employed, and actually so employed, is to be computed as a part of the eight years required by the statute, and therefore that one-half, or thirty eight hundred and seventy-five trees, must actually have been growing for five years after planting, and the remaining half for four years. This decision was in conformity with the instructions of February 1, 1882 (1 L. D., 28), and the general circular of March 1, 1884; and it allows the entryman the full benefit of the time occupied in preparing the soil and planting the trees, but does not relieve him from the necessity of showing that he has cultivated the trees, after planting, for the remainder of the statutory eight years.

In this case the greater part of the trees were planted in 1879; hence it is apparent that Patterson's proof was prematurely made, for on his own showing, at the time he made final proof, he could not have had under cultivation and protection the requisite number of trees for a sufficient length of time to entitle him to a patent. But under the rule laid down by you in Lake's case (*supra*), which I think is fairly within the intent of the law, there is no reason why Patterson should not now at any time submit additional proof, showing the number and condition of trees upon his claim at the present time, and if such proof be found satisfactory receive a patent for his land.

Your decision is therefore affirmed.

SOLDIER'S ADDITIONAL HOMESTEAD—ATTORNEYS.

SAMUEL DAVIS.

A power of attorney authorizing one as attorney in fact to "select, locate and enter, and to file application to locate and enter" the land, "empowering him to demand, receive and receipt for all titles and evidences of title which the United States may or should grant for said additional homestead, . . . and to do all things convenient and proper to support this instrument", is to be regarded as authorizing him to prosecute the claim before the Land Department and to receive the certificate.

The claimant (illiterate) swears that he never (except by fraud and deceit) gave his attorney a power to locate and sell the land, and he is sustained by his original affidavit accompanying the application, and by two witnesses present at date of the contract; and the record shows that said attorney wrote or caused to be written said original affidavit denying such power of sale (which was signed by mark), when in fact he then had such a power of sale in his possession: held that the claimant was justified in revoking said power and appointing another attorney.

Acting Secretary Joslyn to Commissioner McFarland, December 18, 1884

I have considered the appeal of R. A. Burton, esq., from your decision of July 30, 1884, denying him the right to receive the certificate of soldiers' additional homestead right in the claim of Samuel Davis, guardian of the minor children of Marion J. Miller, deceased.

This case was before me on the 14th of last June,* when I ruled that on the record, which showed a power of attorney to Burton, the certificate should be delivered to him; and I concluded, by saying: "You will therefore deliver it to Burton, unless within thirty days Spradling and Penn (claiming it under a prior power) file their alleged power of attorney and show further cause why this decision should not stand." It appears from your letter resubmitting the case that notice of this decision reached Messrs. Drummond & Bradford the resident attorneys of Spradling, on June 23, and that they filed in your office the papers responding to the requirement on July 24, 1884, that is to say, not within the thirty days prescribed. Mr. Drummond makes affidavit, executed August 27, 1884, to the effect that he distinctly recollects filing said papers on July 22, 1884. In view of these facts, the objection by Mr. Burton to the reception of the evidence is overruled.

Mr. Burton also urges that the power of attorney filed as part of the evidence is not an authority to represent the claim before the Land Department, but merely an authority to locate the land. Said paper was executed March 9, 1883, and constitutes James A. Spradling attorney in fact "to select, locate and enter, and to file application to locate and enter" the land, "empowering him to demand, receive and receipt for all titles and evidences of title which the United States may or should grant for said additional homestead, . . . and to do all things convenient and proper for enforcing this instrument." Whilst the instrument is palpably defective in the use of words expressly authorizing Spradling to represent the claimant before the Land Department, it nevertheless, to my mind, clearly contemplates such a representation, as well as the receipt of the certificate by the attorney; and, the general words of authority being large enough, I hold that it is sufficient authority for said purposes.

The question remaining concerns the superior right of Burton or of Spradling under their several powers, and its answer depends on whether Davis, the claimant, has shown sufficient cause for changing his attorney. He alleges that, having discussed with Spradling in February 1883, at his own house, a prospective sale of the homestead right after

* Burton had appealed from the Commissioner's decision, to the effect that the certificate of additional homestead right would be delivered to Drummond & Bradford. The latter, representing Penn & Spradling, of Harrison, Ark., had filed the claim, without a power of attorney, which, however, they alleged that they had possession of; but the former had filed a power of attorney, revoking all former powers, together with Davis's affidavit alleging that this power of attorney in the possession of Penn & Spradling was obtained by fraud and deceit.

issue of the certificate, he afterwards, in pursuance of said conversation, executed a power of attorney authorizing him to prosecute the claim before the Land Department; that he has since learned that said power was a power to locate and to sell the land; and that he did not agree or intend to give such a power, and, if he ever did give it, it was procured by fraud and deceit. Spradling files the affidavits of his brother and of one G. W. Penn, (who as his agents had the conversation alluded to), which set forth that such a contract was then made, and that the powers of location and sale (Spradling admitting that he has the latter) were executed in pursuance of it. Both parties thus assent to the fact that the power of attorney was signed in pursuance of the agreement (whatever it was) made during the conversation at Davis's house. Davis then files the affidavit of W. O. Price and J. W. Davis, who swear that they were present at said conversation, and afterwards when the papers were signed, "and know that Mr. Davis did not sell or contract to sell his ward's interest in an additional homestead, but only got them to represent him and to get the claim for his wards, on these occasions."

It appears from the record that, on the day after executing the power of attorney for the sale of the land, Mr. Davis executed his homestead papers, and the affidavit includes the following language: "and further (I do swear) that I have not made nor agreed to make any sale, transfer, pledge, or other disposition of my right to make the entry for which I now apply." This affidavit appears to have been prepared by the aforesaid Penn, Spradling's agent and partner, and Davis's name, which he signs by a mark, was written by Penn. The record shows, then, that Davis's present oath to the effect that he made no sale is supported by his oath made at date of the application, as well as by the two witnesses referred to; and it shows that the attorneys, who then held his power to sell the land, were willing to deceive the Land Department concerning the facts. If Davis had knowingly made the sale, then said attorneys aided and abetted him in false swearing; if he had not knowingly made the sale, then they deceived him, as he alleges.

On the evidence before me I conclude that Davis's charge against his attorney is sustained, and that he has shown good cause why his appointment of another attorney should be recognized. You will therefore deliver the certificate in question to Mr. Burton.

SURVEYORS-GENERAL—OFFICIAL CORRESPONDENCE.

INSTRUCTIONS.

Commissioner McFarland to surveyor-general, Helena, Montana, December 22, 1884.

My attention has been called to the fact that it is the custom at your office, as at some others, for the chief clerk to sign his own name to official correspondence. It is my opinion that this practice is improper,

and I find no sanction for it in law or regulations. All official correspondence should be addressed to, and be signed by the surveyor-general. None other can be considered as official. Communications addressed to, or signed by, the chief clerk are essentially private communications. The law makes no provision by which the duties of a surveyor-general can be performed in the name of a subordinate. In the necessary absence of a surveyor-general, I see no objection to the transmittal to this office by the chief clerk of current returns previously signed by the surveyor-general and authorized by him to be so transmitted. In such cases the signature to the letter of transmittal should be "A. B., surveyor-general, by U. D., chief clerk."

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RAILROAD GRANT—PRE-EMPTION CONFLICT.

CENT. PAC. R. R. Co. (OREGON BR.) *v.* WOLFORD'S HEIRS.

Wolford settled in 1856 on a tract of unoffered land, which was offered in 1859, but was not sold, though without fault of his; no adverse claim was made, and he continued residing on and improving it until August 5, 1871, when, by the filing of a map of definite location (by which the company's right attached), it was found to be within the granted limits of the road; he continued residing on and improving the tract until 1882, when he filed a pre-emption (declaratory statement) claim for it: held, that he had a valid subsisting pre-emption claim to the land at date the company's right attached, which excepted it from the grant.

Secretary Teller to Commissioner McFarland, December 22, 1884.

I have considered the case of the Central Pacific Railroad Company, Oregon Branch, (formerly the Cal. & Or. R. R. Co.), *v.* the heirs of Silas Wolford, involving the E. $\frac{1}{2}$ of N. E. $\frac{1}{4}$ of Sec. 25, P. 41 N., R. 9 W., M. D. M., Shasta district, California, on appeal by the company from your decisions of May 19 and July 11, 1882.

The tract is within the twenty-mile or granted limits of the grant of July 25, 1866 (14 Stat., 239), to the California and Oregon Railroad Company, the right whereof attached (upon filing the map of definite location in this Department) August 5, 1871; *vide* departmental decision of November 30, 1875, in case of Swift *v.* Cal. & Or. R. R. Co. (2 C. L. O., 134). The withdrawal was made September 6, 1871.

It appears that the tract was offered February 17, 1859, but was subsequently withdrawn as aforesaid. April 16, 1882, Wolford applied to file a pre-emption declaratory statement for it, alleging settlement January 1, 1856; but the register denied his application by reason of said offering and subsequent withdrawal, and forwarded the same to your office per letter of April 22, 1882, "for your consideration and instructions." With his declaratory statement Wolford filed his affidavit, alleging that he had settled as stated, and that he had cultivated and made certain improvements upon the land, aggregating some \$1,000 in

value. By your decision of May 19, 1882, you permitted Wolford to file for the tract, upon the ground that he had a valid, subsisting claim thereto at the date of the company's withdrawal; that, under the Department's ruling in the Trepp case (1 L. D., 396), "a failure to file in time on unoffered land in the absence of another settler does not forfeit a pre-emption claim;" and that the fact that the tract in question was "offered" subsequently to Wolford's settlement, and that it has not been "appropriated by another settler, nor sold by the government at public sale, leaves his claim still valid and subsisting, as he has resided continuously thereon, and had a valid claim at the date of withdrawal."

Whereupon, under date of June 2, 1882, the company's attorney filed a motion for a reconsideration of your said decision of May 19 preceding, but you denied said motion by your decision of July 11 ensuing. Wherefore the company appealed therefrom, upon the ground that, Wolford having settled on the land prior to the public offering in the year 1859, he should have made proof and payment and filed the requisite affidavit before the day fixed for such sale; and that, having failed to do so, he was barred from thereafter asserting a pre-emption claim to the land. In support of such view the company's attorney cites the U. S. Supreme Court's decision in the case of *Moore v. Robbins* (96 U. S., 530), wherein it was held that under the acts of September 4, 1841 (5 Stat., 453, 457), and March 3, 1853 (10 Stat., 244), no pre-emption claim was of any avail against a purchaser of the land at the public sales ordered by the proclamation of the President, unless the claimant had proved up and paid for his claim before the day thus fixed for the sales.

This is substantially the same principle that had been enunciated by the Department in the cases of *Jonathan B. Fisher* (1 Lester 391), and *Tong v. Hall et al.* (3 C. L. O., 3); and said principle has been since reiterated in case of *Central Pacific R. R. Co. v. Orr* (2 L. D., 525), but upon a different state of facts from those existing in the premises. Here, it will be observed, the tract in question was offered February 17, 1859, and although Wolford alleges settlement January 1, 1856, he had failed to assert any claim to the tract at the date fixed for the sale thereof. Hence, whatever right he might have acquired as a pre-emptor by virtue of his filing prior to that date would then have been unquestionably extinguished, by reason of his failure to make proof and payment and to file the requisite affidavit as aforesaid. But the tract was not sold, nor does it appear that there were any bona-fide bidders therefor. Neither does the sale appear to have been in any wise delayed. Had it been sold, however, Wolford would, of course, have been thereby concluded, or rather precluded, from asserting any claim whatever in the premises; but, as hereinbefore stated, the tract was not sold, and it remained free from any adverse claim whatsoever until August 5, 1871, when the aforesaid map of definite location was filed in this Department. The land being thus free and un-encumbered, was subject to his pre-emption settlement and filing.

Hence it was competent for Wolford to initiate such claim thereto, as he did. He swears that he has cultivated the tract and resided thereon continuously from the day he settled to the date of his application to file; that prior to August, 1871, he erected a substantial dwelling house, barn, and other out-buildings upon the land, inclosing about seventy-five acres thereof with a good fence; that he has constructed an irrigating ditch to and upon the land at considerable expense; that his improvements aggregate about \$1,000 in value; and that he was a citizen of the United States at the date of his settlement, and a qualified pre-emption claimant. It thus appears that he virtually had a valid, subsisting pre-emption claim to the land at the date the company's right attached.

Your decisions are accordingly affirmed.

TIMBER TRESPASS—PUBLIC LAND.

JAMES MCCAGHREN.

The trespasser was allowed to settle by purchasing the land, but waited until the State had selected it and then purchased it from her: held that the receiver shall take possession of and sell the wood, or, if it has already been sold, that the purchaser shall be sued for its value.

Secretary Teller to Commissioner McFarland, December 29, 1884.

I am in receipt of your letter of the 9th instant, with the inclosures therein enumerated, relative to timber trespass alleged against James McCaghren, in cutting eleven hundred and sixty cords of firewood from certain described lands in Nevada.

In accordance with the directions contained in my letter of December 12, 1883 (2 L. D., 833), McCaghren was notified that he would be permitted to settle said trespass by purchasing the lands in question under the act of June 3, 1878. McCaghren postponed availing himself of the lenient offer until, on May 31, 1884, the land in question was selected (*inter alia*) by the State of Nevada in lieu of the sixteenth and thirty-sixth sections previously granted. Thereupon McCaghren purchased the land *from the State*.

In view of the fact that the cordwood in question is the personal property of the United States (having been severed from the soil), I concur in your recommendation that the proper receiver of public moneys be directed to take possession of the same and sell it for the benefit of the United States; and that, in the event that McCaghren has sold the wood, the agent be directed to ascertain the financial status of the purchasing party, with a view to the institution of civil proceedings for the recovery of the value of the same.

MINING CLAIM—RELOCATION; WORK; PROTEST.

MCNEIL ET AL. v. PACE ET AL.

On the protestants against a mineral patent (for failure to do the requisite work) is the burden of proof, and, as forfeitures are in law odious, the evidence warranting a forfeiture should be clear and convincing.

When the parties owned two adjoining claims and a drift in one of them was run in the direction of the other, under the advice of mining experts, with a view to the improvement of both, it is available for holding them both.

A tortious entry is unavailable for the purpose of a valid location of a mining claim, and, in Colorado, where adverse possession was obtained on a legal holiday, by stealth, when the locators were temporarily absent, and was retained by threats, it was in violation of the local statutes, although the locators were derelict in performing the requisite work, and gave no right of relocation.

Secretary Teller to Commissioner McFarland, December 29, 1884.

I have considered the protest of David McNeil et al. against the issue of patent to J. A. Pace et al., claimants for the G. M. Favorite Lode claim, mineral entry No. 975, Leadville, Colorado, on appeal by the protestants from your decision of June 5, 1884, dismissing the protest.

This claim was located in April, 1879, and application for patent was filed August 27, 1880. It was adversed by claimants of the Brian Boru Lode, alleging conflict with their claim to a narrow strip of surface ground. Suit was commenced thereon, and judgment rendered in favor of these claimants January 28, 1882. On the same day the Favorite Lode claimants made entry for the remainder of their claim. On January 30, McNeil et al. protested against issuance of patent on said entry, alleging failure on the part of the applicants to expend one hundred dollars in labor or improvements on their claim during the year 1881, whereby it became forfeited and the premises became subject to re-location, and that the protestants re-located the same January 1, 1882, as the Oro Boys Lode claim.

It satisfactorily appears that the applicants complied with the requirements of the law prior to the year 1881, that whatever assessment work they did during that year was done in the month of December, and that they did no work after the expiration of that year. The whole case is therefore narrowed to the single issues of whether or not the applicants performed the required labor or made the required improvements upon this claim during the month of December, 1881; and if not, whether they performed such labor or made such improvements upon the adjoining Continental Lode claim, of which they were owners, so as to answer the statutory demand in respect to the Favorite claim; and whether the premises were subject to re-location by the protestants on January 1, 1882.

Section 2324, Revised Statutes, provides as follows:

On each claim located after May 10, 1872, and until patent has been issued therefor, not less than one hundred dollars worth of labor shall be performed or improvements made during each year; . . . but,

where such claims are held in common, such expenditures may be made upon any one claim; and upon a failure to comply with these conditions the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon their claim after failure and before such location.

It appears from the testimony submitted at a hearing to ascertain the facts, that, on December 1, 1881, a written contract was made between the owners of the Favorite claim and one Williams, by which the latter agreed to develop this mine by tunnels and cross-cuts to the extent of at least fifty feet, (said development to include the assessment thereon for the year ending December 31, 1881, as required by law), and to do and complete said assessment to the full value of one hundred dollars within the time named. The size of the tunnels was agreed upon, and the whole work was to be done "with a view to develop said mine on a systematic plan," and with a view "to its permanency and full security;" and, in compensation for his services, said Williams was to receive three-fourths of the net proceeds of all the pay ore extracted from the tunnels and cross-cuts during the continuance of the agreement, namely, to May 1, 1882. Williams forthwith commenced work upon the mine, assisted by his hired-man, Johnson. The two worked upon sundry days during the month, sometimes together and sometimes separately. Williams testifies that he kept a memorandum (which he recites in detail) of such work, and that the value of their work, at miner's ordinary wages, amounted to more than one hundred dollars. Johnson could not be found, and was not a witness at the hearing, but his affidavit accompanying the protest was filed, to the effect that not more than four or five days' work was done by both himself and Williams, the value of which did not exceed fifteen dollars, and that no work was done by either after December 24. In a later affidavit he says that he and Williams were working together upon several other mining claims during that month, and that he remembers of working, himself, for five days upon the Favorite, and he may have worked more. He does not distinctly remember as to this, but he does remember that he worked all day on this mine upon Saturday, December 31, 1881. His general want of remembrance, and his contradiction in these affidavits upon material points, weaken his whole testimony, and do not detract from that of Williams. There is much other conflicting testimony as to the value of this work, the witnesses for applicants testifying, in the main, that it amounted to one hundred dollars, or more, and those for protestants that it was a less sum. But they all express opinions merely, without knowledge of the actual time expended by Williams and Johnson. Williams is the only witness who knows the real facts, and I find nothing in the case to discredit his testimony.

But whatever might be the conclusion in this respect, there are other questions pertinent to the subject-matter. The statutes of Colorado (p. 538, ed. of 1883) make certain days, among which is that of January

1, holidays, and provide that in case any of said holidays fall upon a Sunday then the Monday following shall be considered as the holiday. Section 137 (p. 51) of the civil code of Colorado provides that a district court of the State, or any judge thereof, shall have power to issue writs of injunction for affirmative relief, having the force and effect of a writ of restitution, restoring any person or persons to the possession of any mining property or premises from which he or they may have been ousted by fraud, force or violence, or from which he or they are kept out of possession by threats or by words or actions which have a natural tendency to excite fear or apprehension of danger, or whenever such possession was taken from him or them by entry of the adverse party on Sunday, or a legal holiday, or while the party in possession was temporarily absent therefrom; the granting of such writ to extend, however, only to the right of possession under the facts of the case, in respect to the manner in which the possession was obtained, leaving the parties to their legal rights on all other questions.

Section 1, chapter 41, of the Colorado statutes provides that no person shall enter upon or into any land, tenements, or other possessions, except in cases where entry is given by law, and then only in a peaceable manner; and Section 2 provides that if any person or persons shall enter upon any mining claim with force or a strong hand, whether any person be actually upon or in the same at the time of such entry or not, or if any person shall enter peaceably upon a mining claim, whether any person be actually upon the same at the time of such entry or not, and shall by words or actions which have a natural tendency to excite fear or apprehension of danger, frighten the party out of possession and retain and hold the same, or shall by such words or actions intimidate the party entitled to possession from returning upon or possessing the same, or shall hold and detain the same, the person or persons so offending shall be deemed guilty of a forcible entry and detainer.

Section 30 (p. 726) of these statutes provides that in all cases when two or more persons shall associate themselves together for the purpose of obtaining the possession of any lode then in the actual possession of another by force, violence, or by stealth, and shall proceed to carry out such purpose by threats against the party in possession, or shall make any threats or use of language, signs, or gestures calculated to intimidate any person at work on said property from continuing to work thereon, or to intimidate others from engaging to work thereon, they shall be subject to fine and imprisonment.

It is clear from the testimony that Williams and Johnson (or one of them) worked on this mine December 31, 1881; that when they left it on that evening their working tools were left there with the intention of resuming work; that Williams returned to it early Monday morning for that purpose, but found the mine in possession of these protestants, who were armed, and who informed him of their possession and that he could

not work upon the mine. This possession was obtained after midnight of December 31, 1881, and prior to seven and one-half o'clock, a. m., January 2, 1882—upon Sunday, January 1, or upon Monday, January 2, which was a holiday—by stealth, in the temporary absence of the applicants, in violation of the laws of Colorado; and the applicants were prevented from continuing their work by the language and conduct of the protestants, also in violation of said statutes. It was therefore a possession illegally acquired, and did not give the protestants the right to re-locate the premises. A tortious entry is unavailing for the purpose of a valid location of a mining claim; (*Belk v. Meagher*, 104 U. S., 279, 285.) The court further say in this case, that a mining claim perfected under the law is property in the highest sense of the term; that such claims are not open to relocation until the rights of a former locator have come to an end; that a relocater can not avail himself of mineral in the public lands until the discoverer has in law abandoned his claim, and left the property open for another to take up; and that a relocation on lands actually covered at the time by another valid and subsisting location is void. In *North Noonday M'g Co. v. Orient M'g Co.* (6 Sawyer, 299), the court say: "The statute nowhere authorizes a person to trespass upon or relocate a claim before properly located by another, however derelict in performing the required work the first locator may have been, provided he has returned and resumed work and is actually engaged in developing his claim at the time the second locator enters and attempts to secure the claim." See also *Jupiter M'g Co. v. Bodie Cons. M'g Co.*, (7 Sawyer, 96). The present case is within these rulings. The applicants had not by intent or in fact abandoned their claim, but were in its actual possession, engaged in its development, when the protestants by a tortious entry attempted their ouster. Such action was illegal and did not deprive the applicants of their rights, which remained the same as if they had completed their assessment work in 1881, even if this were not in fact done, with the right also to prosecute said work in 1882 and until a valid relocation was made by another.

There is another conclusive objection against the forfeiture of applicants' claim on the ground alleged. The Continental Lode claim is adjoining to and parallel with the Favorite claim. They are both owned by the applicants. The required assessment work for the Continental for the year 1881 was performed. Work on the Continental was with the intent also to develop the Favorite. A drift in the former was run in the direction of the latter, under the advice of mining experts with reference to improvement of both. Work on the Continental was therefore, under the law, work on the Favorite. The court say, in *Mt. Diablo M. & M. Co. v. Callison* (5 Sawyer, 439): "Work done outside of the claim, or outside of any claim, if done for the purpose and as a means of perfecting the claim, as in the case of tunnels, drifts, etc., is as available for holding the claim as if done within the boundaries of the claim itself. One general system may be formed well adapted and

intended to work several contiguous claims or lodes, and, when such is the case, work in furtherance of the system is work on the claim intended to be developed by it." See also *Smelting Company v. Kemp* (104 U. S., 636), and *Jackson v. Roby* (109 U. S. 440).

I am of the opinion that, under the testimony, the required assessment work for 1881 was done on the Favorite mine; and if there is doubt of this under the conflicting proofs, then that the protestants, upon whom was the burden of proof, have failed to preponderate the same in their own favor and thus show the delinquency of the applicants and establish their own claim. In *Mt. Diablo v. Callison* (*supra*) the court say: "Forfeitures have always been deemed in law odious, and courts have universally insisted upon the forfeiture being made clearly apparent before enforcing it." For these reasons, as well as for what is above said in respect to work on the Continental mine, I think the protest should be dismissed, and I affirm your decision.

SETTLEMENT; PRE-EMPTION—CONFLICTING GRANT.

EMMERSON *v.* CENT. PAC. R. R. CO.

The pre-emption act of 1841 not only created a pre-emption right, or preferred right of purchase, but it legalized settlement on the public domain with a view to cash entry, and made such settlement by a qualified person the basis of a claim (within limits) against the United States. By such settlement a pre-emption claim attaches to a tract, to be consummated by final proof and entry, and to be forfeited only in favor of other purchasers. It is this equitable though inchoate claim which is contemplated as excepting a tract from the operation of various railroad grants, and it exists after the mere pre-emption right has been forfeited by failure to file or to purchase as required. ✓

Secretary Teller to Commissioner McFarland, December 29, 1884.

I have considered the motion of the Central Pacific Railroad Company for a review of my decision in the case of *Henry Emerson v. said Company* (3 L. D., 117), made September 18, 1884.

The motion proceeds, first, upon the ground that the contemporaneous construction of the pre-emption act of 1841, and the subsequent legislation of Congress (Section 2272, Revised Statutes), show that a right of pre-emption to "offered" land expires on failure to file notice within thirty days or to make payment within twelve months after settlement, and that said construction has ever since obtained; that the pre-emption right of Hutchinson had expired and been forfeited, by his failure to so file and make payment, at the time the right of the road attached; and that therefore it was error to hold that it excepted the tract from the grant.

Whilst the conclusion is denied, the premises are admitted, as they

were substantially in said decision. Hutchinson's "right of pre-emption" had been forfeited at date that the grant took effect; but what followed? Merely the right of some other purchaser to enter the land; (Section 2264, Revised Statutes). A right of pre-emption on offered land is simply a preferred right of purchase over third persons for twelve months after settlement, dependent on the filing of a declaratory statement; (J. B. Raymond, 2 L. D., 854). From the early days of the national land system the right of private purchase, or private entry, of offered lands had existed, and priority of right had depended on priority of the offer to purchase. The pre-emption act added to this right of private purchase a right to hold the land for a year after settlement, on filing a declaratory statement for it. By the pre-emption law Congress said to the settler, if you will give due notice of your intention to claim the tract, you shall have a preferred right to purchase it for the twelve months; but if you fail to make the purchase, or to file the required notice, the first purchaser who applies for it shall have it. This still left to the settler the right of private entry, in common with all other citizens; but, your office having construed the act as denying said right to one who had filed the notice (1 Lester, 369), it became necessary for Congress in the Act of 1843 to declare that "said act shall not be so construed."

The Act of 1841, however, did more than create a "right of pre-emption," or of purchase before others; it legalized settlement on the public lands with a view to cash entry, which before had been trespass, and made it the basis of a claim against the United States; "it protected settlements already made, and allowed future settlements to be made with a right to pre-emption"; (Johnson v. Towsley, 13 Wall., 72). Under the act, "every person (qualified) who makes a settlement in person on the public lands . . . and who inhabits and improves the same . . . is authorized to enter . . . a quarter section, to include the residence of such person" (Sec. 2259, R. S.). The right herein described is not the right to hold the land for a year against third persons, but a right against the United States which the government will recognize (within limits) after the preferred right has been lost. It is the equitable though inchoate right which was conceded in Frisbie v. Whitney (9 Wall., 187),—which was protected by the decision in Johnson v. Towsley (*supra*),—which was recognized in the case of Trepp v. Nor. Pac. Railroad (1 L. D., 396),—and which is contemplated in the various acts granting lands to railroad companies.

In the grant of 1862 to the Central Pacific Company, the exception was of land "to which a pre-emption or homestead claim may not have attached." It has been uniformly ruled that the pre-emption law bases the pre-emption right on settlement, as the homestead law bases the homestead right on entry; and by settlement, which is the initial act in pre-emption, a pre-emption claim against the United States attaches, to be consummated by final proof and entry, and to be forfeited only in

favor of other purchasers. The true deduction from the ruling in *Johnson v. Towsley* is, as was said in my decision in this case, that "a valid settlement creates a valid claim against the United States." The amending act of 1864 provides that the grants to the Central Pacific Company "shall not defeat or impair any pre-emption, homestead, or other lawful claim," and it follows from the foregoing that, under either act, land which is covered by a valid settlement is excepted from the operation of the grant whether or not there has been a declaratory filing for it.

The second ground of review assigned is that the evidence fails to show that Hutchinson was entitled under Section 2260, Revised Statutes, first, because there was but one witness, and, second, because the proof was not affirmative. I think that the testimony of persons, who knew and had various business transactions with a settler and his family for two years prior to his settlement and for eight years prior to his death, that he did not to their knowledge own three hundred and twenty acres of land or quit land of his own in California, is sufficiently affirmative evidence upon the negative proposition to be maintained. And I think that the testimony of one witness, uncontradicted and unimpeached, coupled with and corroborated by the settler's declaratory filing to this fact and to the fact of settlement in 1860 and of residence and improvement for six years thereafter and until date of his death, makes out a prima-facie case in favor of the settler.

For these reasons the motion for review is dismissed.

PRE-EMPTION—SETTLER'S DEATH.

MARY HANLEY.

A qualified pre-emptor settled in 1858, filed in 1872, and died without entering in 1881; his widow transmuted to a homestead in 1883: held that she could not lawfully make the transmutation, but that, as his pre-emption right had expired before his death, she may be treated as an original homestead claimant, whose right may be regarded (in the absence of adverse interests) as beginning at date of his death.

Secretary Teller to Commissioner McFarland, December 30, 1884.

I have considered the appeal of Mary Hanley from your decision of May 8, 1884, rejecting her final homestead proof as widow of Richard Hanley, deceased, for the S. $\frac{1}{2}$ of N. E. $\frac{1}{4}$ of Sec. 14, T. 11, R. 10, Sacramento, California.

It appears that Richard Hanley filed a pre-emption declaratory statement for the tract October 28, 1872, alleging settlement April 11, 1858, and that he continuously occupied it with his wife (the said Mary Hanley) and children, and improved it until his death in September, 1881, since which date she and her children have continued to occupy it. On

December 6, 1883, she, as his widow, transmitted said filing to a homestead entry—so far as related to Lot 3 of the tract—and subsequently made final proof thereon, and final certificate issued to her February 6, 1884. Your decision held that Mrs. Hanley could not, as heir of her deceased husband, transmute his filing to a homestead entry, as this right may only be exercised by the original claimant; but you allowed her entry to stand, subject to the right of his heirs under the pre-emption law, until such time as she can show her residence on the land for five years since the death of her husband, in her own right.

The right of transmuted a pre-emption filing to a homestead entry is accorded a pre-emptor by Section 2289 of the Revised Statutes, but is restricted to one who has "filed a pre-emption claim," who, of course, must be a qualified pre-emptor. Hence, this right does not inure to the widow or heirs of a deceased pre-emptor. If a pre-emptor dies before consummating his claim, Section 2269 affords the appropriate relief, namely, his executor or administrator, or one of his heirs, may file the papers necessary to complete it; in such case the entry and patent thereon will be in favor of the heirs. The homestead law differs from the pre-emption law in that if the entryman dies before completing his entry, his widow, or in case of her death, his heirs or devisee, may perfect the entry. Had Richard Hanley therefore made a homestead entry, instead of a pre-emption filing, his widow might have perfected it upon his death. But as no law authorizes her to transmute his filing to a homestead entry, you properly rejected her proofs.

Richard Hanley filed his declaratory statement in 1872, but never made proof and payment. His right therefore would have been forfeited in his life time in the presence of an adverse claimant. It may fairly be inferred, I think, under the facts, that no proceedings are intended in behalf of his heirs under Section 2269. His widow may therefore be treated as an original homestead claimant, whose rights may, in the absence of an adverse claimant, commence from the date of his death in September, 1881, since which date she has intended to claim the land under the homestead law.

I modify your decision in this slight particular.

RAILROAD GRANT—INDEMNITY.

SOUTH & NORTH ALABAMA R. R. Co.*

The right of a railroad company to indemnity under the act of June 22, 1874, turns—not on its legality or illegality, but—upon the date that the entry or filing was allowed, whether before or after the date on which (as decided) the right of the road attached.

In this case, the dates when the right of the road attached—"May 26, 1866, between Decatur and a junction with the Alabama & Tennessee Railroad, in T. 22 S., R. 2 W., and May 30, 1871, between that point and Montgomery"—were decided prior to the passage of the act, and will be accepted for the purpose of adjudicating the company's claim for indemnity.

* Motion for a re-review dismissed December 29, 1884.

Secretary Teller to Commissioner McFarland, May 7, 1884.

I have considered the application of the South and North Alabama Railroad Company for a reconsideration of my decision of December 4, 1883 (2 L. D., 484), wherein I held that said company is not entitled to make certain indemnity selections under the act of June 22, 1874.

It is urged on behalf of the company that the lands for which indemnity is sought were, in fact, withdrawn, by virtue of certain orders emanating from this Department, at the time when the entries were allowed thereon; and that at the time of the passage of the act of June 22, 1874, the Department held that the rights of grantees, under grants similar to the one now under consideration, attached from the time when the line of road was actually located on the surface of the ground.

The right of the company to the indemnity asked can in no manner be made to turn upon the legality or illegality of the entries made by the settlers, for, by the terms of the act granting this indemnity right, it is provided that the same shall be recognized "where any of the lands granted be found in the possession of an actual settler whose entry or filing *has been allowed* under the pre-emption or homestead laws of the United States subsequent to the time at which by the decision of the Land Office the right of said road was declared to have attached to such lands." For the purposes of this act it is sufficient if it be found that entries and filings *have been allowed* on lands that would have otherwise passed to the company under the grant, *after* your office had decided the rights of the road had attached to lands along its line; hence any consideration of the legality of the entries now involved would be outside the true issue.

An examination of the question raised by the second exception shows that it is without force so far as the case at bar is concerned, for it appears that the question, as to the time when the rights of this company attached, had been settled by your office prior to the passage of the act of 1874. In the report of the Commissioner of the General Land Office for 1873, on page 299, will be found a tabulated statement, showing the time when various railroad rights attached. In this statement, referring to this company and to the time when its rights attached, appears the following: "May 22, 1866, between Decatur and a junction with the Alabama and Tennessee Railroad, in Township 22 south, Range 2 west, and May 30, 1871, between that point and Montgomery." The various succeeding annual reports from your office up to and as late as 1877 show the same as the above. Hence it appears that at the very time Congress enacted the indemnity law of 1874 that body had before it the Land Office report for 1873, which showed from what date this company's right under said indemnity act would take effect, according to "the decision of the Land Office."

Accepting then, for the purpose of determining this claim for indemnity, the date of "definite location" adopted by your office prior

to and after the passage of the act of 1874, the said claim must fail for the reason that the rights of the settler in each instance attached prior to said date of "definite location."

The application is therefore dismissed.

FINAL PROOF—PROTEST CASES.

SORENSEN *v.* ROBINSON.

Robinson settled on offered land in November 1882, and Sorenson made homestead entry in February 1883; in August 1883 Robinson offered his final proofs, and Sorenson, protesting, proved that he had never established a bona-fide residence: held that the final proofs must be rejected.

Secretary Teller to Commissioner McFarland, July 15, 1884.

I have considered the case of Ole C. Sorenson *v.* Orsamus B. Robinson on the appeal of Robinson from your decision of December 18, 1883, holding for cancellation his pre-emption filing for the SE. $\frac{1}{4}$ of Sec. 30, T. 35 N., R. 26 W., Marquette, Michigan.

The records in your office show this tract to be "offered" land, and November 18, 1882, Robinson filed his declaratory statement therefor, alleging settlement on the 4th of said month; and February 26, 1883, Sorenson made homestead entry for said land. August 3, 1883, Robinson offered his final proof, and Sorenson, protesting against its allowance, appeared at the same time and furnished evidence to show where-in Robinson had not complied with the pre-emption law. The evidence shows conclusively that Robinson never established a bona-fide residence in person upon the land in question, hence his final proof must be rejected.

Your decision is therefore affirmed.

FINAL PROOF—PROTEST CASES.

ATLANTIC & PACIFIC RAILROAD CO. *v.* BUCKMAN.

Map of definite location was filed in August 1872, and withdrawal was made in May 1874; Buckman filed pre-emption declaratory in October 1878, alleging settlement in July 1874; he transmuted in April 1879, and proved up before the judge of a court, after due notice by publication in October 1882; his proof shows settlement "in the spring of 1874"; the company failed to appear and object to his final proof: held that, by reason of their failure to then appear and object, they cannot be heard to object now.

Secretary Teller to Commissioner McFarland, July 15, 1884.

I return herewith the papers certified by you March 18, 1884, pursuant to my direction of the 5th of that month, in the case of the Atlantic and Pacific Railroad Company *v.* Fillmore S. S. Buckman, involving

the NW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Sec. 3, T. 4 N., R. 22, W., S. B. M., Los Angeles district, California.

The tract is within the twenty-mile or granted limits of the grant of July 27, 1866 (14 Stat., 292), to the company, whose right attached, upon filing the map of definite location, August 15, 1872, and the withdrawal for which was made May 10, 1874. Notice thereof was received at the local office December 10, 1874. The township plat was filed in said office about June 22, 1874.

It appears that Buckman filed declaratory statement, No. 1664, for the SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of Sec. 4, and the NW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Sec. 3, T. 4 N., R. 22 W., S. B. M., October 11, 1878, alleging settlement July 29, 1874. He transmuted his filing to homestead entry No. 462 on April 15, 1879, pursuant to the provisions of the act of March 3, 1877 (19 Stat., 404), and, after due notice by publication pursuant to the provisions of the act of March 3, 1879 (20 Stat., 472), he made proof October 30, 1882, before the judge of the superior court of San Buenaventura county, California, whereupon final certificate No. 520 was issued to him November 9, 1882. His proof shows him to be a native-born citizen of the United States, and a qualified pre-emption and homestead claimant, and that he settled on the land with his family in the spring of 1874, where he continuously resided to the date of proof, cultivating and improving the land, his improvements aggregating \$3,000 in value. By your office decision of August 13, 1883, it was held that, as Buckman's proof showed settlement after the company's right had attached, but prior to the receipt of the notice of withdrawal at the local office, his entry is confirmed by the first section of the act of April 21, 1876, (19 Stat., 35) and the same was accordingly held for approval for patent.

Wherefore, the company appealed, assigning error (1) in rejecting its claim, and (2) in holding Buckman's entry confirmed as stated. Motion to dismiss said appeal having been made by opposing counsel upon the grounds (1) that the company had formally relinquished its rights in the premises by letter dated February 16, 1875, and (2) that the company failed to appear and object to Buckman's making final proof before the county judge. By your decision of February 2, 1884, you over-ruled the first ground of said motion, but sustained the second, under authority of my decision of December 5, 1882, in the case of the Company *v.* Forrester (1 L. D., 481). See also *Jordan v. Wright* (*Idem*, 480), and *Vasquez v. Richardson* (3 L. D., 247). Inasmuch as this case comes clearly within the rule laid down by the department in the cases cited, and also that of *Gilbert v. St. J. & D. C. R. R. Co.* (1 L. D., 472), I deem it unnecessary to discuss the several questions of practice, etc., raised by the company's counsel.

Your decisions are accordingly affirmed.

*HOMESTEAD—CONTEST; ATHERTON—FOWLER.**DOTY v. MOFFATT.*

Where the affidavit of contest against a homestead entry lacked the corroborating affidavit required by the rules of practice, but was not objected to at the hearing, objection may not be made on appeal, especially in view of the ruling in *Houston v. Coyle*.

A. made use of the land entered for a homestead by him for a cattle ranch, and finally abandoned it and sold all his right in the claim to B. and C., who used it for the same purpose, without filing a claim for it; D. contested for abandonment, and C. and D. pleaded the case of *Atherton v. Fowler*: held, as C. and D. are not settlers or claimants under any law and have not inclosed the land, and as D. has not forcibly intruded on their possession, that D. has right to contest B's entry, and, if successful, has a preferred right of entry under the act of May 14, 1880.

Secretary Teller to Commissioner McFarland, October 2, 1884.

I have considered the case of *Silas Doty v. William Moffatt*, involving the latter's homestead entry made July 29, 1882, upon the SE. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of Sec. 10, the SW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Sec. 11, and the N. $\frac{1}{2}$ of NW. $\frac{1}{4}$ of Sec. 14, T. 24, R. 64 W., Cheyenne, Wyoming Territory, on appeal by Moffatt (and Sturgiss & Lane) from your decision of January 31, 1884, holding his entry for cancellation.

This contest was commenced August 8, 1883, upon charges of abandonment. It appears from the testimony that in the winter prior to his entry, Moffatt built a house, a stable and a corral on the land which he occupied as a cattle ranch until September, 1882, when he sold his cattle and whatever claim he had to the land to Sturgiss and Lane and went to Ireland, where he has since remained. Sturgiss and Lane have continued to occupy the land as a cattle range from that date, but have made no record claim to it. Neither of the parties has cultivated any portion of it, and the fact of Moffatt's abandonment is not questioned.

No question was made at the hearing—at which counsel appeared in behalf of Moffatt—as to the regularity of the proceedings, but motion is now made in behalf of Sturgiss and Lane for dismissal of the case upon the ground that Doty's affidavit of contest was not corroborated as required by the rules of practice; wherefore, it is claimed, the local officers did not acquire jurisdiction thereof. As Moffatt has sold and transferred to Sturgiss and Lane all his interest in the land and left the country, the same is practically equivalent to a record relinquishment of his rights, and, as Sturgiss and Lane are strangers to the record, I do not understand how either can now of right move this or any objection to the contest. But were this otherwise, the failure to raise it at the hearing would bar their right to raise it at the present stage of the case, especially in view of the ruling in the case of *Houston v. Coyle* (2, L. D. 58), wherein it was held that the rule requiring corroboration of an affidavit of contest was in order that the good faith of the contest-

ant might be assured to the local officers before issuing notice of the contest; but that, even in the absence of such corroboration, the information having been given and the notice issued to the claimant, and the parties being present (or represented) for trial in pursuance of the notice, the local office had full jurisdiction to proceed with the trial and to render judgment. This objection cannot now, therefore, be entertained.

It is also claimed in behalf of Sturgiss and Lane that under the ruling in *Atherton v. Fowler* the present contestant can have no preference right to enter the tract under the act of May 14, 1880, even if Moffatt's entry is canceled under the contest, because they are in occupation of the land, with valuable improvements. It was held by this Department in *Brown v. Quinlan* (1 L. D., 435) that the single question before the court and decided in *Atherton v. Fowler* was that the right of pre-emption could not be initiated by forcible intrusion "upon the possession of one who had already settled upon, improved and inclosed the tract." Sturgiss and Lane are not settlers upon or claimants to the land in question under any law for the disposition of the public lands, nor have they inclosed it (or had not at the date of these proceedings), nor has Doty forcibly intruded thereon, but he has exercised only his legal right to contest Moffatt's entry, in which, if successful, the act of May 14, 1880, gives him the preference right to enter it.

Finding nothing in the case adverse to the regularity of the proceedings in contest, nor conflicting with Doty's preference right of entry, I affirm your decision.

MARSHALL v. ERNEST.

A. filed soldier's declaratory November 18, 1882, settled May 7, 1883, executed May 18, before the clerk of a court his affidavit, which was received with his application on May 21, and rejected because not executed before the local office; B. made pre-emption filing May 22, alleging settlement May 16; A. was not notified of his right of appeal and did not appeal from the rejection, but, under advice of the local officers, filed another application for entry May 24: held (1) that the local officers erred in holding that the affidavit could not be executed before the clerk of court; (2) that A's right was not prejudiced by the rejection of his application or his failure to appeal in time; and (3) that, as A's entry was not actually made "within six months" from date of his filing, B's pre-emption right at once attached to the land.

Secretary Teller to Commissioner McFarland, November 15, 1884.

I have considered the case of Miles C. Marshall v. Fred. Ernest, involving homestead entry No. 4096, for the SE. $\frac{1}{4}$ of Sec. 34, T. 112, R. 79, Huron district, Dakota Territory, on appeal by the former from your decision of September 13, 1883, holding that his entry must stand subject to that of Ernest, and of April 11, 1884, declining to re-open the case.

Marshall made soldiers' declaratory statement No. 416 for the tract,

November 18, 1882. May 18, 1883, he made affidavit before the clerk of the court of Hughes county, instead of before the register, on account of the distance of the land from the local office (nearly or quite a hundred miles), in said affidavit alleging settlement on the 17th of May, the preceding day. The affidavit and application were received at the land office at Huron on the 21st of May. The register indorsed upon the application, "Affidavits to Soldiers Hd. must in all cases be sworn to before officers of the land office," and returned application and affidavit to claimant, omitting to note the date of rejection, as required by Rule 66 of Rules of Practice. On learning of this action, Marshall hastened (May 24) to the land office to remedy his alleged error. On reaching the office he found that on May 22 Fred. Ernest had filed pre-emption declaratory statement, alleging settlement May 16.

Thereupon (by advice of the land officers) Marshall made a new application—homestead application No. 4096—for the land (his prior application, soldiers' homestead application No. 416 having previously been canceled without his knowledge or consent). The new application was dated on that day (May 24, 1883), and was held by the land officers to be subject to the pre-emption declaratory statement of Ernest, filed on the 22d of May. Marshall protested against this, and urged that his last filing should be dated back to the day when his first application should (as he contended) have been placed on file, to wit, May 21. The register suggested that Marshall make an affidavit to the facts in the case, corroborated by credible witnesses, and forward the same to the General Land Office. This he did. In your reply (September 13, 1883) to the register and receiver, referring to their return of the original (soldiers' homestead) affidavit on account of its having been executed before a clerk of the county court, you say:

The ground of your objection is untenable, as a soldier who is residing upon his claim can make his homestead affidavit before a clerk of the court, the same as any other homestead affidavit. But owing to your failure to date your rejection it is not shown whether Marshall's application reached your office before the expiration of his declaratory statement; and in view of his failure to appeal from your action, and the fact that an adverse right to the land intervened before his entry was allowed, the respective rights of the parties will not be determined upon an ex-parte statement; and Marshall's entry, although he appears to have acted in good faith, can only be allowed to stand subject to the pre-emptor's rights.

In Marshall's application accompanying the affidavit which he made (May 18, 1883) before the clerk of the court of Hughes county, and again in his application accompanying the affidavit which he made (May 24, 1883) before the land officers at Huron, he states that his soldiers' declaratory statement was made November 21, 1882. But the register and receiver in their letter of July 2, 1884, transmitting Marshall's appeal, say: "Referring to the records we find . . . S. D. S. No. 416, Miles C. Marshall, November 18, 1882." This latter state-

ment, being an extract directly from the official record, officially furnished for the especial purpose of enabling the Department to take intelligent action in the case, must be presumed to be correct. The date of the arrival of Marshall's (first) application at the local office, though not appearing from any official record, can with equal certainty be fixed as May 21, 1883. That is the date of the delivery by the postmaster at Huron to the register of the registered package containing the application and affidavit; Marshall does not claim any earlier date, Ernest does not assert any later date, and the register and receiver let the claim that such was the date pass without denial or comment.

The questions raised in your decision of September 13, 1883,—to wit, whether Marshall's rights should be prejudiced by the action of the register and receiver in returning his application for the cause assigned, or by their omitting to date their rejection, or by his own failure to appeal in time when they not only did not notify him of his right of appeal (as directed by Rule 66 of the Rules of Practice), but instructed him to take an entirely different course,—are discussed at great length by the attorneys for the respective parties. Regarding it I may say in brief, that for none of these reasons did Marshall lose any rights that would otherwise have been his; (*Lytle v. State of Arkansas*, 9 How., 314; *Schmidt v. Stillwell*, 1 L. D., 177.)

The pre-emptor's settlement upon the tract, on May 16, was the inception of a right capable under certain circumstances of being perfected. But the land was at that date subject to the soldier's prior right, and in case the soldier should perform the acts demanded by the law as essential to the perfection of his claim, within the time prescribed by the law, then the pre-emptor's right would be utterly extinguished. These acts were (1) to "commence his settlement and improvement," (2) and "make his entry" (3) "within six months"; (Sec. 2304 R. S.)

May 17, one day after the pre-emptor had made settlement, the soldier built a house. (The pre-emptor produces affidavits to prove that it was not even commenced until the 18th; that it was only a "shanty," 7 x 12 feet, floorless, without a particle of furniture; and that the soldier did not take up his residence in it at all, nor even remain therein over night; and he denies other of the soldier's allegations. But the settlement or discussion of these disputed points is not necessary in order to arrive at a conclusion.)

On May 18, the period of six months within which Marshall was by law required to commence settlement and make his entry expired, and he had as yet made no entry. Thereupon the tract in question passed from under the protection which had been established over it for his benefit, and became, like any other portion of the domain, subject to entry by the first qualified applicant. Thenceforth the relations of Marshall and Ernest to each other were the same as if neither had ever received, for half a year, statutory protection against all other comers. Whichever of the two, or whoever else, was the prior settler, had the

paramount right to the land—provided that, if a pre-emptor, he should file his declaratory statement within the three months allowed him by Section 2265, Revised Statutes. The prior settler in this case was Ernest, and his right related back to the date of his settlement, May 16.

It will be seen that if Marshall's petition were granted, so far as regards being "placed in the same position as if the local officers had accepted and placed his entry of record May 21, 1883," it would be but a barren right, for he would be no better off than he is now. His claim would still be subject to that of Ernest.

For the reasons herein set forth, I affirm your decision that Marshall's homestead application must be held subject to Ernest's claim.

TOWN SITE—HOMESTEAD FLICT.

MATTHIESSEN & WARD *v.* WILLIAMS.

Where a settler, prior to survey, during a mining excitement in the vicinity, invited the miners and others to reside on his land and build a town, and they did so, but without organization or formal town-site selection, and afterwards abandoned the town when the excitement expired, and he thereafter duly made homestead entry, he is entitled to the land. The controlling factor is the status of the town at date of the entry, and not as it existed at some prior time.

Two of said residents remaining do not constitute a town; the keeping of a post-office and saloon by one of them is not "trade and business" within the meaning of Sec. 2258, R. S.; and, in the absence of some claim, the land is "unappropriated" within the meaning of Sec. 2289, R. S.

Secretary Teller to Commissioner McFarland, July 17, 1884.

I have considered the case of F. O. Matthiessen and Lebbeus B. Ward *v.* Joseph T. Williams, involving NE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, NW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, and S. $\frac{1}{2}$ of NE. $\frac{1}{4}$, of Sec. 33, T. 8 N., R. 50 E., Eureka, Nevada, on appeal by Matthiessen & Ward from your decision of February 1, 1884, sustaining the validity of Williams's homestead claim; (10 C. L. O., 356).

Williams made homestead entry No. 69 on said land December 2, 1875, and filed his final proofs October 24, 1882. On the latter day contest was issued against him on the ground of illegality in his entry and proofs, and applications to purchase as transferees under the act of June 15, 1880, were made by several persons. The said charges and claims will be taken up and discussed seriatim.

The first charge is that the entry was illegal under Section 2289, Revised Statutes, because not made on "unappropriated public lands," and under Section 2258, Revised Statutes, because at its date the land was "selected as the site of a town," and was "actually settled and occupied for purposes of trade and business." The testimony taken at the hearing shows that Williams, with several other persons, went into Hot Creek cañon in May, 1866, prior to any survey of the region, and "took up" as claims all the arable land to be found. They also discov-

ered what they supposed was valuable mineral land in the neighboring mountains, and prospectors began flocking to it, and finally organized the Hot Creek Mining District. As a matter of convenience to all parties, the settlers invited the miners to reside on their land, marked off into lots a tract of about an acre in extent, and gave a lot to each person who would build on it. By the fall of 1867 there were more than a hundred persons in the settlement, which was known as "Hot Creek," some fifteen or twenty cabins, including a boarding-house or "hotel" and a post-office, and the usual variety of small tradesmen to be found in a mining camp. There appears to have been no town organization in the settlement, nor any selection of a townsite other than that above indicated. The mining excitement was ephemeral, and with it disappeared the population of the town, until in December, 1875, scarcely any of its residents were left. Three witnesses (Donahue, Joslyn, and Franklin) testify to the number of residents at this time, the date of the entry; and from their testimony it appears that there were but two persons in the town, namely, Joslyn, who was postmaster, trader, saloon and hotel keeper, and one Cook, whose business is not mentioned. Hot Creek was on a stage route, and was a convenient place of stopping; and this probably accounts for Joslyn's stay in it, which was prolonged, together with his business and official duties, until 1880, when he too abandoned it. In 1879, some fifteen persons, employed by a mining company, occupied the deserted buildings; but they disappeared in a few months, and at date of the offer to make final proof there were but two persons there, neither of them engaged in trade.

It is quite evident from this recital that if the so-called town of Hot Creek ever advanced beyond the condition of a mining camp, it had lost all semblance of a town at date of Williams's entry. We are to consider its status at said date, and not as it existed at some prior period. Two people cannot be said to constitute a town, under either the townsite or settlement laws, and particularly when they occupy land by license of the claimant. Williams had been an old settler in the cañon, claiming the land and cultivating it from the beginning, and after its survey in 1875 filed the first claim against the United States for it. Residents were originally invited by him to come upon it in expectation of making a town, and, had the town remained, his entry for part of the land at least would have been void. But the failure of the town obliterated such townsite selection as may have been made, and left the land open to the claim of any qualified person. The fact that Joslyn and Cook lived on it, and that one of them traded and kept a post-office, could not invalidate the entry. Such a "trade and business" is not that in contemplation of the statute, which has in view something more permanent, substantial, and extensive than that of a single person. Nor is a settlement by one or two persons, with the consent of the claimant, and without their claiming the land under any statute of the United

States, an appropriation of it in the eye of the law. And for these reasons I find nothing in the record which would invalidate this homestead entry.

The second charge against Williams is that he contracted to sell part of the land to one Donahue when he obtained a patent for it. The evidence shows that in 1875 Williams had expected to obtain this and other land by means of a State selection, and that in contemplation of this mode of acquiring title he executed said contract on March 30 of that year. The contract was in fact an option of purchase by Donahue, under the terms of which he was to have ten days after Williams obtained title in which to decide whether he would purchase the land. It could be rescinded without consideration, and in fact was so rescinded in the fall of 1875 and before the homestead entry was made. Consequently it in no wise affects Williams's standing as a homestead claimant.

The third charge is that Williams contracted to sell part of his land to Joslyn. Joslyn came upon the land, in the manner heretofore referred to, in the summer of 1866, and resided there until 1880. He filed a pre-emption claim for 120 acres of it on December 4, 1875, and began a contest against Williams's prior homestead entry. Pending said contest, and with a view to terminating litigation, and by the advice of the local officers, the said contract was executed on April 13, 1876. In it Joslyn agreed to relinquish his claim and dismiss the contest, and Williams agreed to transfer a portion of the land to him after he got his patent. Joslyn fulfilled his part of the agreement. It is urged that such a contract, terminating litigation, is not in contravention of the homestead law, which has in view speculative contracts and entries; that the pre-emption law (Sec. 2274, R. S.) sanctions such contracts, and that the equity of the statute extends to homestead entries; that, as land concerning which there is such a contract, openly acknowledged, may be covered by a valid pre-emption entry, and that as land subject to pre-emption is subject to homestead claims (Sec. 2289, R. S.), the homestead entry on this land should not be regarded as invalidated by said contract, made by the advice of the local officers. Whether such a contract is legal I need not consider, for it is settled that, though illegal, it does not bar the right of final entry; (*Aldrich v. Anderson*, 2 L. D., 71).

The fourth charge is that Williams has conveyed by deed to Joslyn a part of his land. The deed was made January 13, 1874, and for the consideration of fifty dollars conveyed a lot in the town of Hot Creek. This conveyance was made when the town was not altogether dead, and before any application to the United States for the land. It was a quit claim, made when parties had and could have but a possessory right to the soil, but contained a covenant of warranty. It is urged by Williams that he never intended to convey a higher interest than he had in the town lot. Whether this be so or not, I think that in view of

the peculiar circumstances under which the conveyance was made, and the small portion of land embraced by it, it should not be regarded as impeaching his good faith in either the original or final entry. So it was ruled in the case of *The State of California v. Alari* (1 L. D., 461), in which the facts were substantially the same as those in the case before me.

Joslyn and Matthiessen & Ward apply to purchase parts of the land in controversy under the act of June 15, 1880, as transferees, the former by virtue of his deed of conveyance, and the latter relying on certain conveyances from Joslyn and Donahue of the interests acquired by them under the contracts hereinbefore mentioned. As to Joslyn's application, it is denied for the reason that said act contemplates an attempted transfer after entry, whereas the conveyance to him was made before the entry. As to the application of Matthiessen & Ward, it is denied for the reason that said act contemplates a conveyance, and not a mere contract to convey.

Your decision is affirmed.

RAILROAD GRANT—CONFLICT WITH OCCUPANT.

SWANSON *v.* SO. PAC. R. R. CO.

The grant to this company makes lands "occupied by homestead settlers" a basis for indemnity. Where a tract within the indemnity limits was occupied and improved in advance of the government surveys by a settler who had exhausted his pre-emption right, but who intended to claim it as a homestead, it was excepted from the executive withdrawal, and, on abandonment thereafter, was subject to the first legal claim.

The case of Valina Taylor (2 L. D., 557) was based on an erroneous statement of facts, and was therefore revoked; but, so far as the principle enunciated in it is concerned, it is be regarded as a precedent.

Acting Secretary Joslyn to Commissioner McFarland August 22, 1884.

I have considered the case of Julius A. Swanson *v.* The Southern Pacific Railroad Company, Branch Line, involving the N.E. $\frac{1}{4}$ of S.E. $\frac{1}{4}$, and Lot 9, of Sec. 31, T. 4 N., R. 19 W., S. B. M., Los Angeles district, California, on appeal by Swanson from your decision of November 10, 1883.

The tract is within the thirty-mile or indemnity limits of the grant of March 3, 1871 (16 Stat., 573, 579), to the company, the right whereof attached (upon filing the map of designated route in your office) April 3, 1871, and the withdrawal for which was made May 10 ensuing. The company has not selected the tract.

The township plat was filed in the local office December 18, 1874. It appears that Swanson filed declaratory statement No. 714 for the tract January 13, 1875, alleging settlement thereon October 15, 1870. He applied at the local office August 22, 1878, to make pre-emption proof and transmute his filing to a homestead entry pursuant to the provisions of the act of March 3, 1877 (19 Stat., 401), but the register and receiver

rejected his application by reason of "the withdrawal for the Southern Pacific and Atlantic & Pacific Railroad Companies." Whereupon he appealed, alleging that the tract was within the exterior limits of the rancho Sespé, and hence in a state of reservation at the date of the railroad withdrawal. Pending appeal, however, the register and receiver permitted him to make pre-emption and homestead proof pursuant to the acts of March 3, 1877 (*supra*), and May 27, 1878 (20 Stat., 63), and transmute his filing to homestead entry No. 451; whereupon final certificate No. 139 issued February 25, 1879.

By your office decision of April 16, 1880, you found from said proof that he did not settle on the land until December, 1872, when the land was not subject to settlement, having been withdrawn May 10, 1871, as aforesaid; that the tract was within the arenal or sandy bed of the Santa Clara river, which, by decisions of July 31, 1872, and November 20, 1879 (the latter in the case of *Sprague v. So. Pac. R. R. Co.*), was found never to have formed any part of said rancho; that Swanson having settled upon the tract subsequently to said withdrawal, his entry was illegal, and, should said tract be required by the company in adjusting its grant, would be canceled eventually; but under authority of departmental decision of April 7, 1879, in the case of *Blodgett v. Cal. & Or. R. R. Co.* (6 C. L. O., 37), his entry was permitted to remain intact, subject to be selected by the company in lieu of land lost in place.

Under date of March 15, 1883, Swanson's attorney filed in his behalf certain affidavits, alleging that one William T. Ashbill, "a qualified settler," had settled upon the tract in April, 1869, and had occupied and improved the same until on or about December 20, 1872, when he sold his possessory right and improvements to Swanson, who has since continuously occupied the tract; and in view of the departmental decision in the case of *Perkins v. Cent. Pac. R. R. Co.* (1 L. D., 357), said attorney asked that a hearing be ordered to establish the facts alleged in said affidavits.

A hearing having been ordered by your letter of April 16, 1883, the same was accordingly had June 11, ensuing, whereat both parties in interest appeared. The testimony shows that the aforesaid Ashbill settled upon the tract in question in the year 1869, erected a dwelling house and corral, constructed an irrigating ditch to and cleared a portion of the land, etc., and that he remained there until the year 1872. While you find these facts from the testimony you also find "that he was not a qualified pre-emptor, having made a pre-emption entry for other land in 1857 or 1858." Upon this state of facts the register and receiver decided July 12, 1883, adversely to Swanson, and, he having failed to appeal therefrom, the register transmitted the case to your office per letter of August 14, 1883. You thereupon by your decision of November 10, ensuing, held Swanson's entry for cancellation, under authority of departmental decision of November 5, 1883, in the case of *Valina*

Taylor v. So. Minn. R'y Ext. Co. (2 L. D., 557), which decision was revoked, however, on the 21st ultimo, the same having been based upon an erroneous state of facts disclosed by the record transmitted by your office, whereof you advised this Department per your letter of July 10, ultimo. It will be observed that the sole question in the case in question was the one indicated, to wit, the date of the railroad withdrawal, "September 10, 1866," and, that having been decided in the company's favor upon "erroneous information," such decision was accordingly rescinded, "and the land awarded to the heirs of the settler," inasmuch as the withdrawal was found to have been "made after Mr. Taylor's pre-emption settlement (which was made in 1869) and did not operate on the land." Hence the principle enunciated by the former decision still obtains, and may be regarded as a precedent.

Now, as touching Ashbill's personal qualifications as a pre-emptor, it is true that he admits having made a pre-emption entry in Tulare county, California, either in 1857 or 1858; but it will be observed that he settled upon the tract in question with the intention of making a homestead entry thereof, for he testified categorically, "I settled on this land with the intention of making *homestead entry for the same*." While it is true that it was not competent for Ashbill to initiate a pre-emption claim to the tract, by reason of his former filing, it is nevertheless a fact that he settled upon the same when it was vacant public land with the intention of claiming it under the homestead law so soon as the public surveys should be extended thereupon. He continuously resided upon and improved the tract until the year 1872, when he sold his possessory right and improvements to Swanson, who immediately took possession, and, so soon as the township plat was filed in the local office, or at least within thirty days thereafter, filed his pre-emption declaratory statement therefor.

Now the question arises: What is the intendment of the railroad grant with respect to such a claim? or, in other words, did Congress intend to grant to the railroad company lands occupied in good faith by homestead or pre-emption settlers, who had evidenced their *animus manendi* by making substantial improvements upon the land? By section 23 of the granting act, the company was authorized as follows:

"To construct a line of railroad from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas Pacific railroad at or near the Colorado river, *with the same rights, grants, and privileges, and subject to the same limitations, restrictions, and conditions* as were granted to said Southern Pacific Railroad Company of California by the act of July 27, 1866" (14 Stat., 292).

By the 18th section of said act, said company was granted as follows:

"Similar grants of land, subject to all the conditions and limitations herein provided"—and these are they contained in the 3d Section of the said act (of 1866), to wit,—“ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever, on the line thereof, the United States have full title, not

reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, *occupied by homestead settlers*, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior."

Although the foregoing provisions have reference to granted lands, I am of opinion that, if by the express language cited such lands "occupied by homestead settlers" are excepted from the operation of the grant and are made the basis for indemnity selection, *a fortiori* should such occupation of lands in the indemnity limits entitle the claimant to consummate his entry, if he appears and asserts his right prior to any attempt of the company to select the same. No such selection having been made, this case falls within the rule laid down by the Department in the Prest case (2 L. D., 506), decided on the 23d of May last, wherein the question was elaborately considered. In the case of Ryan v. Cent. Pac. R. R. Co. (99 U. S., 383), the court said: "The railroad company had not and could not have any claim to it until specially selected." The company having failed to select the tract in question, I am of opinion that it is not competent for it to object to the consummation of Swanson's claim, which is matter to be considered solely between him and the government.

Your decision is accordingly reversed.

SIoux INDIAN RESERVATION IN DAKOTA.

REPORT ON ADJUSTMENT OF SETTLERS' CLAIMS.

Special Agents U. J. Baxter and F. E. Campbell to Commissioner McFarland, January 2, 1885.

SIR: We have the honor to submit the subjoined report and accompanying papers, under your instructions of September 15, 1884, directing us as follows:

You have been detailed by the Honorable Secretary of the Interior, in compliance with my request of 12th instant, to adjust the claims of settlers upon the lands of the late Sioux Indian reservation in Dakota, many entries having been made under act of March 3, 1863 (12 Stat., 819), in conformity to surveys which have been ascertained to have been fraudulent and incorrect, and new and correct surveys having now been approved. You will proceed to the vicinity of said lands and adjust the said entries and claims to the correct description, as near as may be, making only such changes as may be found necessary in properly adjusting the boundaries and dividing lines of the several settlers, in the manner best comporting with your judgment as to the true interests of the settlers and the United States.

Pursuant to these directions we proceeded to the neighborhood of the lands, reaching Milbank, the county seat of Grant county, Dakota, on the 21st of September, and immediately promulgated notice of our arrival. . . . The next morning we opened the work of adjustment, and ascertained from settlers, and by personal observation of such lands as lay within reach, the fact that the survey made by Meyer, in 1865, was entirely wanting in proper execution, no corners having been established in sectionizing and subdividing on the ground. Nothing of permanence could be found except the common Minnesota and Dakota boundary line, the waters of the Big Stone lake on the eastern boundary of the lands, and the original survey of the western line of the tract when set apart as an Indian reserve. These boundaries embraced fifteen townships, entire or fractional, by the survey of Meyer in 1865, and seventeen by the new and correct survey of Woolley in 1882. The topography of the region, as exhibited on both surveys, was found to be mainly correct, and coincident except in the matter of location by the respective plats. Thus, the outline of lakes and ponds and the course of streams corresponded as to form and general features, but upon placing a connected plat of one survey over the other the locus of such objects was exhibited differently, showing a false projection of the map of original platting, which rendered it impossible to make the plats of 1865 the basis of adjustment.

Under these circumstances, having been joined by Hon. H. R. Pease, U. S. receiver of the Watertown district office, we sought to reach some system which would correctly locate the settlers by the correct description upon the new and improved survey, preserving to each his land, and at the same time retaining so much of the original description as to preserve the titles acquired by the entry, many of which had already been transferred to third parties, and a large number of which had also been made security for loans and mortgages. To this end we adopted and published, both in the form of handbills and through the public press, the following circular:

The following brief statement will explain the proposed mode of adjustment adopted by the United States agents upon the Sioux Indian Lands in Grant and Roberts counties, on Big Stone Lake, Dakota:

1st. The original survey of Meyer, having been executed entirely on paper, without any establishment whatever of corners in the field, necessarily becomes secondary and subordinate to the actual topographical features; consequently permanent physical objects must, to a large extent, govern in establishing the true location and identity of the tract entered by the settler.

2d. The reputed survey, being thus fatally wanting in execution as well as in accuracy, has in fact been misleading instead of aiding the proper description; and being thus void on account of fraud, the home and improvements upon the ground, as established by the settler and recognized by surrounding claimants, must be fairly ascertained in the same manner as upon unsurveyed land.

3d. Where claims conflict, the actual possession and occupancy at date of the true and only recognized survey must control in the adjustment; and slight deviations upon either side must yield to the necessity of securing the greater portion of the legal subdivision to him whose lines embrace it—the loss, if any, falling upon the lesser portion. In other words, the entries must be described by those subdivisive descriptions the nearest conforming to the lines of occupation, so as to give each his quantity as nearly as may be, including the larger portion of his improvements.

4th. Actual location, without regard to character of land or quality of soil, can alone be considered; and in cases of such actual location and improvement of the same smallest legal subdivision, the law allows joint entry for the purpose of enabling the parties to adjust coterminous boundaries and conflicting interests, either by agreement or by resort to courts of equity. In no case, however, will such award be made unless it be reasonably shown that substantial injustice will be done by an award to each by separate legal subdivisions; and claimants are respectfully urged to make such concessions and agreements as will aid the agents in giving to each his fair individual claim with as little variance as possible in the form of the entries as made and reported to the General Land Office.

5th. Conflicts which can not be reconciled will be left open for contest in the usual manner by proofs before the district office at Watertown, subject to appeal to and revision by the General Land Office and the Secretary of the Interior; but the agents will report the correct description of the tracts by the new survey, and the question to be then determined will be whether or not the entry shall be patented by amended description for other tracts claimed to have been intended to be taken instead of the tract actually described.

6th. Notwithstanding the character of the original survey, claimants who properly settled and filed their claims or who have been prevented from filing by the suspension caused by discovery of the fraud, ought not to be prejudiced, but should be allowed to file by the proper description at the earliest practicable moment after the suspension shall have been removed, and prove up their claims in due form and season; and this the agents will recommend to the favorable attention of the Department.

The plan gave universal satisfaction. We had, as before stated, pending its general promulgation, commenced the adjustment and made rapid progress. . . . After transcribing from the original plats and records each entry in its order, commencing at the southernmost point of the tract, we identified by the new survey the land covered by such entry, as nearly as possible by legal subdivisions, and gave the proper description accordingly. Few changes were made, except to adjust the entry to the nearest lines of subdivision where differences either slight or material were found. In a very few cases, where valuable improvements had been placed on contiguous lands free from other settlement or claim, the entry was allowed to embrace them to the extent of approximating one hundred and sixty acres. In a few cases the area, by the new plats, was enlarged to exceed that quantity by the necessary conformation of the lines of the original entry to the actual location upon the ground. In these cases we determined, as the fault was that of the government in the first survey, to allow the entry to stand notwithstanding the excess. Several cases of apparent conflict were adjusted in a manner to remove the interference and permit each claim to cover one hundred and sixty acres, where heretofore, on the original papers, one had been reduced by the supposed appropriation of the other. In all these cases, as well as in others where the original area has been increased, the parties will be required to pay the legal price for the excess. In one or two adjustments the change in running the subdivisional lines destroyed the contiguity and rendered it necessary to allow the entry to describe a tract not strictly compact, or to resort to cancellation and joint entry. In these cases the respective owners preferred to take our adjustment and exchange deeds to correct the apparent discrepancies, and we fully agreed that this would be the most satisfactory mode. . . .

We forward the result of our work in the form of an abstract of the entire list of entries, five hundred and eight in number, with the new

description pertaining to each, and memorandum notes indicating special action or explanation in all cases where required.

1. We recommend as to these that they be corrected by the issue of new certificates to conform to the true description, with a recital fully connecting them with the original, so as to carry into the patent such reference thereto as will preserve the integrity of the entry and of all transfers of title based thereon, and of liens and incumbrances created by the respective grantees.

2. After such correction, we recommend that the books of the local office be posted to show the same, and that parties who have filed on the remaining lands, but who have been prevented by the order of suspension from making entry, be allowed to amend by filing anew, according to the proper description, for the lands actually settled upon, giving date of settlement as in the original filings.

3. At the same time we recommend that the rights of all settlers who have not filed, on account of such suspension, be recognized as though no suspension had been ordered, and that they be notified to file their claims within three months from date of such notification; also, that the residue of the lands be continued subject to settlement, filing and entry, according to the original instructions. In such case, of course, the order for public sale will be entirely revoked.

We submit the following with respect to three cases, specially examined upon the ground, in view of conflicting claims:

1. *Oliver Martell v. John Quigley*, involving Lot 1 and SW. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of Section 8, 121, 46. Martell entered by the original plats, September 25, 1879, based on settlement in 1875, Lot 2 of 5 and Lots 1, 2, and 3 and NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of 8, containing 166.50 acres; (Fargo entry No. 15). Quigley entered September 4, 1880, based on settlement in July, 1879, the W. $\frac{1}{2}$ of NW. $\frac{1}{4}$ of 8, containing 80 acres; (Watertown entry No. 43). Martell's entry has been patented. Quigley's has not been adjudicated, but he has sold the land and left the neighborhood. By the new plats both entries cover the fractional W. $\frac{1}{2}$ of NW. $\frac{1}{4}$, described as Lot 1 and SW. $\frac{1}{4}$ of NW. $\frac{1}{4}$, containing 75.15 acres.

On visiting the land, both Martell and the assignee of Quigley being present, it was clearly shown that Martell, some time prior to the settlement of Quigley, endeavored to establish his westerly line by the aid of a county surveyor, who marked, by a well-defined mound and pits, the section corner, which monument still remains. This was so nearly accurate that the new mound established by the government survey in 1882 stands but a few feet from the spot. The southwest corner was also established. Martell called the attention of Quigley to this line when the latter made his settlement, and forbade his occupation; but Quigley persisted in taking possession of a small spot, and built a little cabin on the tract. Upon these facts we have no hesitation in awarding the land to Martell, and recommending the cancellation of Quigley's entry.

2. *Oliver Martell v. John W. Molm*, involving the NW. $\frac{1}{4}$ of SW. $\frac{1}{4}$

of 8, 121, 46. Martell entered September 25, 1879, based on settlement in 1875, Lot 2 of Section 5, and Lots 1, 2, 3 and NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$, Section 8, 121, 46, containing 166.50 acres; (Fargo entry No. 15). Molm entered the same day (entry No. 16), based on settlement in October, 1878, the W. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of 8, and N. $\frac{1}{2}$ of NW. $\frac{1}{4}$ of 17, containing 160 acres. The plats showed no conflict. It appears, however, by the new survey that the actual settlement and claim of Martell cover Lot 1 of 5, Lots 1, 2, and 3, and the SW. $\frac{1}{4}$ of NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of 8; thus appropriating the NW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of 8, embraced in the claim of Molm.

It is impossible to satisfy the claims of both. Martell was the prior settler, his occupation was by actual possession, and his west line, as shown in the case of his conflict with Quigley, varies but a few feet from the identification originally made by the local surveyor. He must therefore be awarded the tract, and so much of Molm's entry as conflicts must be canceled.

3. Francis Van Tongeren *v.* Michael Brennan, involving S. $\frac{1}{2}$ of NW. $\frac{1}{4}$ of Section 21, 121, 47. Van Tongeren made Fargo cash entry No. 29, January 2, 1880, for SW. $\frac{1}{4}$ of 21, based on settlement in May, 1879. Brennan entered the NW. $\frac{1}{4}$ December 7, 1880, based on settlement in March, 1880 (Watertown entry No. 153). The old and new surveys practically agree in description, and there is no conflict on the face of the certificates and plats. But the topography differs, especially with respect to the position of a small stream denominated the Whetstone. By the old survey a certain fork of this stream, which Van Tongeren alleges was taken by him as a landmark in choosing his location, no corners being marked, falls in Section 28, several rods south of the line of Section 21; and he claims to have chosen to include in his settlement only such portion of the stream as lay north of that line, which would give him the SW. $\frac{1}{4}$ of 21 by that plat. By the new survey the fork in the stream falls in Section 21, and the line between 21 and 28 runs a very little south of it, thus throwing more of the stream within the SW. $\frac{1}{4}$.

He built his house a little over one hundred and sixty rods north of the section line, so that it stands a few feet over the half section line upon the NW. $\frac{1}{4}$; and he claims a right to amend so as to take the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, thus appropriating one-half of Brennan's claim, and leaving the latter only the N. $\frac{1}{2}$ of NW. $\frac{1}{4}$. Brennan sold the NW. $\frac{1}{4}$, and shortly after died. His assignee, one Hefferman, now lives with his family in a little shanty only a few inches space from the house of Van Tongeren. He bought it, it is alleged, with full knowledge of Van Tongeren's claim, and certain suits growing out of the conflict are pending in the local courts. He denies that Van Tongeren gave such notice of the extension of his claim northward as to clearly indicate his intent to claim the eighty acres, and insists that the claims as they stand on the record shall be recognized.

Almost the entire improvement and cultivation on the NW. $\frac{1}{4}$ have

been done by Brennan and his assignee. Van Tongeren's small house and a partially completed well, with a small shed or granary just about on the line, are all that belong to him. He did, however, originally break a field, the north line of which commenced a few rods north of the quarter-section corner on the west, and ran somewhat diagonally eastwardly, crossing the line and falling to the southward upon the SW. $\frac{1}{4}$ a short distance east of the house. Most of the original fields of breaking in this belt of lands ran upon about the same diagonal course; indicating that this was supposed to be the true direction of the survey lines, there being no corners to guide the judgment. A doubt arose, which strongly impressed us, as to whether this breaking was not intended to mark the north line instead of the center of Van Tongeren's claim; as he set no corners further to the north, nor has he to this day ever marked the exact spot claimed by him as his northern boundary. This doubt was strengthened by the fact that his breaking and raising of crops have extended considerably to the southward of the half quarter line of the SW. $\frac{1}{4}$, and embraced a portion of the S. $\frac{1}{2}$ of SW. $\frac{1}{4}$, which he insists upon leaving vacant, although he has never formally waived his claim and asked to have it stricken from his entry. After viewing the land in the presence of the parties, we fully agreed, Receiver Pease concurring, that the record of entry should be permitted to stand; but that Hefferman should deed to Van Tongeren twenty acres extending in a strip on the south side of the NW. $\frac{1}{4}$, thus amply securing to him all his valuable interests on that subdivision. The justice of this will be further apparent from an inspection of the connected surveys, by which it will be clearly seen that the distance between the true position of the fork of the stream and the section line in Section 21, by the new survey, is not more than half the distance of the false position in Section 28 by the old; so that, if Van Tongeren really intended to run northward and take the nearest adjustment of lines when corners were found, he would not have reached to the center of the S. $\frac{1}{2}$ of NW. $\frac{1}{4}$; and it is more reasonable to require him to fall toward the nearest line, especially when he has covered a vacant eighty in that direction by his entry and partially covered it by his improvements, than to permit him to force from the land another settler, who has made his entry to conform to the previous and existing record of the claimant. To our proposition Hefferman practically agreed, and we have no doubt he will be ready to make the conveyance when required. Van Tongeren refused to accede to the adjustment. We are therefore compelled to make the award, and adjudge that the patents follow entries as made, leaving Van Tongeren to seek relief in the judicial tribunals, if he still desires to contest the matter.

Upon one subject included in the foregoing recommendations, a few suggestions may be added. This is the security of title already transferred by the original claimants. On this point we refer to a letter from George L. Becker, esq., of St. Paul, Minnesota, addressed to us under

date of 28th of October, giving a list of entries in which he has secured title by the original description from the grantees, and requesting the issue of patents direct to himself by the proper description as contained in the new survey. Our opinion is that the rule of the Department should be adhered to, and patent should issue to the original parties, so that all transactions of record affecting the assignments, mortgages, liens, taxation, and the like, may be left entirely without interference by the new or original patent, as the case may be. At the same time the identification should be so clear, by reference to the original erroneous papers, as to carry the record, as it were, bodily into the new certificates and the patents themselves, under the well known maxim of construction, that where an instrument is referred to for purposes of description or explanation in another instrument, it must be taken and read as if actually inserted therein. In this manner, we have no doubt, the questions raised by General Becker will be satisfactorily disposed of, and full security be given to the titles held by him.

All of which is respectfully presented.

PRE-EMPTION SETTLEMENT.

HOWDEN *v.* PIPER.

To constitute a legal settlement there must be an entry on the land with the intent to appropriate it, and an act indicative of that intent; and the two must harmonize.

Secretary Teller to Commissioner McFarland, January 3, 1885.

On October 27 last the Acting Secretary of this Department rendered a decision in the case of Howden *v.* Piper (2 L. D., 162), involving lands in the Huron, Dakota, land district, cancelling the pre-emption filing of Howden, made February 14, under an alleged settlement of February 11, 1882, and sustaining that of Piper made June 14, under an alleged settlement on March 30, 1882, upon the following facts. Upon the day of Howden's alleged settlement, a person engaged in the business of locating settlers upon the public lands, took Howden and two others to different tracts for that purpose—the three each taking boards with them and a pick. They first went to the lands in question—remaining not over one-half hour—where Howden (one or more of the others assisting him) “picked” a piece of frozen ground, about six by eight feet in area, to an average depth of not over one inch. He then erected two boards—at a different place—(which were directly blown down,) to show, in the language of the witnesses, “that the land was taken,” “to attract attention to his settlement” and “to give notice to other parties that he claimed the land.” He did nothing further, and these acts constituted his alleged settlement. The parties then left this and went to other tracts, for a like purpose, in behalf of the other two. Having finished their excursion, they returned to town, and soon

after Howden went to Iowa for the purpose of bringing his family to Dakota, which he did not reach until April 17. He went to the land May 1, erected a house (in which he has since continuously lived), and made other improvements. In the mean time (March 30) Piper purchased a house on the land from a former occupant, broke and sowed to crops five acres (which he afterwards increased to seven and one-half acres), and was residing upon the land when Howden returned to it on May 1.

The only question involved was which of the parties was the prior settler, and the Acting Secretary held that the acts of Howden on February 11 were with the intent merely to reserve the land for his future settlement and did not in themselves constitute a settlement, and that Piper was the first settler. He therefore ordered cancellation of Howden's filing.

Howden now moves a reconsideration of this decision on the ground of its erroneous conclusions.

It has not been found possible to formulate a general rule as to what acts constitute a settlement. Almost every case differs from almost every other case in its peculiar facts, all of which are to be considered and adjudicated under settled principles and rulings of law. Attorney-General Mason, in his opinion of April 25, 1846 (4 Ops., 493), in the case of the conflicting claims of one Brauley et al.,—in which it appeared that Brauley had cut logs on the land for erection of his house, which was held a good settlement act,—said: "From the moment, therefore, that he (the pre-emption claimant) enters in person on land open to such a claim with the *animus manendi*, or rather with the intention of availing himself of the provisions of the act referred to, and does any act in execution of that intention, he is a settler." In other words, there must be the intent to appropriate the land and some act upon it indicative of the intent, and the two must harmonize. Neither alone is sufficient, and the only difficulty has been in the application of the law to the facts, because cases so essentially differ in the details which influence their disposition.

The opinion of Attorney General Mason has been approved as a sound construction of the law in respect to a settlement, and has been generally followed. It has also been repeatedly held by this Department that mere intention is insufficient to constitute a pre-emption settlement, and that one claiming such settlement must do something in the nature of reducing the land to his possession, or of exercising ownership over it. See *Buchanan v. Minton* (2 L. D., 186), *Slate v. Dorr* (Idem, 635), and *Kessel v. Spielman*.* In *Thompson v. Jacobson* (Idem, 620), it was held

* *KESSEL v. SPIELMAN*.

[Secretary Teller, March 9, 1883; (10 C. L. O., 6).]

Plat filed July 18, 1881; same day Kessel made pre-emption filing for land in Section 21, alleging settlement September 30, 1878; Spielman filed August 2, 1881, alleging settlement January 8, 1871.

that the erection of a board, with a statement thereon of the party's claim, was not an act of settlement, but was indicative only of an intent of future settlement. Applying that ruling to the present case, Howden's erection of two boards, which were in no sense a substantial or permanent improvement of the tract, nor so intended, but were for the sole purpose of showing that he claimed the land and that it "was taken," had no legal significance and did not aid his alleged settlement. Nor do I think his "picking" (while the wagon stopped for a half-hour or less) a spot of frozen ground, six by eight feet, which was not the commencement of a cellar nor so intended, but which was obliterated upon his first plowing, was such an act of substantial, or permanent, or visible improvement as amounted to an act of settlement, or excluded the land from other actual settlement.

Concurring with the Acting Secretary in his decision that Howden's doings manifested an intent only to reserve the land for his future settlement, and that such an act of reservation is not recognized by the pre-emption law, and that, consequently, the land was vacant and unappropriated at the date of Piper's settlement, I overrule the motion.

UTE RESERVATION; ABANDONED RESERVATIONS.

L. V. BRYANT.

The establishment by executive order of a cantonment within the limits of the late Ute reservation in Colorado did not change the status of the lands; it merely prevented disposals under the act of June 15, 1880, of the land embraced in the cantonment during the military occupancy.

The act of July 5, 1884, is general in its nature, and applies to abandoned military reservations upon lands of the United States not encumbered by special trusts, or to be disposed of under fixed conditions.

Spielman, several years prior to filing, inclosed 700 or 800 acres of public land in Sections 21 and 28, making a sub-inclosure of 20 acres in Section 28 which he improved and wherein he resided; he only grazed on Section 21, and he "never improved (said section) nor did any act of settlement thereon, nor defined a pre-emption claim within said inclosure by stakes, or other monuments, denoting the boundaries thereof; he however in 1876, 1877 and in 1878, prior to Kessel's settlement, expressed a purpose to include a tract on Section 21 in a pre-emption claim when the land was surveyed and became subject to disposal, which proposed claim corresponds to that afterwards made."

"One intending to claim the benefit of the pre-emption law must perform some act connecting himself with the particular tract he intends to claim—whether it be surveyed or unsurveyed—equivalent to the public announcement of his claim, so that his purpose may be manifest. Intention, merely, is insufficient, and does not satisfy the requirements of the law. Spielman's enclosure of a body of 700 or 800 acres of the public land was unauthorized, and he thereby acquired no right to any part of it until he performed some act of settlement identifying himself with the particular tract (not exceeding 160 acres) he intended to claim. So far as appears, he did nothing of this nature prior to Kessel's settlement." Land awarded to Kessel.

Secretary Teller to Mrs. L. V. Bryant, Washington, D. C., January 3, 1885.

MADAM: I am in receipt of your letter of the 2nd instant, referring to a supposed discrepancy between a circular letter of the Commissioner of the General Land Office* and a statement made by the Secretary of War in a letter addressed to me under date of June 3, 1884, relative to the rights of settlers on certain lands released from military reservation. The circular letter referred to relates to abandoned military reservations restored to entry under the act of July 5, 1884 (Stat., 48 Cong., 1 Sess., p. 103). The letter of the Secretary of War relates to the cantonment on the Uncompahgre river, within the limits of the former Ute reservation in Colorado. It will be observed that the date of the letter of the Secretary of War is June 3, 1884, while the act of Congress in view of which the circular letter of the Commissioner of the General Land Office was issued, was not passed until July 5, 1884.

The lands embraced in the former Ute reservation in Colorado are subject to disposal only under the act of Congress of June 15, 1880 (21 Stat., 199), passed in pursuance of treaty stipulations, and the proceeds of the sales of such lands are appropriated by permanent law for the benefit of the Indians. The establishment, by executive order, of the cantonment on the Uncompahgre river, could not and did not change the status of these lands; it had the effect merely to suspend and prevent disposals under the act of June 15, 1880, of the land embraced in the cantonment during its occupancy for military purposes. Upon abandonment by the military authorities, the land again became subject to disposal as provided by treaty and the act of June 15, 1880. This land does not fall within the scope of the act of July 5, 1884, because it had previously been appropriated to a fixed, definite, and permanent purpose. The act of July 5, 1884, is general in its nature and applies to abandoned military reservations upon ordinary lands of the United States not encumbered by special trusts and not otherwise provided to be disposed of under fixed conditions of some particular character. If, for example, a military post should be established upon lands embraced in a private land claim, or within the limits of a school, railroad, or other grant, the disposal of such lands after the abandonment of the military post, would not fall under the act of July 5, 1884, but the lands would remain subject to and a part of the original grant or reser-

*CIRCULAR LETTER.

SIR: Referring to your recent letter relating to the law respecting the disposal of lands within abandoned military reservations, I have to state that the act of July 5, 1884, provides that any person who may have settled on such lands prior to January 1, 1884, in good faith for the purpose of securing a home, and is entitled to a homestead entry, may enter the land so occupied, not exceeding 160 acres in a compact form. Only such persons as were actual settlers prior to the date given are in anywise protected, or have any preferred right of entry under the act. As Congress made no provision for defraying the expenses incident to appraisement and sale under said act, no steps in the premises can now be taken.

vation. This act does not abrogate legislative contracts or treaty stipulations, nor repeal laws passed in pursuance thereof.

The rights of settlers upon the lands referred to in your letter are therefore the same as the rights of settlers upon any of the lands embraced in the former Ute reservation, and no special instructions are needed in the matter. Such lands are subject to pre-emption entry, but can be disposed of only for cash, and not under the provisions of the homestead law.

PRE-EMPTION—FINAL PROOF.

INSTRUCTIONS.

The testimony of witnesses in pre-emption final proofs must be taken before officers authorized to take the affidavit of claimant. Notaries public are not authorized to take any part of the pre-emption proof.

Acting Commissioner Harrison to inspector F. D. Hobbs, January 5, 1885.

In your letter of the 26th ultimo, you direct attention to the manner of making final proof in pre-emption cases, which differs materially, you state, at different offices. You request that proper instructions be given in the premises.

Section 2262, Revised Statutes, provides that the pre-emption affidavit may be made before the receiver or register, and Section 2263 provides that the proof required by Section 2259 shall be made to the satisfaction of said officials, *agreeably to such rules as may be prescribed by the Secretary of the Interior*. The form of proof (No. 4-374, a,) has been duly prescribed, and I can nowhere find authority from the Secretary for the taking of proof elsewhere than before the register and receiver; (see circular of March 1, 1884 pp. 8 and 9).

The act of June 9, 1880 (21 Stat., 169), provides that the affidavit required to be made by Sections 2263 and 2301, Revised Statutes, may be made before the clerk of the county court or of any court of record of the county and State, or district and territory, in which the lands are situated. It has been held that a person authorized to take the affidavit may likewise take the proof. In the absence of express statutory authority, or authority from the Secretary, no person is competent to take the proofs required except those mentioned in the statutes above cited. This of course excludes notaries public, and all such proofs taken by them should be rejected.

I will state, in answer to your inquiry, that I am of opinion that a person swearing falsely in support of a pre-emption claim before a notary public cannot be convicted of perjury, there being no regulation of the Secretary, or Federal or Territorial law, authorizing a notary to act in such cases. Final proofs should, of course, be taken at the time and place designated in the published notice. Adverse claimants and pro-

testants are not required to, nor does the law contemplate that they shall, appear at different places, often a long distance apart, to cross-examine the claimant or his witnesses and adduce counter proof. All proofs not taken as above indicated must be rejected.

The purchase price of the land sought to be entered should always accompany the proofs and application to purchase, and if not found therewith the papers must be promptly rejected and returned; (see 3 L. D., 188).

HOMESTEAD—FRAUDULENT ENTRY.

BASIL C. SANDERS.

Where a homestead entry was obtained by fraud, it must be canceled, notwithstanding the fact that the entryman made his home on the tract for seven years afterwards, and that there was no adverse claim.

Acting Secretary Joslyn to Commissioner McFarland, January 5, 1885.

I have considered the appeal of Basil C. Sanders from your decision of April 9, 1884, rejecting his final proof made February 23, 1884, upon his homestead entry of March 20, 1877, for the NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$, and Lots 3, 6, and 8, of Sec. 29, T. 5, R. 3 W., Concordia, Kansas.

The reasons for said objection do not appear in your decision, but the facts upon which it was based are fully set forth in your letter of February 9, 1884, to the officers of the Concordia office, showing that Sanders' entry was obtained through fraud, falsity and imposition upon your office, except for which it would not have been allowed; and hence that it is immaterial whether or not, since the date of his entry, he has complied with the requirements of the law. The stated facts justify your decision, and the same is affirmed.

TIMBER CULTURE—FINAL PROOF.

SAMUEL G. LEAVITT.

Where, nine and one-half years after entry, the trees averaged but two and one-half inches in diameter and ten feet in height, the final proof is rejected, with privilege to entryman of filing further proof within thirteen years after date of entry.

Assistant Secretary Joslyn to Commissioner McFarland, January 5, 1885.

I have considered the appeal of Samuel G. Leavitt from your decision of May 12, 1884, rejecting his final proof made September 15, 1883, upon his timber-culture entry of February 10, 1874, for the SW. $\frac{1}{4}$ of Sec. 32, T. 99, R. 50, Yankton, Dakota.

While rejecting this proof because it showed that the trees averaged but two and one-half inches in diameter and ten feet in height, you also allowed the entryman until February 10, 1887, (thirteen years from the

date of his entry, as authorized by the act of June 14, 1878), within which to make further proof showing that the trees have then reached a sufficiently large size to require no further cultivation in order to live and thrive. Although with his appeal Leavitt files his own and the affidavits of two others to the effect that many of the trees are of larger size than that above named, they do not change the proof as to the general character and condition of the trees, nor afford reason for modification of your decision, which is affirmed.

SOLDIER'S HOMESTEAD—SETTLEMENT AND ENTRY.

CHARLES HOTALING.

In this case the plea, that the contest was initiated before issue of the circular authorizing it, may not be set up by one who was a stranger to the record at date of said initiation.

Where A. and B. bargained for the withdrawal of the latter's contest, and B. made a formal written withdrawal of it and gave it to A. to file, but, before it was filed, notified the local officers that he revoked it, it was their duty to refuse to receive it when presented.

While A.'s contest against B., which C. had procured to be rejected, was pending on appeal, C. also initiated a contest, which was allowed, heard, and decided in his favor, and thereupon went upon the land and made valuable improvements; C. acquired no equity, by this undue haste in occupying the land, which can be pleaded against A.

Acting Secretary Joslyn to Commissioner McFarland, January 5, 1885.

I have before me the motion of Willis H. Davis for review of my decision of July 21 last in the case of Charles Hotaling (3 L. D., 17).

By reference to said decision, it will be seen that it was made in the contest of said Hotaling against one John M. Leech, on appeal from your decision sustaining the action of the local office in dismissing said contest, and that after said action said Davis filed a contest against Leech. On these facts it is plain that Davis's contest was subject to the decision in Hotaling's contest, and that Davis is a stranger to the record in the case of Hotaling *v.* Leech. Consequently Davis has no right to make this motion for review, and said motion is therefore dismissed.

I will, however, comment briefly on the points of error assigned in the motion.

1. It sets up that "it was error to hold that it had always been ruled that a (soldiers' homestead) claim is not valid where settlement, improvement and entry are not all made within six months after filing." My said decision, referring to the ruling which had just been made, proceeded as follows: "So it has always been ruled, as appears from circular," etc. This conclusion was drawn from the fact that there could be found no decision to the contrary. Since then I have learned from

your office that a practice to the contrary prevailed until December 15, 1882, when it was changed. I therefore modify said decision so that the passage above referred to shall read as follows: "So it has been formally ruled, as appears from circular of March 20, 1883 (1 L. D., 44)." This modification does not, however, affect the decision in any manner.

2. The motion sets up that "it was error in law to hold that the homestead entry of Leech was subject to contest for failure to settle and improve within the life of his declaratory statement." The argument sustaining this proposition is that, as the practice until December 15, 1882, prohibited contest for failure by the soldier to settle and improve within six months after date of his filing, therefore Hotaling's contest, which was initiated December 12, 1882, was invalid. Under said practice it was invalid, it is true, but so soon as my decision overruled the practice formally, it became valid. When there is an erroneous ruling or practice extant in a lower court which is overruled in the appellate tribunal, there must always be a first case in which it is overruled; and in this instance, so far as I am aware, the first case involving the question was presented to the Department. In the case of *Milne v. Ellsworth* (3 L. D., 213), decided on December 1, 1884, I accepted a plea by the contestee to the effect that she had acted under said practice, and held that she was protected by it. But while a contestee may set up such an equitable defense for the purpose of saving an existing claim, it is evident that a stranger to the record has no right to set it up, for the purpose of acquiring a claim to the tract; and in this case, as Leech has not made such a defense, Davis cannot be heard to make it for him. I may add that the hearing in Hotaling's contest did not take place for ten weeks after change of the practice aforesaid, at which time it had become, by virtue of said change, a valid contest, if no objection of this kind was urged by the contestee.

3. The motion sets up "that it was error to hold that Hotaling appealed within the legal period after decision." On this point my decision was based on the facts in evidence, and nothing has since been suggested which would lead me to change the view therein expressed.

4. It is urged that, with a view to a rehearing, I consider the ex-parte affidavit of one Suediegar, made since the decision, to the effect that Leech had in fact settled on and improved the land within six months after date of his filing. This evidence is not offered by Leech, nor does it appear that it could not have been offered by him at the hearing. Hence it is not ground for a motion for a rehearing.

5. I am requested to consider the fact that on August 2, 1884, Davis and Hotaling bargained for the withdrawal of the latter's contest, that Hotaling executed a paper for that purpose, that it was offered to the register and refused by him because it was offered after business hours, and that it was again offered by Davis on August 4 and rejected because of a protest against it by Hotaling alleging that it was procured from him by fraud and deceit. A withdrawal is the act of the contest-

ant, and, in this case, before the paper was received from Davis, the contestant notified the local office that he would not withdraw his contest. It was a plain rescission of his contract with Davis, it is true, but it was also a plain refusal to withdraw, and I think the rejection of the paper was proper. If Davis has been wronged, he has his remedy in the local tribunals. Certainly the contestee has not been wronged, and if it be conceded that the contestant had a right to withdraw the contest after its decision here, still I am of opinion that the interests of third persons in such a withdrawal can not be considered by the Land Department.

It is finally urged that the equities are with Davis, because he has valuable improvements upon the tract and Hotaling has none. This is a radically erroneous view. In my judgment the equities are with Hotaling, who has before going upon the land awaited final decision on his appeal as a law-abiding citizen, whilst Davis has recklessly assumed a right to the tract and attempted to forestall the orderly disposition of the case. Such undue haste in occupying public land cannot create an equity, which may be pleaded against a prior claimant or contestant. To admit such a plea is virtually to declare that all contests must be dismissed where, after their initiation, third persons have been pleased to settle on the land in controversy,—which would be to create an absurd and clearly unlawful practice. Further, in sustaining Hotaling's contest I am not awarding him the land, nor have I any means of knowing that he has the intention or the qualification to enter it. His right to do so must depend on his filing a claim for it under the act of May 14, 1884, and it is that, and not this contest, which may jeopardize Mr. Davis's interests.

UMATILLA RESERVATION; WITHDRAWAL OF PLATS.

NOR. PAC. R. R. CO. v. MANSFIELD.

The lands mentioned in the treaty of June 9, 1855, with certain tribes of Indians in Oregon, not included in that portion thereof reserved for an Indian reservation, having been ceded by definite boundaries, became public lands at date of its ratification, March 8, 1859.

The plats of township survey which were filed February 18, 1867, were withdrawn May 28 following, pending the survey of said reservation and its expression on the plats, and corrected plats were filed June 28, 1872; but said withdrawal did not operate as a reservation, against settlement or grant, of the lands north of Wild Horse creek, because said creek was fixed in the treaty as the northern limit of the reservation.

Assistant Secretary Joslyn to Commissioner McFarland, January 6, 1885.

* * * For the reasons set forth in your letter, I concur with you in the opinion that the temporary withdrawal of the township plats did not except all the lands in said township from the operation of the railroad grant.

Your decision is accordingly affirmed.

COMMISSIONER'S DECISION, AUGUST 22, 1883.

I am in receipt of your letter of the 27th of June last, transmitting the application of Isaac S. Mansfield to make timber-culture entry of the NE. $2\frac{1}{4}$ of Sec. 27, T. 4 N., R. 34 E., W. M., in Oregon, under the Act of June 14, 1878, and requesting special instructions.

It appears that the land in question is within the 40-mile limits of the grant of July 2, 1864 (13 Stat., 365), made to the Northern Pacific Railroad Company, as fixed by the withdrawal upon map of general route, filed August 13, 1870. The first withdrawal was ordered by letter of September 20, 1870, for twenty miles on each side of said line of general route, and did not include said land. The additional withdrawal of the second twenty miles, making the forty miles, was ordered by telegram of February 9, and letter of February 14, 1872, received at La Grande February 12 and March 4, respectively, of that year. The road has not yet been definitely located opposite the land in question.

Whatever may be held as to the effect of the mere filing of the map of general route, it is clear that the tract, if it was public land, has been withdrawn from settlement and entry since March 4, 1872, by executive order.

The land applied for is also included within the limits of the land ceded to the United States, by treaty between the United States and the Walla Walla, Cayuses, and Umatilla tribes and bands of Indians in Washington and Oregon Territories, concluded at Camp Stevens in the Walla Walla valley, Washington Territory, June 9, 1855, and ratified by the Senate March 8, 1859. By the terms of said treaty, "the above named confederated bands of Indians cede to the United States all their right, title and claim to all and every part of the country claimed by them, included in the following boundaries," . . . with a proviso that a certain portion thereof within certain specified natural boundaries shall be set apart as a residence for said Indians to be held and regarded as an Indian reservation.

February 18, 1867, plats of Government surveys in which said land is situated were filed in the office of the Oregon City land district, and were subsequently withdrawn May 28, 1867. Corrected plats were filed in the local office June 28, 1872. The object of the withdrawal is clearly set forth in the following order to the surveyor-general of Oregon, May 28, 1867: "You are directed to withdraw the plats of Townships 3 and 4 N., R. 33 E., and 3 and 4 N., R. 34 and 35 E., from the register's office, until the lands of the Umatilla Indian reservation shall have been surveyed, and the areas on both sides of Wild Horse creek calculated and expressed upon the plats, in order that the reservation may be protected from sale."

It is clear that the lands mentioned in said treaty, not included in that portion reserved for an Indian reservation, having been ceded by definite boundaries, became public lands at the date of the ratification

of said treaty; (see Secretary's decision in Crow reservation, Montana*).

But it is contended on the part of the applicant that the withdrawal of the plats of survey of the townships, above mentioned, operated to reserve all the lands in said townships and defeat the claim of the railroad company under the grant. An inspection of the plats will show the fallacy of this position. By the terms of the treaty, the Wild Horse creek, traversing these townships from east to west, is made the boundary line of the Indian reservation on the north, and only the lands in said townships situate south of said creek fall within the limits of the reservation as defined in said treaty. All of the said lands falling north of said creek were public lands and subject to grant or settlement in like manner as other public lands. Said lands were settled upon by many settlers during the time when said plats were withdrawn, and the claims of such settlers have been allowed by this office; the claim of the railroad company has also been repeatedly recognized, as is fully set forth in office letter "F," December 2, 1882, in the case of H. J. Hale *et al.*

The application of Mr. Mansfield is accordingly rejected.

RAILROAD GRANT—HOMESTEAD CONFLICT.

SOUTH & NORTH ALABAMA R. R. CO. *v.* LOGAN.

On July 26, 1871, was filed the map, definitely locating the line between Calera and Montgomery, adopted by the board of directors on May 30, 1871; the latter date has been held by the G. L. O. to be the date upon which the withdrawal became effective within the indemnity limits; the existence of an uncanceled homestead entry on both of said dates bars a selection of the tract by the company.

Acting Secretary Joslyn to Commissioner McFarland, January 6, 1885.

I have considered the case of the South and North Alabama Railroad Company *v.* James B. Logan, as presented by the appeal of the company from your decision of June 29, 1882, holding intact the homestead

* CROW RESERVATION, MONTANA.

[Secretary Teller, May 25, 1883; (10 C. L. O., 96.)]

"I inclose herewith an application for the recognition of mining claims, locations, and applications for survey and patent, upon the public lands ceded by the Crow Indians, in Montana, by agreement of June 12, 1880, ratified by Congress April 11, 1882 (22 Stat., 42).

"I am of opinion that the said lands, being ceded by definite boundaries, became public lands at date of the approval of the act, and the legal rights of claimants and settlers took effect therefrom. Unless you are in possession of data, instructions, or decisions, which in your judgment should modify this view, you are directed to act upon the same, and to open the offices of the surveyor-general and of the register and receiver to the receipt of all legal applications for the lands in question."

entry of Logan for the E. $\frac{1}{2}$ of NW. $\frac{1}{4}$, and W. $\frac{1}{2}$ of NE. $\frac{1}{4}$, of Sec. 21, T. 22 N., R. 17 E., Montgomery, Alabama.

The company claims the land as lying within the indemnity limits of the grant of June 3, 1856 (11 Stat., 17), and therefore subject to its selection for lands lost in place.

November 4, 1868, Napoleon B. Logan made homestead entry for said tract, said entry being of record until November 14, 1877, when it was canceled. October 11, 1880, James B. Logan made his entry. July 26, 1871, the company filed in your office a map showing the definite location of the road between Calera and Montgomery, as adopted by resolution of its board of directors on May 30, 1871, and the latter date has been held by your office as the time when the withdrawal became effective within the indemnity limits. As an uncanceled homestead entry covered the land in question both at the time said resolution was adopted and the map filed, it is apparent that, whichever of said dates is adopted as the date of withdrawal, the claim of the company must fail, it not having selected said tract prior to the entry now under consideration.

Your decision is therefore affirmed and the appeal dismissed.

RAILROAD GRANT—PRE-EMPTION CONFLICT.

ST. PAUL & PACIFIC R. R. CO. v. LARSON.

A pre-emption filing having a prima-facie valid existence, capable of being perfected, at date of a withdrawal of lands within the indemnity limits, excepts the tract covered by it from the withdrawal.

Acting Secretary Joslyn to Commissioner McFarland, October 30, 1884.

I have considered the case of the St. Vincent Extension of the St. Paul and Pacific Railroad Company *v.* Gustav Larson, involving the SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, the NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$, and the SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, of Sec. 15, T. 124, R. 37, Benson, Minnesota, on appeal by said company from your adverse decision of March 30, 1883. The land is within the indemnity limits of the grant to said company.

You state that Daniel Frouberg "pre-empted said piece of land in the latter part of May or first of June of the year 1871," and that at the time of the withdrawal for the benefit of said company, to wit, on or about September 3, 1872, said pre-emption filing had a prima-facie valid existence, capable of being perfected. Larson seems to have been a resident upon the land in question since July, 1875, at which time he bought the improvements thereon. February 28, 1882, he applied to make homestead entry of said land, which application was rejected by the local office on the ground that the land was part of an odd section lying within the indemnity limits of said grant. On appeal you reversed

the decision of the local office, and directed that Larson be permitted to make the homestead entry.

The existence of a valid pre-emption filing capable of being perfected at the time of withdrawal, excepted the land from the withdrawal; at that time it was not public land; (*Nor. Pac. R. R. Co. v. Prest*, 2 L. D., 506). I affirm your decision.

REVIEW; JANUARY 7, 1885.

* * * The questions so ably presented by counsel for the company on this motion were fully considered in the *Prest* case, above cited, and I see no reason for now entertaining an opinion differing from the one therein expressed. I am further confirmed in this conclusion by the decision (rendered at the October Term for 1884) of the U. S. Supreme Court, in the case of *Kas. Pac. R'y Co. v. A., T. & S. F. R. R. Co.*, in which it was said, with reference to the status of lands withdrawn within indemnity limits:

“But what unappropriated lands would thus be found and selected, could not be known before actual selection. A right to select them within certain limits, in case of deficiency within the ten mile limit, was alone conferred; not a right to any specific land or lands capable of identification by any principles of law or rules of measurement. Neither locality nor quantity is given from which such lands could be ascertained. If, therefore, when such selection was to be made, the lands from which the deficiency was to be supplied had been appropriated by Congress to other purposes, the right of selection became a barren right; for, until selection was made, the title remained in the government, subject to its disposal at its pleasure.”

The motion is therefore dismissed.

CALIFORNIA—INDEMNITY SCHOOL LANDS.

STATE OF CALIFORNIA *v.* DODSON.

A partial survey of a Mexican or Spanish grant, declared to be final by the Secretary of the Interior, which necessarily determines that a portion or all of section 16 or 36 belongs to the grant and is lost to the State, is the final survey of said grant contemplated by Sec. 6, Act of July 23, 1866.

In this case, the west and north lines of Las Virgenes rancho were formally and finally decided by the Secretary to be identical with the east and south surveyed lines of the ranchos El Conejo and Simi, which joined each other, at right angles; under said decision said surveyed lines became the final survey, and, as the land in question was embraced by them, entitled the State to make lieu selection.

Acting Secretary Joslyn to Commissioner McFarland, January 9, 1885.

I have considered the case of *The State of California v. Nelson H. Dodson*, involving the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, and S. $\frac{1}{2}$ of NW. $\frac{1}{4}$, of Sec. 14, T. 14 S., R. 2 W., S. B. M., Los Angeles district, California, on appeal by the State from your decision of September 15, 1883, awarding the land to Dodson.

It appears that on December 9, 1882, the State of California made indemnity school selection No. 770 of this land and an adjoining forty, in lieu of the SW. $\frac{1}{4}$ of Sec. 16, T. 1 N., R. 18 W., S. B. M. It appears further that said last-named quarter section lies within the limits of the rancho Las Virgenes, which was surveyed by Goldsworthy in 1875 and 1876. Said surveys were not approved, and on July 11, 1878, the Minto survey was ordered and duly made. Said last-named survey being contested, an investigation was ordered October 22, 1880, and on June 10, 1881, as the result of said investigation, the Minto survey was set aside by this Department, and a resurvey was directed, to include the Canada del Triunpho (the tract in controversy), for the southern and eastern limits "following substantially the lines of Goldsworthy's first survey, and bounding the tract on the north and west by the lines of the patented ranchos Simi and El Conejo." Objection to this action being made by certain claimants, it was held by the Department on May 2, 1882, that "the first Goldsworthy survey conforms as nearly as practicable to the petition, diseño, grant, and decree of confirmation, in respect to the length and width of the juridical measurement of the grant." A protest, which was subsequently made, was dismissed by decision of July 2, 1883, wherein it was ruled that the location of the lines of Las Virgenes "must be held definitely settled by the former action of the Department."

Meanwhile, in October 1882, the resurvey of the rancho Las Virgenes was made, which was approved by your office September 5, 1883, when patent issued. On December 9, 1882, the State of California made the indemnity selection aforesaid. On April 14, 1883, the State assigned her interest in the land to one Paine, who made improvements thereon, and in the following May issued to him a certificate of purchase. In July or August 1883, Mr. Dodson filed his application for a timber-culture entry on the land in controversy, which was rejected by the local office for conflict with the State's selection. On appeal your office canceled the State's selection on the ground that, being made before approval of the final survey, it was illegal and void, and awarded the land to Dodson.

Paine has filed an appeal from said action, supplementary to that of the State, claiming to be a party in interest by virtue of his purchase and improvements prior to any claim to the land by Dodson. In the view I take of the case, it is unnecessary to discuss this aspect of it.

The question is as to the validity of the State's selection. By Section 7 of the act of March 3, 1853 (10 Stat., 244), which granted Sections 16 and 36 in each township to California, it was provided that "where such sections may be taken by private claims, other land shall be selected by the proper authorities of the State in lieu thereof"; and by Section 6 of the Act of July 23, 1866 (14 Stat., 218), it was provided that the former act should be construed as giving to the State the right of indemnity selection, "which shall be determined in case of Spanish or Mexican grants when the final survey of such grants shall have been made." In

administering these laws the question naturally arose, At what period may the survey of a Mexican or Spanish grant be considered as finally made"? It was discussed in the case of *Selby v. California* (3 C. L. O., 89), and therein it was said that "whether a survey is final or not can only be known when it receives the approval of the Commissioner of the General Land Office; consequently the right to select can only be exercised by the State upon such approval." It is upon this ruling that Dodson relies, pointing out the fact that the State's selection was made before the approval of the final survey or resurvey by your office. It is to be observed, however, that the reason of the said rule, as well as the rule, is succinctly stated in the above extract, and that reason was that it is impossible to know whether a survey is final until it has been approved. "If the reason of a rule ceases, the rule itself should cease," and I think that this maxim applies to the case before me.

From an examination of the plats in your office, it appears that the southern boundary line of the patented rancho Simi, which is the northern boundary line of the rancho Las Virgenes, is substantially identical with the east-and-west subdivisinal line of Section 16, and consequently it is the northern boundary line of the southwest quarter of said Section, for which the State's indemnity selection, herein involved, was made. Said quarter-section lies some distance to the east of the patented rancho El Conejo, which is the western boundary line of Las Virgenes. It also lies far from the southern and eastern boundaries of Las Virgenes, as determined by the first Goldsworthy survey, which were the disputed boundaries. It lies within a tract of land bounded by El Conejo on the west, Simi on the north, and an imaginary line drawn from its southwest corner at El Conejo to the northeast corner at Simi. On June 10, 1881, as above recited, it was finally and definitely determined by this Department that the El Conejo and Simi ranchos were the true northern and western boundaries of the Las Virgenes rancho. These ranchos had surveyed lines, and therefore it was then finally and definitely determined that these were the western and northern surveyed lines of Las Virgenes. In a word, the final survey of these lines had been made and approved on June 10, 1881, and all land embraced between them, at the points indicated, including the SW. $\frac{1}{4}$ of Section 16, was finally and definitely determined to belong to the grant. It cannot justly be said of this part of the survey, that whether or not it was final could only be determined by the Commissioner's approval.

In the case of *Sheply v. Cowan* (91 U. S., 330), the towns of St. Louis and Carondelet were adverse claimants of a tract of land, about a mile in width, whose east-and-west boundary line had been officially surveyed in 1816, and resurveyed in 1834. In 1852 the Secretary of the Interior decided to have a new survey made, so as to give the tract in controversy to Carondelet; but subsequently his successor in office re-examined the subject, recalled the order for the new survey, and decided that

the surveyed line of 1816, as retraced, was the true boundary line. Of this decision the Supreme Court say: "This was the final determination of the boundaries of the Corondelet commons by that department of the government to which the supervision of surveys of public grants was intrusted." In this case there was but one line to be determined, whereas in the case at bar the four boundary lines were to be determined; but this fact cannot affect the ruling, which is that the Secretary's decision, accepting an old survey as the true limits of the grant, is a final determination of the boundaries of the grant. In the case at bar, if it be conceded that but two lines, the western and northern, were thus determined, still it is to be remembered that the sole object in determining the boundary lines is to determine the title to the land. If the final determination of these two surveyed boundary lines necessarily determined, as it did, that the SW. $\frac{1}{4}$ of Section 16 was included in the rancho Las Virgenes, then I think the State's right of indemnity selection for it immediately attached. The statute is not to be construed in so narrow a spirit as to defeat or delay its benevolent purpose. Its purpose was to give to the State a right of indemnity selection so soon as it appeared that the land granted was lost to it; and, in view of this purpose, and with the object of effectuating it, it is my opinion that a partial survey declared to be final by this Department, which necessarily determines that a portion or all of Section 16 or 36 belongs to a Mexican or Spanish grant and is lost to the State, is the final survey of said grant contemplated by Section 6, Act of July 23, 1866.

Under this ruling the State's selection in the case before me was valid, it appropriated the land, and it barred subsequent entry by Dodson. Your decision is therefore reversed.

It is to be understood that existing rulings on this general subject are not changed by this decision, but that its purpose is to discriminate the case at bar from those to which existing rulings properly apply.

CONTEST—AFFIDAVITS.

GRAVES *v.* KEITH.

Where the local officers issued a notice of hearing, for invalidity of entry (timber-culture), on verbal allegations of the informant, without the affidavit of contest required by the rules of practice, and both parties appeared at the time and place set, and the trial proceeded without objection by the contestee, objection because of the irregularity of the proceedings may not afterwards be made.

Acting Secretary Joslyn to Commissioner McFarland, January 9, 1885.

I have considered the case of Edwin E. Graves *v.* Alexander P. Keith, involving the E. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of Sec. 21, T. 12 S., R. 2 E., S. B. M., Los Angeles, California, on appeal by Graves from your decision of April 7, 1884, dismissing the contest between said parties and ordering a hearing to determine the character of the land in said Section 21.

The record shows that Keith made timber-culture entry, No. 155, May 16, 1881, for the N. $\frac{1}{2}$ of SE. $\frac{1}{4}$, and the E. $\frac{1}{2}$ of SW. $\frac{1}{4}$, of said Section 21, and that Graves made homestead entry, No. 772, June 16, 1881, for the E. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of Section 21, and the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Section 28, T. 12 S., R. 2 E., S. B. M., claiming settlement on said tract and continuous residence thereon prior to the date of Keith's entry. On February 20, 1882, the register and receiver issued a notice to Keith, upon the application of Graves, to attend a hearing at their office on May 22, 1882, at 10 a. m., at which time and place Graves would show cause why Keith's entry should be canceled. Personal service of said notice was made upon Keith on March 18, and both parties appeared, with their witnesses and counsel, and offered testimony at the time and place appointed for the hearing. From the testimony there taken, the register and receiver decided on May 29, 1883, that the land in controversy was not subject to timber-culture entry, and they recommended that Keith's entry be canceled. On June 26, 1883, Keith filed in the district land office a motion for rehearing, upon the ground of surprise and newly-discovered evidence, which motion was denied by the register and receiver August 11, 1883. On August 21, 1883, Keith appealed from the decision of the register and receiver denying his motion for a rehearing, and assigned several grounds of error, none of which seem to be well taken. Your office, "without considering the appeal referred to," dismissed the contest on the ground of irregularity in the proceedings, because no affidavit of contest was filed and no notice stating the grounds of contest was served upon Keith, as required by the rules of practice. You also state that the register and receiver have no authority under rules of practice to order a hearing upon an application to contest an entry for invalidity. The rule is stated quite to the contrary in the departmental decision of Caroline Halvorson (2 L. D., 302). Both parties appeared at the time and place appointed for said hearing and without objection offered their testimony in the case.

In *Houston v. Coyle* (2 L. D., 58), this Department held that the notice to the settler gives jurisdiction to the district land officers, and not the affidavit upon which the citation issues. The decision of your office dismissing said contest was erroneous. The district officers having rendered an opinion upon the testimony taken at the hearing, the parties were entitled to a decision by your office upon the merits of the case as shown by the record; *Houston v. Coyle* (supra). The testimony shows by a fair preponderance that said tract is not prairie land or land devoid of timber, and also that at the date of Keith's entry, and from the 10th day of May prior thereto, Graves had established his residence, and that he resided upon said tract continuously up to the time of the said hearing, claiming the same under the homestead law. Your decision dismissing the contest is therefore reversed and you are directed to cancel said timber-culture entry, so far as the same covers said E. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of Section 21.

ADVERSE CLAIMS—SIMULTANEOUS FILING.

DOWNS *v.* MCGEE.

On the day plat of survey was filed (Saturday), Downs presented timber-culture application for SE. $\frac{1}{4}$, and homestead application for SW. $\frac{1}{4}$, depositing the money for the fees and commissions with a friend, to be paid when called for, and leaving the land office; shortly afterwards McGee made timber-culture application for SW. $\frac{1}{4}$; the register adjudged the two timber-culture applications to be simultaneously filed, the right of entry was put up at auction, and sold to McGee, who made entry on the SW. $\frac{1}{4}$; on Monday following Downs filed another homestead application, alleging settlement and residence for seven months, which was allowed, and another timber-culture application, which was rejected, and Downs appealed: held (1) that McGee might have sixty days in which to show cause why his entry should not be canceled; (2) the regulations do not authorize an auction where different tracts are applied for, or where one of the parties has improvements on the tract; and (3) that the allowance of McGee's entry was not a bar to Downs's timber-culture application.

Acting Secretary Joslyn to Commissioner McFarland, January 12, 1885.

I have considered the case presented by the appeal of Samuel U. Downs from your decision of February 6, 1884, refusing his application to make timber-culture entry for the SE. $\frac{1}{4}$ of Sec. 24, T. 117, R. 69, Huron, Dakota.

Plat of the above township was filed in the local office October 20, 1883. On the same day Downs presented a timber-culture application for the above described tract, and a homestead application for the adjoining SW. $\frac{1}{4}$ of same section. On the same day one John A. McGee presented timber-culture application for said SW. $\frac{1}{4}$. Downs having urgent business elsewhere that afternoon, placed in the hands of a friend the money with which to pay the land office fees and commissions when called for, and left the office, unaware of the fact that McGee was an applicant to make timber-culture entry for the same tract for which he (Downs) had applied to make homestead entry. After his departure the register adjudged the two timber culture applications to be simultaneous, and allowed the parties to bid for the privilege of entry, (since two timber-culture entries upon the same section are prohibited). McGee bid higher than Downs's friend felt authorized to bid for him in his absence, and was allowed to make timber-culture entry No. 3407 for said SW. $\frac{1}{4}$.

This occurred on Saturday afternoon, October 20. On Monday following, October 22, Downs presented another homestead application and affidavit for said SW. $\frac{1}{4}$, alleging settlement March 13, 1883, and residence and improvement from that time forward, which he had omitted to allege in his application of the preceding Saturday. His amended entry was allowed, No. 5895. Downs thereupon again applied to make timber-culture entry of the SE. $\frac{1}{4}$; but his application was re-

jected, because of McGee's timber-culture entry (of record) on the SW. $\frac{1}{4}$ of the section. From this action Downs appealed, arguing that McGee's entry was illegal on account of his (Downs's) prior right to said land under the homestead law.

You held that, "as it appears that said Downs has *prima facie* the better right to the SW. $\frac{1}{4}$ of said Section 24, you will advise McGee that he will be allowed sixty days to show cause why his timber culture entry No. 3407 should not be canceled for conflict with Downs's homestead entry No. 5895. At the proper time report what further action, if any, is taken by the parties in interest, after due notice hereof." The register and receiver, in their letter to you of May 15 last, state that on February 15 preceding they duly notified McGee as above instructed, and that McGee has taken no action in the matter. I concur in your decision as regards his entry, and direct its cancellation.

There remains for consideration, however, that branch of your decision which holds that "McGee's entry, though it may prove to be illegal, constituted a bar to Downs's subsequent application." The register and receiver were in error in allowing the parties to bid for the privilege of making timber-culture entry. There is no provision in the statutes for pursuing such a course in entries of any class; and the regulation of your office authorizing an award to the highest bidder "in case of simultaneous application to enter the same tract of land under the homestead law," certainly does not constitute authority to do so in case of application for different tracts of land under some other law. Even under the homestead law, in accordance with your office regulations, the right is sold to the highest bidder only where neither party has improvements on the land; "where one has actual settlement and improvement and the other has not, the land should be awarded to the actual settler."

In the present case, when the register and receiver discovered that they had before them simultaneous applications—one a homestead and the other a timber-culture application—for the same tract, they should have immediately instituted inquiry as to the date of settlement by the homestead party. The result of such inquiry (as appears from the homestead affidavit submitted by Downs on the next day) would at once have shown that McGee's application was for land not subject to his entry, because already occupied and improved by a prior actual settler (see *Helfrich v. King*, 3 C. L. O., 164), and would have left but one valid timber culture application—that of Downs—for land within the limits of said section.

In short, there is not now, and (the erroneous action of the register and receiver to the contrary notwithstanding) there never has been, any bar to Downs's timber-culture application. If this be not evident from the considerations already presented, the doctrine enunciated by the Supreme Court in case of *Lytle v. State of Arkansas* (9 How., 314).

is here plainly applicable: "Where an individual in the prosecution of a right does everything which the law requires him to do, and he fails to attain his right by the misconduct of a public officer, the law will protect him." I therefore direct that Downs's timber-culture entry be allowed.

PRE-EMPTION—ERRONEOUS FILING.

DUVALL *v.* NIELSON.

Nielson settled on N. $\frac{1}{2}$ of NE. $\frac{1}{4}$ of Sec. 35 and on parts of Secs. 25 and 26, and, on erroneous information given by a local surveyor, made (pre-emption) filing for the NE. $\frac{1}{4}$ of Sec. 35; he then and subsequently resided on Sec. 25, but farmed on Secs. 26 and 35; on discovering the error in his filing, he had correspondence with a city firm, of which one Parsons was a member, with a view to correcting it; but he did not correct it, nor did he make final proofs by the expiration of the time required by law (Oct. 1, 1881); four days prior thereto Parsons covered all of the land which Nielson farmed with soldiers' additional entries: held that Nielson may make homestead entry of the NE. $\frac{1}{4}$ of Sec. 35 as of the date of an application on file in the case.

Acting Secretary Joslyn to Commissioner McFarland, January 12, 1885.

I have considered the case of Duvall et al. *v.* Rasmus Nielson on appeal by Nielson from your decision of April 19, 1884.

Nielson filed declaratory statement No. 7591 on February 27, 1879, covering the NE. $\frac{1}{4}$ of Sec. 35, T. 21, R. 1, Salt Lake, Utah, alleging settlement January 1, 1879. April 25, 1881, John G. Thomas made desert entry No. 511 for the tract, which was canceled September 17, 1881. September 7, 1881, M. K. Parsons, as attorney in fact for William T. Oliver, filed soldiers' additional homestead entry No. 5336 for the S. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of Sec. 26, for which final certificate No. 1631 was issued the same day. September 27, 1881, Parsons, as attorney in fact for William Crawford, filed soldiers' additional homestead entry No. 5358 (final certificate No. 1644) for the E. $\frac{1}{2}$ of NE. $\frac{1}{4}$, and the NW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, of Sec. 35. September 27, 1881, Parsons, as attorney in fact for John W. Duvall, filed soldiers' additional homestead entry No. 5359 (final certificate No. 1645) for the SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, and the SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, of Sec. 35.

It appears that Nielson failed to make final proof within the time required by law, which expired October 1, 1881, and on October 9, 1882, your office directed that he be allowed to show cause why his filing should not be canceled, and the additional entries of Crawford and Duvall approved for patent. Hearing was held May 7, 1883. The testimony presented on that occasion shows that Nielson, who is an illiterate man, married, and fifty-seven years of age, selected land which appeared to him on personal inspection to be the most suitable for a residence and farming purposes. The nearest land office is situated at Salt Lake City, one hundred and fifty miles distant, and the facilities for traveling limited. On inquiry Nielson was informed by the county

surveyor, that the land selected was the NE. $\frac{1}{4}$ of Sec. 35, under which description he filed his declaratory statement. Some time subsequently he learned that the land, on which he had settled as the NE. $\frac{1}{4}$ of Sec. 35 was really contiguous parts of the SW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Sec. 25, the S. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of Sec. 26, and the N. $\frac{1}{2}$ of NE. $\frac{1}{4}$ of Sec. 35. Through a local attorney, correspondence was opened with the firm at Salt Lake City of which Parsons was a member, with a view to correcting the misdescription in the filing, so as to include the S. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of Sec. 26, and the N. $\frac{1}{2}$ of NE. $\frac{1}{4}$ of Sec. 35, instead of the NE. $\frac{1}{4}$ of Sec. 35, or to change the filing to a homestead entry; but, owing to the intervening desert entry of Thomas, the latter object was deemed unattainable. In the meantime, Parsons covered all the land described with the soldiers' additional entries.

It is clearly shown that Nielson has a corral, incidental improvements, and a house on the SW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Sec. 25, whereon he has resided continuously from the date of his settlement. His improvements extend over the S. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of Sec. 26, and the N. $\frac{1}{2}$ of NE. $\frac{1}{4}$ of Sec. 35, and consist of land broken and cultivated to crops, an orchard, and about three miles of irrigation ditches. The soil is shown to be strongly impregnated with alkali, and the natural growth of vegetation is grease wood, which attains a height of from one to five feet. In order to render the land suitable for farming purposes, he has been engaged since the date of his settlement in clearing it and in working out the alkali by cultivation; and he appears to have shown by his actions, in connection with his said labor, that he has been honestly endeavoring to reclaim the land from its desert character and to obtain a home for himself and family.

Your decision holds, that Neilson failed to make legal appropriation of the land at the time the entries of Duvall and Crawford were consummated, and that therefore their entries should stand. The circumstances as enumerated show that Nielson, in addition to the obstacles not usually encountered by those who settle in more favorable localities, was situated a long distance from, and with but little means of obtaining quick transportation to or communication with the Land Office. It further appears that there was some question of conflict at the time of his settlement, of which he does not seem to have been aware, relative to the correct section lines, owing to a misconception by the county officials of the lines of government survey. In spite of all the difficulties encountered, he has persistently endeavored by every reasonable means to correct the error and to sustain his settlement prior to the expiration of the time prescribed by law for final proof and payment. No fraud is shown or charged against him in the matter. These facts were fully known to Parsons; indeed, the record shows that immediately after obtaining such knowledge, he, while ostensibly advising as an attorney, hastily obtained the final certificates before the time had expired for Nielson to make final proof and payment, thereby compli-

eating the record and rendering it more difficult for Nielson to extricate himself from his predicament, with full knowledge of the latter's excusable misfortune.

The provision of law granting extensive privileges to those holding soldiers' additional homestead entry rights was never intended to be used to hinder the settler in his honest efforts to sustain the privileges guaranteed him by law. The facts presented by the record in this case warrant me in concluding that the action of Parsons in this matter was highly reprehensible. To my mind this is just such a case as warrants the exercise of my supervisory power. The final certificates obtained by Parsons covering the tract involved in this case will be held subject to the rights of Nielson.

I am not convinced of the entire freedom of Nielson from blame in the question of reasonable haste to correct the error in his misdescription in the declaratory statement filing. However, as it appears that he was hampered by obstacles sufficient to excuse him, I shall exercise a degree of leniency in his behalf.

Your decision is reversed. Nielson will be permitted to enter the NE. $\frac{1}{4}$ of Sec. 35, under the provisions of the homestead law, as of the date of his application on file with the record of this case.

ALABAMA UNIVERSITY LANDS—SELECTION, ETC.

STATE OF ALABAMA.

Under the grant of April 23, 1884, to Alabama, for university purposes, the State's selection of lands must be admitted and reported by the local officers, subject to any inchoate pre-emption or homestead claim which is filed within the time required by law, before or after the selection; and if such claim is not perfected, or prosecuted in good faith by observance of the legal requirements, prior to approval of the selection, the selection will take the land.

Acting Secretary Joslyn to Commissioner McFarland, January 13, 1885.

I have considered your report of the 10th ultimo upon the subject of State selections for the University of Alabama, under the act of April 23, 1884 (Stat., 48 Cong., 1 sess., p. 12), with an explanation of your action of 29th November rejecting certain selections in the Montgomery district, and promulgating further instructions.

This grant is of 46,080 acres of the public lands in Alabama, to be selected by agents "from any public lands not included in some subsisting grant made by the United States," and to be reported by such agent to you, to be approved by the Head of this Department, who is empowered to make all needful and proper regulations and rules for carrying the act into effect and for the decision of all questions arising under it.

In accordance with such legislation, instructions were approved on

the 29th of May last for the direction of the agents, making the registers and receivers of the respective district offices the medium of transmittal to your office of the reported selections. Those instructions contemplate the making of monthly returns by those officers (in the same manner as other monthly returns are made) of all lists filed by the agents during the month, with the notation of conflicts, rejections and allowances, date of filing, payment of fees, etc., so as to enable your office to speedily adjust the grant and report lists for my approval, as fast as all legal objections to any considerable amount of lands shall be removed.

It appears that several lists were filed in the Montgomery office, the first being so filed on the 20th of August last, another on the 31st of October, and two others at a date not specified by you, all of which were transmitted to you November 8, 1884. Respecting Lists 1 and 2, embracing respectively 5,682.26 acres and 13,527.77 acres, the same are certified and approved by the register and receiver under date of October 31, as free from conflict and properly inuring to the State under the grant; and the receipt of the proper fees is also certified. The date of filing and payment of fees is not, however, properly indorsed on said lists, as should be done in all cases. Lists 3 and 4, aggregating 3,685.93 acres, were not approved, for the reason, as stated by the district officers, that "the tracts contained therein are covered by expired pre-emption filings which have not been canceled."

On the 10th of October one F. B. W. Bock, of Montgomery, addressed to you a letter, stating generally that certain settlers, represented by him, on lands embraced in said lists, have been unable to secure title to the same or to present their claims on account of the alleged mineral character of the lands, and claiming that some of said lands were erroneously reported as containing valuable coal; in view of which statements he asks whether or not any remedy is afforded such settlers against the University selections. No description of lands is furnished, and the number of settlers is not given. Another letter of like import appears, dated 10th November, from Paul R. Jones, of Hewitt, Walker county, protesting against certain lands, not described, in Township 15 S., Range 7 W., being allowed to be taken by the State, and alleging that there are many persons residing in comfortable homes, and having improved lands on the public domain in that township, who could not enter because the tracts were marked valuable for coal.

Upon the representations of these letters, you, on the 29th of November, suspended action on Lists 1 and 2, and ordered copies of the same published for four weeks, with notice to all actual settlers on the land at date of selection to file notice of their claims in the district office within sixty days from date of such notice. Lists 3 and 4 you "rejected for conflict with prior claims of record," apparently without any examination whatever by the books of your office to ascertain the particulars and status of each conflict; and, without giving notice of opportunity for appeal, it appears that the lists were remailed to the district office

(as I am unable to find them among the papers which should be before me, and your letters are silent as to their disposition). As to future selections you directed the register and receiver to "require the selecting agent to certify under oath that the tracts selected are vacant, unimproved, public lands of the United States, not occupied by any settler, and not reserved or appropriated in any manner under the laws of the United States." The agents of the State and officers of the University, not being satisfied with the tenor of these instructions, have brought the matter to the attention of the Department and requested their modification.

It is to be regretted that in a matter of this importance involving great beneficial interests, wherein the law specifically directs the Secretary of the Interior to make the rules and regulations, you should have changed or added to the original approved instructions without submitting the matter for my concurrence. It is clear, I think, from the language of the act and the uniform practice in all general matters of State selection, that the presentation of a selection of a tract of land has the force of an application for entry of the tract, and unless it has been previously disposed of the application must be received. It is for the register and receiver to determine whether or not the land has been so disposed of, and, if not, the selection is accepted and reported, subject of course to all legal priorities. Consequently, your action in ordering publication of the lists and fixing time for settlers to file claims must be considered as outside of both the law and the customary practice. If a selection embraces land subject to pre-emption or homestead, the law requires any settler intending to claim the land to put his or her claim of record within a prescribed period of thirty days or three months from settlement, depending on the condition of the tract, as "offered" or "unoffered" land. If no adverse claim be filed under the law, the selection is entitled to approval. There is no obligation on the State agent or on the United States to publish the selection, but it takes its regular place for adjustment as an appropriation of the land under the well-settled rules.

List 1 of these selections appears to have been filed on the 20th of August, and should have been reported with the returns for that month. Three months from date of selection had more than elapsed when your order of suspension was made, and sixty days' notice for settlers to file claims was given. The time granted by law could not be extended by regulation of this Department in this manner. Nor could any other than the legal period be allowed to settlers with respect to the lands covered by List 2.

Respecting Lists 3 and 4, the reason given by the register and receiver is not sufficient to authorize their rejection. An "expired pre-emption filing" is no bar to receipt of an application for public lands, nor for suspension of an entry, and is never considered as a bar to issue of patent. Nor is it the practice to enter formal cancellation of such

filings upon the books, nor take any action concerning them. They are simply treated as abandoned claims. Neither is an unexpired filing of record treated in the practice of your office as a bar to the entry of the land by another applicant, but he takes subject to the pre-emptor's right to prove up and claim his preferred right before the expiration of the legal period. I do not, therefore, consider the peremptory rejection of these lists "for conflict with prior claims of record" as a proper disposal of the selections. And even in case the same were to be rejected it should have been done by regular course of examination, tract by tract, with the reason stated in each case; each selection being in fact an individual appropriation, and the whole being included in lists merely for the convenience of the parties adjusting the grant.

Respecting the requirement of certification by the agent under oath, touching the fact of the freedom of the land from individual settlement or claim, I do not think the law authorizes its imposition. Section 2 permits the selection "from any public lands in said State not included in some subsisting grant made by the United States."

It is for Congress to define its own grant, and when so defined I can not, under the power to make rules, limit the right explicitly declared. "*Expressio unius est exclusio alterius.*" Many tracts may be settled upon which are not legally claimed, and even a legal claim of settlement does not amount to a grant; consequently we find the law as to settlers defined in the 3d Section, to the effect that "the provisions of this act shall not apply to any legal subdivision of land to which the right of homestead entry or pre-emption shall have attached in favor of any person who is entitled to such homestead and pre-emption entries, and who is occupying and claiming such subdivision of the public lands in Alabama at the time when such selections are approved by the Secretary of the Interior."

I construe this to mean that the selection is entitled to be admitted and reported, subject to the inchoate claim, which has been (in case of pre-emption) or may be (in both cases) filed within the time required by law, although subsequently to the date of selection; and that, if such claim is not perfected, or prosecuted in good faith by observance of the legal requirements, up to date of approval of the selection, the latter will prevail and take the land. For the act goes on to provide that, "in cases where it is found that such claims are superior to the rights of the State of Alabama herein granted, the said State may select other lands in lieu thereof, and in like quantity, elsewhere in the said State, from the public lands of the United States, so as to make up, as nearly as may be, the total number of acres of land granted in this act to said State." This provision evidently contemplates an adjudication of the claim of the settler upon *selected* lands, and an award as to superiority; with the privilege to the State, if the issue be against her right, to select *lieu* lands to make up the quantity so stricken from her lists. Now a lieu selection is not one made because of original re-

fusal to admit to record, but a selection in place of one admitted and afterward stricken therefrom. If this be so, it is evident that the *onus* is upon the settler to prefer his claim, show his compliance and receive his award, at least in so far as to give legal notice of its existence by proper filing, without requiring advertisement of the lists, or preliminary affidavit as to non-settlement upon the lands as matter of fact.

I therefore vacate your action of 29th November, and direct that the selections be allowed according to the usual practice in the admission of applications to enter the public lands, the register and receiver being required to report, by noting as to each, any conflicting filings or claims not expired; and that in any case where the State offers to show the invalidity of recorded claims, hearing be ordered to afford an opportunity to do so as in other cases.

It is proper in this connection to express the strong desire of this Department that no substantial settlement claim and improvement, even though barred from recognition by existing laws, shall be sacrificed or prejudiced by selections of land made under this act. And it is to be fairly presumed, in justice to the State, that her officials and agents entertain like respect for bona-fide settlers, whose intention to await favorable legislation to secure their homes and improvements shall be manifested by fair representation and proof of the existence of such settlement. It can be no part of the wish of the promoters of this legislation to despoil private property for the endowment of an institution devoted to the highest teachings of the moral as well as of the intellectual nature, and it certainly will be safer for the executive branch to administer the law as enacted by Congress, than to seek by technical construction, apparently based upon an unwarranted mistrust as to the intention of the grantee to limit, and in a measure (it may be) to defeat, the beneficial object of the grant.

INDEMNITY LANDS—RESTORATION TO ENTRY.

JESSE SPALDING.

Where lands within the indemnity limits of a railroad grant were duly withdrawn, and afterwards ordered by the Commissioner to be restored "to homestead and pre-emption entry only," they are not subject to Supreme Court scrip location.

Acting Secretary Joslyn to Commissioner McFarland, January 14, 1885.

I have considered the appeal of Jesse Spalding from the decision of your office of June 28, 1884, holding for cancellation his entries, R. & R. Nos. 976 and 977, December 21, 1882, Marquette, Michigan, covering the SE. $\frac{1}{4}$ of SW. $\frac{1}{4}$, and the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, of Sec. 29, T. 41 N., R. 25 W., and embraced in Supreme Court scrip locations X 136 and X 135, because said tracts were not subject to private entry.

An inspection of the records of your office shows that said tracts are in an odd-numbered section within the fifteen-mile or indemnity limits of the grant of June 3, 1856 (11 Stat., 21), for the benefit of the Bay de Noquet and Marquette Railroad Company, and that they were duly withdrawn, and ordered to be restored "to homestead and pre-emption entry *only*," by letter from your office, dated September 12, 1879. It is evident that at the date of said entries, said tracts were not subject to said locations. Your decision is accordingly affirmed.

ENTRY—CONTEST; RELINQUISHMENT.

STAAB *v.* SMITH.

B's contest against A's (timber-culture) entry was dismissed for want of service, on A's motion made upon special appearance at the hearing; thereupon A's relinquishment was filed by C., who had purchased it prior to the initiation of the contest, together with C's application for entry, dated prior to the cancellation, which was allowed; B. afterwards made application for entry: held that C's entry must be canceled, and B's allowed.

Acting Secretary Joslyn to Commissioner McFarland, January 14, 1885.

I have considered the application of Charles Leikam for a review of my decision and a rehearing in the case of Jacob Staab *v.* Annie B. Smith, involving the SW. $\frac{1}{4}$ of Sec. 20, T. 13 S., R. 17 W., Wa-Keeney, Kansas, wherein I, on October 14, 1884, canceled the timber-culture entry of Leikam for said tract and allowed Staab to make entry therefor.

By reference to the decision rendered therein, it will be seen that Staab had initiated a contest against Smith's entry, and that said contest was dismissed on Smith's motion, by special appearance, for want of service, whereupon Smith's relinquishment was at once filed, together with the application of Leikam. The application of Leikam bearing date prior to the cancellation of the entry, I held that his entry must be canceled under the rule in the case of Johnson Barker (1 L. D., 190), and permitted Staab's entry on a subsequent application.

It is now urged on behalf of Leikam that his entry should not have been canceled without a hearing, and that if permitted he could show that he had purchased the relinquishment of Smith's entry prior to the initiation of Staab's contest. The relinquishment of Smith being filed, her entry ceased to exist, and, it being ascertained who was the first legal applicant, the land went to that person; hence it could avail Leikam nothing to prove at a regular hearing his present allegations. The application is therefore denied.

PRACTICE—WAIVER OF RULES.

JOLLY COBBLER LODGE.

The waiver of a rule of practice by the Commissioner is a matter within his official discretion, subject to exception and final adjudication by the Secretary when the case comes before him.

Acting Secretary Joslyn to Commissioner McFarland, January 16, 1885.

In reply to your letter of 15th instant, requesting authority to waive Rule of Practice 86, requiring appeal to be filed within sixty days, in order that you may extend the time for appeal in case of the application for patent to the Jolly Cobbler Lodge, you are instructed that the waiver of any rule of practice in a particular case under your own jurisdiction is a matter for your official discretion, subject to exception and final adjudication whenever the whole case shall be brought before me in the regular course of administration.

The Department cannot be aware, in advance, of the particular reason requiring, at any stage of the proceedings, waiver of a rule; consequently the propriety of such waiver must necessarily be adjudged by the tribunal having the matter of the controversy in charge.

 JOINT RESOLUTION OF 1870; PRE-EMPTOR'S DWELLING.

SO. PAC. R. R. CO. v. RAHALL.

The Joint Resolution of June 28, 1870, saved the rights of all persons who were actual settlers, within the limits of the grant to this company, on the date of its passage. The decision in the Tome case is approved.

Where a pre-emptor's dwelling is partly on the tract claimed, the law is satisfied.

Acting Secretary Joslyn to Commissioner McFarland, January 17, 1885.

I have considered the cases of the Southern Pacific Railroad Company v. James Rahall and Matthew Rahall, involving the NE. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of Sec. 19, T. 10 S., R. 5 E., M. D. M., San Francisco, California, as presented by the appeal of the company from the decision of your office of February 9, 1883, rejecting its claim and allowing said parties to file their pre-emption declaratory statements upon said tracts.

The record shows that the land in question is within the twenty-mile or primary limits of the grant of July 27, 1866 (14 Stat., 292), to said company. The map of general route was filed in your office January 3, 1867, and a withdrawal of the odd-numbered sections was made by letter of March 22, 1867, which was received at the district land office on May 8, 1867. The township plat of survey was filed in the local land office on September 22, 1875, and an additional plat of survey was filed on February 7, 1882. On February 14, 1882, Matthew Rahall offered

to file his said statement upon the NW. $\frac{1}{4}$ of said Section 19, alleging settlement thereon May 17, 1869. On February 15, 1882, James Rahall offered to file his statement upon the NE. $\frac{1}{4}$ of said Section 19, alleging settlement thereon May 17, 1869.

Under date of February 16, 1882, the company filed in the district land office its protest against the allowance of Matthew Rahall's application, on the ground that the tract applied for was within the limits of the grant to said company, was reserved for its benefit, and was not subject to entry under any law of the United States. The register and receiver, without accepting or rejecting said applications, as they should have done, transmitted the statements to your office for instructions. It appears that your office regarded said protest as applicable to both applications, since you rejected the claim of the company to each of said tracts. The company duly appealed as above stated.

On March 1, 1883, without waiting for the expiration of the time in which the company had a right of appeal, the register and receiver permitted said Matthew Rahall to file his pre-emption declaratory statement, No. 17,007, upon said tract, alleging settlement thereon May 17, 1869. On May 11, 1883, after due notice by publication, Matthew Rahall offered his final proof and applied to make pre-emption entry of the land. The company, through its attorney, appeared at the time when Rahall offered his final proof, and contested his right to make entry of said land.

The proof offered shows that Rahall, on June 9, 1869, purchased from one Rhoads his possessory right and improvements upon said land, for the sum of \$1600, and that he continuously resided in the house purchased from Rhoads up to the time of making proof, and has complied in all respects with the requirements of the pre-emption law. The testimony as to the location of Rahall's dwelling house is conflicting. One John Coombe testifies that he was county surveyor of Santa Clara county, California, in 1876; that in that year he made a survey of the land in question from the field notes furnished him by the United States surveyor; that he made a plat of said survey, which correctly represents the location of Rahall's dwelling house and improvements; and that "the line running through the centre of the section, east and west, cuts Rahall's house in two, leaving part on the NW. $\frac{1}{4}$ and part on the SW. $\frac{1}{4}$ of section 19." One John F. Burch, introduced by the company, testifies that he is a practical surveyor, that he ran a line east and west through the center of said Section 19, and that Rahall's house is one hundred and seventy-three links south of said line. On cross-examination, however, Burch swears that he did not have any field notes; that he was employed by the company to make said survey, and that he gave Rahall no notice of the time when he would run said line. From the testimony taken, the register and receiver rejected Rahall's application to enter said land, because it appeared that his residence is not on the tract applied for.

From the decision of the register and receiver rejecting his proof, Rahall duly appealed to your office, and with his appeal filed the ex parte affidavit of Charles Herriman, county surveyor of Santa Clara county, together with a plat of survey that tends to corroborate the testimony of Coombe, as to the exact location of Rahall's dwelling house and improvements. Upon the affidavits and plat of survey made by Herriman, Rahall asked for a rehearing upon the question of the locality of his residence. No action has been taken by your office upon the proof offered or the motion for a rehearing. It will be quite unnecessary to order a rehearing in this case. Aside from Herriman's affidavit and plat, above referred to, the weight of evidence is in favor of Rahall. A portion of his house being upon the tract applied for, he is entitled to claim the land which he has improved and cultivated; (*Silver v. Ladd*, 7 Wall., 219).

By the Joint Resolution of June 28, 1870, said company was allowed to construct its road and telegraph line, as near as may be, on the route indicated by the map filed by said company in this Department on January 3, 1867, "expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act." This Department held in *Tome v. said Company* (5 C. L. O., 85), that by said resolution the rights of all parties were saved, who were actual settlers on lands within the limits of said grant on June 28, 1870. That decision seems to have been well considered, and was based upon the opinion of the Attorney-General, to whom were submitted the facts of the case and the legal questions involved. The ruling in the *Tome* case has been uniformly followed by this Department, and I see no good reason for changing it in the present case. It follows, therefore, that the claim of the company must be rejected, so far as the same applies to land claimed by Matthew Rahall, and he should be allowed to enter said land upon payment of the purchase money and fees and commissions required by law.

On March 12, 1883, James Rahall filed his pre-emption declaratory statement, No. 17,051, upon the NE. $\frac{1}{4}$ of said Section 19, alleging settlement May 17, 1869. The final proof offered by him on May 12, 1883, shows that he was not an actual settler upon the tract claimed by him on June 28, 1870, and has not since complied with the requirements of the pre-emption laws as to residence. The register and receiver rejected his proof on November 5, 1883, and from their decision no appeal has been taken by Rahall. His pre-emption declaratory statement must therefore be canceled.

RAILROAD GRANT—RELINQUISHMENTS.

FLORIDA R'Y & NAVIGATION CO. *v.* MILLER.

The successors of the Florida Railroad Company executed a relinquishment, under the act of June 22, 1874, in favor of all bona-fide settlers prior to December 13, 1875, on lands withdrawn for their benefit, entitled to equitable relief; one Rowe had in 1875 made thereon a homestead entry, which was canceled in August 1883; in September 1883 Miller filed a pre-emption claim on the same tract, and in March 1884 offered final proof: held that, as Rowe's entry had been canceled without claim thereunder, the relinquishment, which was intended for his benefit, did not take effect on the land.

Acting Secretary Joslyn to Commissioner McFarland, January 19, 1885.

I have considered the application for a writ of certiorari filed in behalf of the Florida Railway and Navigation Company, in the case of said company against Elsie Mobley and Wiley Miller, and involving the NW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of Sec. 25, T. 15 S., R. 20 E., Gainesville, Florida.

September 6, 1875, Albert Rowe made homestead entry for said tract, the said entry being canceled August 25, 1883. September 10, 1883, Wiley Miller filed his pre-emption declaratory statement for said land, alleging settlement August 25, 1883, and March 17, 1884, made cash entry on the proof submitted. September 6, 1883, Elsie Mobley made homestead entry for the same tract. December 1, 1884, you held that Rowe's entry was illegal, because the land embraced therein was at the time of the entry reserved for the benefit of the road now known as the Florida Transit and Peninsula Railroad, that part of the original Florida Railroad—one of the beneficiaries under the grant of May 17, 1856 (11 Stat., 15)—extending from Waldo to Tampa; but that, "inasmuch as under date of April 1, 1876, the Atlantic, Gulf & West India Transit Co., the immediate successor of the Florida Railroad Co., executed a relinquishment in favor of all bona-fide settlers (upon lands withdrawn for their benefit) up to December 13, 1875, whom this office should find to be entitled to equitable relief," you would order a hearing to determine the question whether or not upon December 13, 1875, Albert Rowe had such improvements upon the land in question as would have entitled him to equitable relief under said relinquishment, had his entry not been canceled.

From this decision the applicant appealed, specifying, among other things, that "it was error to assume that the existence of improvements on said odd section upon December 13, 1875, by Albert Rowe is of any legal consequence;" but you decided December 24, 1884, that, as the decision of December 1, 1884, was only an order for hearing, and as the specifications of error were not sufficient to prove this an exceptional case, the right of appeal should be denied. Whereupon the company applied for relief under Rules 83 and 84 of the rules of practice. The

relinquishment referred to herein was made under the act of June 22, 1874. (18 Stat., 194), which provides as follows :

That in the adjustment of all railroad land grants, . . . if any of the lands granted be found in the possession of an actual settler whose entry or filing has been allowed under the pre-emption or homestead laws of the United States subsequent to the time at which, by the decision of the land office, the right of said road was declared to have attached to such lands, the grantees, upon a proper relinquishment of the lands so entered or filed for, shall be entitled to select an equal quantity of other lands in lieu thereof, . . . and any such entries or filings thus relieved from conflict may be perfected into complete title as if such lands had not been granted.

The sole object of this act, as is made fully obvious in the concluding clause of the foregoing quotations, is to relieve entries and filings from conflict with railroad grants that would otherwise take the land so entered or filed for; and the effect of a relinquishment thereunder is merely to allow the settler an opportunity to show his compliance with the law under which his filing or entry was made. It can not therefore be held that a relinquishment, executed for such a purpose, could in any way affect the status of the land with respect to any one except the railroad company and the settler in whose name the original entry or filing stood. In this case Rowe, the only settler who could have invoked the aid of the relinquishment, is not here. His entry no longer exists; and, as it will not avail Miller or Mobley anything to be permitted to show that if Rowe had asked the benefit of the relinquishment he would have been entitled thereto, it was error to order a hearing addressed to that end.

This Department will not entertain an appeal from a decision of yours ordering a hearing, and you so properly held. It was however to cover such cases as this that the proceeding by certiorari was instituted, so that substantial justice may be secured to all parties, even where it is held that the right of appeal does not exist. The applicant is entitled to the relief sought, but an order for certification will not be made, it being deemed sufficient to remit the applicant to your office for appropriate action in the premises under the foregoing construction of the law.

DESERT LANDS—SPECIAL SURVEYS.

JULIUS M. WILDE.

Desert lands are only surveyed in the course of the general public surveys, except that settlers thereon may have a special survey under Sec. 2401, R. S.

Commissioner McFarland to Hon. H. S. Greenleaf, H. of R., January 19, 1885.

SIR: I am in receipt by your reference of a letter from Mr. Julius M. Wilde, Rochester, N. Y., dated the 17th ultimo, inquiring in what manner a survey can be hastened of certain land of which he desires to make entry under the desert-land laws.

You are informed that there is no law especially authorizing the survey of desert lands. Such surveys are made in the due course of the public surveys. In case, however, there are settlers upon such lands, a special survey may be made under Section 2401, Revised Statutes, which authorizes settlers in any township of non-mineral lands to apply for a survey of the township, and to deposit in a proper United States depository, to the credit of the United States, a sum sufficient to pay the expenses of the same.

Desert-land applicants are not required to be settlers on the land embraced in their claims or applications, and therefore as such claimants or applicants they do not come under the descriptive term "settler" used in Sections 2401, 2402, and 2403, Revised Statutes.

HOMESTEAD—CONTEST.

WALLACE v. SCHOOLEY.

When notice of contest is given by publication, the posting of a copy on the land and the mailing of a copy to the defendant, required by Rule 14, are essential parts of the notice.

B contested A's transmuted homestead entry for fraud, but failed to post and mail copies of the published notice; A made default at the hearing, and it does not appear that he had knowledge thereof; after making final proof, A. sold and conveyed the land to C, who was allowed to intervene and in his own behalf defend the contest: held that the contest must be dismissed.

Acting Secretary Joslyn to Commissioner McFarland, January 20, 1885

I have considered the case of Henry Wallace et al. v. Henry Schooley, involving Lot 2 of NE. $\frac{1}{4}$, and Lots 3 and 4 and the SW. $\frac{1}{4}$ of NW. $\frac{1}{4}$, of Sec. 4 T. 19, R. 4 E., Marysville, California, on appeal from your decision of April 5, 1884, adverse to Schooley.

Schooley filed declaratory statement for the tracts December 17, alleging settlement December 15, 1877. He transmuted his filing to homestead entry November 6, 1882, and made final proof thereon the same day, being credited with certain time for military services under Section 2305 of the Revised Statutes. In May, 1883, Wallace et al. filed an affidavit alleging that his certificate of entry was obtained through fraud and misrepresentation in his proofs, and a hearing was ordered thereon. Upon satisfactory evidence that personal notice of the hearing could not be made upon Schooley, notice was given by publication. A copy of this notice was not mailed to his last known address, nor was it posted upon the land, though both these acts are required by Rule of Practice 14. Schooley made default at the hearing, and it does not appear that he had knowledge thereof. You excuse this non-compliance with the rule for the reason that, as he had left the vicinity of the land and his then address was unknown, such mailing and posting would have been useless.

I do not concur in this view. Personal notice of a hearing is required in all cases where it can be made, and notice by publication is permitted only when from ignorance of the defendant's address it cannot be made. In such cases, in addition to publication, a further duty is imposed upon the attacking party, namely, that he must mail a copy of the notice to the last known address of the defendant, and also post a copy of the same upon the land, so that the latter's rights may not be lost without reasonable endeavor to notify him of the jeopardy to which the proceeding subjects him. The rule is a wise precaution against such loss, and neither local officers nor parties may dispense with its requirements. Had it been complied with, knowledge of the hearing might have reached Schooley and secured his presence thereat. It is a case within the special purpose of the rule. Nor is it material that, after his final proof, Schooley sold and conveyed the land to another, who was allowed to intervene and defend (in his own behalf) the charges against Schooley. The latter, as the party defendant upon the record, was entitled to knowledge of the hearing, in so far as the rule could give it to him, in order that he might defend the integrity of his proofs and protect his grantee. For non-observance of the rule, (and without considering the merits of this controversy upon which you differ with the local officers), I modify your decision and dismiss the proceeding.

INDEMNITY SCHOOL SELECTION.

STATE OF CALIFORNIA.

When the public surveys had ascertained that a certain school section in California was included within the Round Valley Indian reservation, which had been established two years prior to the survey, and was thereby "reserved for public uses," the right of the State to select lieu lands immediately attached.

Acting Secretary Joslyn to Commissioner McFarland, January 22, 1885.

I have considered the appeal of the State of California from your decision of April 21, 1884, holding suspended certain indemnity school selections of several particularly described tracts of land situate in the Sacramento district, in lieu of Sec. 36, Tp. 23 N., R. 13 W., M. D. M., the same having been lost in place within the Round Valley ("Nome Cult") Indian reservation.

Without reciting certain antecedent but extraneous matters set forth in your decision, it will suffice to state that the sole ground upon which the State bases her appeal is contained in the closing paragraph of your decision in question, to wit: "The records also show that the unapproved portions of the selections in R. & R. Nos. 3447 and 3448 were re-selected December 15 and 30, 1881, per R. & R. Nos. 3978 and 3979, upon the basis of school sections within the Round Valley Indian reservation, and the said selections are held suspended for the reason that such indemnity is not admissible."

The land in place was surveyed in the field in the years 1859 and 1860, and the survey approved by the U. S. surveyor-general May 4, 1860. Section 36 was thereby found to be within said reservation, which had been established in the year 1858. It is contended in behalf of the State that the basis of the selections in question having been lost to her by reason of the United States' "public use" of the same, as aforesaid, she is entitled to indemnity therefor by virtue of the seventh section of the act of March 3, 1853 (10 Stat., 244). By the sixth section of said act, there were granted to the State of California Sections 16 and 36 in each township for public school purposes, and by the seventh section of the act she was authorized to select other land in lieu of any portion of said sections where the same "may be reserved for public uses," etc. And it was further provided that such selection was to be made by the proper authorities of the State, agreeably to the provisions of the act of May 20, 1826 (4 Stat., 179). And by the sixth section of the act of July 23, 1866 (14 Stat., 218), it is expressly provided that the Act of 1853 should be construed as granting to the State "the right to select for school purposes other lands in lieu of such sixteenth and thirty-sixth sections as were settled upon prior to survey, reserved for public uses," et cetera.

This section prescribes specifically the classes of cases wherein and the time when indemnity should be taken by the State. It is conceded that the land in place had been reserved for Indian purposes two years prior to the official survey thereof. Such reservation is within the statutory language, to wit, "reserved for public uses," and hence should be regarded as a basis for the selections in question. Indeed, the U. S. Supreme Court so declared in the case of the L. L. and G. R. R. Co. v. United States (92 U. S., 733), wherein the Court say:

We are not without authority that the general words of this grant do not include an Indian reservation. In *Wilcox v. Jackson* (13 Pet., 498), the President, by proclamation, had ordered the sale of certain lands, without excepting therefrom a military reservation included within their boundaries. The proclamation was based on an act of Congress supposed to authorize it; but this court held that the act did not apply, and then added, "We go further, and say that, whenever a tract of land shall have been once legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands, and that no subsequent law, proclamation, or sale would be construed to embrace or operate upon it, although no reservation were made of it." It may be urged that it was not necessary in deciding that case to pass upon the question; but, however this may be, the principle asserted is sound and reasonable, and we accept it as a rule of construction. The supreme courts of Wisconsin and Texas have adopted it in cases where the point was necessarily involved; *State v. Delesdenier* (7 Tex., 76); *Spaulding v. Martin* (11 Wis., 274). It applies with more force to Indian than to military reservations. The latter are the absolute property of the government; in the former, other rights are vested. . . . That lands dedicated to the use of the Indians should upon every principle of natural right be carefully guarded by the government, and saved from a possible grant, is a prop-

osition which will command universal assent. . . . Every tract set apart for special uses is reserved to the government, to enable it to enforce them. There is no difference, in this respect, whether it be appropriated for Indian or for other purposes. There is an equal obligation resting on the government to require that neither class of reservations be diverted from the uses to which it was assigned. . . . A construction which would limit it to land set apart for military posts, and the like, and deny its application to that appropriated for Indian occupation, is more subtle than sound.

It thus appears that the manifest intent of the aforesaid statutes was to grant to the State, under certain prescribed conditions, either the land in place, or a like quantity of lieu land, which she was authorized to select as soon as they should be identified by the official survey; see *Giovanni Le Frauchi* (3 L. D., 229). In other words, the State's right to indemnity for lands found by the public survey to be within any of the exceptions specified by the statute was absolute and immediate, and, when it was so discovered that the school lands or any portion thereof had been lost in place, the right to select other land in lieu thereof accrued to the State *eo instanti*. This is simply a *quid pro quo* to which she is justly and unquestionably entitled by virtue of the very terms of the statute. Such view obviates the discussion of the several points of construction, raised in behalf of the State, touching the intentment of the Act of April 8, 1864 (13 Stat., 39).

Your decision is reversed.

TIMBER CULTURE—CULTIVATION; SIZE OF TREES.

PETER CHRISTOFFERSON.

Where the timber-culture final proof fails to show definitely that the required number of trees has been actually under cultivation for four and five years, respectively, it must be rejected.

Where the final proof shows the required number of trees, that they are living and thrifty, and that they have been cultivated for the statutory period, it should not be rejected solely because they happen to fall below a preconceived standard of size; though size may well be considered, in connection with other facts, in determining the question of compliance with law.

Acting Secretary Joslyn to Commissioner McFarland, January 22, 1885.

I have considered the appeal of Peter Christofferson from your decision of May 27, 1884, rejecting his final proof on timber-culture entry for the NE. $\frac{1}{4}$ of Sec. 32, T. 96, R. 48, Yankton, Dakota.

The entry was made September 10, 1875, and proof submitted November 1, 1883. You rejected the proof for the reason that "the trees as shown by said proof are not of sufficient size (two and one-half inches in diameter and ten feet high) to warrant this office in accepting, at this time, the proof, when there are yet nearly five years of the thirteen allowed by law in which proof can be made."

The proof shows that four acres of land were planted in trees in the year 1877, and ten acres planted in 1878; that in 1880 he "filled in" where trees had died out, and in 1882 planted one acre in trees; and that "the trees are in a thrifty, growing condition, and will average about two and one-half inches in diameter and about ten feet high, . . . and at least 920 trees to each acre." While it appears that there are more trees growing on the land than required by the statute, it is not shown that the requisite number of trees have been cultivated for the period of time required by law. As the proof shows that planting was done as late as 1880 and 1882, it is impossible to ascertain therefrom whether the entryman has had actually under cultivation thirty-eight hundred and seventy-five trees for five years and a like number for four years, which it has been held must be shown in making final proof (Charles E. Patterson, 3 L. D., 260), and for this reason the proof submitted should have been rejected.

Where the final proof shows the required number of trees to have been cultivated for the statutory period, and that said trees, at the time of making proof, are living and thrifty, it should not be rejected solely because the trees, in point of size, fall below a preconceived standard of the size that such trees should reach while under such cultivation; though size may well be considered, together with other facts, in determining whether the entryman has complied with the law.

Since your decision the entryman has filed his affidavit, duly corroborated, showing that he had on his claim at time of proof ten acres of large trees, "some of which are twelve inches in diameter, and from that down to about four inches, and none smaller." Although this may be true, it does not yet appear that the proof is sufficient under the rule herein expressed, and additional proof in accordance therewith should be furnished. With the modification indicated, your letter is affirmed.

HOMESTEAD; PRE-EMPTION—FINAL PROOF.

J. E. DYER.

Final proofs (in Dakota) under the acts of March 3, 1877, and June 9, 1880, must be taken before the proper officer, at the county seat where the court is holden and the seal kept.

Acting Secretary Joslyn to Commissioner McFarland, January 23, 1885.

I have considered your report of the 17th instant on the letter of Judge J. E. Dyer of Britton, Dakota, of the 3d ultimo, in which he asks for a modification of your ruling that final proofs, under the acts of 3d March, 1877, and 9th June, 1880, must be taken before the proper officer at the county seat where the court is held and the seal kept. I concur in your opinion that the request should not be granted, and you will so inform Judge Dyer.

REPORT.

SIR: By your reference of the 9th instant, I am in receipt of the petition of J. E. Dyer, probate judge of Day county, Dakota, and others, asking that final proofs may be taken by him at a place other than the county seat. You request from me "an expression of opinion thereon."

I have the honor to state that I have held that final proofs under the acts of March 3, 1877 and June 9, 1880, must be taken before the proper officer, at the county seat where the court is holden and the seal kept; (H. N. Copp,* J. B. Eaton, 7 L. D., 224, and several later cases not reported.) This ruling is in harmony with the code of Dakota, (and of other States), which requires the probate judge to keep his office "at the county seat;" (Rev. Codes Dakota, 1877, Sec. 91, p. 511). It is true in all probability, as stated by Mr. Dyer, that many settlers residing in the northern part of the county will be inconvenienced by adhering to this rule, owing to the geographical location of their county seat; but this, in my judgment, is not sufficient cause for a modification of the rule. Under the provision of the code cited, if the proof be taken before the judge at a place other than the county seat, it is questionable whether a prosecution for perjury, in the event of false swearing, could be successfully maintained.

DESERT LAND—SPECIAL SURVEYS.

CHARLES PERRINE.

Desert-land applicants are not required to be settlers on the land as a pre-requisite to entry; hence, where they allege settlement for the purpose of having a survey of the township made, under the special deposit system, they must show something more than a compliance with the desert-land laws, namely, they must show such acts of settlement as would constitute them bona-fide actual settlers under the pre-emption or homestead laws.

Commissioner McFarland to surveyor-general, Helena, Montana, January 23, 1885.

Accompanying contract No. 182, dated January 13, 1885, with John R. Thompson, deputy surveyor, payable from special deposits, you transmit "settlers applications" Nos. 160 and 164 by Charles Perrine and Charles Peck for the survey respectively of Townships 10 N., R. 25 E., and 13 N., R. 27 E. The parties submit the required affidavits, each swearing that he is an actual, bona-fide settler on the land described in his application. Perrine makes oath that he settled on the land in good faith, September 20, 1884, and that his improvements consist of a cabin and stable valued at \$250. Peck makes oath that he

* HENRY N. COPP.

[Acting Commissioner Harrison, November 2, 1883; (10 C. L. O., 256).]

Under act of March 3, 1877 (19 Stat., 403), allowing final proof to be taken before the judge or clerk of a court, it is held by this office that such proof must be made where the court is held and the seal kept.

settled in good faith on the land described in his application, August 21, 1884, and that his improvements consist of a cabin and corral, valued at \$250.

These applications appear to bring the cases within the rules of this office allowing surveys under the deposit system where applications are made by "settlers" in accordance with Section 2401, Revised Statutes, although the land is sought to be entered under the desert-land act. By circular of this office of January 7, 1882 (9 C. L. O., 120), surveys of desert-land claims under the deposit system were authorized where such claims were within the lines of the public surveys, but not where they were isolated from the public surveys. The circular of instructions of September 15, 1883 (3 L. D., 350), governing surveys under the deposit system, approved by the Secretary of the Interior September 19, 1883, supercedes and of necessity revokes all prior and conflicting instructions. The circular of January 7, 1882, is therefore regarded as abrogated. The instructions in force confine surveys under the deposit system exclusively to cases where the applicants for survey are actual, bona fide "settlers" in the township to be surveyed.

X { Desert-land claimants or applicants are not required to be settlers in order to make entries under the desert-land act, and therefore, as such claimants or applicants, do not come within the descriptive term "settler" used in Sections 2401, 2402, and 2403, Revised Statutes. Neither do acts performed in compliance with the requirements of the desert-land law constitute of themselves acts of settlement in the sense of said sections. A desert-land claimant may become an actual settler on the land by virtue of actual settlement acts, and if he does personally establish himself on the land and become a bona-fide settler in the same manner as if he were claiming the land under the homestead or pre-emption laws, instead of under the desert-land laws, he is regarded by this office as entitled to make application for a survey under the deposit system of the township in which he resides. But he is not regarded as entitled to make such application if he is merely a desert-land applicant or claimant, without having such inhabitancy and improvement of the land as would constitute him an actual and bona-fide settler independently of his claim as an entryman under the desert land act.

In accepting applications hereafter for surveys under the deposit system, where the persons applying for the survey seek to acquire title to land under the desert-land act, you will be careful to see that the fact is satisfactorily established that such persons are also actual bona-fide "settlers" on the land.

CONTESTS—CROSS-EXAMINATION.

COCHRAN & HELEN.

Rule of Practice 35, as amended, par. 7, providing that "the costs of transcribing cross-examinations will in all cases be taxed to the party making the cross-examination," applies to both protest and contest cases.

Commissioner McFarland to Messrs. Cochran & Helen, McCook, Neb., January 24, 1855.

I am in receipt of your letter of the 26th ult., referring to amended Rule of Practice 35 (3 L. D., 194), and the requirement stated therein, which is also referred to in my letter of November 24, 1884 (Anna M. Livingston, Idem, 193) to the register and receiver at Tucson, Arizona, namely, that each party must pay the costs of his own cross-examination.

You suggest that a diversity of opinion exists in regard to the matter in respect both to contest and protest cases. I do not understand how a diversity of opinion arises. The rule is specific. Its application is the same whether a contest is initiated by an adverse party, or invited by claimant upon his notice to make proof. When objection is made to proof offered under notice, issue is joined and the trial proceeds as in other cases.

DISTRICT OFFICES; FINAL PROOFS; PROTESTS.

GOODRICH *v.* GAMBLE.

Employés in the district offices are required to labor seven hours each day, except Sundays and legal holidays. Local offices must not be closed at noon on Saturdays. When the hour for hearing or making final proof is not mentioned in the notice, contestants or protestants have the whole of the day in which to enter an appearance. The local officers must consider and act upon objections offered to all classes of entries, including cash entries, of the public lands.

Commissioner McFarland to register and receiver, Fargo, Dakota, January 24, 1885.

It appears from proceedings in the case of Goodrich *v.* Gamble, in which hearing was ordered by my letter of December 31, 1884, that it is your practice to close your office on Saturdays at 12 o'clock noon. You are advised that this practice is without authority, and is disapproved. District land offices are expected to be open for the transaction of public business during proper business hours every day in the week except Sundays and legal holidays, and to remain open on Saturdays the same as on other days. The law (22 Stat., 563) requires of persons employed in the executive departments of the government not less than seven hours of labor each day, and district land offices should be governed by the same rule.

You are further informed that when no hour is mentioned in a notice of hearing, or for making proof, the appearance of a contestant or protestant at any time during the day so fixed is an appearance under that notice.

My attention has also been called to the following among the reasons specified by the register for rejecting the protest filed with case above referred to, as shown by his indorsement on said protest, namely: "4th. It is not the province of this office to entertain objections to a cash entry." You are instructed that it is your province and duty to entertain, consider and properly act upon all objections offered by any person to cash or other entries of public lands. The large number of fraudulent pre-emption, commuted homestead, and other entries, to which the attention of this office is constantly called might be materially lessened if local officers were vigilant in the discharge of their duties to prevent such entries from being made. Your attention is called to the following among other decisions and instructions: *Moore v. Horner*, 2 L. D., 594; *Tremaine v. Houge*, *Idem*, 596; *Henry Buchman*, 3 L. D., 223; to register and receiver, *Humboldt, Cal.*, and decisions and instructions cited therein, *Idem*, 247; to register and receiver *Aberdeen, D. T.*, *Idem*, 211; to register and receiver, *Gunnison, Col.*, *Idem*, 141; to register and receiver, *Olympia, W. Ty.*, *Idem*, 132; to register and receiver, *Miles City, M. T.*, *Idem*, 220; to *F. D. Hobbs*, inspector, *Idem*, 298.

SWAMP LAND—RE-ADJUDICATION.

STATE OF OREGON.

Review of the plans, original and modified, agreed upon by the authorities of the State of Oregon and those of the United States, for the ascertainment and selection of the swamp and overflowed lands within said State.

It was competent for the State, with the consent of the United States, to modify the original plan and to act upon the modified plan, and this most clearly it did, by the agreement to the modified plan, by appointing an agent thereunder, and by approving his doings. It was competent for the United States to regard the governor of the State as its authorized agent, in the absence of notice of legislative enactment to the contrary. And it was competent for the General Land Office to adjudicate the character of the lands as ascertained under said plan. Wherefore said adjudication is approved, and the present claim of the State to some 48,000 acres, reported under said plan as not being swamp land, is rejected, except as to certain tracts in Range 32½ east, concerning which, for the reasons assigned, further examination may be made.

Acting Secretary Joslyn to Commissioner McFarland, January 24, 1885.

I have considered the appeal of the State of Oregon from your decisions of September 25 and 28, 1882, rejecting its claim to about 48,000 acres as swamp and overflowed land in that State.

The act of September 28, 1850 (9 Stat., 519), granted to certain States

lands therein, the greater part of the subdivisions of which were from their swampy character, or being subject to overflow, unfit for cultivation; requiring the Secretary of the Interior to transmit lists and plats of such lands to the governors of such States, and, at their request, to cause patents therefor to be issued. Lest the field notes might be found not sufficiently accurate to enable the Secretary to decide in all cases what tracts were and what were not of this character, he adopted the plan of requiring the States entitled to lands under the act to elect whether they would abide by the field notes as the basis for the lists, or whether they would furnish other testimony to determine the character of the lands. The provisions of this act were extended to the State of Oregon by the act of March 12, 1860 (12 Stat., 3), and this State elected to adopt the latter plan. She has not furnished testimony as to the character of the lands now in question, and the principal question raised by the present cases is, whether or not she has waived her right in this respect, and has consented, in lieu thereof, to rest her claims upon other facts and considerations, under a different plan mutually agreed upon by the State and the United States. A review of the action of your office and of the State is necessary to determine this question.

On June 30, 1880, Commissioner Williamson instructed R. V. Ankeny to proceed to Oregon for the purpose of making an examination in the field of the lands claimed by the State under its swamp grant, the claim to which had not then been fully adjudicated, conforming his action to certain instructions issued to him under date of July 22, 1879, and to the Circular ("Rules and Regulations") of August 12, 1878. These, both, were to the general effect that he should personally examine the lands and endeavor to acquire information, by inquiry of well-informed persons residing in the vicinity, as to the character of the lands. He was required to confer with the State authorities, and, if they decided to appoint an agent to co-operate with him in ascertaining what lands inured to the State, to agree upon some plan of operations; and, if such agent were appointed, to transmit to your office a list of the tracts upon which the two agreed, accompanied by testimony as to the character of each tract, and, in case of their disagreement, to report his own opinion, accompanied by like testimony. This appointment of Ankeny, and the proposed method of adjusting the claim of the State, were adopted at the request of the State; (see Governor Thayer's letter of January 29, 1881, and the letter of the State board for the sale of its school and university lands under date of March 8, 1881, *infra*).

On August 4, 1880, Ankeny announced to your office his arrival in Oregon, his conference with the governor of the State and his council, respecting the method of investigating the character of the lands, and an agreement on their part to appoint an agent to co-operate with him; that testimony would be taken in the field after he (Ankeny) had made his examination, and that he was then preparing a form of affidavit similar to that used in Florida, (when the swamp lands of that State

were investigated by Ankeny, and respecting which the instructions of July 22, 1879, were issued), which met the approval of the State authorities; and that, when printed and the State's agent was designated and ready, they would commence their work.

On September 1, 1880, Commissioner Williamson instructed Ankeny that the taking of testimony in the field would require more labor, time and expense than was contemplated when his instructions were issued, and that, in case the State appointed an agent to act with him, they should jointly examine the lands claimed by the State, make out lists of such as were found to be of a swampy character, and attach their affidavits thereto, setting forth the facts, and that such "affidavits" were what were referred to in his original instructions as "testimony." He was also instructed to submit this plan of operation to the State authorities, and, when agreed to by them, proceed to the examination as instructed on June 30. These instructions wholly changed those of June 30, in respect to the mode of proceeding; and, if the State concurred therein, the report of the two agents based upon their personal examination of the lands, and on such information as they could acquire, and on their own affidavits, was to control the disposition of the lands, instead of ordinary and formal testimony. To this letter Ankeny replied October 1, 1880, that he had submitted to the agent (Whiteaker) appointed by the State this modification of his original instructions, and that Whiteaker had submitted to him (Ankeny) his instructions, directing him "to act in all matters pertaining to his duties as special agent of the State of Oregon in full accord and concert with all the orders and instructions of the special agent of the United States General Land Office"; that he (Whiteaker) deemed his instructions sufficient authority for him to act as suggested, and that he would at once notify the governor of the State of the modification. That such notice was given does not directly appear, but, inferentially, and most conclusively, the fact appears that the State authorities were cognizant of the modification from the time their agent commenced his duties. No work was performed by either or both of these agents jointly, except under the modified plan. It was this plan or system, therefore, to which Governor Thayer referred in his subsequent letter of January 29, 1881, when he advised your predecessor that Ankeny's appointment, in pursuance of his (the governor's) request, not only met with his full approval, "but that the system adopted" would, in his opinion, "prove highly successful," and the co-operation of Ankeny with Whiteaker, the State's agent, "in viewing the lands," and the report of the work which they had prosecuted to a considerable extent during the last season would, in his opinion, be highly satisfactory to the parties concerned. He also expresses his anxiety "that the system be continued," convinced that it would "result in a fair and honest adjustment" of the claim of the State.

The same appears from a letter of the governor, the secretary of

State, and the State treasurer, acting as a board for the sale of certain lands of the State, to your predecessor, under date of March 8, 1881 (*supra*), wherein, after expressing their approval of Ankeny's appointment and doings in connection with their own agent, they urge upon him "the great necessity of continuing the system of selecting the swamp lands, inaugurated as aforesaid, in force."

These agents reported to your office a large number of tracts, some as swamp and inuring to the State, and others as dry and not so inuring. The State is silent as to those reported as swamp, but claims that those reported as dry were erroneously so reported, because testimony was not offered as to their character according to the original plan agreed upon by the Secretary of the Interior and the State; in other words, it now disclaims the mode of investigating the character of the lands, (suggested by itself, and agreed to by the United States), in which it had taken part, and claims that these proceedings were void, and that the State may still insist upon the original plan, and submit testimony as thereby provided.

It was competent for the State to insist upon the original plan. It was equally competent for it, with consent of the United States, to modify and waive that plan and act under a different one. And this most clearly, in my opinion, it did, not only agreeing to the modified plan, but executing its agreement by appointment of an agent to act thereunder, and afterwards approving his doings.

It is claimed, however, that these acts of the governor and other State officials were void, because not sanctioned by prior legislative authority. Admitting even that no legislation conferred upon them the powers they assumed, yet as the Legislature has since been in session, and (so far as appears) has not dissented from their action, its assent thereto may fairly be presumed. It was also, in my opinion, competent for the United States to regard the governor of the State as its authorized agent in this matter, no legislative enactment to the contrary having been brought to its notice. I can not therefore recognize this claim, but hold that, under the facts, the State waived its right to testimony as to the character of the lands, and consented and agreed that they be determined under the modified plan, by the examination of its own and the agent of the United States, supported by their affidavits, and such information as they could acquire, without formal testimony; and, hence, that it was competent for your office to adjudicate the character of the lands upon the report of these agents, and that in this respect there was no error in your decisions.

It is, however, further claimed that one of these reports is false and fraudulent by the forgery of Ankeny in material matters, and, therefore, not entitled to consideration. It appears that the several reports were sworn to in December, 1881, and were transmitted to your office in the spring of 1882. They were (with one or two exceptions) written in black ink, upon a blank prepared for the purpose, all of the blanks

being to the effect that the described lands (when inserted) are "swamp and overflowed lands" and "should accrue to the State of Oregon." That as to which charge of forgery is made is upon one of these blanks, and shows an erasure of the words "are swamp and overflowed lands" and a substitution of the words (in red ink) that the described lands "are not swamp or overflowed lands," with the further interlineation (in red ink) of the word "not" in its appropriate place; the report thus showing that the described lands should not accrue to the State. Evidently, I think, this blank form of report was changed to suit the opinion of the agents as to the character of the lands therein reported. The erasures and interlineations were necessary to that end, and the change in the color of the ink was apparently intended to call special attention to the change in the blank. Except for this, the report is regular upon its face, and nothing discredits its genuineness.

It is signed and sworn to by both Ankeny and Whiteaker, and the facts do not, in my opinion, prove the alleged forgery. As tending, however, to its proof, the affidavit of Whiteaker is filed, dated in September, 1883, in which he states that, as agent of the State, he examined the lands with Ankeny and reported thereon; that he has examined the lands described in your decisions, but that he has no accurate or complete list thereof and cannot depose as to whether a part of said lands were reported as swamp or dry; but that, as to many of said tracts, his knowledge of their character is intimate and his recollection distinct, and that they are unquestionably swamp, and that at the time of their examination it was understood and agreed between Ankeny and himself to so report, and that to the best of his knowledge they were so reported, and that, if reported as dry land, it was without his knowledge or consent; and he names the tracts described in your decision of September 25, located in certain sections in T. 31 S., R. 32½ E.—embracing about 1,500 acres—as so found and reported to be swamp. He makes no direct reference to the report in question, and his statement is insufficient, in my opinion, to establish the charge of forgery against Ankeny, in changing the character of the report after his (Whiteaker's) signature thereto. While, on the one hand, it is not strange that, in the examination of a body of lands embracing nearly 50,000 widely-located acres, discrepancies and mistakes should occur, on the other, it manifests extraordinary powers in one accurately to remember and describe, subdivisionally, fifteen hundred acres, examined nearly two years previously, without reference to his memoranda of examinations, which Whiteaker does not appear to have retained. His statement, from memory merely, is counter to the report, which he does not appear to have seen since it was filed, and which he does not directly impugn.

I give his statement as much, if not more, weight than I think it legally entitled to, and in view of all the facts affirm your decisions, except as to the tracts in Range 32½; and that the State may lose no right to which it is entitled, but that the true character of these tracts may

unquestionably appear and justice be done between the State and the United States, I modify your decision of September 25 as to these tracts, and direct that you appoint an agent to re-examine them in the field, in connection with an agent to be appointed by the State for a like purpose (if the State shall so see fit), and that, after personal examination of each tract and upon such information as they can acquire as to the character of the land upon March 12, 1860, they make report thereon. If they concur in their conclusions, you will regard the character of the tracts as thereby established. If they disagree, you will direct hearings in respect thereto, and upon report thereof you will dispose of each tract as the law and the facts may require.

RAILROAD LIMITS—LAND REDUCED IN PRICE.

A. W. WOODALL.

Where the Commissioner rejected the cash entry because the tract had not been offered at the reduced price, provided by act of June 15, 1880, and because, being made two days after October 31, 1881, it was not confirmed by act of March 3, 1883; and where there is no evidence that the circular of October 10, 1881, notifying the local offices of the change in the departmental construction of the scope of the previous law and forbidding receipt of further entries, had reached the local office in question at date of Woodall's entry; it is assumed, on appeal, that said circular had not reached said office on October 31, and that the entry was confirmed by said act.

Acting Secretary Joslyn to Commissioner McFarland, January 24, 1885.

I have considered the appeal of A. W. Woodall from your decision of August 18, 1884, holding for cancellation his cash entry No. 35,179, made November 2, 1881, on the W. $\frac{1}{2}$ of NW. $\frac{1}{4}$, and NW. $\frac{1}{4}$ of SW. $\frac{1}{4}$, of Sec. 34, T. 14 S., R. 1 E., Huntsville district, Alabama.

The land is part of an alternate government section within railroad limits, the price of which was reduced by act of June 15, 1880, to \$1.25 per acre, and your decision holds as follows: "The entry is illegal, because the lands had not been offered for sale at the reduced rate." Evidently misunderstanding the force of your objection, Mr. Woodall in his appeal assumes that the land was still subject to entry at the former rate, \$2.50 per acre, and requests permission to pay the additional \$1.25 per acre and take his patent.

On September 27, 1884, you declined to entertain his proposition, and on the same day transmitted his papers on the appeal to this Department. No mention is made in your decision, or instructions to the register and receiver, of the provisions of the act of March 3, 1883 (22 Stat., 526), confirming certain entries of like kind; but in your report, transmitting the case to me, you say that the entry does not fall within the confirmation because of a rule adopted by your office to allow as a limit for receipt at the local office of the circular instructions of October

10, 1881, "to the 31st of October inclusive." From this I infer that you kept no record of the sending and receipt of that document, and have adopted as a rule of convenience the arbitrary date closing the month, only twenty days from the imprint date of the circular. It seems to me this is too restrictive an assumption, in view of the liberal manifest intent of the law to confirm all entries allowed by registers and receivers without specific notice of the change in the departmental construction of the scope of the previous law. Twenty days might elapse while the circular was passing through the printing office, or before it could be mailed from your office to all the district offices, or while passing to remote points in the mails.

In the absence of a report that it was filed in the Huntsville office before the 2d of November (only two days beyond the limits of the rule of convenience), and where there has, as the record intimates, been no attempt on your part to ascertain the fact before proceeding to cancellation, or to direct the attention of the party injured to the subject, so that he might show the real date, if it was in his power, I prefer to believe that the register and receiver performed their duty in admitting the entry, rather than to assume that within two or three days of the receipt they violated the express instructions of your office approved by the head of the Department.

I conclude, therefore, to consider the entry as confirmed by the act of March 3, 1883, and reverse your decision holding it for cancellation.

MINING CLAIM—APPLICATION FOR PATENT.

A. P. SMITH.

Smith's application for mineral patent is allowed, notwithstanding that he has sold and quit-claimed all his interest in the lode to one Campbell, who has also conveyed it to the Edgar Mining Company, because Smith has fully complied with the law in locating, etc., and the evidence shows privity between all the parties, and their desire and intention that Smith should apply for and obtain the patent.

Secretary Teller to Commissioner McFarland, January 26, 1885.

I have considered the appeal of A. P. Smith from your decision of November 11, 1884, holding his mineral entry No. 2329, Central City, Colorado, for the Oakland Lode mining claim, for cancellation. The ground of your action is the fact that at the date of Smith's application for patent, to wit, November 1, 1881, he had parted with all his interest in the property, and therefore has no possessory right upon which to base his application.

It appears from the abstract of title on file in the case that the applicant on the 28th of September, 1881, sold and conveyed by quit-claim deed said Oakland Lode mining claim to one W. L. Campbell. This transfer is not only admitted by Smith, but he furnishes the affidavit of Campbell to the effect that said sale and transfer were made with

the express agreement and understanding that Smith should apply for patent for the claim or lode in his own name, and that the application by Smith was for the purpose of carrying out said agreement and not otherwise. It further appears from an original warranty deed on file with the papers that said W. L. Campbell on the 26th of April, 1883, sold the lode claim in question to the Edgar Gold and Silver Mining Company, of Louisville, Ky.; so that the possessory title is now in said company, and not in either Smith or Campbell.

That Campbell was privy to the application of Smith is shown by his affidavit already referred to. The privity of the Edgar Mining Company is equally evident. A suit which said company had instituted as adverse claimant against Smith was on the 3d of March, 1883, dismissed on the motion of plaintiff. In the case are Smith's location certificate, his final receipt for purchase money, the deed from Smith to Campbell and that from Campbell to the company, all filed by the company.

The evidence shows that Smith fully complied with the law in all its requirements as to locating, working, and making application for patent. He has omitted nothing which the statute makes prerequisite to the issuance of patent. In view of the fact that no objection to the granting of patent in his name is presented, and of the evident privity and desire of all parties concerned, I think it may properly be concluded that the spirit as well as the letter of the law has been complied with, and that patent may issue in the name of A. P. Smith, upon the entry as made.

Your decision is accordingly reversed.

APPLICATION; CONTEST; RELINQUISHMENT.

THORPE ET AL. v. McWILLIAMS.

One Dayton filed affidavit of contest against McWilliams's homestead entry, but notice of contest did not issue. Wells, six months thereafter, filed affidavit of contest, alleging also that Dayton's contest was speculative, and rule issued on Dayton to show cause why his contest should not be stricken from the docket, and Wells's contest substituted therefor. Before the hearing Dayton filed withdrawal, and as attorney for Mrs. Thorpe, filed May 21, 1883, the relinquishment of McWilliams, and the affidavit and timber-culture application of Mrs. Thorpe. McWilliams's entry was not canceled until October 25, 1883. One Mrs. Nell made homestead application December 21, 1883, alleging settlement May 15, 1883, and continuous residence thereafter.

Held, that Dayton's contest, being without notice, was illegal, and that the proceedings based thereon were without effect; that, as Mrs. Nell failed to apply for more than three months after her settlement became effective, her application is rejected; that the land was open from date of relinquishment of the prior entry, not from date of cancellation of said entry; and that Mrs. Thorpe's entry must be allowed.

Acting Secretary Joslyn to Commissioner McFarland, December 16, 1884.

I have considered the case of Mrs. Laura A. Thorpe and James W. Wells v. David McWilliams, as presented by the several appeals of the

former from your decision of October 25, 1883, canceling the latter's homestead entry, No. 6616, covering the S. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$, and the N. $\frac{1}{2}$ of S. E. $\frac{1}{4}$, and S. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, of Sec. 11, T. 125 N., R. 64 W., Watertown series (now Aberdeen), Dakota Territory, and directing the register and receiver to allow the land to be entered by the first legal applicant.

The record shows that McWilliams made said entry on March 9, 1882. August 7, 1882, Lyman C. Dayton filed in the district office at Watertown his affidavit of contest, charging relinquishment, upon which is the following endorsement, "Reg. Com'r 'C.' Nov. 3, 1882." On October 2, 1882, after a change in the land district including said tracts, Dayton filed in the district office at Aberdeen a second affidavit of contest, alleging relinquishment, abandonment, and non-compliance with the requirements of the homestead laws by McWilliams.

On April 24, 1883, Wells filed his affidavit of contest against said entry, alleging relinquishment and abandonment, and also another affidavit charging that Dayton had initiated his contest for speculative purposes, and had commenced other contests against entries in the Watertown land district, as shown by the annexed copies of the record. Said copies show that Dayton filed several affidavits of contest against said entry, which were subsequently withdrawn by him. The record fails to show that any notice of contest was ever issued or served upon McWilliams.

On April 24, 1883, the register and receiver, upon the application of Wells, issued a rule to Dayton to show cause on May 16, 1883, why his contest should not be stricken from their docket and Wells's contest substituted therefor.

On May 21, 1883, Dayton filed a withdrawal of his contest, and immediately afterwards, as the attorney of Mrs. Laura A. Thorpe, filed the relinquishment of said McWilliams, dated May 16, 1882, together with his receiver's duplicate receipt No. 6616, issued for said tracts, and the affidavit and application of Mrs. Thorpe to enter said tracts under the timber-culture law. The hearing upon the rule to show cause was continued until May 24, 1883, at which date both parties appeared with their respective counsel. At the hearing Wells offered the affidavit of McWilliams, dated April 12, 1883, alleging that on or about May 9, 1882, he gave to Dayton his written relinquishment and duplicate receipt, and that Dayton did not act in good faith in not presenting said relinquishment at the proper land office. Wells also filed a second relinquishment of said tracts by McWilliams, and his own application to enter the land under the timber-culture act. On May 26, 1883, the register and receiver transmitted all of the papers in the case to your office for directions.

The record also shows that one Thaddeus H. Short filed in the local office his corroborated affidavit, dated November 10, 1883, alleging settlement on said tracts on June 7, and continuous residence thereon

since June 10, 1883, and that he was allowed to make homestead entry No. 2254 for said tracts, on November 12, 1883.

Under date of December 18, 1883, said Dayton, as the attorney for Mrs. Thorpe, filed a motion for review of your decision of October 25, 1883, on the ground that no notice of said decision had been served upon her or her attorney, that there had not been a fair and impartial hearing before the receiver, and that she had a preference right to enter said tracts which had been refused. It does not appear that any action has been taken by your office upon said motion.

It further appears that one Maria B. Nell made homestead application for said tracts on December 21, 1883, which was rejected by the register for conflict with the prior homestead entry No. 2254, made by said Short. Mrs. Nell filed with her application her own affidavit duly corroborated, alleging that she made settlement on said tracts on May 15, 1883, and established her residence thereon on June 23, 1883, and has continually resided on the land since that time; that her improvements consist of a house sixteen by twenty feet, one and one-half stories high, and five or six acres of the land broken on January 26 or 27, 1881; and that the entry of said Short is illegal, because the entry of McWilliams was canceled October 25, 1883, when the local land office was closed by order of this Department on account of the death of the late register, and also because the said Short has exhausted his homestead right by a former entry. Mrs. Nell duly appealed from the action of the register adverse to her, but no action has been taken thereon by your office.

It appearing that no notice of contest was ever issued or served upon McWilliams, it follows that no legal contest was ever initiated against said entry; *Houston v. Coyle* (2 L. D., 58). When, however, Mrs. Thorpe filed the relinquishment of McWilliams, the land covered by his entry became open to settlement and entry under the provisions of the first section of the act of May 14, 1880 (21 Stat., 140); *Whitford v. Kenton*.*

* *WHITFORD v. KENTON.*

[Secretary Teller, January 30, 1884; (10 C. L. O., 374).]

A timber-culture entryman had executed a relinquishment of his claim, and, hearing of it, Kenton initiated contest for abandonment, but without application for the land; thereupon Whitford filed the said relinquishment, but without application for entry; one Hurns, however, immediately filed a timber-culture application for the land, which was rejected, without appeal by him; and then Kenton filed a pre-emption declaratory statement for the land.

"From the law (act of May 14, 1880) it will thus be seen that, the moment a relinquishment is filed the land covered by the entry thus abandoned reverts to the government, and is thereafter as fully open to settlement and entry as though the former entry had never existed, and the first legal applicant therefor takes the land." When executed in proper form and presented at the local office, "the duty of such office is to act thereon instantaneously, and let the record show a cancellation of the entry, without

Mrs. Thorpe's application to enter was filed three days before Wells offered his timber-culture application to enter said tracts, and, being regular in all respects, clearly gave her the superior legal claim to the land. While her application was pending, it reserved the tracts included therein from entry by any other party; Sarah Renner (2 L. D., 43); Johnson v. Gjevre (3 L. D., 156). The allowance of Short's entry was, therefore, erroneous. Neither party could acquire any rights, by reason of acts of settlement upon said land, prior to the filing of the relinquishment of McWilliams by Mrs. Thorpe on May 21, 1883.

More than three months having passed, after Mrs. Nell's settlement became effective, her application to enter said tracts under the homestead laws must be rejected. The homestead entry of Short should be canceled, and Mrs. Thorpe should be allowed to make timber-culture entry for the tracts included in her application.

Your decision of October 25, 1883, is modified accordingly.

PRACTICE—REVIEW.

THORPE ET AL. v. MCWILLIAMS.

Ex-parte affidavits, after judgment, are to be received with great caution, for the reason that they are apt to encourage fraud.

Secretary Teller to Commissioner McFarland, January 29, 1885.

I have considered the motion of counsel for James W. Wells for review of Departmental decision of December 16, 1884 (3 L. D., 341), in the case of Laura A. Thorpe and James W. Wells v. David McWilliams, Aberdeen, Dakota Territory, awarding the right of entry for the tracts in controversy to Mrs. Thorpe. The grounds for review are, error of fact in holding that notice of the contest of Wells was not served upon McWilliams, and error of law in deciding that the relinquishment filed by Dayton did not inure to the benefit of Wells and secure him in the preference right of entry.

With said motion is filed the ex-parte affidavit of one Ralph L. Brown, a member of the firm of local attorneys who appeared for Wells before the local office in said case, in which he alleges that said decision does

reference to the question of what party may acquire a preference right of entry by such cancellation."

"In the event of a legal contest pending at the time a relinquishment is filed, the relinquishment, if directly or constructively the result of such contest, will be held to inure, after cancellation of the entry, to the benefit of the contestant, under the second section of the act referred to above. . . . If the contest is not properly brought, no cancellation can result therefrom, and consequently no preference rights are acquired thereby" (Hoyt v. Sullivan, 2 L. D., 283).

Kenton's contest was void under Bundy v. Livingston (1 L. D., 179). Whitford obtained no rights by filing the relinquishment without application for the land. Hurns lost his rights by failure to appeal. Kenton's filing is held intact.

not state the record correctly, wherein it says that "it appearing that no notice of contest was ever issued or served upon McWilliams, it follows that no legal contest was ever initiated against said entry," and "the affiant asks that the local office be called on for the full record of the case."

A careful re-examination of the record shows that the statement made in said decision is correct. Indeed, it is admitted by counsel for Wells, in his argument on review, that the notice to McWilliams, if issued and served, is not with the papers in the case, "nor is the fact of notice to McWilliams reported." In the case of the Caledonia Mining Co. v. Rowen, on review (2 L. D., 719), this Department laid down the rule that ex-parte "affidavits, after judgment, are to be received with great caution, for the reason that they are apt to encourage fraud." The affidavit of said Brown upon close scrutiny shows that, in several material respects, it is contradicted by the record. I am of the opinion, upon consideration of the whole matter, that substantial justice has been done in the premises, and the motion for review is accordingly dismissed.

PRE-EMPTION—SETTLEMENT AND DEATH.

KEPHART v. MACOMBER.

Macomber purchased the shanty and improvements of a prior settler, took possession and repaired the shanty, filed his pre-emption declaratory in October 1882, and died ten days thereafter without establishing residence; Kephart settled and filed April 7, 1883; two weeks afterwards Macomber's heir applied under Sec. 2269, R. S.: held (1) that Macomber made a good settlement; (2) that he had a reasonable time (more than ten days) in which to establish residence; and (3) that as residence by the heir was not required, and as the long winter prevented cultivation, the absence of the heir, who lived in another State, was justified, and abandonment was not proved.

Secretary Teller to Commissioner McFarland, January 29, 1885.

I have considered the case of William H. Kephart v. Wilfred H. Macomber, deceased, involving the NE. $\frac{1}{4}$ of Sec. 25, T. 113, R. 69, Huron, Dakota, on appeal by Kephart from your decision of June 18, 1884, holding his declaratory statement for cancellation.

Macomber filed declaratory statement October 17, alleging settlement October 6, 1882, and Kephart filed declaratory statement April 7, alleging settlement April 4, 1883. The case shows that Macomber purchased the improvements on the tract (consisting of a shanty and about five acres broken) from a former occupant, and immediately took possession thereof and repaired the shanty. These acts, as respects his good faith, were as if he had personally made the improvements, and constituted an effective settlement. He died about ten days thereafter without having established residence on the land. This had not be-

come necessary at that date. It could have been made within a reasonable time after his settlement.

His father, Henry W. Macomber, a resident of the State of Iowa, and his administrator and sole heir, applied April 21, 1883, to make final proof in support of the claim under Section 2269 of the Revised Statutes, which authorizes the executor or administrator or one of the heirs of a pre-emptor, who dies before consummating his claim, to file the necessary papers to complete the same. Under rulings of this Department, residence on the land by the representatives of the deceased pre-emptor was not necessary, and the fact of the residence of the father in another State, and of the intervening winter (from early November 1882 to April 1883) when cultivation of the land for climatic reasons could not be made, were sufficient to justify absence therefrom, and do not, as claimed, prove its abandonment.

I affirm your decision.

TIMBER TRESPASS—PUBLIC LAND.

ROBERT HATCH.

Hatch, without knowledge as to ownership, bought the standing timber on the land whereon a settler, without making entry, had established a home, cut it, and sold it to Staples and Covill; in view of his culpable negligence in not ascertaining the ownership of the tract, he and his vendees are jointly responsible for the price they paid for it.

Secretary Teller to Commissioner McFarland, January 29, 1885.

I am in receipt of your letter of the 20th instant, with the documents therein enumerated, relating to timber trespass committed by Robert Hatch, of Holton, Michigan, and Kneeland Shaw, now of Kansas, upon certain described lands in Michigan, belonging at the time of trespass to the United States.

It appears that Mrs. Catharine White, of Holton, established her home upon the land (without making entry thereof) in the summer of 1874, and sold a portion of the standing timber, at the rate of one dollar per thousand feet, to said Hatch and Shaw. She vacated the premises in 1875. Hatch, in his sworn statement and offer of settlement, acknowledges cutting one hundred thousand feet of timber from said land; states that Shaw made the actual purchase of the timber from Mrs. White, and that he (Hatch) supposed that she had the right to sell it; and Hatch, being now held responsible, offers to pay one hundred dollars as stumpage, and asks that upon such payment he—and Messrs. Staples & Covill, of Whitehall, Michigan, to whom the timber was sold—be relieved from further liability in the premises.

If Hatch and Shaw were not guilty of willful trespass, they at least seem to have been culpably negligent in not ascertaining, before cutting the timber, whether Mrs. White had the right to sell it. In any event, the case comes within the ruling of the Supreme Court in the case of

Wooden-ware Company *v.* United States, (106 U. S., 432). I therefore concur in your recommendation, and direct that you instruct the special agent to so notify Hatch, and to make demand upon him and Messrs. Staples & Covill, jointly, for the value of the amount of timber stated in the agent's report (130,000 feet) at the price given said Hatch by said Staples & Covill, to wit, three dollars and seventy-five cents per thousand—making a total of four hundred and eighty-seven dollars and fifty cents.

PRE-EMPTION—LACHES IN FILING.

CRARY *v.* CAMPBELL.

Crary, who settled first, was in laches with his pre-emption filing, and Campbell, who settled subsequently but before said filing, was in laches with his own filing; both acted in good faith: held that Crary's right is superior, to the extent of the conflict between them.

Secretary Teller to Commissioner McFarland, January 29, 1885.

I have considered the case of Noah T. Crary *v.* Charles Campbell on appeal by Campbell from your decision, rendered July 22, 1884, wherein you award the NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of Sec. 4, T. 46, R. 2, Gunnison, Colorado, to Crary, and hold the declaratory filing of Campbell as to that tract subject to the final proof of Crary.

Crary filed declaratory statement, No. 1738 (Del Norte series), January 26, 1883, for the N. $\frac{1}{2}$ of NE. $\frac{1}{4}$, the SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of said section, alleging settlement September 20, 1882. Campbell filed declaratory statement, No. 9, April 23, 1883, for the SE. $\frac{1}{4}$ of the same section, alleging settlement April 18, 1883. Township plat filed in 1876.

May 17, 1883, Campbell filed an application for correction of the allegation in his declaratory statement, showing that an error had been unmistakably committed; that his settlement was in fact made January 18, 1883. Campbell made final proof in support of his claim to the land October 15, 1883; against the acceptance of which Crary filed a protest, setting forth his prior right to the NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$, both as to settlement and record filing, which question is the point at issue. The evidence on protest hearing shows, satisfactorily, that Campbell did in fact settle on the land claimed under his declaratory statement January 18, 1883.

If the error in such declaratory statement had been granted, Campbell could not be held to sustain a right to the disputed tract superior to that of Crary, for the reason that he as well as Crary failed to file his declaratory statement within the period required by law. Both parties being in laches in this respect, and no valid intervening adverse claim having been asserted, (the record evidence shows that both parties acted in good faith), the prior record and settlement of Crary will be held to carry the superior right to that extent.

I affirm your decision.

DEPOSITS FOR SURVEY—EXCESS OVER COST.

INSTRUCTIONS.

Acting Commissioner Harrison to receiver, Tucson, Arizona, January 30, 1885.

In reply to your letter of the 20th instant, asking if the excess of the amount of a certificate issued for a deposit, made for the survey of public lands, over the cost of lands entered under the pre-emption laws by one person, may be applied in part payment for lands included in an entry of the same character by another, I have to call your attention to paragraph 36 of the enclosed circular of September 15, 1883 (3 L. D., 350), which permits that practice. The offer, however, must be made voluntarily by the second party.

TIMBER TRESPASS—PUBLIC LAND.

E. C. PICKETT.

Since Pickett's affidavit, to the effect that the trespass was committed by his employes cutting accidentally over the lines of adjoining tracts upon which he was authorized to cut timber, is corroborated by the attendant circumstances and his reputation for honesty and veracity, his proposition to settle at thirty-three and a third cents per cord is accepted.

Secretary Teller to Commissioner McFarland, January 30, 1885.

I am in receipt of your letter of the 23d instant, with the documents therein enumerated, relative to timber trespass alleged against E. C. Pickett, of Jacksonville, Florida, in cutting two hundred cords of wood from lands in that State belonging to the United States.

Pickett made affidavit that the trespass was caused by his employes accidentally, without his direction or knowledge, cutting over the lines of tracts adjoining that in question, upon which he was authorized to cut timber. This is corroborated by the attendant circumstances, and by Pickett's reputation for honesty and veracity.

In view of these facts, I concur in your recommendation that Pickett be permitted to settle upon the terms proposed by him, namely, thirty-three and one-third cents per cord, making a total of sixty-six dollars and sixty-six cents. You will notify the special agent and the proper receiver of public moneys accordingly.

TIMBER TRESPASS—PUBLIC LAND.

RICHARD N. GREEN.

Green made homestead entry of the land in 1867, cut and sold three hundred pine trees to unknown purchasers, made no improvements, and his entry was canceled in 1876; being dead, the proposition of his heirs to settle at one dollar and twenty-five cents per thousand feet is accepted.

Secretary Teller to Commissioner McFarland, January 30, 1885.

I am in receipt of your letter of the 21st instant, with the documents therein enumerated, relative to public timber trespass alleged against Richard N. Green, of Florida, since deceased.

Green made homestead entry of the land described September 26, 1867, and between that date and 1883 cut and removed therefrom three hundred pine trees, producing about one hundred thousand feet of timber, which he disposed of to unknown purchasers. During all these years he made no improvements upon the land, showing that he made the entry solely to secure the timber thereon. The entry was canceled December 21, 1876, and the tract is now vacant. The heirs of said Green concede the trespass, and offer to compromise by paying the government one hundred and twenty-five dollars, being at the rate of one dollar and twenty-five cents per thousand feet.

I can not concur in your recommendation that the heirs of said Green be required to pay to the government the full market value of the timber involved, to wit, three dollars and fifty cents per thousand feet; and you are directed to accept the offer made by them as above set forth. You will notify the special agent and the proper receiver of public moneys accordingly.

PRACTICE—APPEALS.

JOHN W. BAILEY ET AL.

When cases on appeal to the Secretary involve different claimants and different tracts, though but one protestant (a railroad company) and one ground of protest, they must be transmitted separately.

Secretary Teller to Commissioner McFarland, January 30, 1885.

I return herewith the papers submitted by your letter of September 3, 1884, for the consideration of this Department. Said papers include the register's letter of April 15, 1884, Walla Walla, Washington Territory, inclosing thirteen several applications to enter separate tracts of land, by John W. Bailey and others, with appeals by the applicants from the action of the local land officers, and also appeals from your decision of June 26, 1884, adverse to the applicants. On September 10, 1884, the Northern Pacific Railroad Company, by its resident attor-

ney, filed its protest against the allowance of said applications, so far as the same covered certain tracts in the odd-numbered sections within the limits of its grant by Act of Congress of July 2, 1864, (13 Stat., 365.) The papers do not show that any notice was given to said company in accordance with paragraph 111, of Circular Instructions of November 7, 1879.

Your office was advised in the departmental decision, of April 27, 1883, in the case of *Griffin v. Marsh* (2 L. D., 28), that "hereafter you will transmit each case separately." This Department will insist upon a strict compliance with the above instruction. You will therefore separate the cases and transmit each appeal separately.

DEPOSITS FOR SURVEY OF PUBLIC LANDS.

CIRCULAR.*

Commissioner McFarland to surveyors-general, registers, and receivers, September 15, 1883.

The circular of this office dated March 5, 1880, relative to surveys under the provisions of Section 2401, Revised Statutes of the United States, and the acceptance by receivers of public moneys of certificates issued for deposits made under the provisions of said section, is hereby revoked, and the following substituted therefor :

1. The provisions of law governing such surveys and the issue and application of certificates of deposit on account thereof, are Sections 2401, 2402, and Section 2403, as amended by the Acts of March 3, 1879, and August 7, 1882; . . . (statutes quoted).

APPLICATION FOR SURVEYS.

2. Applications for surveys under Section 2401 must be made in writing, in the form prescribed by this office, dated January 20, 1882, and must designate as nearly as practicable the township to be surveyed, and state that the applicants are actual bona-fide settlers therein, that they are well acquainted with the character and condition of the land included in said township, and that the same is not mineral or reserved by government.

3. The mineral character of a township will be determined from the character of the greater portion of the land. Where it is not known that the greater portion of the land of a township is mineral, such township will be deemed surveyable under the provisions of Section 2401. In such case the application will state the fact that the greater portion of the land is not mineral.

4. Every application for a survey must be accompanied by affidavits corroborating in full the statements made in the application.

*Omitted from the last volume.

5. The applications and affidavits, certified by the surveyor-general of the district within which such lands are situated, must be transmitted to this office with the contract entered into for the survey thereof.

6. Where the partial survey of a township becomes necessary on account of natural obstructions to a complete subdivision of the same, or of previous partial surveys, or for other good and sufficient reason, and it is impracticable to proceed regularly from a connection with the established southeast corner of the township, the survey must be connected with the nearest and most accessible established corner of existing surveys, and the lines must be properly run, measured, and marked from that point, so as to represent accurately and correctly the sections and subdivisions embraced in the surveys under execution. In such case the connecting corner should be fully identified and described in the manner required by law and instructions, and a full explanation should be given in the field-notes of the deputy, showing the reasons for its adoption as the corner from which additional surveys are initiated.

7. Where one or more settlers on public lands make application as aforesaid for the survey of a particular township at his or their expense, the surveyor-general shall furnish the applicant or applicants two separate estimates, one being for the cost of the subdivisive survey of the surveyable portion of the entire township, and the other to cover all the expenses incident thereto. The surveyor-general will take the precaution to estimate adequate sums in order to prevent deficiencies in the cost of the service.

8. Surveyors-general will not under any circumstances accept, for the purpose of making the deposit, moneys from applicants for surveys, either *mineral* or *agricultural*, but will instruct the applicants to deposit the estimated cost of the survey desired in some United States depository in the surveying district within which the lands are located.

Should there be no depository within the district, the deposits should be made with the nearest United States assistant treasurer, or other depository. Applicants must be instructed fully as to the necessity of transmitting the *original* certificate to the Secretary of the Treasury and the *duplicate* to the surveyor-general, and of retaining the *triplicate*.

9. The surveyors-general shall exercise the most searching scrutiny into the statements of applicants for survey, to satisfy themselves of the truth thereof, and unless found to be bona-fide in every respect they shall not accept such applications nor furnish the estimates requested.

10. Believing that in a great many instances applications for survey, particularly in sections of country unfit for settlement, have been procured or invited at the instance of deputy surveyors seeking contracts, you are instructed that such proceedings on the part of deputy surveyors are unlawful, and that contracts thus unlawfully procured will not be recognized as valid. The surveyor-general must minutely examine into all applications for surveys under the deposit system. If he is satisfied that the

deputy has acted in the manner described, the commission of such deputy shall be forthwith revoked, and the surveyor-general shall report all the facts, with the findings in the case, to this office. Upon approval thereof, such deputy shall be deemed unfit to exercise the functions of a deputy surveyor, and the approval of a finding against a deputy will be communicated by this office to each surveyor general for his information and guidance; and any surveyor-general who shall fail to report such deputy, or who shall employ any deputy so barred, will be open to charges to be preferred by the Commissioner of the General Land Office to the Secretary of the Interior.

11. Surveyors-general are required to exercise the utmost care and vigilance to prevent frauds and irregularities of any kind regarding surveys under the system of deposits by individuals, as also of surveys made under any other appropriation of moneys by Congress, whether general or special, and they will report each and every fact that may come to their knowledge of any attempted fraud, by whomsoever made, with all obtainable particulars, to this office for consideration and action.

12. The plats and field-notes of surveys under the system of deposits by individuals, as returned to this office, do not usually show the settlements and improvements of the settlers at whose instance the surveys are ostensibly made. In a majority of instances the location of the settler, whether bona-fide or otherwise, is entirely omitted, while the improvements, if any, are never noted. In order, therefore, to still further check the abuses and dishonest practices to which this system of surveys has become subject, the attention of surveyors-general and deputy surveyors is specially directed to the requirements of pages 43 and 44 of the instructions of the Commissioner of the General Land Office, dated May 3, 1881. The requirements therein contained must be strictly adhered to, and surveyors-general are required and enjoined to see to it that their deputies comply therewith.

13. Surveyors-general are directed to instruct their deputies that they must designate in the field-notes and plats of their surveys the location of each and every settlement within a township surveyed under the deposit system, whether it be permanent in character or not, together with the names of such settlers and their improvements, if any. Cattle corrals are not considered as constituting improvements.

14. When no settlers are found within a township surveyed under the system of individual deposits, the field-notes of survey must distinctly and unequivocally state that fact, and any omission so to describe and designate the settlements and their surrounding improvements, or the absence of one or both in the field-notes and plat, will be deemed a sufficient cause to infer fraud, and the accounts of the deputy will be suspended until such omission shall have been supplied to both plat and field-notes. A suspension of the commission of the deputy will in the mean time take place, and all the facts will be reported to this office for consideration and action.

15. Surveyors-general are directed to make known to their several deputies the provisions and nature of this order, and will be held strictly accountable for its faithful execution. Ignorance of the terms of this order will not be held an excuse for failure to comply therewith by deputies.

16. This order will be observed by deputies now in the field, and surveyors-general are directed to so inform them with the least practicable delay.

17. Surveyors-general are reminded of the important trust confided to them, and are instructed to exercise their whole authority to secure correct and honest surveys and returns by their deputies.

18. This order will take effect from and after the receipt of the same, and its receipt will be immediately acknowledged by each surveyor-general.

19. In every case of a contract heretofore approved, which the surveyor-general has reason to believe was fraudulently procured, such contract and the accounts thereunder must be immediately suspended, and the facts reported to this office.

DEPOSITS.

20. Settlers availing themselves of the foregoing provisions will deposit with an assistant treasurer or in a designated depository of the United States, to the credit of the Treasurer of the United States on account of surveying the public lands and expenses incident thereto, in the district in which their claims are situated, the sum so estimated as the total cost of the survey, including field and office work.

21. Where several settlers desire the survey of the same township the necessary deposit, to cover all expenses of the survey and platting, may be so subdivided as to be proportionate to the amount of lands within the township claimed by each settler.

22. In cases where the estimated cost of survey and incidental expenses is in excess of two hundred dollars, the settler should be instructed to deposit in two or more sums in order that no certificate may bear a face value of more than two hundred dollars.

23. Settlers making deposits for surveys are required to transmit the original certificate of deposit to the Secretary of the Treasury and the duplicate to the surveyor general. They will retain the triplicate, to be used in the purchase of public lands in the surveyed township if desired, or to be disposed of by assignment as provided by law.

24. The triplicates only, therefore, are to be received in the purchase, under the pre-emption and homestead laws, of lands within the limits of the land district in which the lands desired to be surveyed are situated. This restriction applies to all certificates issued on or after August 7, 1882, except as hereinafter provided.

All certificates issued prior to that date are receivable for any public lands entered under the pre-emption and homestead laws, without reference to the location of the lands surveyed.

25. Certificates issued for deposits made subsequently to and including August 7, 1882, to cover excesses of cost of surveys executed under contracts entered into prior to the passage of the Act of August 7, 1882, are not affected by the clause in said act restricting the use of certificates of deposit on account of surveys to the land districts within which such survey are located.

26. Surveyors-general will, however, require all depositors in such cases to transmit to this office the triplicate certificates through their offices for certification, specifying in their letters of transmittal the name of deputy surveyor and number and date of contract.

27. Where the amount of a certificate or certificates is less than the value of the lands taken, the balance must be paid in cash.

28. Where the certificate is for an amount greater than the cost of the land, but is surrendered in full payment for such land, the receiver will indorse on the triplicate certificate the amount for which it is received, and will charge the United States with amount only.

EXCESS REPAYMENTS.

29. Where the amount of the deposit is greater than the cost of the survey, including field and office work, the excess is repayable upon an account to be stated by the surveyor-general.

30. The surveyor-general will in all cases be careful to express upon the register's township plat the amount deposited by each individual, the cost of survey in the field and office work, and the amount to be refunded in each case.

31. Before transmitting accounts for refunding the excess of deposits over and above the cost of surveys in the field and office work, the surveyor-general will indorse on the back of the triplicate certificate of deposit in the possession of the depositor the following: "\$ ——— refunded to ——— ———, by account transmitted to the General Land Office with letter dated ———," and will state in the account that he has made such indorsement. Where the whole amount deposited is to be refunded, the surveyor-general will require the depositor to surrender the triplicate certificate of deposit, and will transmit it to this office with the account.

32. No provision of law exists for refunding to other than the depositor, nor otherwise than as referred to in the preceding sections.

ASSIGNMENTS.

33. Under Section 2403 as amended, certificates of deposits for surveys "may be assigned by indorsement." Assignments of such certificates are therefore not required to be acknowledged before an officer authorized to take acknowledgments, but the same will be recognized when made and presented in accordance with usages governing in cases of ordinary negotiable paper.

34. Certificates issued before or subsequent to March 3, 1879, may be

assigned; but if issued prior to March 10, 1881, they must be transmitted to the General Land Office for an examination as to excess repayments, if any, and for certification as to their genuineness and value, if they do not already bear such certificates, before they can be accepted by the receiver, who will be governed by the certificate indorsed on or attached to them by this office.

35. Fraudulent certificates of deposit, purporting to have been issued at various United States depositories, having been put upon the market, rendering it possible for innocent parties to be defrauded in their purchase, you will cause the people in your respective districts to be advised of the possibility of such fraudulent issues, and request that all holders of certificates of deposit send them to this office for the purpose of examination and verification; said certificates to be returned to them without delay, with the certificate of this office as to their genuineness attached.

You are directed to post a copy of this circular in your office, and to take such other steps as you may deem necessary to disseminate the information without incurring the expense of publication in newspapers.

Assignments may be made to one or more persons, and when there are several original parties to, or several assignees of, one certificate, whether the same was issued on account of joint deposits or otherwise, and such certificate is presented in payment for lands to which it is authorized to be applied, the register and receiver will make the proper indorsement on the triplicate certificate presented showing the satisfaction of the *pro rata* share of each party interested. They will make the same notes respectively on the register's certificate of purchase and the receiver's original and duplicate receipts.

36. When the entire amount of a certificate is not satisfied at the same time, the triplicate should be retained by the receiver, and when fully satisfied be sent up as hereafter prescribed. But such certificates should as far as practicable be satisfied during the current quarter, and in order to avoid embarrassment in the settlement of receivers' accounts, and to enable depositors to more readily utilize their certificates, attention should be particularly directed to the instructions contained tained in Section 21 of this circular.

37. The statute specifically provides that certificates when assigned may "be received in payment for any public lands of the United States entered by *settlers* under the *pre-emption* and *homestead* laws of the United States, and not otherwise." They are therefore not receivable in payment for lands sold at public or private sale, nor for mineral, desert, coal, or timber lands, nor for fees and commissions on homestead entries, nor in any maner otherwise than as provided by law.

REGISTERS' AND RECEIVERS' RETURNS.

38. In their monthly cash abstracts, the register and receiver will designate the entries in which certificates of deposit are used and the

balances paid in cash, if any, noting on the certificates of purchase and receipts the manner of payment. The receiver in his monthly account-current will debit the United States with the amount of such certificates, and in his quarterly accounts will specify each entry made with these certificates, giving number, date, amount for which received, by whom and with whom the deposit was made, and debit the United States with the same.

39. After certificates are accepted they should be canceled by writing across the face of each the word "canceled," together with a description of the tract of land sold, date of sale, name of office, and number of entry over the signature of the receiver.

40. All certificates, whether transmitted for examination or as having been accepted in payment for lands sold, must be forwarded in a registered package (the latter once a month), with letter of transmittal, direct to the Commissioner of the General Land Office, and by the same mail an abstract (Form 4-543) should be transmitted to the same address, containing a full description of each certificate inclosed in the registered package (which is to contain no other matter), as follows: No. of certificate, date, assistant treasurer or depository issuing the same, name of depository and amount deposited (stating whether for field or office work, or both), and description of survey for which deposit is made.

(Approved September 19, 1883, by Secretary Teller).

TOWN SITE—RESERVATION; OCCUPATION.

KEITH *v.* TOWNSITE OF GRAND JUNCTION.

Settlements upon, or attempted occupation for townsite purposes, of land within an Indian reservation confer no rights, and are void as against the United States. The passage of an act of Congress opening such a reservation gives preference right to actual settlers found thereon against a town company, as described, where such settlers were first in possession, notwithstanding the town may have been incorporated prior to the passage of such act of Congress. Town companies, composed of non-residents, are not recognized by the laws of the United States or of Colorado. Four persons, non-residents, cannot select and reserve an entire section of land.

The townsite lands must be selected, if there is no incorporation, by actual settlers, for townsite purposes, in order to exclude pre-emption or homestead settlement. The question of conflict, in such case, is not to be decided by the number of inhabitants at date of townsite entry, but by their number at date of the settlement of the adverse claimant. A growing town nearly large enough to include a certain quantity of land may, perhaps, exclude a speculative settlement.

Secretary Teller to Commissioner McFarland, July 21, 1884.

I have considered the case of William Keith *v.* Townsite of Grand Junction, involving the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Section 14, Township 1 S., Range 1 W., Ute Meridian, Gunnison land district, Colorado, on appeal by Keith from your decision of October 4, 1883.

It appears from the record that the land in controversy lay within the Ute reservation at the time of the alleged initiation of these claims. In June, 1881, it was proposed by several persons in New York and Philadelphia to found a town on said reservation, at the junction of the Grand and Gunnison rivers. In pursuance of said plan, a party of four interested persons visited the reservation on September 26, 1881, and selected Section 14 for said townsite, by placing marked stakes at its four corners. Within a day or two they departed, leaving an agent to look after their affairs, and notifying various persons of said townsite selection. At this time there were no settlers on Section 14, nor in its immediate vicinity. On October 6, 1881, Keith, a qualified settler, came into the reservation for the purpose of taking up a pre-emption claim. He was aware of the attempted townsite selection, but regarded it as either abandoned or invalid, and selected the tract in controversy and the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Section 13. He marked off and settled on the land, living on Section 14 until he had built a cabin in Section 13, just over the line between them and nearly in the center of his claim, where he has since resided. The managers of the company returned in November. During the same month the "Grand Junction Town Company," then incorporated, filed a declaration of occupancy under the local laws, (Gen'l Stat's of Col., 1883, Chap. XC), for said Section 14. About January 1, 1882, they attempted to survey the tract in controversy, but were stopped by Keith. At this time there were fifty inhabitants in the town. In February, 1882, the company attempted to build a cabin on Keith's claim, but were prevented by him; he was arrested, and thereupon the cabin was built; it was not occupied by the town company until about the date of the townsite entry. In March, 1882, a plat of the blocks of the townsite was made, without regular survey however, and in June following, as alleged, Grand Junction was incorporated. At this time its inhabitants numbered about one hundred, none of whom were occupying the tract in controversy. The government plat of survey was approved April 28, 1882. On July 28 following was approved the Act of Congress (22 Stat., 178), releasing the Ute reservation. On the day following the town company restaked their claim on Section 14. On September 26 Keith filed his pre-emption declaratory statement, Number 2186. About the same time the town company built a house on each forty of Keith's claim. By virtue of an ordinance of October 24, 1882, the mayor of Grand Junction filed in the local office a townsite declaratory statement, covering 1280 acres, and including Section 14. Keith gave notice on November 1, of his intention to prove up, and appeared at the local office for that purpose on December 5. The townsite claimants appeared to contest his proofs, and by advice of counsel he declined to offer them. On December 6, 1882, the townsite made cash entry Number 820 for 640 acres, including the tract in controversy, but excluding the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Section 14, for which was substituted the N. $\frac{1}{2}$ of the N.W. $\frac{1}{4}$ of Section 23. At this time there were 524

residents on the townsite. Keith instituted contest, and a hearing was ordered February 23, and concluded June 12, 1883. I think that the foregoing are all the facts material to the case.

In considering the claims of the parties, it is to be observed at the outset that neither of them acquired rights against the United States by acts done prior to the release of the reservation. Section 2258, R. S., excepts from the right of pre-emption "lands included in any reservation by any treaty, law, or proclamation of the President for any purpose." The townsite laws, Sections 2380 to 2394, R. S., apply only to "public lands," whilst Section 2393 in terms excepts from their operation "military and other reservations heretofore made by the United States." The selection, occupancy, settlement, marking, and platting of either party prior to July 28, 1882, were therefore in law, as against the United States, void; (*Shepley v. Cowan*, 91 U. S., 330).

The act of July 28, 1882, declared the reservation, as described, "to be public land of the United States, and subject to disposal from and after the passage of this act." The passage of the act found Keith a bona-fide settler on the land, with a view to pre-empting it, and in sole possession of it. His settlement became a legal one on the passage of this act. Soon afterwards, perhaps the next day, the town company marked off the townsite claim, including the land in controversy. Both parties have since complied with the law; but, as between the two, their rights begin with their initiatory acts, (*Shepley v. Cowan*, *supra*), and Keith's right, being initiated earlier, is the superior. This is the legal aspect of the case.

The townsite claimants invoke the clause in Section 2258, R. S., excepting from pre-emption "lands included within the limits of any incorporated town, or selected as the site of a city or town." They urge, first, that the townsite had been "selected" by the town company prior to Keith's settlement, and by the corporation prior to the release of the reservation. By reason of the reservation, either selection was ineffectual for any purpose, as above shown. But, apart from this, I find nothing in the townsite laws under which this entry was made recognizing a "town company" composed of non-residents, or any association of persons not inhabitants of the town; nor is there any recognition of them in the townsite laws of Colorado; (*Gen'l Stat's*, 1883, Chap. CVIII). If four persons may select and reserve from pre-emption an entire section of land, as in this instance, one person may do so; and we might thus have entire townships, in newly-opened territory, cut off from occupation by settlers for an indefinite period. Such a construction would make the townsite laws an absurdity, and defeat the plain provisions and purposes of the agricultural settlement laws.

As to the selection by the town itself in June, 1882, the manifest intent of the statutes is to limit all rights to cases where the land is "occupied," as well as "settled"; (*Sec. 2387*). The Townsite Acts of 1844 and 1867, from which said section comes, refer to public lands "settled

upon and occupied as a townsite, and *therefore* not subject to pre-emption under the agricultural pre-emption laws." It may be true that 200 persons, concentrated at one point, may be held to be settlers and occupants of the 640 acres allowed them by law (Sec. 2389, R. S.); but certainly 100 persons, so settled, as in this case at date of selection by the incorporated town, cannot do so. The letter of law limits them to 320 acres, and the spirit of the law confines their selection to lands not occupied by a prior claim. This question was carefully discussed in the case of *Carson v. Smith* (12 Minn., 546), and the conclusion—and, as I think, the only just conclusion—there reached was, that "the act clearly contemplates a bona-fide settlement and occupation of the land as a townsite; the mere selection by surveying and platting the ground into blocks, lots, streets, etc., will not be sufficient."

Nor does there seem to be an equitable right in the townsite claimants to this particular tract. The record shows that 100 persons undertook to reserve 640 acres by selecting Section 14 as their townsite; they included Keith's claim, on which none of them were residing, and on which Keith was residing; there appear to be no conflicting claims to the remaining 560 acres; consequently, any equitable rights which they may have then acquired can be fully satisfied out of the section without their interfering with Keith's claim.

Your decision rules in favor of the townsite claimants on the following ground, namely, that, as at date of their entry they had a population of 524, and were therefore entitled to enter 640 acres, their rights were superior to Keith's, under uniform rulings of the Land Department that "persons settling upon lands in the vicinity of a town, or the site of a prospective town, must take the risk of the land falling within its limits." I know of no ruling of this Department going to the extent of holding that a pre-emption claim, or any other valid claim, may be cut off by the subsequently-accurring rights of third persons. The spirit and tenor of the decisions of the Department, and of the courts, are to the effect that parties are remitted to their rights as they existed at date of the initiation of the adverse claim. A town of 100 persons may select 320 acres of land, but outside of such selection it has no rights; the lands are public, and "all lands of the United States," not so selected, "shall be subject to the right of pre-emption"; (Sec. 2257, R. S.) In respect to incorporated towns, it is "the right of pre-emption," and not the mere act of entry and purchase which is based on it, that is prohibited; and, therefore, we are to consider the status of the town at date of initiation of the claim, and not at some subsequent date. A pre-emption right lawfully acquired, and lawfully followed up, gives the settler a good right of entry; a right to enter is equivalent to a right to patent, as against everybody but the United States; and the patent, when issued, relates back to the initial act so as to cut off all intervening claims; (*Shepley v. Cowan, supra*). It is possible that there may be exceptions to this rule, as, for example, where a growing town is nearly large enough

to take a certain quantity of land, and a speculative settlement is made which, if recognized, would defeat the town's claim; but I am of opinion that the case before me, where the pre-emptor settled before the town had an existence, is not an exception to it.

Keith was the first occupant; at the time he went on to the land now claimed by him, there was no settlement within the limits of the present incorporated town of Grand Junction. If it is said that his occupation was not legal because the land was in a state of reservation, the same objection applies to the settlement made by the people subsequent to his occupation of the claim in controversy. If one man could not make a legal settlement, a hundred could not. If the land was in a state of reservation, it is for the government, and the government alone, to raise that question in a case of this kind. Parties having the same status cannot defeat his title by asserting that the land was in a state of reservation. If it is admitted that the organization of the town of Grand Junction, under the laws of the State of Colorado, was a legal and valid incorporation while the land occupied by it was in a state of reservation, it cannot be claimed that the town could acquire rights on an Indian reservation denied to a settler on such reservation. Keith was first in occupancy, and all the equities are with him. I think his legal rights are quite as clear as his equitable rights.

Your decision is therefore reversed, and the town entry cancelled as to the Keith claim, and allowed to stand as to all the other land embraced in the entry. Keith will be allowed to prove up his claim as of the date he attempted so to do.

TIMBER CULTURE—CONTESTANT'S RIGHT OF ENTRY.

HENDERSON v. CROSBY.

Before the successful contestant is allowed to make entry he is required to show that he has not exhausted his right to make the same, since filing application.

*Acting Commissioner Harrison to register and receiver Devil's Lake, D. T.
October 30, 1884.*

I am in receipt of your letter of Oct. 17, 1884, asking to be advised in regard to the timber culture application and affidavit of the contestant in the case of E. E. Henderson v. Hiram A. Crosby, involving timber culture entry No. 1798, Grand Forks Series, for the NE. $\frac{1}{4}$ of Sec. 13; T. 149, R. 65, enclosed to you with my letter of October 9, 1884, cancelling said entry.

You are informed that said papers were returned to you as the basis of entry, before allowing which you will require of the contestant an affidavit made before a duly qualified officer, within or without the Territory of Dakota, showing that he has not exercised his timber culture rights since making said application.

Be governed by these instructions in all analogous cases.

TIMBER CULTURE—ENTRY.

WILLIAM A. COX.

Land, shown by field notes of survey to be timber land, not subject to entry under the timber culture act.

Entry of land in different sections not admissible.

Commissioner McFarland to register and receiver Roseburg Oregon. December 3, 1884.

I have received your letter of November 13, 1884, transmitting an appeal by William A. Cox, from your rejection of his application to enter under the provisions of the timber-culture act of June 14, 1878, the W. $\frac{1}{2}$ NW. $\frac{1}{4}$, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, of Sec. 10 and Lot 1 of Sec. 9, T. 18 S. R. 12 West. The rejected application does not accompany the appeal, but it appears from your letter, that your action was based on the fact that "the land embraced in Mr. Cox' application lies upon the beach and is a sandy tract of land which, though destitute of timber, does not appear to me to be such land as was contemplated by the act under which Mr. Cox seeks to enter." In reply, I have to state that while the tracts covered by the party's application, may, as stated by you, be devoid of timber, yet an examination of the field notes on file in this office shows that said section ten, is not devoid of timber, but contains considerable heavy pine.

Without entering into the question, of whether the soil is adapted to the cultivation of trees, the application must be rejected for the reason that the section is not composed of prairie land, and also because it embraces portions of different sections, which is not admissible under the rules of this office. Your action in rejecting the application of Mr. Cox, is therefore affirmed and you will so inform him.

HOMESTEAD—AMENDMENT.

JOSEPHUS A. PYLE.

A person who makes entry without examination or knowledge of the land does so at his own risk.

Commissioner McFarland to register and receiver Valentine Nebraska, December 3, 1884.

I am in receipt of your letter of May 23. last, transmitting the application of Josephus A. Pyle, to amend his homestead No. 1407 made April 29, 1884 for the NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, W. $\frac{1}{2}$ SE. $\frac{1}{4}$, of Sec. 3 and the NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, of Sec. 10 T. 33 N. R. 24 W. so as to embrace in lieu thereof the S. $\frac{1}{2}$ SW. $\frac{1}{4}$ and S. $\frac{1}{2}$ SE. $\frac{1}{4}$, of Sec. 34 T. 34 N. R. 24 W. From the affidavits presented it is shown that the land the party desires to amend to, is not

the land he originally intended to enter, and that the land he intended to enter was occupied and entered by a pre-emptor. He further swears that the land locator made a mistake in describing the tracts embraced in his entry and that the same is unfit for cultivation.

As a general rule amendments to embrace land not originally intended to be entered cannot be allowed; and then again there is nothing to show that the party examined the land he intended to enter, and it seems to me that if he had done so, he certainly would have known of the alleged pre-emptor's settlement, nor does he describe the tract he intended to enter and states was taken. It is held that when a person makes an entry of land without first examining it, and without any knowledge of the character of the same he must suffer the consequences of his own neglect.

Under the circumstances I must decline to authorize the change asked and you will so notify the claimant.

HOMESTEAD—SETTLEMENT; OCCUPATION.

LEON v. GRIJALVA.

Homestead entries cannot be made of land occupied in good faith by others, having their homes and improvements thereon and who are holding the same for their own use and benefit; nor can homestead rights be secured through tenancies. Final proofs taken without authority and without notice are void.

*Commissioner McFarland to register and receiver Las Cruces, N. M.,
December 5, 1884.*

I have considered the case of Guadalupe Leon *v.* Anastacio Grijalva, transmitted July 18, 1884, involving homestead entry No. 100, July 11, 1879, final certificate No. 45, Oct. 1, 1879, for the SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, and SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, of Sec. 13, and the NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, of Sec. 24, T. 17 S., R. 11 W., on appeal from your decision in favor of defendant. Hearing was ordered by office letter of August 17, 1883, upon the affidavit of contestant alleging that claimant was not a citizen of the United States at date of final proof; that he had disposed of a portion of the land before making final entry: that he was not and never had been in possession of some of the tracts embraced in the entry; that he had not complied with the law, and that his homestead proof was falsely and fraudulently made.

Testimony was taken before the Probate clerk of Grant County, November 14, 1883, both parties appearing.

Condensing the testimony taken, it appears that the land in question is situated on the Mimbras river, near the town of San Lorenzo; that a community settlement was established thereon many years ago after the manner of similar settlements in New Mexico; that a strip three hundred varas in width on the river, running back across the valley, was appropriated to each settler, and that each occupied, cultivated and

improved the strip assigned him and was regarded as the owner thereof, and as having the disposable right thereto according to the customs of the country; that a public ditch was constructed for irrigating the several tracts, in which public ditch all the inhabitants had a common interest; that Anastacio Grijalva, the present homestead claimant, had his residence and improvements upon the tract of three hundred varas in width which had been allotted him in the apportionment; that he improved and cultivated this tract only, and never had the possessory right to any other portion of the land, but that after survey by the United States he made his homestead entry embracing not only the three hundred vara tract to which he had originally a recognized right, but also the tracts to which his neighbors had an equivalent right.

It also appears that Grijalva had bargained to sell, and in fact had sold to Incarnation Benavides and Pedro Aguvire a portion of his three hundred vara tract, measuring one hundred and fifty by one hundred and fifteen yards, for the purpose of a millsite, the consideration agreed being a specified sum of money and an agreement on the part of Benavides and Aguvire to do a certain amount of grinding and other work for Grijalva. The purchase money was paid and the purchasers entered into possession, obtaining the consent of the inhabitants to take water from the public ditch, and improved their possession by a erecting a mill at a cost of some \$2000. Grijalva subsequently refused to execute a deed to the property but embraced the millsite in his homestead entry, claiming the improvements as his own. The public ditch and the improvements of other inhabitants of the land are also claimed by Grijalva as his improvements. Grijalva alleges that all these people are his tenants, a claim which is disproven by the testimony. Besides, homestead rights cannot be established or maintained by tenancies. (*Dilla v. Bohall*, 4 Copp. 162.)

At the time of Grijalva's final entry he furnished no proof of citizenship, but evidence that he had been duly naturalized prior to said date was presented at the hearing.

His proof was made before Geo. D. Bowman, register of the land office at La Mesilla. It shows no evidence of the publication of notice to make proof as required by statute, without which such proof is illegal and should not, on that ground alone, have been received by the local officers. It is further shown by the testimony that the proof was not made before Register Bowman officially at the land office at La Mesilla, as purported, but at the town of San Lorenzo. Proofs so taken without authority and without notice, are fraudulent and void. The allegations of contestant as to the fraudulent character of claimants proof, and that he embraced in his entry lands never in his possession but in the possession and occupation of others appear to be fully established. He appears to have claimed as his own the improvements of others, and among such improvements he claims under his entry the valuable mill and other buildings and works erected by and at the ex-

pense of others upon land which he had bargained and sold to and received payment for, from such other parties, who would be defrauded of their rights and property if Grijalva's claim were sustained. Your decision is reversed and Grijalva's entry held for cancellation. Notify all parties allowing the usual time for appeal. Should this decision become final the contestant will have the preference right of entry for thirty days for so much of the land by legal subdivisions, as may be in his actual occupation or free from the occupation of others, but will have no more right than Grijalva had to enter any portion of the land which is occupied in good faith by others who have their homes and improvements upon it, and are holding and claiming the same for their own exclusive use and benefit and who desire to make entry thereof under the public land laws.

The land involved in the controversy is within the limits of the grant to the Texas and Pacific Railroad Company. Any question arising from this fact will be settled hereafter.

ACCOUNTS—PRIOR ADJUSTMENT.

DANIEL WOODSON AND J. W. WHITFIELD.*

Accounts long since adjusted and settlements acquiesced in for many years will not be reopened.

Acting Commissioner Harrison to William Brindle, Dec. 6, 1884.

* * * * * The only ground for reopening a case decided by my predecessor would be the presentation of new and important facts which were not known at the date of the decision or the discovery of errors

*July 11, 1884, Mr. William Brindle appeared as attorney for Daniel Woodson, late Receiver of Public Moneys, and Mrs. J. W. Whitfield, administratrix of J. W. Whitfield, late Register at Kickapoo, Kansas. In this and subsequent communications he asked to have the accounts of Woodson and Whitfield reopened and restated, claiming certain amounts due each officer. From an examination of the records, it appeared that a dispute arose many years ago between the Department and Messrs. Woodson and Whitfield, as to certain commissions claimed for selling Indian lands. It was shown that they retained from the proceeds of these lands \$9,048.74, to which it was decided they were not entitled. Subsequently this decision was reversed and credit allowed the Receiver for the amounts so withheld. Pending this final decision no advances were made Mr. Woodson to pay the salary, fees and commissions of the Register and himself, but an account was regularly stated each quarter in favor of Woodson as Disbursing Agent and the balance found due him carried forward from quarter to quarter and finally liquidated by warrants on the Treasurer. The record therefore showed that Mr. Woodson received credit for certain sums as fees and commissions that were not paid Mr. Whitfield as Register and to which Mr. Whitfield was as much entitled as Mr. Woodson. It was the opinion of the Acting Commissioner that Mr. Whitfield never pressed his claim for compensation for services rendered, as he is indebted to the United States as the bondsman of a defaulter in a sum largely in excess of any amount accruing to him as Register.

of calculation, etc., and you have presented no facts of which my predecessor was not cognizant, and in your presentation of this case you have not confined yourself to pointing out specific errors, but you have made statements which the records disprove. I think furthermore that both officers were amply paid for their time of service considering the large sum they received for services in selling Indian lands to which under existing laws they are not entitled.

Your attention is also called to a letter of the Honorable Secretary of the Interior, dated October 10, 1884, in which it is stated, "The question thus presented is not a new one in the case, it was covered clearly and broadly by the decision of September 19, 1884, wherein it is stated that 'this Department cannot enter upon the adjustment of such claims upon the theory that the decision of the Court in the Brindle case must be taken as a guide and authority in the settlement of numerous other cases claimed to be in every respect similar to the one decided by the Court,' and it is not proposed to allow you to render accounts to this office for settlement for men whose accounts have long since been adjusted or outlawed by age."

February 10, 1880, this office wrote to Hon. L. A. Brigham, House of Representatives, in relation to a valid claim of the heirs of Ely Moore, late R. P. M., at Lecompton, Kansas, for salary and commissions shown by the records of this office to be due him. "There being no appropriation from which this can be paid, an act of Congress authorizing its payment will be necessary," and the item was duly included in the Deficiency Bill, passed and paid; in the case of Mr. Whitfield you must look to Congress for relief. The fullest access to the records of this office has been granted you to properly present your claim and I decline to act further in the matter. * * *

TIMBER CULTURE—GOOD FAITH.

THOMPSON *v.* SANKEY.

In view of the timber culture claimant's good faith, the fact that he has but eight and one-half acres, instead of ten, under cultivation and planted as required, should not cause the cancellation of his entry. He is advised of the importance of fully complying with the requirements before making final proof.

Secretary Teller to Commissioner McFarland, Dec. 6, 1884.

I have considered the case of James A. Thompson *v.* Christian Sankey, as presented by Thompson's appeal from your decision of February 6, 1884, dismissing his contest against Sankey's timber culture entry for the SW. $\frac{1}{4}$ of Sec. 26, T. 147, R. 46, Crookston, Minnesota.

Sankey made his entry May 20, 1878 and Thompson began a contest against the same April 16, 1883, on the ground that Sankey had "wholly

failed to plant and cultivate to timber, trees, seeds or cuttings, ten acres or any part of said tract as required by law."

The evidence fairly establishes the fact that previous to the contest being initiated the entryman had complied with the law in the matter of planting and cultivating trees, on what he presumed, on his own measurement, to be ten acres of land, but which was shown by the testimony of a surveyor at the contest to contain but eight and a half acres. There is some doubt in my mind as to the exact amount of land the entryman did have planted to trees, but as his entire good faith in the matter is fully evident, I concur in your conclusion that his entry should not be canceled, even though it be conceded that he did have an acre and a half less planted than the law required. This determination of the case should not however be held as overlooking the requirement of the law at the time of making final proof, hence, although Sankey's entry is not disturbed by the decision in this case, he must understand that he holds his entry under what has been deemed a substantial compliance with the law, but that when he comes to make final proof, being now advised as to the area of the tract planted, he cannot be permitted to secure title on the cultivation of less than ten acres of land planted in timber.

With this modification, your decision is affirmed.

INDIAN LANDS—RESIDENCE.

MILLER *v.* RANSOM.

An appeal will lie from the decision of the local office as to the sufficiency of the evidence showing residence under the act of August 11, 1876.

In view of the fact that through the violence of an occupying claimant the applicant was prevented from free access to the land, except at the risk of life, and the good faith shown by said applicant, the residence in this case is held satisfactory.

Acting Secretary Joslyn to Commissioner McFarland, Dec. 8, 1884.

I have considered the case of Benjamin F. Miller *v.* Wyllys C. Ransom, as presented by the appeal of Ransom from your decision of April 7, 1884, holding for cancellation his entry No. 8522 for the SE. $\frac{1}{4}$ of Sec. 17, T., 32 S., R. 17 E., Osage Ceded Lands, Independence, Kansas, because of failure to show actual residence at the date of said entry.

The record shows that said tract was the subject of contest between Miller and Ransom in 1877 and that, upon the evidence submitted, your office awarded the land to Ransom and held for cancellation the filing of Miller on May 29, 1878.

The decision of your office was affirmed, on appeal, by this department on November 21, 1878, upon the facts and conclusions stated therein.

It appears that Ransom subsequently demanded possession from Mil-

ler and was refused. He then applied to make entry of the tract without proof of actual residence upon the land. This was refused by the district land officers, and, on appeal, their action was affirmed by your office on January 8, 1879, but further time was allowed within which to comply with the requirements of the statute, as to residence. On April 2, 1879, Ransom again offered his proof and one-fourth payment for said tract, which was accepted by the register and receiver.

In 1882—the exact date not appearing upon the papers—A. B. Clark, as the attorney for said Miller, transmitted to your office an application, not verified, in which he asks “for a re-opening and a rehearing” of the contest case of Miller *v.* Ransom, on the ground that Ransom was permitted to enter said tract “by reason of false representations and fraudulent statements made to the officers by whom said entry was allowed.”

Several affidavits were transmitted with said application, and upon which it was based, alleging that Ransom never made any valuable and lasting improvements upon the land in controversy, and never resided thereon at any time.

On February 1, 1883, you directed the register and receiver to order a hearing to ascertain “whether Mr. Ransom actually resided upon the land at the time of his entry, he having complied with the law in all other respects.” The hearing was begun May 24, 1883, both parties appearing and offering testimony.

Under date of August 6, 1883, the district land officers transmitted to your office the testimony taken at said hearing, together with their joint opinion in favor of Ransom.

On appeal by Miller your office reversed their decision, and held Ransom’s entry for cancellation, as above stated.

The grounds of error assigned by the appellant are—

1. That under the act of August 11, 1876 (19 Stat., 127), providing for the sale of said tract, the register and receiver are the sole judges of the sufficiency of the proof of residence, and that their decision is final.

2. That if your office has the right to hold said entry for cancellation, then the appellant, and not the former defeated adverse claimant, should be permitted to make such additional residence and improvement on the land, as may be required by said act and the regulations of the Department, and

3. That the decision holding said entry for cancellation is contrary to the evidence as shown by the record.

The first objection is not well taken. It was not the intention of Congress, in the passage of said act, to deprive your office of the right of supervision over the acts of the register and receiver, in accepting the proof offered by persons claiming the right to purchase any of the Osage Ceded Lands. Such has been the uniform ruling of this Department

in similar cases. *Vigil & St. Vrain Grant* (1 C. L. O., 165); *Barnard's Heirs v. Ashley's Heirs* (18 Howard, 43).

The main question presented by the record is, as to the sufficiency of the proof of residence. Under the 2d proviso of the second section of said act, it is required that the claimant must actually reside on the land, at the time of completing his or her entry thereof at the proper land office. The proof upon which the district land officers allowed Ransom's entry showed that on April 1, 1879, he built upon said land a good frame house, 12 feet by 18 feet, one and a half stories high, with a gable shingle roof, two doors, and four windows, each containing eight panes of glass, into which he moved his family the same day. The proof also showed that "said house was built in one day, for the reason that armed force was threatened to prevent its erection by an adverse claimant to said land named Miller, . . . and further it was deemed necessary in view of such danger that a number of men should remain with the said Ransom and family, during his occupancy of such house to this time, and that in fact a number of men have been in the house of said Ransom ever since their occupancy thereof by himself and family, and it is the opinion of said deponents that, under present circumstances, it would be extremely imprudent and dangerous for said Ransom and family to attempt to remain in his said house, at the present time, without the protection of a number of men."

It is observed that the question at issue is between the government and the entryman. The rights of Miller were fully adjudicated in his former contest, in which the decision of your office adverse to him was affirmed by this Department, as above stated. It was then held that "Miller went into *Ransom's house* without his knowledge, or that of his agent, but remained until the following spring by permission and with the consent of Ransom. And, although Miller claims to have gone on the land in good faith, as a settler, the testimony, I think, shows that he was simply the tenant of Ransom." When, however, Ransom rented the land to another party, Miller refused to surrender possession, and claimed the land for himself, and insisted that Ransom had abandoned the tract, because he had not attempted to eject him (Miller) by due process of law. That claim was overruled by said decision, upon the ground that it would have been imprudent for Ransom to have resorted to the courts to obtain possession of the land in controversy, on account of the bitterness of the feeling of the settlers against the railroad companies, it appearing that Ransom at that time was the treasurer of the Leavenworth, Lawrence, and Galveston Railroad Company. Without commenting upon the testimony of each witness, it appears to be fairly proven that Ransom, after the decision of this Department in his favor, demanded possession of the land from Miller and was refused; that Miller agreed to allow him to build a house upon the land without let or hindrance on his part; that in February, 1879, he made a contract with Messrs. Beal and McCormick, at Cherry Vale, to build a house on

said land to be ready for use April 1, 1879; that Ransom, who had been living in Michigan, upon his arrival at Cherry Vale, finding the house not built, hired additional carpenters to assist in erecting the house; that when said parties arrived with lumber for the house, Miller appeared with his gun and told the men "to keep the road"; that Ransom immediately applied to the Prosecuting Attorney of Montgomery county, who, after hearing the statements of Ransom and his witnesses, advised the arrest of Miller, which was done, and on the next day, after Miller's arrest, Ransom and his wife moved into the house, and were living in it at the time of completing his entry.

The testimony does not show that Ransom attempted to evade the law; the proof offered at the time of making said entry is substantially corroborated by the testimony taken at the hearing.

While there is a large amount of testimony as to the peaceable character of Miller, it can not outweigh the established facts that he refused to surrender possession after the Departmental decision adverse to him, and prevented, with gun in hand, the erection of the house by the men hired by Ransom, until arrested by the Sheriff of the county.

It is claimed by counsel for Miller, that the case at bar is identical with that of *Dawson v. Mills* (2 Hill's L. C., 29). It is evident, however, that the cases are quite dissimilar. In the latter case, it is stated that Mrs. Dawson caused a cheap board shanty to be erected on the tract, having neither door, floor, nor chimney, into which she moved on Wednesday, October 30th, leaving her husband at Independence, thirty miles distant. She placed therein a very meagre supply of household effects, mostly borrowed from a sister living near, and her food was chiefly brought there already cooked, or she ate her meals elsewhere. On Friday, November 1st, she left the land, and on Saturday the 2d, made her entry at Independence. In two weeks from the date of its erection, the shanty was torn down and carried away by her brother, to whom she had given it. In her case, she was not even occupying the house at the date of her entry, and no excuse was offered for a failure to actually reside upon the land. It is also insisted that the case at bar is on "all fours" with the case of *Ogg vs. McDonald*, decided by this Department July 21, 1881, wherein it was held, upon the authority of *Dawson v. Mills* (*supra*), that Mrs. McDonald was not an actual resident upon the tract in controversy at the date of her entry. In the last case, however, it appeared that the tract in question was in the actual occupancy of her tenant, to whom she had delivered possession prior to making her entry, and, as in the case of *Dawson v. Mills*, no excuse for the meagre residence was offered.

The testimony of Mr. and Mrs. Ransom tends to show that when they demanded possession from Miller, they intended to make a home for themselves, and that, by reason of his refusal, they were compelled to erect another house at an expense of three hundred dollars, in order to comply with the requirements of the law. All the surrounding facts and

circumstances show that it would not have been prudent for them to remain in the house after the completion of the entry. As was stated in *Porter v. Johnson* (3 C. L. O., 37), no inflexible rule should be laid down, but each case should be decided in view of all the facts and circumstances surrounding it.

To cancel Ransom's entry and allow Miller to take the land would be, in effect, allowing the latter to take advantage of his own wrong. It is shown that Ransom has not completed payment for the land. His excuse is inability to pay for the same, on account of expenses incurred in his contest and lack of means. He should be required to complete payment within sixty days, or in default thereof his entry will be canceled. You will cause him to be so advised, and, to that extent, your decision of April 7, 1884, is modified, and the contest dismissed.

PRE-EMPTION—RESIDENCE.

FORBES *v.* DRISCOLL, (REVIEW, 3. L. D. 86).

Bringing suit in the courts for possession will not excuse the pre-emptor's failure to comply with the law.

The subsequent settler finding the land apparently abandoned, and thereafter complying with the law has the superior right.

Acting Secretary Joslyn to Commissioner McFarland Dec. 16, 1884.

* * * Soon after Petty's departure the roof of the cabin caved in, the fences were allowed to deteriorate so as to be useless, and the premises permitted to remain in that condition unoccupied, so as to indicate abandonment.

It appears that Driscoll purchased the interest of one Parker in the cabin a short time before his settlement, and erected a cabin on another part of the tract, which latter he occupied during the first months of his settlement. During the month of February, 1880, Forbes visited the old cabin, and proceeded to take possession thereof; Driscoll objected, denying Forbes' right of possession, whereupon Forbes left the place without making any further attempt then or since to exercise his privilege as a settler. The testimony shows that Driscoll objected to Forbes' right of possession to the cabin, but did not prevent him from otherwise occupying or improving the land.

Forbes appears to have taken the ground that he was dispossessed of his privileges in the land, and has been satisfied to rest his case on that basis, without any effort to comply with the requirements of the pre-emption law. True, Forbes brought an action of forcible entry and detainer against Driscoll, which is pending on appeal in the courts of the Territory; but that action of itself did not relieve him from pursuing the required residence and development of the land.

Driscoll shows that he has continued to reside on and cultivate the tract from the time of his settlement as required by law, which showing was not contradicted.

Forbes pleaded as an excuse for his non-residence, temporary sickness in his family, which lived at Omaha, Nebraska; but he failed to explain why he omitted to evidence his intentions as a *bona fide* pre emptor by residing on the tract and sustaining his identity as a settler, so as to negative the indication of abandonment. Prior to Driscoll's settlement there were ample opportunities presented, when Forbes could have shown a reasonable compliance with the law. When he settled on the tract he was aware of the fact that his business would necessitate his absence at times; but no satisfactory excuse is given for his neglect of the place during the periods of his presence in the vicinity, at which time it is shown that he preferred to reside at Deadwood.

The law requires the pre-emption settler to make final proof and payment within a time certain; Forbes did not give notice of final proof until after such time had expired.

To my mind it is clearly apparent that Forbes did not exercise sufficient good faith prior to Driscoll's settlement to negative the conclusion that he had abandoned the place; this, however, was not alone considered by me in examining the record hitherto. Although not expressed, all the facts were taken into consideration; but it was determined that the facts then stated were sufficient to conclude Forbes and sustain the settlement of Driscoll.

Forbes was not prevented by Driscoll from exercising his prerogatives as a pre-emption settler; Driscoll found the cabin unoccupied and in an abandoned condition, and under his purchase he maintained his possession of it. Forbes chose to pursue a certain plan of action, in the consummation of which he failed to comply with the law; in view of the adverse intervening claim of Driscoll, I am prevented from administering the relief he requests.

INDIAN OCCUPANTS.

CIRCULAR.*

Commissioner McFarland to registers and receivers, May 31, 1884.

Information having been received from the War Department of attempts of white men to dispossess non-reservation Indians along the Columbia River and other places within the Military Department of the Columbia of the land they have for years occupied and cultivated, and similar information having been received from other sources in reference to other localities where land is occupied by Indians who are making

* Unintentionally omitted from last volume.

efforts to support themselves by their own labor, you are hereby instructed to peremptorily refuse all entries and filings attempted to be made by others than the Indian occupants upon lands in the possession of Indians who have made improvements of any value whatever thereon.

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

(Approved May 31, 1884, by Secretary Teller).

TIMBER CULTURE—BREAKING; CONTEST.

PECK v. TAYLOR.

Where the affidavit in a timber-culture contest failed to show the continuance to date thereof of the alleged failure to break and plant, as required in *Worthington v. Watson*, advantage of the defect may be taken only at the hearing.

Where eight and three-quarter acres only were broken during the first two years, by mistake, and there was no evidence of bad faith, it is not ground for forfeiture.

Acting Secretary Joslyn to Commissioner McFarland, February 2, 1885.

I have considered the case of *Rollin A. Peck v. Frank A. Taylor*, involving timber-culture entry No. 1852, August 20, 1879, Springfield, now Mitchell, Dakota Territory, for the NW. $\frac{1}{4}$ of Sec. 23, T. 104, R. 61, being on appeal from your decision of May 20, 1884, holding Taylor's entry for cancellation.

It appears from the papers that contest affidavit was filed against said entry by Peck December 27, 1882, the allegations being that defendant "had failed to break ten acres during the first two years subsequent to entry, and failed to plant to trees, seeds or cuttings five acres during the third (year) subsequent to entry, as is required by law." Non-residence being alleged, notice was given by publication, and hearing held April 25, 1883, at which both parties were present and submitted testimony.

The affidavit of contest is defective in not charging the continuance of the alleged defaults up to the date of its filing. Had the claimant thought proper to take advantage of this defect before testimony was submitted the contest would have been dismissed, unless application had been made to amend; (*Worthington v. Watson*, 2 L. D., 301).

Having submitted testimony and gone to trial, the defect must be considered as waived and can not now be entertained, but the case must be determined on the evidence before me.

This shows that in point of fact 8.73 acres only were broken. But it further shows that it was the intention of the entryman to comply with the law in this respect, and that he measured the land as best he could, caused to be broken what he supposed to be ten acres, five each year, and paid for that quantity. In all this I see abundant evidence of good faith on his part, but none of a purpose to evade the requirements of the law. And, because of the rude means at hand for measuring the land or an honest error of judgment, causing so small a deficiency in the breaking, I do not find sufficient cause for forfeiture of the entry.

As to the other ground of contest, the preponderance of the evidence is decidedly in favor of the claimant. The contestant and his witnesses testify that only about four and one-half acres were planted with trees the third year, and that the trees so planted were withered and dead at the time of planting, so that but a very few lived, the whole number planted being estimated by the contestant at only 5,617. All this is fully and specifically contradicted by the evidence of the entryman, which shows that the area prepared for the trees was measured and laid off for five acres, embracing a portion of the second year's breaking in order to make the requisite quantity. It further shows that 9,400 trees were purchased from one party and 5,000 from another, that they were all in good condition when received upon the land, and that they were therein carefully planted shortly afterwards, except a few left over. In the face of this clear and specific testimony, I can not forfeit the entry of Taylor because the trees failed to grow.

Entertaining these views, your judgment is reversed and the contest of Peck is dismissed.

FINAL PROOF; SETTLEMENT; ACT OF JUNE 15, 1880.

CHARLES C. MARTIN.

When protest was made against the final proof of a pre-emptor and hearing ordered, and the protestant failed to appear, his right of protest is concluded.

Failure to settle before filing a pre-emption declaratory statement is cured by a settlement prior to the intervention of an adverse right.

An application to purchase a homestead claim under Sec. 2, Act of June 15, 1880, is barred by a pre-emption claim initiated while the tract was vacant and unappropriated.

Acting Secretary Joslyn to Commissioner McFarland, February 2, 1885.

I have considered the appeal of Charles C. Martin from your decision of March 24, 1884, allowing Frank R. Vernam to make pre-emption entry for the E. $\frac{1}{2}$ of NE. $\frac{1}{4}$, of Sec. 31, and the W. $\frac{1}{2}$ of NW. $\frac{1}{4}$, of Sec. 32, T. 95, R. 61, Yankton, Dakota, and holding his (Martin's) cash entry for the same tracts for cancellation.

Martin made homestead entry October 15, 1879, for the SE. $\frac{1}{4}$ of NE. $\frac{1}{2}$, of Sec. 31, and the SW. $\frac{1}{4}$ of NW. $\frac{1}{2}$, and the N. $\frac{1}{2}$ of NW. $\frac{1}{2}$, of Sec. 32, of said township, and after cancellation thereof, October 22, 1881, for abandonment, was allowed, September 24, 1883, to make cash entry for the tracts under the act of June 15, 1880, except for the NE. $\frac{1}{4}$ of NW. $\frac{1}{2}$, of Sec. 32, which he waived.

Vernam filed declaratory statement July 16, alleging settlement July 13, 1883, for the tracts first above described, and offered final proof thereon March 11, 1884, against which Martin protested, alleging Vernam's failure to settle on the land prior to his filing; and he asked for a hearing in order that he might prove the same. As Vernam published the required notice of his intention to make final proof and payment, of which Martin had knowledge, it was the latter's duty to have offered whatever objection he had to such proof and payment, at that time. A further hearing will not be allowed an adverse claimant in order to show facts which he had opportunity to show at the regular hearing. His failure to object at the time specially ordered for that purpose, without valid excuse, will conclude his rights in this respect. A different rule would lead to prolonged and unnecessary litigation. Martin's application for a hearing was properly denied.

I also concur in your ruling that, although, as a rule, settlement is required before the filing of a pre-emption claim, yet if, in fact, it is made before intervention of an adverse claim, the defect is cured.

The further question respects the right of Martin to his cash entry under the second section of the act of June 15, 1880 (21 Stat., 237), which authorizes one who had entered lands (subject to such entry) under the homestead laws, to purchase the same at a stated price, "provided this shall in no wise interfere with the rights or claims of others who may have subsequently entered such lands under the homestead laws." My decision of July 18, 1882, in the case of George S. Bishop (1 L. D., 95), holds that these latter words, "the homestead laws," were intended by Congress to be used in a generic sense, and to protect all vested rights that intervened prior to the application of the homestead entrymen to purchase, and hence would include an intervening right acquired under the pre-emption as well as the homestead laws. At the date of Vernam's settlement and filing the tracts in question were vacant and unappropriated, and subject to a pre-emption claim. Vernam's proofs show his full compliance with the law, and as his right was initiated prior to Martin's application to purchase, his was the superior claim.

I affirm your decision.

PRE-EMPTION—RESIDENCE.

SMITH *v.* MAROLD.

Marold settled February 1, and made a pre-emption filing February 14, 1882; Smith settled March 1, and filed March 21, 1882; Marold made cash entry February 21, 1883, and then Smith contested, alleging non-residence; the evidence obtained at the hearing being doubtful as to residence, on supplementary proof by Marold showing satisfactory residence after August 1, 1884, the land awarded to him.

Secretary Teller to Commissioner McFarland, February 3, 1885.

I have considered the case of William H. Smith *v.* John B. Marold, involving lands in the Del Norte, Colorado, land district, on appeal by Smith from your decision of July 25, 1884, allowing Marold further time to show compliance with the requirements of the law.

Marold filed declaratory statement February 14, alleging settlement February 1, 1882, for the NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$, and the W. $\frac{1}{2}$ of NE. $\frac{1}{4}$, of Sec. 10, and the SW. $\frac{1}{4}$ of SE. $\frac{1}{4}$, of Sec. 3, T. 45, R. 6 E., and made cash entry therefor February 21, 1883. Smith filed declaratory statement March 21, alleging settlement March 1, 1882, for the N. $\frac{1}{2}$ of SE. $\frac{1}{4}$, and SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, of Sec. 10, of the same township, and subsequently to Marold's cash entry filed affidavits alleging his non-compliance with the law; whereupon a hearing was ordered to ascertain the facts. The register and receiver rendered dissenting opinions under the testimony adduced, and both parties appealed to your office. In view of some doubt as to Marold's full compliance with the law in respect to his residence upon the tract, you modified the two decisions of the local office, and directed that, as Marold's time for making proof and payment would not expire prior to November, 1884, he be allowed a reasonable time within which to effect actual residence on the land, of which he might make supplemental proof, and that in the meantime his entry remain suspended.

I have examined the original testimony and concur with you in the opinion that Marold was the prior settler and had complied with the law unless in the matter of residence. I have also examined the supplemental proof filed by Marold November 1, 1884, under your permission. It shows actual residence on the land from August 1, 1884, and satisfies the previous doubtful proof. The land claimed by Marold is awarded to him, and Smith's filing in conflict therewith is canceled.

PRE-EMPTION—RELINQUISHMENT.

SMYTH *v.* LARING.

The pre-emptor's relinquishment appearing to have been procured through fraud, the filing is re-instated, and the pre-emptor having complied with the law is allowed to make final proof.

Commissioner McFarland to register and receiver Crookston, Minn., May 7, 1884.

I have examined the contested case of John B. Smyth *v.* John Laring, involving the SE. $\frac{1}{4}$ of Sec. 26, T. 156 N. R. 48 W., on appeal by the former from your adverse decision.

The record shows that Smyth filed declaratory statement, No. 5338, on August 10, 1880, for the above tract, alleging settlement on the same day; that on April 12, 1881, Laring filed declaratory statement, No. 5698, for the same land, alleging settlement April 5, 1881; that on January 19, 1883, Smyth made homestead entry, No. 8397, for said tract, and on January 25, 1883, filed for cancellation the relinquishment of Laring of his said declaratory statement; that on representations made by Laring that his relinquishment was fraudulently procured, his filing was re-instated by my letter (G) of May 18, 1883; that on August 9, 1883, Laring gave notice of his intention to make final proof and payment on September 14, 1883; that on the day last named he appeared and submitted his final proof; that at the same time Smyth appeared and filed a written protest against said proof, on the ground that Laring's declaratory statement had been reinstated through fraudulent representations and in fraud of his rights under his homestead entry; that by written stipulation the trial of the case was adjourned to November 15, 1883, at which time both parties appeared, with their respective counsel and witnesses, and submitted their testimony; that on December 5, 1883, you rendered the following decision: "We are of the opinion that Laring's tender of proof and payment should be accepted and Smyth's homestead entry, No. 8397, should be declared canceled and forfeited to the United States."

The record further shows that both parties were duly notified of this decision and of their right to appeal, and that within the prescribed time Smyth filed an appeal.

I have examined the testimony in the case, and find that Smyth made the prior settlement on the tract; that his settlement was made sometime in August, 1880; that in the fall of that year he removed from the State, leaving his stock and effects in charge of one Barker; that he removed to Nebraska, and whilst there, namely, in the spring of 1881, he disposed of his declaratory statement to Laring, taking in payment therefor the latter's promissory note for five hundred dollars, without security, and gave an order on said Barker for the delivery of the goods

etc., left in his charge, to said Laring; that thereafter Laring entered into possession as he alleges under his declaratory filing; that he has continued in possession ever since; that he was a qualified pre-emptor on April 12, 1881, the time he filed his declaratory statement, and that he has ever since continued to cultivate and improve the tract and to make it his home; that in the spring of 1882, with the avowed intention of collecting the note executed by Laring, Smyth returned to the neighborhood of the claim, worked on different adjacent farms, and made Laring's his headquarters; that on January 19, 1883, he made a homestead entry for the aforesaid tract, and, by reason of his intimacy with Laring and the latter's ignorance of business transactions, he fraudulently obtained from said Laring his relinquishment of his pre-emption claim and filed the same in the local office for cancellation. I find further that Laring has fully complied with the provisions of the preemption law in respect to settlement, residence, and cultivation.

Your decision is therefore hereby affirmed, and the homestead entry of Smyth held for cancellation, subject to appeal, and you will permit Laring to make final proof and payment for said tract in the event of this decision becoming final.

(Affirmed February 2, 1885, by Acting Secretary Joslyn).

TIMBER CULTURE—CONTEST AFFIDAVIT.

BENNETT *v.* GATES.

In view of the evidence submitted, an allegation that the entryman has "wholly abandoned" the tract is held sufficient.

Secretary Teller to Commissioner McFarland, February 4, 1885.

I have considered the case of George B. Bennett *v.* Abraham R. Gates, involving timber-culture entry No. 2712, made by the latter May 18, 1880, for the SW. $\frac{1}{4}$ of Sec. 10, T. 116, R. 61, (Watertown series) Huron district, Dakota, on appeal by Bennett from your adverse decision of June 12, 1884.

In said decision you say: "The affidavit of contest is fatally defective. It alleges that the claimant 'has wholly abandoned said tract, and has failed to break or cause to have broken five acres thereof during the first or second years after the date of said entry, and has failed to plant any trees, seeds or cuttings thereon.' See Worthington *v.* Watson (2 L. D. 301), wherein it is stated that an affidavit of contest must allege non-compliance up to the date of initiating contest."

It is difficult to see how the contestant could "allege non-compliance up to the date of initiating contest," any more directly and strongly than he has. Neither the law nor the regulations demand that these precise words shall always be used—only that this fact shall be alleged

and proven. When the contestant alleges that the claimant has "abandoned" the tract, he uses the strongest of all approximately synonymous words in the language to indicate a forsaking without return, up to the date of initiating contest. "Abandon—to give up absolutely; to forsake utterly; to relinquish all connection with, concern in, interest for, control of. . . . The distinctive sense of 'abandon' is that of giving up a thing absolutely and finally," (Webster's dictionary). This certainly includes the idea of not having returned. Contestant not only alleges that defendant has "abandoned" the claim, but that he has "wholly abandoned" it. Stronger language than this could not be used. Moreover: In his testimony before the register and receiver he not only testifies as above, but adds: "The present condition of said tract is wholly wild and uncultivated." This proves more than the law and the regulations demand. It not only proves non-compliance generally, but no attempt nor pretense at compliance; not only non-compliance up to date of initiating contest, but non-compliance up to date of the hearing.

In my opinion the affidavit of contestant is sufficient, and the allegations therein contained fully proved. I therefore reverse your decision, and direct the cancellation of Gates' entry.

SAME—(ON REVIEW).

The decision in this case was not intended to overrule the former practice requiring precision in the affidavit of contest, but as the hearing had been held and the entryman, on the evidence, appeared to be in default, the obvious intent of the contestant was accepted.

Secretary Teller to Commissioner McFarland, February 11, 1885.

My attention having been called to the case of George B. Bennett v. Abraham R. Gates—timber culture entry No. 2712, Huron district, Dakota—decided by me on the 4th instant, by an inquiry as to whether it is to be regarded as overruling the long-standing practice which requires the charges in the affidavit and notice to be specific, I would say that it is not to be so regarded. The requirement of a specific charge, including failure on the part of the entryman until the date of the initiation of contest, has been, and very properly should be, insisted upon, for the purpose of avoiding the expense, delay, and vexation of a hearing upon frivolous or insufficient grounds. The charge in the case of Bennett v. Gates was not as definite or clearly expressed as it should have been; but as the hearing had been held, as the evidence was all in, and as it showed the entryman to be in default, I concluded in this case not to insist upon the utmost exactness of expression when it was plain that the contestant *intended* to prefer a specific charge. In this direction, however, as a precedent of general application, I am not disposed to go beyond the ruling in the case of Hanson v. Howe (2 L. D., 220).

PRE-EMPTION—FINAL PROOF.

HELGE GULLECKSON.

The pre-emptor through failure to make final proof within the statutory period, and neglect to assert his claim, as against a subsequent homestead entry, is held to have forfeited his right to the land.

Secretary Teller to Commissioner McFarland, February 5, 1885.

I have considered the appeal of Helge Gulleckson from your decision of June 28, 1884, wherein you decline to grant him a hearing in support of his pre-emption claim, as requested by his petition dated May 9, 1884, on the ground that he forfeited his rights as such claimant, by failing to make final proof and payment for the tract within the time required by law:

Gulleckson filed declaratory statement No. 1287, June 12, 1877, alleging settlement the same date, for the NW. $\frac{1}{4}$, of Sec. 22, T. 115, R. 46, Redwood Falls, Minnesota. Unoffered land.

Ebrat C. Hanson made homestead entry No. 2541 November 14, 1879, for the same tract, for which final certificate No. 2854 was issued to the heirs of said Hanson January 26, 1884.

Gulleckson was informed of the final entry, and notified to show cause why his declaratory statement should not be cancelled. In response to which, he presented no explanation as a reason for his disregard of the requirements of the law. No fraud is shown to have been perpetrated by Hanson, or his heirs, in their connection with the tract, nor does it appear that they failed to comply with the homestead law.

Gulleckson has entirely ignored the law, requiring him to make final proof, notwithstanding the fact that he had notice of Hanson's adverse possession of the tract, prior to the time limited by law for making his final proof.

I fail to perceive any reason why your decision should be disturbed.

PRE-EMPTION—SECOND FILING.

WILLIAM BAINTER.

The application for a second filing for the reason that the tract filed for is not suited to cultivation, is rejected, as it appears that no act of settlement or cultivation has been performed since the date of the alleged settlement.

Secretary Teller to Commissioner McFarland, February 5, 1885.

The appeal of William Bainter from your decision of June 14, 1884, has been considered, in which you deny his application to make a second filing under the pre-emption law.

Bainter filed declaratory statement No. 1145 January 18, 1883, for the

W. $\frac{1}{2}$ of SE. $\frac{1}{4}$, and the E. $\frac{1}{2}$ of SW. $\frac{1}{4}$, of Sec. 29, T. 12, R. 76, Huron, Dakota, alleging settlement January 12, 1883.

Mary Johnson made homestead entry for the SW. $\frac{1}{4}$ of said section February 20, 1883.

Bainter filed his application March 18, 1884, accompanied by his relinquishment of the declaratory statement, setting forth that he inadvertently filed on the tract, which he subsequently discovered was unsuitable for purposes of cultivation.

In view of the fact that he has performed no act of settlement or cultivation on the tract since the date of his alleged settlement, I am concluded from granting him any relief in the premises.

Your decision is affirmed.

PRE-EMPTION—SETTLEMENT.

ZINKAND *v.* BROWN.

Acts of settlement must be performed in person and upon unappropriated land.

In final proof or contested cases a date of settlement differing from that alleged in the declaratory statement may be shown.

The case of Howden *v.* Piper (3. L. D.) cited and distinguished.

Secretary Teller to Commissioner McFarland, Feb. 5, 1885.

I have considered the case of John J. Zinkand *v.* Hannah M. Brown, involving the S. $\frac{1}{2}$ of NE. $\frac{1}{4}$, and NE. $\frac{1}{4}$ of SE. $\frac{1}{4}$, and Lots 2 and 3 of Sec. 17, T. 118, R. 78, Huron, Dakota, being on appeal by the latter from your adverse decision of June 11, 1884.

It appears John Green made declaratory statement No. 1186 January 25, 1883, alleging settlement September 21, 1882; that Zinkand made declaratory statement No. 3139, April 13, 1883, alleging settlement March 19, 1883; that Hannah M. Brown made declaratory statement No. 4602, May 24, 1883, alleging settlement also on March 19, 1883, and that Henry C. Zeake made homestead entry No. 2803, April 2, 1883—all on said tract.

On June 4, 1883, Mrs. Brown filed a petition to the register and receiver asking that hearing might be had to determine the question of priority of settlement as between Zinkand and herself. This application was granted, but afterwards, on motion of Zinkand, dismissed by them. No appeal from this action was taken by Mrs. Brown and consequently no question is before me in relation thereto.

On August 9, 1883, Mrs. Brown published notice of her intention to make final proof in her said claim, October 16, 1883, before the Clerk of the District Court, against which Zinkand filed protest.

On October 25, 1883, Zinkand also published notice of his intention

to make final proof, December 20, 1883, before the same officer; and on November 5, 1883, the Register and Receiver ordered a hearing on the aforesaid protest of Zinkand which was had, under stipulation of the parties, December 29, 1883, when testimony was submitted on both sides. Decision was rendered against Zinkand, which, on his appeal, you reversed.

The testimony shows that one Aldrich, by direction of a son of Mrs. Brown, hauled some logs on the tract, March 19, 1883, and commenced improvements thereon in her behalf, but that she never was on the land until April 14, 1883. These facts being unquestioned, Mrs. Brown's claim must be eliminated from the case, for it is clear she could not acquire any settlement right to the tract by virtue of the acts of Aldrich or any other person in her behalf. *McLean vs. Foster* (2 L. D. 574). Neither can she claim any benefit from alleged settlement after April 2, 1883, because precluded from legally making the same by the homestead entry of Zeake made on that day.

In his declaratory statement and also in his final proof, filed in the case, it is stated that Zinkand made settlement on March 19, 1883, but the evidence shows this was an error of the attorney who prepared the papers, and that in point of fact the alleged settlement was made March 17, 1883.

It is insisted in behalf of Mrs. Brown that Zinkand, in his declaratory statement, having alleged settlement on March 19, 1883, is thereby estopped from proving that it was actually made on another and earlier day; and the case of *Tribble v. Lawhorn*, (1 Lester, 404,) is cited as sustaining this view. A careful reading of the decision in that case does not sustain the assertion, though the syllabus does. If, as claimed, such technical rule ever prevailed, it is now no longer in force, as will be seen by reference to the case of *Tipp v. Thomas*, (3d L. D., 102,) wherein the same point was raised in regard to the application to make homestead entry, where prior settlement was alleged. In overruling the objection it is there said, "the date of settlement is to be established as a fact in all cases, whether *ex parte* or contested. If the correct date is alleged, it must nevertheless be proved; if an incorrect date is alleged, the correct date should be likewise proved. To rule otherwise is to hold that a settler is bound to prove by the oaths of himself and witnesses a thing which in fact is not true. The law gives him a right to the land from the date of his settlement, if duly exercised, and I think that this right is not to be defeated by a discrepant allegation he may have made, when it is shown it was made by mistake." There is no reason why this ruling is not applicable to pre-emption cases.

As to Zinkand's settlement, the evidence shows that Green, who made declaratory statement No. 1186, January 25, 1883, had done some breaking and laid the foundation of a log house on the tract. On March 17, 1883, Zinkand purchased these improvements and, accompanied by

Green and others, went upon the land, where, with his own hands, he transposed some of the logs, adding some four of them to the foundation commenced by Green. On the same day he contracted with Dolphus to commence forthwith the erection of a house on the land and also wrote to Carter to come and assist. These two men commenced work March 23, 1883, hauled the logs purchased from Green, and began to build a house on the spot selected by Zinkand. The building was delayed, because of a claim to the logs, set up by Aldrich; but this was arranged in an interview between him and Zinkand, March 26, 1883, when the work was proceeded with, the house completed and occupied by the latter by April 1, 1883.

Now it is insisted with much earnestness, by the counsel for Mrs. Brown, that, in view of the decision of *Howden v. Piper*, (3 L. D. 162, 294), the foregoing facts do not show a sufficient settlement.

Whilst no rule can be formulated prescribing the specific acts which will or will not constitute settlement on the part of pre-emption claimants, because the facts of each case must necessarily differ with the varying circumstances thereof, yet the principles, which shall govern all such cases have been heretofore well defined, and notably so in the opinion of Attorney-General Mason, referred to in the case of *Howden v. Piper*. This opinion is correctly summarized on page 312 of that decision, where it is said, "there must be the intent to appropriate the land and some act upon it indicative of the intent and the two must harmonize. Neither alone is sufficient." The evidence in this case meets exactly the requirements of the above rule. The purchase of the improvements from Green and the payment of \$50 therefor, the going upon the land, taking manual possession of the logs, exercising a formal act of ownership over them, the selection of a site for a house, followed by a contract, the same day, to build it, the commencement of the same within a few days thereafter, the completion and occupancy of it as speedily as might be, all show, fully and conclusively, an intent to appropriate the land and the prompt inauguration and consummation of acts illustrating that intent.

The case of *Howden v. Piper* differs essentially from the one under consideration, in that it shows no act which by the most latitudinous construction could be held to meet the requirements of the above quoted rule. The most that can be inferred from the act of *Howden* is, that at some future time he intended to make settlement on the land.

Concurring in your conclusions, your judgment is affirmed.

SCHOOL-LANDS—SETTLEMENT.

CHRISTIAN P. WILLINGBECK.

Although the settlement of the homestead claimant was subsequent to the survey in the field, in view of the peculiar equities, the case is referred to the Board of Equitable Adjudication.

Secretary Teller to Commissioner McFarland, February 6, 1885.

I have considered the appeal of Christian P. Willingbeck from your decision of March 22, 1884, rejecting his application of January 18, 1884, to make a homestead entry for the SW. $\frac{1}{4}$ of Sec. 16, T. 1 S., R. 1 E., Salt Lake City, Utah.

This township was surveyed in 1856 and the plat was filed in January 1869. It appears that the tract was first settled upon in 1848 and so continued until 1870, when Willingbeck purchased the improvements, paying therefor \$600. He has continuously resided upon the land from that date, and his improvements are now valued at \$3,000. No one, prior to Willingbeck's application of January 18, 1884, ever applied to enter or file for it. Section 15 of the act of September 9, 1850, (9 Stat., 457), reserved to the Territory of Utah (when surveyed) sections sixteen and thirty-six in each township for school purposes, and the act of February 26, 1859 (11 Stat., 385—now Sec. 2275, R. S.), provides "That where settlements with a view to pre-emption have been made before the survey of the lands in the field, which shall be found to have been made on sections sixteen or thirty-six, said sections shall be subject to the pre-emption claim of *such settler*; and if they, or either of them, shall have been or shall be reserved or pledged for the use of schools or colleges in the State or Territory in which the lands lie, other lands of like quantity are hereby appropriated in lieu of such as may be patented by pre-emptors."

Your decision held that both the homestead and the pre-emption laws require a *personal* settlement on public land, in order to recognition of a claim thereunder, and that in the present case the only person who could successfully defeat the reservation in favor of the Territory was he who settled prior to its survey in the field and who has maintained his settlement and residence since that date, and that consequently Willingbeck, who settled (in 1870) subsequently to the survey (in 1869), could not avail himself of the settlement prior to his own, in order to defeat the reservation. I concur in the technical correctness of this ruling, but in view of the large equities in favor of Willingbeck and the extreme hardship which would result from a rejection of his application, of his apparent good faith and of the fact that an allowance of his claim would cause no loss to the Territory of Utah, which should be allowed indemnity in lieu of this tract, whereby this question becomes one really between the government and Willingbeck only, I modify your decision and direct that the case be referred to the Board of Equitable Adjudication.

PRE-EMPTION—MARRIED WOMAN.

SARAH A. EDWARDS.

A single woman marrying after filing declaratory statement, and before final proof, loses the right to purchase under the pre-emption law.

Secretary Teller to Commissioner McFarland February 6, 1885.

I have considered the appeal of Mrs. Sarah A. Edwards, formerly Evans, from your decision of July 3, 1884, rejecting her final proof for the N. $\frac{1}{2}$ NW. $\frac{1}{4}$ of Sec. 21 T. 1 R. 21, Hailey, Idaho, because she married after having filed her declaratory statement for said tract and before making final proof thereon.

Concurring in your conclusions as to the facts and the law of the case; (see Rosanna Kennedy, 10 C. L. O., 152,) your judgment therein is affirmed.

HOMESTEAD—HEIRS.

RICHARD CLUMP.

There being no statutory beneficiaries to assert a claim under the entry made by deceased the said entry must be canceled.

Secretary Teller to Commissioner McFarland February 9, 1885.

I have considered the appeal of John Van Harlingen from decision of your office, rendered June 23, 1884, wherein you hold cash entry No. 8123, made by him as administrator of the estate of Richard Clump, deceased, for cancellation.

Clump made homestead entry No. 3625 May 3, 1882, for the N. $\frac{1}{2}$ of SE. $\frac{1}{4}$, SW. $\frac{1}{4}$ of SE. $\frac{1}{4}$, of Sec. 15, and the NW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, of Sec. 22, T. 2, R. 14, Stockton, California. Clump it appears died May 12, 1883.

December 22, 1883, Van Harlingen, as administrator, presented final proof for the tract under the provisions of Section 2301 of the Revised Statutes, which was accepted and cash entry allowed. Your office advised that in pursuance of law, it would be necessary for the decedent's widow or heirs to make affidavit as required under Sec. 2301. In response to such request, it is shown that there are no known heirs.

The homestead law makes provision that in the event of the death of the entryman, his widow, or in case of her decease, his heirs or devisee, shall be entitled to the benefits accruing to him. In this case there is no claim made by the beneficiaries mentioned in the law. Your office does not possess the power to issue final certificate in the absence of final proof by a duly authorized person.

Your decision is affirmed.

DESERT LAND—FINAL PROOF.

See 4 P.D. 51
and 5 P.D. 120, 121

The proof is satisfactory when it shows the claimant to be the owner of a sufficient quantity of water to irrigate the land sufficiently for agricultural purposes, and that he has conveyed such water on the lands, so that it can be used in irrigating the crop.

Secretary Teller to Commissioner McFarland, February 9, 1885.

I have yours of the 4th instant concerning the submission by the register at Cheyenne, Wyoming Territory, of certain Desert land proofs, for such construction as I may think proper to give.

You say on examination, that the proof is not in accordance with my decision of August 2, 1882. I suppose you refer to the case of Wallace v. Boyce (1 L. D. 54), decided by me on that date. I have examined the proofs sent forward by the register and have carefully examined the decision to which you refer. It appears by the printed form for taking proof that the rules of the office require that it should appear not only that the claimant has conducted water on the land, but that he has raised an agricultural crop. There is nothing in the act that requires such proof be furnished, and in the case referred to, I said I did not think a regulation of the office that such proof be furnished can be said to be in contravention of the act. I am disposed to modify the views thus expressed as it may be a hardship in many cases to require proof of this character. The fact to be ascertained is, has the claimant of desert lands reclaimed the lands within the meaning of the act. He has three years to make such reclamation which can only be done in one way, and that is with water. It is true that evidence that such reclamation is perfect and complete will be by proof of an agricultural crop raised on such land by the aid of the water so brought on the land, except in exceptional years as hereafter mentioned. But it is not the only proof, and might not be at all times the best proof. In all the arid districts where the Desert Act is in force, it has been found that some years an agricultural crop may be raised with but little water, and in some instances with none. Taking a favorable year, the proof of an agricultural crop might enable the claimant to enter; and the following year, and many years thereafter, he might not be able to raise a crop with the amount of water owned by him in connection with the land he claims to have reclaimed. The act gives him three years to reclaim the land. It must be supposed then he has the full three years in which to construct his ditches and carry the water to his land, and to prove up.

Revised his proof

If it is said that no other proof shall be received save that of a growing crop, he may be compelled to put his water on the land within a less time than provided for in the act, for he must have his water on at least four or five months before he can mature his agricultural crop. The act very clearly contemplates that the reclamation must be from a desert state to an agricultural one, and that is proved where it shows

that the claimant is the owner of a sufficient quantity of water to irrigate the land claimed, sufficiently for agricultural purposes and has conveyed such water on the lands in such manner that he can use it for the purpose of irrigating his crop. The mere carrying of water on the land is not sufficient; it must be in sufficient quantities and in such manner that it may be distributed in such quantities that a crop can be raised by the aid of the water so conveyed to the land. I do not think it is necessary to distribute the water over the land as is done in the course of irrigation. That would be to require a useless thing of the claimant, but the water must be conveyed to the highest portions of the land.

I do not give the case of *Wallace v. Boyce* the force you appear to have given it. Boyce, it appears, failed to conduct a sufficient quantity of water on the land and failed to make the proper ditches. The case does not appear to have been decided against Boyce because he did not raise a crop, but because the evidence showed he could not raise a crop for want of water, as it appears by the evidence that his ditch consisted of a main ditch and two laterals, from which the loose dirt had not been removed and that if his ditches were completed, only fifty acres could be irrigated out of two hundred and forty that he claimed.

Your regulations should therefore be so amended as to allow other evidence of the reclamation of land besides that of a growing crop. The raising of an agricultural crop may be evidence of reclamation, but it is not the only evidence that ought to be received and ought not at any time to dispense with actual proof as to the character of the ditch, quantity of water, etc., owned by the claimant.

I do not wish to be understood as holding that the water must cover all of the land; but it must be carried to a part whence it can be distributed over the land, except where high points and uneven surface make it practically impossible that it should be done.

The proof appears to be sufficient according to the view I have here expressed, but as to the sufficiency of the evidence, I do not care to decide, that must be left to your office, subject to the rules I have here laid down.

MINING CLAIM; MILL-SITE—NOTICE.

JOHN W. BAILEY ET AL. AND GRAND VIEW MINING & SMELTING CO.

Although under the law and office regulations notice should be posted on the mill-site as well as upon the lode portion of the claim, in this case in view of the improvements erected and that no adverse right has intervened and the fact that the failure to post was through oversight, the said requirement is waived.

Secretary Teller to Commissioner McFarland, February 10, 1885.

I have considered the appeal of John W. Bailey et al. and the Grand View Mining and Smelting Company, from your decision of August 29, 1884, holding for cancellation mineral entries Nos. 263 and 281 as to the

Aztec and Columbia mill-sites, respectively, situate in the Pioneer Mining district, Dolores County, Lake City, Colorado.

It appears that satisfactory proof touching the Aztec and Columbia Lode claims having been made, said entries thereof together with said mill-sites were allowed by the register and receiver July 22d and August 22, 1881, respectively, and patents accordingly issued thereon for the Aztec Lode April 30th and for the Columbia Lode May 15, 1883; but by your decision in question you held the entries for cancellation as to said mill-sites, because no notice of application for patent therefor had been posted thereon.

The sole question thus presented is as to the sufficiency of notice of application for these mill-sites.

You held aright that both the statute (section 2337 R. S.) and your office regulations (paragraph 73 of U. S. Mining Laws and regulations thereunder) require posting of plat and notice upon the mill-site as well as upon the lode portion of a mining claim, and that it was not competent for your office to waive such requirement. Inasmuch, however, as no adverse claim has intervened, and as failure to comply with such requirement seems to have resulted from oversight rather than from a willful disregard of the same, and as the company has erected large and expensive smelting and reduction works (aggregating several hundred thousand dollars in value) upon said mill-sites, which they are using and occupying for milling purposes in connection with their lode mines, I deem it expedient to direct that such requirement be waived in this particular case, and that you issue patent for the non-mineral residue of said mill-sites upon the present record.

Your decision is therefore reversed.

TOWN GRANT OF CHILILI.

W. H. HENRIE.

The boundaries of the survey conforming to the instructions, the motion for a rehearing is denied.

Secretary Teller to Commissioner McFarland, February 10, 1885.

I have considered the appeal of Franz Huning, administrator of the estate of W. H. Henrie, deceased, from your decision of April 21, 1884, in the matter of the survey of the Chilili town grant, in the counties of Bernalillo and Valencia, New Mexico, and also the application of said Huning and William Pool for a rehearing of the same matter.

This grant was confirmed by the act of Congress of December 22, 1858, (11 Stat., 374) and was first surveyed in 1860. The survey was set aside and a new one was ordered by this Department September 7, 1875, which was made in 1877, and approved by the Surveyor-General for New Mexico. No further proceedings appear to have been had in

the matter until 1880, when a protest against the survey was filed by sundry inhabitants of the town, in view of which your office directed an examination of matters pertinent thereto. This duty was performed by U. S. Deputy Surveyor Wilson, who made the report, and thereupon my predecessor, on July 28, 1881, considering all the material facts, directed a new survey according to certain boundaries, which he named, and the same was made in August, 1882. Upon returning it to your office, Surveyor-General Atkinson advised you that "the survey in the main is correct and agrees with the report of Deputy Wilson, I think, in every particular;" and on July 18, 1884, he further advised you that "a portion of the residents of Chilili declined to take an appeal (from your decision of April 21, 1884), believing the (present) survey to be correct, but the administrator of the estate of W. H. Henrie, Mr. Franz Huning, appeals therefrom, and I forward his letter of appeal, together with report and diagram of a part . . . of the grant. It occurs to me that the diagram tends to show the correctness of the present survey."

The successor of Mr. Atkinson, as surveyor-general of New Mexico, entered upon his duties July 29, 1884, and on September 4th following, Mr. Atkinson, as attorney, filed the present appeal and motion for rehearing. Were it important to consider the relative value of Mr. Atkinson's official and professional opinion upon this survey, I should incline to that which was based upon his oath and responsibility as a government officer, more especially as his two clients, now objecting to the survey, are the only inhabitants of Chilili who dissent from its correctness. I have, however, given their views the weight to which they were entitled.

The required boundaries of this survey were fully considered by my predecessor in his decision of July 28, 1881, and the only material question now presented is, whether the survey conforms to his instructions. I have examined the survey and pertinent matters, and concurring with you in the opinion that it does so conform, I affirm your decision and deny the motion for rehearing.

MINERAL ENTRY—KNOWN LODE.

SHONBAR LODE.

The twenty-five feet referred to in Section 2333 U. S. Revised Statutes is to be measured from the center of the vein or lode.

Secretary Teller to Commissioner McFarland, February 10, 1885.

I return herewith the record of proceedings had by your office in the matter of the Shonbar Lode subsequently to the rendition of my decision of March 26, 1883,* transmitting said record.

* The entry for this lode was held for cancellation by the Commissioner because the land covered by the claim was included within a former patent placer claim, but it being shown that the existence of the lode was well known prior to the placer appli-

The Shonbar claimants having appealed from your serial instructions (or so-called decisions) to the Surveyor-General for Montana, you submit the same for the consideration of this Department.

Barring the instruction contained in your letter of May 17, 1883, I approve the action of your office rejecting the amended survey and reducing the width of said claim to twenty-five feet on either side of the center of the vein; since the statute (Section 2333 R. S.) expressly restricts such claims "to twenty-five feet of surface on each side thereof," as held by my decision.

OFFICIAL TELEGRAMS.

CIRCULAR.

WASHINGTON, D. C., *February 10, 1885.*

Special Agents, General Land Office:

Referring to Department Circular of September 24th, 1884 (3 L. D., 123), copy of which has been heretofore sent to you, it is directed that you furnish in all monthly accounts a copy of each telegram charged for therein on the blank used, whether day or night message; and in same have the agent of the telegraph company note the number of words, distance, rate and amount charged.

Failure to comply with the above instructions will cause all charges for telegrams to be stricken from accounts.

L. HARRISON,
Asst. Commissioner.

Approved, February 11, 1885.

H. M. TELLER,
Secretary.

cation, it was held by the Secretary of the Interior to be excepted, under the law, from the placer patent, and further said: "But the present claim exceeds twenty-five feet in width on each side of the vein. The application has been allowed, publication regularly had, and the entry made. In fact said claimants had completed their proofs, and the same were of record in your office for several months prior to the issuance of the placer patents, and no adverse claim was filed. It would not therefore be practicable, at this stage of the cause to remit these claimants to the performance *de novo*, of such preliminary requirements. In the absence of an adverse claim they are entitled to take their lode and twenty-five feet on either side. The only question remaining is, whether the excess over that width of surface ground can be allowed. I think this cannot be done. The lode claimants, in order to protect their rights to the full extent of their claim, should have filed adversely to the placer application within the statutory period, but having failed to do so, they are expressly restricted by the statute to their lode and twenty-five feet of surface on each side thereof." (1 B. L. P., 52).

HOMESTEAD—CONTEST.

PARKER *v.* GAMBLE.

The application for the privilege of contesting this entry is denied, as it rests upon information fully considered in a former contest against the same entry.

Secretary Teller to Commissioner McFarland, February 10, 1885.

I have examined the appeal of William Parker from your decision of May 23, 1884, refusing his application to contest homestead entry No. 11,492, covering the SE. $\frac{1}{4}$ of Sec. 29, T. 7 S., R. 3 W., Concordia, Kansas, made July 7, 1874, by Reason Gamble.

It appears from the record that one William C. Dodd initiated a contest against said entry upon the ground of abandonment, that at the hearing had March 20, 1878, Samuel Gamble, father of the entryman, appeared and claimed the land in controversy, as the only heir of the entryman. A rehearing was had December 10, 1879, and upon the testimony transmitted, your office dismissed said contest. On appeal, this Department affirmed the decision of your office, and found that the allegation of abandonment was not sustained, because the entryman was legally entitled to be absent during the period of alleged abandonment.

On March 7, 1884, Parker filed in the district land office his affidavit of contest against said entry, alleging abandonment by Reason Gamble in the month of February, 1875, and from that time up to date of said affidavit. On the same day Samuel Gamble, claiming to be the only heir of his alleged deceased son, Reason Gamble, having given due notice, offered final proof in support of said entry. Said proof and affidavit of contest were duly transmitted to your office. You refused to order a hearing upon said allegation of abandonment, accepted the final proof, and directed the register and receiver to issue the final entry papers on receipt of the final commissions.

Parker claims no settlement right in the premises. His position is that of a mere informer. The information offered by him has been considered in the case of *Dodd v. Gamble* (*supra*) and "found to have no foundation in fact," and there are no allegations of fraud, perjury or collusion.

I concur with you that the application to contest said entry ought not to be allowed.

Your decision is accordingly affirmed.

OHIO SWAMP GRANT.

Election of the State to rely on the field notes of survey recognized.

Secretary Teller to Commissioner McFarland, February 10, 1885.

I have considered your letter of December 22 last, inclosing a letter addressed to you on the 14th November last by the Governor of Ohio

who states that that State elects to rely upon the field notes of survey in the General Land Office, in proof of her claim to swamp lands. You see no legal objection to acceding to the election of the State in this respect, nor do I. You will govern yourself accordingly.*

PRE-EMPTION—SECOND FILING.

WILLIAM T. AVERY. .

One filing having been made through a duly authorized attorney, the right of the pre-emptor to file a declaratory statement is thereby exhausted, and a second filing should not be allowed.

Secretary Teller to Commissioner McFarland, February 11, 1885.

I have considered the appeal of William T. Avery from your decision of June 3, 1884, refusing to reinstate his pre-emption cash entry of January 15, 1883, for the SE. $\frac{1}{4}$ of Sec. 1, T. 123, R. 65, Aberdeen, Dakota, made under a filing of July 11, 1882, which was canceled for fraud by your decision of August 18, 1883.

It appears that Avery made homestead entry October 26, 1881, for the SW. $\frac{1}{4}$ of Sec. 6, T. 123, R. 64, in said district, and commuted the same to cash June 9, 1882. On June 20, 1882, he filed (as the record shows) a pre-emption declaratory statement for the NW. $\frac{1}{4}$ of Sec. 32, T. 124, R. 64, alleging settlement June 15, 1882, and on July 11, 1882, he filed pre-emption declaratory statement for the SE. $\frac{1}{4}$ of Sec. 1, Tp. 123, R. 65, alleging settlement June 1, 1882, for which he made cash entry January 15, 1883, and which was canceled as above stated. You rejected Avery's application for reinstatement of this entry, because, 1st, he removed from his homestead land to settle on the involved land under the pre-emption laws, in violation of law, and, 2d, because his filing of June 20th exhausted his pre-emption right and he could not therefore maintain his filing of July 11, 1882.

As to the second question, it appears that Avery, having purchased the improvements and right of a former occupant of the tract embraced in his filing of June 20, 1882, and paid twenty-five dollars therefor, employed an attorney to make for him the filing of that date, but soon thereafter he sold said improvements and right to another person for the sum of fifty dollars, and telegraphed the attorney not to make the filing. It had, however, been made before the date of the telegram. He swears that, as to this telegram, he had no reply from the attorney, nor did he receive the ordinary receipt from the local officers advising him of the filing, and that he supposed the filing was not made when he made the subsequent filing of July 11th. All this is immaterial. His filing of June 20th was a voluntary act, with full knowledge that his

* This followed the precedent established July 9, 1884, in the case of the Mississippi Swamp Grant.

pre-emption right would be exhausted by such action, and his subsequent endeavor to prevent the filing, in order to speculate in filings, and make twenty-five dollars, can not operate to authorize his filing of July 11th. His pre-emption right was exhausted by the filing of June 20th. Under this view it is not necessary to consider the question of removal from his other land to settle on the public land.

Your decision is affirmed.

PRE-EMPTION—GOOD FAITH.

HENRY W. DERHAM.

Where a person other than the pre-emptor paid for improvements placed on the claim, but it was shown that such payment was for money due the pre-emptor, and he appeared to have complied with the law in the matter of residence and cultivation his good faith was held to be unimpeached.

Secretary Teller to Commissioner McFarland February 11, 1885.

I have considered the *ex parte* case of Henry W. Derham on appeal from your decision of November 24, 1884, rejecting the final proof and holding his declaratory statement for cancellation, on the ground that the filing was not made in good faith by Derham, for his own exclusive use and benefit.

Derham filed declaratory statement No. 5289 June 3, 1882, for the SW. $\frac{1}{4}$ of SW. $\frac{1}{4}$, of Sec. 18; the NW. $\frac{1}{4}$ of NW. $\frac{1}{4}$, of Sec. 19, T. 99, R. 63, and the SE. $\frac{1}{4}$ of SE. $\frac{1}{4}$, of Sec. 13, the NE. $\frac{1}{4}$ of NE. $\frac{1}{4}$, of Sec. 24, T. 99, R. 64, Yankton, Dakota, alleging settlement May 24, 1882.

December 30, 1882, he made final proof before the probate judge of Douglass County, Dakota, which was rejected by the local office for insufficiency as to proof of residence and cultivation.

It was returned amended, and transmitted to your office with the report of the local officers, that from information obtained by them, they were led to believe that Derham had not acted in good faith as to residence and cultivation. Whereupon your office ordered an investigation of the circumstances.

The report of the special agent, who acted in pursuance of the order, shows that Derham, at about the time of filing, established his residence on the tract, which was continuously maintained up to the date of final proof; that he broke five acres of the tract and erected and resided in a dwelling thereon and dug and "walled up" a good well on the premises; which statement corroborates the final proof as amended. The agent reported, however, that circumstances brought to his knowledge tended to indicate that Derham had pre-empted the tract for the benefit of other persons.

In view of this information, your office directed that Derham be notified to show cause why his declaratory statement filing should not be canceled.

Derham responded and a hearing was had; the testimony adduced on that occasion shows that some time subsequent to making settlement of the tract, Derham accepted employment with a firm in an adjacent town, which service continued up to the year 1883, for which he was paid a monthly salary exclusive of his board. On a number of occasions Derham contracted debts, in his cultivation and improvement of the tract, the payment for which was advanced by members of the firm. In response to the charge that such action indicates bad faith, it is shown that the money used in such payment was due Derham as wages earned by him. This testimony has not been controverted and must therefore be accepted as the true state of facts. Derham on submitting final proof tendered the money for final payment, which was received by the local officers and further action suspended in view of insufficient proof.

It appears that his individual testimony on final proof failed to show that he ever erected a dwelling on the tract. In his amendment to the final proof, it is satisfactorily shown that the omission was merely clerical and unintentional; that he erected a dwelling on the tract June 18, 1882, and that his residence thereon was continuous from such time, which showing is corroborated by the fact that the testimony of both of his final proof witnesses, taken at the time of making final proof, as shown by the original record, clearly sets forth that his improvements on the tract consisted of those hereinbefore mentioned, and that his residence was commenced thereon and has been continuous since June 18, 1882.

His action in making an agreement for the conveyance of the tract prior to the issuance of final receipt was premature, and when taken into connection with the carelessness in his attempt to consummate the entry was sufficient ground, in connection with the other circumstances, to warrant an investigation as to his good faith.

However as no fraud has been proven to have been perpetrated by him, and as his amended proof is shown to be sufficient in law, it will be accepted. He will be allowed to make entry.

Your decision is reversed.

PRE-EMPTION—ALIENATION AFTER ENTRY.

MICHAEL FINK.

Where the final certificate was procured through fraud, patent will not issue, though the entryman, after the issuance of the certificate, may have assigned his interest in the land to an innocent purchaser.

Secretary Teller to Commissioner McFarland, February 11, 1885.

On January 12, 1881, Patrick Hannigan made pre-emption cash entry No. 3028 for lands in township 59, R. 16, in the Duluth, Minnesota, land district, and on January 21, 1882, Samuel Harris made a like entry No.

3146, for lands in townships 58 and 59, R. 16, in the same district. You canceled these entries for fraud August 31, 1883.

Michael Fink subsequently filed his petition representing that after such entries, the entrymen conveyed the lands to him by warranty deed, for a valuable consideration, and asked that he be protected as an innocent purchaser.

These cases being substantially similar to the case of C. P. Cogswell, decided by me July 21st, 1884, (2, L. D. 23), you were directed October 29th last to certify them to this Department for examination as to whether the cancellation of said entries was proper.

I have examined the final proofs in each of these cases and also the proofs submitted at hearings held by your order to ascertain the facts respecting these entrymen's compliance with the law, of which they were duly notified. They both failed to be present or to be represented at said hearings. The testimony shows that neither of them in respect either to residence, cultivation or improvement of the tracts complied with the law, but that their whole proceeding was fraudulent. Concurring in your decision of cancellation, I return the papers to you without action.

ADJACENT FARM ENTRY—RESIDENCE.

BOX *v.* COCHRAN.

Though the law may be satisfied without residence upon the adjacent claim, the entry in this case is canceled as it appears there was no residence upon either the original farm or the adjoining tract.

Secretary Teller to Commissioner McFarland, February 12, 1885.

I have considered the case of Pleasant A. Box *v.* John C. Cochran, involving the latter's adjoining farm homestead entry for the NE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of NW. $\frac{1}{4}$, of Sec. 22, T. 18, R. 19, Harrison, Arkansas, on appeal by Cochran from your decision of August 8, 1884, holding his entry for cancellation.

Cochran, claiming to be the owner of and resident upon the NW. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of said section as an original farm, made the entry in question November 2, 1877, and July 25, 1883, Box commenced this contest alleging only his abandonment of the adjoining farm tracts. The contest was erroneously allowed upon such allegation, because residence upon and cultivation of an original farm satisfies the law, provided the entryman resides upon and cultivates that—the whole body of land being considered as one farm. Not being therefore required to reside upon or cultivate the adjoining tracts, Cochran's failure in this respect would not subject him to the charge of abandonment. As, however, Cochran went to trial without objection to this technical defect in the proceeding, whereby he waived it, I consider the case upon its merits,

and from an examination of the testimony concur in your finding that, even if, at the date of his entry, he owned the tract called his original farm—which is doubtful—he never resided upon that tract, nor improved it sufficiently to indicate his good faith, nor did he ever reside upon or improve the adjoining tracts. Not having complied with the requirements of the homestead law, his entry should be forfeited.

Your decision is affirmed.

ADDITIONAL HOMESTEAD—MINOR.

HENRY CLAY.

The homestead entry of the soldier was canceled for abandonment after his death. On the application of the minor under sections 2306-7 U. S. Revised Statutes, good faith being shown on the part of the soldier, and the death of both parents, it was held that the right of additional entry should be accorded to the applicant.

Secretary Teller to Commissioner McFarland, February 11, 1885.

I have examined the appeal of Christiana Shea, guardian of Henry Clay, minor orphan child of M. H. Clay, deceased, from the decision of your office of August 27, 1884, rejecting her application as guardian of said child, dated January 27, 1882, for the right of additional homestead entry under Section 2306 of the Revised Statutes of the United States.

It appears from the record that said M. H. Clay made homestead entry No. 2,228, February 27, 1868, covering lot 2 of Sec. 34, T. 16 S., R. 33 E., Tallahassee, Florida, containing sixty-seven acres.

On January 5, 1877, said entry was canceled for failure to make final proof within the time required by law, and another party made pre-emption entry for the same land in 1881.

It also appears that said Clay was duly qualified to make said entry, that in the spring of 1868 he established his residence thereon, and continuously lived upon and cultivated said tract for two years, that his father occupied and cultivated said land for him for a period of one year, and that in 1870 he was employed in the surveyor general's office at Tallahassee, Florida, as draughtsman, and continued in such employ until his death, which occurred July 23, 1873.

It is also shown that said M. H. Clay was mustered into the military service of the United States in Company "F," 7th regiment of Infantry, on October 29, 1864, and was honorably discharged therefrom on October 9, 1867. All of the witnesses testify to the good faith of the entryman and there can be no question as to his bona fide residence upon the land for eighteen months, or two years immediately succeeding said entry.

Under the peculiar circumstances of this case, both parents being dead, I am of the opinion that the application should be allowed, and so direct. Your decision is therefore reversed.

LOUISIANA SWAMP LANDS.

This State is not excluded from the benefits conferred by Section 2482 of the Revised Statutes granting indemnity for swamp lands disposed of by the United States after the passage of the act of Sept. 28, 1850, and prior to that of March 3, 1857.

Secretary Teller to Commissioner McFarland, February 12, 1885.

Referring to your letter of 8th ultimo, I return the argument of Hon. Van H. Manning in behalf of the State of Louisiana, and have to advise you that I see no reason for excluding said State from the benefits of the provisions of the acts of March 2, 1855, and March 3, 1857, now section 2482 Revised Statutes, granting indemnity for swamp lands disposed of by the United States after the passage of the act of September 28, 1850, and prior to that of March 3, 1857.

COMMISSIONER'S DECISION.

I have the honor to submit herewith, for your consideration, and such action as you may deem expedient, an argument by the Hon. Van H. Manning, attorney for the State of Louisiana, in which he holds that said State is entitled to the benefits conferred by the Act of March 2, 1855.

I also enclose a copy of Commissioner Hendricks' letter of Nov. 16, 1855, addressed to Secretary McClelland, in which this office held that the State of Louisiana was entitled to the benefits of the act of March 2, 1855, and call your attention in connection therewith to the Secretary's reply of January 14, 1856, holding that the swamp land grant of March 2, 1849, to the State of Louisiana, "is not" "merged in that of 1850;" See 1 Lester 554.

It will be observed that Secretary McClelland was not considering the 2d section of the Act of 1855, which relates to indemnity, but was acting upon the 1st section, which offers relief to purchasers and locators of swamp land, and the relief asked for in this case could not be granted, for the reason that the land covered by the entries had been approved to the State, which approval under the Act of 1849, had the force and effect of a patent.

It is true that the Act of 1849 is not specially mentioned in the act of Sept. 28, 1850, or of March 2, 1855, but it is to be presumed from the language of these acts, in connection with that used in the act of March 3, 1857, which includes Louisiana, that it was the intention of Congress to confer the benefits contained in the Acts of 1850 and 1855, to all the States over which the swamp land grant had been extended, if not, why was Louisiana included in the confirmatory act of March 3, 1857, which act places her on equal footing with the other States.

I am of the opinion that the Revised Statutes treats the subject as if the Act of 1849 had been merged in the Act of 1850, see sections 2482 and 2484.

Section 2484, which is based on the act of March 3, 1857, which act confirms the selections made in Louisiana, under the Act of 1849, refers only to the Act of 1850, no mention is made in said section of the Act of

1849 notwithstanding the fact that the Act of 1857 clearly extends its benefits to that State.

In view of the facts herein recited, I do not think that it was the intention of Congress to single the State of Louisiana out, as the only State to which the Act of 1855 did not apply, but that it was the intention of the law making power, to place her on precisely the same footing as the other States.

PRACTICE—WAIVER OF APPEAL; NEW CONTEST.

PAGE *v.* FLETCHER.

The contestant having waived the right of appeal from an adverse decision will not be allowed to begin a new contest based on the same grounds as the former.

Secretary Teller to Commissioner McFarland, February 14, 1885.

I have considered the case of Hannibal Page *v.* Elijah A. Fletcher, involving the latter's homestead entry made June 30, 1880, for Lots 6 and 7 of Sec. 31, T. 2, R. 18, Bloomington, Nebraska, on appeal by Page from your decision of June 2, 1884, dismissing the contest.

It appears that September 25, 1882, Page initiated a contest against Fletcher, alleging his abandonment of the tracts, and that after due hearing and proceedings you, by decision of February 15, 1884, allowed the entry to remain intact. February 27th following Page filed in the local office a waiver of his right of appeal from this decision "for the purpose of initiating another contest against said homestead entry," and upon the same day he filed an affidavit of contest against Fletcher upon the same charges as those embraced in his former contest. Counsel for Fletcher moved the dismissal of this second contest, because the charges were identically the same as those in the former, and that your decision of February 15, 1884, thereon had become final. You granted the motion and Page appealed therefrom.

I concur in your views. Page having waived his right of appeal from your decision assented thereto, and had no further right to litigate the same matters by a new contest. They had become *res judicata*.

It further appears that since the date of your decision of June 2, 1884, to wit, July 25th following, Fletcher filed in the local office his relinquishment of the tracts embraced in his entry. It therefore results that Page's contest is dismissed and that Fletcher's entry should be canceled, and the tracts become subject to the first legal applicant.

Your decision is modified accordingly.

TIMBER CULTURE—GOOD FAITH—CULTIVATION.

NALL *v.* PULVER.

While the law is liberally construed in behalf of the entryman, where good faith is apparent, his entry will be canceled where gross carelessness and indifference to the requirements of the law, in the matter of cultivation, are manifest.

Secretary Teller to Commissioner McFarland, February 14, 1885.

I have considered the case of David T. Nall *v.* James Pulver on appeal by Nall from your decision of June 26, 1884, dismissing the contest.

Pulver made timber culture entry No. 1459 October 30, 1877, for the NE. $\frac{1}{4}$ of Sec. 6, T. 6, R. 13, Bloomington, Nebraska.

November 18, 1882, Nall filed an affidavit of contest, in which he alleged a general failure by Pulver to comply with the requirements of the timber culture laws. In pursuance of such charge, a hearing was held during February, 1883, (both parties being in attendance,) at which it was shown that, at the date of contest, there were growing on the tract but a few stunted seedlings; that the portion of the tract selected for timber culture was overrun by a thick growth of rank weeds, which choked and prevented the growth of the seedlings or cuttings planted thereon.

In response to this showing, Pulver presented testimony to the effect, that he planted a quantity of seedlings during the spring of 1880, but that they all died during 1881. In 1881, he planted another lot of cuttings, which were destroyed by insects. In April, 1882, he planted still a third lot, which also failed to survive.

The evidence demonstrates as a fact that, during each year of tree-planting, the ground immediately surrounding the seedlings was allowed to become overrun with a dense growth of choking weeds, which were permitted to remain undisturbed. It is conclusively shown that the year 1882 was favorable to the growth of all kinds of vegetation, and that seedlings and cuttings, of the same character as those herein mentioned, on adjacent claims thrived during that year; but in such instances the weeds were kept under subjection. There is no satisfactory proof that, as a fact, insects interfered with timber culture on that claim, or in that vicinity, during 1881. No evidence was presented by him to controvert that of Nall, showing the small number of trees growing on the tract at the date of contest. In fact the evidence presented by Pulver shows, that neither he nor his witnesses, when examined on the point, could say approximately to any extent whatever how many thrifty trees there were on the tract at the date of contest. To my mind it is conclusively demonstrated that such seedlings or cuttings as he may have planted were put in the ground carelessly and allowed

to remain unattended to shift for themselves; particularly is this noticeable in the planting done during 1882 (the fifth year), when from his experience with the heavy growth of weeds on the tract during 1880 and 1881, it would seem that ordinary prudence would have inclined him to the prevention of a recurrence of his former failures. The law through which he made this entry and under the provisions of which he swore he would in good faith cultivate the land to timber does not exact impossibilities. It specifically sets forth that he must properly plant, cultivate, and protect the required amount of young timber.

In view of the number of difficulties which the timber culture entry-man must necessarily encounter in his venture, this Department has liberally construed the law in his behalf, in such cases where he has shown a sufficient degree of good faith; but where he has acted in a manner which conclusively shows gross carelessness and indifference to the law, the result of which (as in this case) is an infinitesimal growth of timber, in quantity as well as quality, within a reasonable time, he must suffer the consequences. Tree culture, to secure a successful growth, necessarily requires different treatment in different sections of the country, according to the varying circumstances, such as for instance, soil, climate, altitude and other conditions. It is expected, that with the clearly expressed provisions of the law a man with ordinary intelligence will, if his intent is earnest, exercise a reasonable course of action, according to the exigencies of his case, so as to secure a proper compliance with the law.

The evidence conclusively establishes the fact that Pulver failed to comply with the law up to the date when contest was initiated, and his entry will therefore be canceled.

Your decision is reversed.

PRE-EMPTION—FINAL PROOF—CONTEST.

MCCRACKEN *v.* PORTER.

The pre-emptor gave notice of his intention to make final proof, and the local office thereupon cited a conflicting homestead claimant to appear and "contest" the right of the pre-emptor. The action of the local office did not change the nature of the proceeding, and the pre-emptor was not bound thereby to proceed with his final proof.

Secretary Teller to Commissioner McFarland, February 12, 1885.

I have considered the appeal of William McCracken from your decision of July 8, 1884, refusing his application to have canceled the pre-emption filing of Thomas H. Porter as to the W. $\frac{1}{2}$ of Lot 3 of Sec. 5, T. 10, R. 13, M. D. M., San Francisco, California.

It appears that on May 29, 1882, McCracken made homestead entry

No. 4893 for Lots 3 and 4 of Sec. 5, T. 10 N., R. 13 W., M. D. M.; that on June 26, 1882, Porter filed declaratory statement No. 16,519 for Lot 1 and W. $\frac{1}{2}$ of Lot 3 Sec. 5, T. 10 and the SE. $\frac{1}{4}$ of SE. $\frac{1}{4}$, Sec. 31, and the S. $\frac{1}{2}$ of SW. $\frac{1}{4}$, of Sec. 32, T. 11 N., R. 13 W., M. D. M., alleging settlement January, 1881. On October 28, 1882, Porter gave notice of his intention to make final proof, December 12, 1882, and at the same time the register and receiver issued a special notice to McCracken to appear on the day named "to contest" the claim of Porter as to the W. $\frac{1}{2}$ of Lot 3 and show cause why the same should not be recognized and he be allowed to enter the tract. In pursuance of this notice, which was duly served, McCracken appeared at the time and place named, as did also Porter. But the latter failed to proceed with his proof, and left the office without assigning any reason for his action. Whereupon McCracken moved that the declaratory statement of Porter be canceled, which was refused; and on appeal you affirmed this ruling of the register and receiver.

The action of the local officers in issuing a special notice to McCracken, citing him to appear and "contest" the application of Porter, did not change the character of the proceeding, or in any sense make it a contest, so as to justify the contention of the appellant, McCracken, that Porter, being in default, should have his filing canceled. The proceeding was the ordinary one where a pre-emptor gives notice of his intention to make final proof, against which parties may come in and protest. The giving of such notice does not necessarily make it imperative upon the pre-emptor to proceed, at the time and place designated, with his proof; for it has been repeatedly held by this Department that he is entitled to the whole period, prescribed by the statute, within which to make his final proof and entry. The fact that he has given notice of his intention to make such proof, on a day named, ought not to preclude him from abandoning his purpose for the time being, or postponing it to some more convenient period, if he thinks proper; nor should it authorize the cancellation of his filing, because he elects so to act. To hold otherwise would be to deprive him of the benefit of the whole period, given him by the statute, within which to make proof and entry.

Had McCracken, the homestead entryman, claimed settlement prior to Porter, the pre-emptor, a different state of facts would have been presented, and other considerations influenced my conclusions. But on the facts as presented by the record your judgment is affirmed.

STATE SELECTION—MEXICAN GRANT.

(Sections 1, 3, and 7, act of July 23, 1866.)

OWEN *v.* STEVENS ET AL.

Invalid State indemnity school land selections upon unsurveyed public land in California, made and disposed of to purchasers in good faith, prior to July 23, 1866, where no valid adverse claim thereto existed at the date of said act, are confirmed to said State, upon her indicating an equivalent acreage for the invalid basis of selection.

Where public lands, so selected and disposed of, are surveyed by the United States subsequently to the date of selection and disposition, and the survey under State authority fails to conform in description to the approved plat, the State may change the description of said selection to include the "identical land" as near as may be, so as to describe the same according to the U. S. subdivisive survey.

Whether, where parties in good faith purchase a specific portion, described by metes and bounds, of a rejected Mexican grant in California, or the whole thereof, and hold the same undivided as co-tenants, there being no valid adverse claim, it is competent to make entry of such tract under the seventh section of said act—Query.

But in this case Eben Owen's grantor having purchased such specific portion from co-tenants in actual possession, with covenants of warranty, and having enjoyed sole possession and conveyed the same to Owen, it is competent to recognize such conveyance for the purposes of this proceeding as a sufficient ouster, and to permit the purchase, leaving all questions respecting the interests so acquired to be adjudicated by the judicial tribunals of California under her own laws.

Secretary Teller to Commissioner McFarland, February 13, 1885.

I have considered the appeal from your decision of April 18, 1883, and previous decisions, touching the respective claims of Eben Owen, Benjamin W. Wilder (administrator of the estate of Asaph Wilder, deceased), James Wilson, R. M. Daniels, Joseph Stevens, William Daniels, Isaac Russell, Alvin Stevens and W. S. Runyon, to all that portion of section 2—T. 5 N.—R. 5 E., Stockton District, California, west of the Cosumnes River, more particularly described as Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 and W. $\frac{1}{2}$ of SE. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of said section.

The claim of Wilder was ostensibly filed under the 7th section of the act of July 23, 1866, (14 Stat., 218); but as it was shown and conceded that all the right and interest of the estate of Wilder was conveyed by Asaph Wilder in his life-time to Eben Owen, the same was not prosecuted, and may be treated as abandoned.

Owen claimed under said 7th section Lots 8, 11 and 12 and the W. $\frac{1}{2}$ of SE. $\frac{1}{4}$ and E. $\frac{1}{2}$ of SW. $\frac{1}{4}$, but waives his claim to Lots 11 and 12, the same having been listed to the State, and has formally abandoned Lot 8, claimed by Joseph Stevens. Said claim is therefore reduced to the W. $\frac{1}{2}$ of SE. $\frac{1}{4}$ and E. $\frac{1}{2}$ of SW. $\frac{1}{4}$, the latter tract being claimed by W. S. Runyon and the former by Alvin Stevens.

The township plat was filed in the Sacramento office May 24, 1870. By instructions from your office of August 22, 1870, the records were transferred to the Stockton office and filed therein December 10, 1870.

Owen filed his claim June 16, 1870. Runyon filed June 4, 1870, claiming the entire SW. $\frac{1}{4}$, alleging settlement January 8, 1865. Stevens filed June 27, alleging settlement January 6, 1870.

By some oversight the filing of Owen was omitted in the transfer of papers, and did not reach the Stockton office till January 19, 1871. In the meantime Runyon had on the 6th of January, 1871, made final proof and entry of the entire SW. $\frac{1}{4}$, Cash No. 4322. On the 11th of April by continuance from the 9th of March, 1871, after due citation, hearing was had, and evidence presented.

Owen set up the proceedings relating to the alleged Mexican grant to Ernesto Rufus, known as the "Cazadores" or "Murphy Grant," confirmed by the Board, but rejected by the U. S. Supreme Court at the December term 1859. (23 How., 476.)

These papers show (1) conveyance from Rufus to Martin Murphy, May 4, 1845; (2) from Martin Murphy to Burt Holcomb, Adolphus W. Ingoldsby, John L. Scroggins and Andrew Chambers, May 28, 1850, one undivided half of said Rancho with described boundaries; (3) from Martin Murphy and wife to James Murphy, September 14, 1850, one undivided half by same boundaries; (4) application by James Murphy for confirmation, concluding with rejection by the court.

The other mesne conveyances down to Eben Owen are as follows: (1.) Holcomb, Ingoldsby, Scroggins and Chambers, July 30, 1851, to William F. Points, B. F. Peabody, J. E. Fleischman and Eli Darban, a certain described tract by metes and bounds, designated as being a part of said "Murphy's Rancho," and recited as then staked out and occupied by the party of the second part. This deed guarantees freedom from all incumbrance made or suffered by the grantors, with special covenant of warranty against themselves their heirs, &c. (2.) Benjamin F. Peabody and William F. Points, November 7, 1857, to George O. Higgins, Cornelius A. Elson and John H. Atkins, the same land by description, and recited as being "staked out and now occupied by said Peabody and Points; also all tenements, hereditaments, appurtenances, reversions, remainders, rents, issues and profits; also all the estate, right, title, interest, property, possession, claim and demand whatever of said parties," &c. This deed was executed with full covenants of warranty against all incumbrances whatever upon the described premises, or any part or parcel thereof. (3.) James Murphy and wife, June 25, 1857, to Asaph Wilder, one undivided half of the entire Cazadores Rancho as presented to and confirmed with described boundaries by the Board of Land Commissioners, containing four square leagues. (4.) G. O. Higgins, C. A. Elson and J. Henry Atkins, February 1, 1859, to Asaph Wilder and William R. Wilder, together with the whole interest in certain other lands, convey the undivided half of a part of the "Murphy Grant," describing it as in the former conveyances hereinbefore cited. (5.) Asaph Wilder to Eben Owen, October 25, 1866, conveys in fee simple by description "the south east quarter and fraction of the

south west quarter of section No. 2 in Township No. 5 North, Range No. 5 East, Mount Diablo base and Meridian, containing two hundred and sixty acres more or less."

Subsequently a deed from Wilder, dated October 24, 1866, covering Lot 8 with other lands was made part of the case, having been inadvertently omitted in the first instance, but as that lot has been abandoned by Owen it is not necessary to consider it in this connection. Since the case was heard, viz, on December 20, 1879, William R. Wilder conveyed to Eben Owen the interest vested in him by the deed of Higgins, Elson and Atkins of February 1, 1859, already cited.

By your decision of April 11, 1879, you held that Owen had acquired but five-eighths interest from Wilder, and was therefore a co-tenant with the parties who had been joined in some of the deeds and had not so far as shown parted with their title.

I am satisfied that these conveyances are sufficient to support a claim under the act of 1866, even if the doctrine heretofore held by the Department, respecting the disability of a co-tenant to make purchase in his individual name in any case or for any purpose, be adhered to, on which point I express no opinion. The deeds by specific boundary, descriptive of parcels of land, with covenants of warranty, and accompanied with absolute and sole possession, are competent in my judgment to enable the claimant to come before the Department and complete the title under the act, leaving questions respecting the interest acquired, which may possibly arise in the future under the possessory laws of the State, to be settled by the judicial tribunals.

The only question left for me is to say whether or not the Wilders, and after them Owen, had such possession at the date of the act and subsequently as to exclude the claims of Stevens and Runyon.

As to Stevens, this is clear. He did not attempt settlement until 1870, at which time Owen was in possession by his tenants, residing in the same house with himself, and had growing crops thereon. Something is alleged tending to show that Owen consented to the settlement of Stevens as a pre-emptor and placed him on the land to hold the same, having concluded that he could not hold his own claim. The allegation is denied in so far as it claims that Owen intended to abandon; and it is explained that, owing to the ruling of this Department at that time denying the assignability of a right under the 7th section of the act of July 23, 1866, he feared that his claim as filed might possibly be rejected, in which case he would be compelled to lose, and Stevens being the father of his tenant he consented to his occupancy of the land. I think this is the extent of the understanding between them, and that it was not inconsistent with the prosecution of the claim of Owen, and could not defeat the preferred right of purchase.

Runyon's case is different. A line of fence marked the possession of Wilder, running from the southward, diagonally across the S. $\frac{1}{2}$ of section 2, to a point in the NW. $\frac{1}{4}$; thence west; thence north, etc., form-

ing a large inclosure of lands within the Cazadores Rancho, constituting the claim covered by the deeds heretofore cited, and used mainly for grazing and stock-herding purposes. This fence subdivided the SW. $\frac{1}{4}$ of 2, in such manner as to nearly mark the quarter line between the E. $\frac{1}{2}$ and W. $\frac{1}{2}$ of said quarter section.

Runyon settled in 1865, after rejection of the grant and prior to the passage of the remedial act; so that if he reduced to possession and exercised ownership over the whole quarter section he must prevail. If he had not such possession of the part within Wilder's boundary, the possession of the latter must be recognized as within the confirmation of the statute.

The testimony in the individual case is not as full as could be desired. But in the whole record touching Owen's claims, which has been considered by you as properly connected, and now before me, enough appears to enable me to decide this single fact on which must rest the decision.

In Runyon's pre-emption proof, taken prior to the hearing, he simply sets up settlement upon and improvement of the quarter-section. At the hearing he refused to put in further evidence, but insisted on having his *ex parte* proof made part of the case, and rested upon it. In your decision of November 30, 1874, it was found that "the evidence tends to show that the claim of Runyon was entirely outside the purchase of Owen and upon no portion of the E. $\frac{1}{2}$ of SW. $\frac{1}{4}$, and that he had no claim to the land included within the purchase of Owen, until some time subsequent to said purchase." It is from this finding that his appeal is taken. I find no error in this. It is shown that as late as 1867 Owen had a crop on the land; that his workmen in threshing the crop resorted to the old fence for fuel; that although fallen down and out of repair the said fence existed; that Runyon himself repaired a portion of it between his land and Owen's, the reason given being that it was necessary to do so for his own protection.

In the other case, Runyon was a witness for Russell in his contest with Owen and William Daniels for a portion of lot 10 (S. $\frac{1}{2}$ of NW. $\frac{1}{4}$) just north of his land, in which subdivision the angles of the fence stand, as recited. On direct examination, he was asked the condition of this fence when he first knew it, stated by him to have been in 1866, and his answer was, "Good." He was then asked, what condition that string of fence had been kept in since that date; and answered that "it was kept up very good for about two years from that date; since then it has been little better than no fence at all." He also testified concerning the entire Wilder enclosure, referring to the Wilders and Owen as "owning the land," &c.

From all this it is evident that at the date of confirmation and afterward the possession of the original owners was undisputed up to the fence in question, and that Owen since his purchase has continuously asserted his right. He must therefore be awarded the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$,

together with the W. $\frac{1}{2}$ of SE. $\frac{1}{4}$, constituting his claim under the 7th section of the act of 1866.

The remaining controversy relates to a portion of the N. $\frac{1}{2}$ of section 2, described as Lots 1, 2, 3, 4, 5, 6, 7, 9 and 10, being a part also of the rejected "Cazadores Grant," included in the purchase of Asaph Wilder aforesaid, but claimed by Owen as his grantee, under the 1st and 3d sections of the aforesaid act of July 23, 1866, based upon an invalid State selection No. 59, made July 6, 1861, and approved by the surveyor general of the State September 23, 1861, in favor of Asaph Wilder, and for which certificate of purchase No. 18 was issued November 12, 1861, acknowledging receipt of twenty per cent. of the purchase money and first year's interest in advance on the balance—interest payable from July 6, 1861, the date of selection, and on which certificate regular endorsements of the successive payments of the annual interest duly appear.

This selection originally called for the NW. $\frac{1}{4}$ and the W. $\frac{1}{2}$ and NE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of said section 2, since described as Lots 1, 2, 3, 4, 5, 6, 7, 9 and 10, containing 352.62 acres—the original area being given by the State survey as 336 acres; taken with other lands in lieu of 16—6 N.—8 E., alleged to have been embraced in the Arroyo Seco grant and lost to the State.

Wilder sold, October 24, 1866, this tract with other lands to Eben Owen for the consideration of four thousand three hundred dollars (\$4,300), and the latter entered into possession of the whole, including also the tracts claimed under the 7th section, hereinbefore awarded.

The State selection was not consummated at the district office, the lands not yet having been surveyed, and at the date of filing the township plat in 1870 it was found that the section 16 in 6 N., 8 E., in lieu of which it was made, was not lost to the State, but remains in place as a part of the school grant.

Unless confirmed, therefore, by the act of 1866, the claim must fail and the pre-emption claims must prevail.

These were as follows:

James Wilson, declaratory statement No. 235, June 15, 1870, Lots 1, 2, 3 and 4; R. M. Daniels, declaratory statement No. 4646, January 31, 1871, settled November 15, 1870, Lots 1, 2, 3 and 4; Joseph Stevens, declaratory statement No. 1258, June 27, settled June 6, 1870, Lots 6, 7, 8 and 9; William Daniels, declaratory statement No. 1209, May 31, settled May 6, 1870, Lots 5 and 10; Isaac Russell, declaratory statement No. 1550, August 22, 1870, settled April 30, 1861, W. $\frac{1}{2}$ of Lot 10, of said section 2, and adjoining lands in section 3; Eben Owen declaratory statement No. 4581, December 28, settled September 21, 1870, Lots 1, 2, 6, 7, 8 and 9.

The township plat was received at the Stockton office by transfer from the Sacramento office December 10, 1870; so that the filings of R. M. Daniels and Eben Owen were improperly received at Sacramento,

and were the case to be governed by technical practice, they might be rejected as out of place and consequently inoperative. But in the view I take of the matter, it is not necessary to assert this conclusion, which if declared would simply throw the parties upon their equities and compel a more elaborate consideration. It is clearly upon the act of 1866 that Owen relies, his pre-emption claim having apparently been filed out of abundant caution, in view of inconsistent and conflicting decisions of the Department from time to time rendered respecting the true construction of the act of 1866.

That act provides (14 Stat., 218), "That in all cases where the State of California has heretofore made selections of any portion of the public domain in part satisfaction of any grant made to said State by any act of Congress, and has disposed of the same to purchasers in good faith under her laws, the lands so selected shall be, and hereby are, confirmed to said State: *Provided*, That no selection made by said State *contrary to existing laws* shall be confirmed by this act for lands to which any adverse pre-emption, homestead, or other right has, *at the date of the passage of this act*, been acquired by any settler under the laws of the United States," etc. "And *provided further*, That the State of California shall not receive under this act a greater quantity of land for school or improvement purposes than she is entitled to by law."

"Section 3. That where the selections named in section one of this act have been made from lands which have not been surveyed by authority of the United States, but which *selections* have been surveyed by authority of and under the laws of said State, and the land sold to purchasers in good faith under the laws of the State, such selections shall, *from the date of the passage of this act*, when marked off and designated in the field, have the same force and effect as the pre-emption rights of a settler upon unsurveyed public land: and if upon survey of such lands by the United States, the lines of the two surveys shall be found *not to agree*, the *selection* shall be so *changed* as to *include* those legal subdivisions which *nearest conform* to the *identical land* included in the State survey and selection. Upon the filing with the register of the proper United States land office of the township plat in which any such selection of unsurveyed land is located the *holder* of the *State title* shall be allowed the same time to present and prove up his purchase and claim under this act as is allowed pre-emptors under existing laws; and if found in accordance with section one of this act the land embraced therein shall be certified over to the State by the commissioner of the general land office."

A case could rarely be brought more specifically within the alternatives of this section than the one presented by Owen. The selection was of unsurveyed lands, sold to Wilder, marked out in the field, by him sold to Owen, who continued the payments of the interest installments to the State, and to whom the State stands ready to issue her

patent; the lines do not conform to the United States surveys, but the claimant has presented application to amend or "*change*" the same to "*include*" the "*identical land*," and the only objection now left is the assertion that the basis of the original selection is now in the State, and it is said she cannot receive this land in consequence of the second proviso to section one. This is merely a matter of accounting. If the State shall indicate, as she has already offered to do, an equivalent loss to her school grant, and elect to take this tract in lieu, a practice long sanctioned by this Department in order to give effect to this equitable and unambiguous statute, no third party can object to the mode of adjustment.

From the date of the passage of the act, the pre-emption right was perfect in the purchaser, and he is entitled to all the aid which both the United States and the State can give him in securing his title under the law.

None of these pre-emptors, except Russell, settled until after survey of the lands, and at that time Owen was in full possession, asserting his claim according to law. Russell conflicts only as to the W. $\frac{1}{2}$ of Lot 10, which Owen has abandoned. Had he not done so he would have been entitled under the proofs either to the whole, or to make joint entry for that forty acres—the dividing lines of their original possession, as marked by their fences and ditches, traversing it in two directions.

Joseph Stevens resides upon Lot 8 and Owen has relinquished the same in his favor, waiving his right under the 7th section of the act of 1866. But the other lots, viz., 6, 7 and 9, included in Stevens' claim must be awarded to Owen under section 3 of the act.

In view of the former want of regularity in practice and many decisions already rendered by your office and the Department, none of which appear to me to have been conclusive of the whole matter, I have not attempted to limit my judgment by the strict technical rules, the more especially as the law seems to lead imperatively to the conclusions reached herein, and no mere regulations, (sometimes asserted and often ignored in the long course of adjudication through which it has passed,) should now be permitted to defeat the clear expression of the statute governing the case.

Your decision of April 18, 1883, conforms with respect to all these tracts to the award herein, grounded upon former awards stated by you to have been unappealed. As to several of the parties this is mistake; but for the reasons now given I affirm the conclusion.

*HOMESTEAD—CONTEST; ABANDONMENT.**SORRENSON v. KELSEY.*

The contestant having signified his desire to have the contest dismissed, the question at issue is thereafter between the claimant and the government. From the acts performed good faith is apparent and the charge of abandonment not sustained.

Secretary Teller to Commissioner McFarland, February, 17, 1885.

I have considered the case of Jens Sorrenson *v.* David G. Kelsey, involving title to the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 20, T. 105 N., R. 48 W., Mitchell, Dakota Territory, as presented by the appeal of Kelsey from the decision of your office of May 21, 1884, holding for cancellation his homestead entry No. 20,620, made June 24, 1882.

On January 25, 1883, Sorrenson initiated a contest against said entry, alleging abandonment, and after due notice a hearing was had April 2, 1883, before C. F. Thayer, a notary public, at which both parties appeared in person, and by counsel, and offered their testimony.

The register and receiver disagreed with regard to the evidence, the register holding that the charge was proven, and that the entry should be canceled, while the receiver found that the allegation of abandonment was not sustained and that the contest ought to be dismissed. Your office concurred with the register and held said entry for cancellation as above stated.

Since the date of your decision, the claimant filed with the register the affidavit of Sorrenson made before Allen Thorne, a notary public, on August 2, 1884, alleging that when he commenced said contest "he did not know the circumstances of the claimant, nor the causes, which prevented him from remaining constantly at home on the land, and he has since become satisfied that it was never the intention of the claimant to abandon said land," and he asks that the contest be dismissed.

It appears from the testimony that the claimant paid four hundred dollars for a relinquishment of said tract, the entryman retaining the right to the growing crop; that in addition to the forty-two acres in cultivation when Kelsey made his homestead entry, he has caused to be broken some ten acres, a part of which he planted in corn and beans; that he placed upon said tract a small house, or shanty, in which he slept prior to making said entry; that some time in October or November he built another small house or shanty upon said tract, but for want of means was unable to build a house suitable for himself or his wife to live in during the severe winter weather; that he has purchased lumber, shingles and nails with the intention of putting up a substantial house in which to live and make his home; that he is an old man, with little means, and his wife an invalid, and that he never intended to abandon said tract.

Since the contestant has withdrawn all claim and asked to have the

contest dismissed, the question at issue is one solely between the government and the entryman.

From a careful examination of all of the testimony in the case, it is evident that Kelsey never in fact abandoned said tract, and his good faith is sufficiently shown under the peculiar circumstances of this case.

Your decision is therefore reversed and the contest dismissed.

PRACTICE—ATTORNEY.

THOMAS HOWARD.

Notice of cancellation to the attorney of the successful contestant meets the requirements of the second section of the act of May 14, 1880.

Secretary Teller to Commissioner McFarland, February 17, 1885.

I have considered the appeal of Thomas Howard from your decision of April 19, 1884, rejecting his application to have canceled timber culture entry No. 5274 of Levi Guthrie, December 28, 1883, Larned, Kansas, for the SW. $\frac{1}{4}$ of Sec. 10 T. 25 R. 11, and that he, Thomas Howard, be permitted to make timber culture entry of said tract, because of having procured, by contest, the cancellation of the prior entry thereon.

It appears that on January 4, 1879, Wilber H. Pinney made timber culture entry of the tract; which entry, being contested by Howard, was on October 20, 1883, canceled by your office. Notice of this cancellation, and of Howard's preferred right of entry of the tract for thirty days, was given by the local officers to L. H. Corse, Howard's attorney of record, on or before October 25, 1883, who in turn forwarded notification of the same, by letter, mailed October 28, 1883, to Howard at Stafford, Kansas, his proper post office. This letter was not received by Howard; and after lying in the office was returned by the postal authorities to the writer, who thus received it December 25, 1883. On receipt of this returned letter, he wrote to other parties in Stafford, who on January 11, 1884, informed Howard of the cancellation of said entry. The day after the receipt of this information, the latter forwarded to the register and receiver an application to make timber culture entry of the tract. The application was rejected, because, on December 28, 1883, Levi Guthrie had made entry thereon and on appeal the action of the register and receiver was sustained by you.

It is well settled that when an attorney enters his appearance in a cause he stands there to represent his client as fully as the latter could were he present, acting for himself. To re-assert this recognized practice in the business of the Land Department, Rules of Practice 104-5-6 were formulated.

In this case, whilst conceding the correctness of these rules generally and their applicability to the ordinary matters connected with a contest, it is claimed that a mistake has been made in holding that the

notice of cancellation, required to be given by the second section of the act of May 14, 1880, was properly sent, in pursuance of said rules, to the attorney, instead of to the contestant personally. In support of this contention, it is insisted that the relation of client and attorney ceased with the cancellation of the entry, to the obtaining of which the employment of the attorney was limited. It is not claimed that such limitation is the result of a special contract to that effect, brought to the notice of the land officers, but it is asserted as a conclusion of law and fact.

In this I do not concur. So long as the appearance of the attorney stands of record in a cause, and there remains anything to be done as part of or in connection with that cause, of which notice should be sent to the parties litigant, it is proper said notice should be given to the attorney. The requirement of the act of Congress, expressed in general terms, that notice shall be given to the party, is gratified by notice upon the attorney.

In the case under consideration, the purpose of Howard's contest was to obtain the cancellation of Pinney's entry, and, incidentally, a preferred right of entry on the tract for himself. To prosecute this contest the attorney was employed, and his work was not finished until either the procurement or final denial of the cancellation.

Of the result, whatever it may be, notice is required to be given to the parties in interest. To say that when this most essential point in the controversy is reached, the connection of the attorney with the case is *ipso facto* and summarily severed, is to assert that with which I can not agree and for which I find neither reason nor precedent. On the contrary, it appears to me, that so long as the interests of the client are to be promoted or injured by any proceeding, part or parcel of, or growing out of the contest, every intendment should be to maintain the relation of client and attorney; and to hold the latter to a strict accountability.

For these reasons, I must hold that the notice was properly sent to the attorney and therefore affirm your judgment.

REPAYMENT—RAILROAD SELECTIONS.

ST. PAUL AND SIOUX CITY R. R. CO.

Where the fees for certain railroad selections were paid by one company, and the lands so selected were subsequently certified to the State for the joint benefit of the company selecting and another company, the right to a return of half the fees so paid was denied.

Secretary Teller to Commissioner McFarland, February 17, 1885.

I have considered the appeal of the St. Paul and Sioux City Railroad Company from your decision of August 14, 1884, rejecting the applica-

tion of said company for the repayment of fees paid on selections, as per schedule "C," made by the Minnesota Valley Railroad Company under the acts of March 3, 1857, and May 12, 1864.

September 26, 1867, said list of selections, as presented by the company last named above, was received at your office, and December 18, 1867, approved to the State of Minnesota for the benefit of said railroad company, the legal fees on such selections having been paid by said company August 26, 1867.

June 9, 1868, your office again submitted to this Department the list of lands approved as above, it having been ascertained that said lands fell within the limits of the Winona and St. Peter Railroad Company, and accordingly on June 10, 1868, said lands were approved to Minnesota for the joint benefit of said roads.

July 12, 1884, the appellant, successor to the Minnesota Valley Railroad Company, filed its claim for the repayment of half the amount of fees paid by its predecessor on said selections, the sum thus claimed being \$439.87.

You rejected said application on the ground that the government has only received the proper fees and from a proper party, and has therefore nothing to refund.

Concurring in your conclusion, your decision is hereby affirmed and the appeal dismissed.

PRE-EMPTION—ENTRY.

JAMES H. MARSHALL.

Where the final proof on which the entry was allowed was perhaps deficient, but not fraudulent, and there was no concealment of the facts attempted, but good faith manifested, the entry was not disturbed.

Secretary Teller to Commissioner McFarland, February 17, 1885.

I have considered the appeal of James H. Marshall from your decision of June 9, 1884, holding for cancellation his pre-emption entry No. 1340, for the SW. $\frac{1}{4}$ Sec. 13 T. 123 N. R. 66 W., Aberdeen, Dakota, on the ground of fraud in making final proof.

The entry was dated April 26, 1883; final proof made February 26, 1883, and certificate numbered 1182, and changed to 1340; no cause shown why entry was not reported as of original date.

Marshall's witnesses swore that he had at date of proof a frame house, ten by twelve, a frame stable, eight by ten, and five acres of breaking; that he settled June 1, 1882, and his residence had been continuous "as per statement."

Marshall swore to the same facts, except as to size of house, which he gave as ten by ten. All valued the improvements at \$115. He also filed a supplemental sworn statement as part of his proof, stating that he settled in June and built a frame house, commenced his actual

residence in August, and that the same had "been continuous except while engaged in the closing up of his business in St. Paul;" that he had "not been absent at any time to exceed sixty days, and that being on account of the snow blockade during the months of January and February; that at no other time has he been absent to exceed twenty-five days."

He also added a further sworn supplemental statement as follows: "That at the time of making settlement on said tract I was on the land continuously for at least twenty days, and from that time forward have been employed a portion of the time in settling my business in St. Paul, with the bona fide intention of making my home on said land."

This proof was all taken before the receiver of the Land Office, and was endorsed "approved" by the register and receiver, and the entry admitted.

August 10, 1883, Special Agent Jaycox reported that on the 7th of that month he visited the land, and found thereon a board shanty eight by nine altogether unfit for a habitation, and about two acres of breaking with no crops but a mass of weeds growing on the same—the value of the whole improvements not exceeding \$25. That Marshall never made a residence on his claim; that for a year prior to entry he was a clerk in St. Paul receiving \$1,200 per annum; that he visited his claim at intervals of one or two months, retaining his position in St. Paul, and had since sold his claim for \$1,400, and was then keeping a store in Freeport, Edmunds County, and had taken a homestead in that vicinity.

Upon your order hearing was had November 10, 1883, resulting in your decision of June 9, 1884, aforesaid, holding his entry for cancellation.

The facts shown at the hearing as to settlement and improvement concur with the statements of Marshall and his witnesses at date of final proof, except as to amount of breaking, which is shown to have been but a trifle over two acres, instead of five. He showed, however, that he had contracted for more with one Garfield, and it becoming too dry to succeed, he directed him to stop about the first of September, but afterward, later in the fall, being assured by one Byers that breaking could still be done in another place on the north side of his claim, he engaged said Byers to break three acres, and in November, the latter assured him it was done and presented his bill for the same, which he, Marshall, paid, and supposed the breaking had been done, and was covered with snow when he made proof in February.

In January he contracted with Garfield to break forty acres the succeeding season. He also sent some lumber to the land as he testifies for the purpose of making additions to his buildings, and planted some tree seeds on the place, but finally considering that he could do better in Edmunds county with the aid of the money, he sold the farm in May for \$1,400, and took the lumber to use in his new enterprise.

He absolutely denies any intent to secure the land except for a home at date of final proof. His shanty and loose lumber were taken away by traveling settlers pressing into the newer regions beyond, which accounted for the condition of the claim when visited by Mr. Jaycox.

I do not find any evidence of fraud in Marshall's proceeding. He was very frank in submitting the particulars as to residence and in mentioning his business at St. Paul when he offered his final proof. If there was a failure to satisfy the register and receiver of his good faith at that time, they should have held him to further residence before admitting the entry. But with the facts voluntarily stated by him, they accepted his proof. At the most it was merely deficient—not fraudulent. He took no advantage by concealment, and if error was committed it was error of the government. I cannot consent to pronounce a forfeiture against him. The land has passed into the hands of a *bona fide* purchaser for value, and may by this time be largely improved.

HOMESTEAD—AMENDMENT.

BROWN *v.* WEST.

An amendment of the application will be allowed so that the entry may correspond with the settlement of the applicant, he appearing to have been the first settler on the land, but through clerical error was prevented from applying to enter the same until after said land had been included within the entry of another.

Secretary Teller to Commissioner McFarland, February 18, 1885.

I have considered the case of Hiram T. Brown *v.* Robert L. West, involving the homestead entry of the latter, No. 1676, for the SW. $\frac{1}{4}$ of Sec. 6, T. 2 N., R. 9 W., made January 27, 1883, Santa Fé district, New Mexico, on appeal from your decision of April 24, 1884, dismissing the contest.

The township plat of survey was filed in the local office September 25, 1882.

January 27, 1883, said West made homestead entry No. 1676, covering the southwest quarter of said section 6.

January 31, 1883, said Brown made application to enter under the homestead law the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of said section 6—alleging settlement thereon August 3, 1882. This application was rejected on account of West's prior entry, covering the *south eighty acres* of the tract now applied for by Brown.

On a hearing held, August 2, 1883, to determine the rights of the respective parties, the register and receiver decided in favor of West; and you affirm their decision. Brown moved for a rehearing, which your office denied, July 3, 1884.

Brown, at the hearing before the local land office, testified that he made application for what he supposed to be the land in dispute; that

a mistake of one figure was made by the person who drew up the papers for him, so that the application was for the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 6, T. 4, when it was intended to be for the same described land in T. 2; that this error led to his application being rejected, January 23, 1883; that he corrected the error, and forwarded to the local land office the amended application, which was rejected, January 31, 1883, because of West's entry, made January 27, 1883.

Brown's allegations are corroborated by the affidavit of his brother, who drew up the papers and made the error; by a comparison of the dates of the several entry papers on file in the local land office; and by attendant circumstances explainable on no other theory than that of a genuine error (and not of a pretended one, alleged upon afterthought as an excuse for his delay).

"The right of the homestead settler to obtain a correction of a clerical error in his papers must be conceded . . . and if a mistake was actually made, he should be allowed full opportunity and a reasonable time after discovery to rectify his error." (Case of Jefferson Newcomb, 2 Copp's L. O. 162.)

According to the doctrine above cited—as well as that of the Atherton-Fowler decision—the prior actual settler in the present case has the paramount right; and the question arises, which of the two, West or Brown, was the prior settler?

There is no question that Brown was the prior settler on the quarter-section claimed by him. The evidence shows that he established his residence thereon in August, 1882, and proceeded at once to improve and cultivate it. This includes the eighty acres in dispute; it was vacant at the time he attempted to make entry thereof, it constituted an integral portion of his homestead claim, and he established a residence upon it as effectually as upon the eighty acres on which his house was actually located. It was not until November, 1882, that West according to his own testimony, first appeared in the vicinity, "looking for a location for a ranch." He built a shanty April 20, 1883, upon the tract in dispute, in which he set up a "camping outfit," and where he slept two nights; he could stay no longer, because (he says), "I was getting one hundred dollars per month from the company, and my time was worth a proportionate amount every day I lost." He then returned to his work on the railroad, and continued thus employed until the date of the hearing.

It is true Brown did not make his application within three months from date of the filing of plat of survey; but neither did any one else; so that delay does not, of itself, give any one else the prior right. The fact that he was in laches in this respect can not be taken advantage of by one who was in laches to a far greater extent, establishing residence upon the tract long subsequently (if ever), and making no improvements whatever upon the land.

The first attempt at entry of the tract in question having been made by Brown, prevented only by a clerical error from being placed on file

prior to that of any other applicant, and Brown being beyond question the first actual settler upon the tract in controversy, I reverse your decision, and direct the cancellation of West's entry and the acceptance of that of Brown.

TIMBER TRESPASS.

BUCKNER H. ROBINSON.

The question of trespass is not affected by the entry of the lands, since at the time of the trespass the title to said lands was in the government.

Secretary Teller to Attorney-General Brewster, February 18, 1885.

I have the honor to transmit, herewith, copy of letter, dated the 9th instant, from the Commissioner of the General Land Office, relative to trespass alleged against Buckner H. Robinson, of Louisiana, in cutting and removing, from certain described lands in said State, timber to the amount of six million, one hundred and twenty thousand (6,120,000) feet, board measure. Some of the lands in question have been entered under the homestead law since the trespass, most of which are reported to be fraudulent, and hearings are now pending to determine their validity. The question of trespass, however, is not affected by the entry of these lands, since at the time of the trespass title to all the lands was in the United States. The timber was taken to Well's Ferry, on Tangipahoa river, and sold to the firms of A. Martin & Co., and J. O. Terry & Sons, both of New Orleans, Louisiana.

The trespass is reported as being beyond question willful; and the agent is of the opinion that the above-named firms failed to make proper inquiry as to the ownership of the timber.

The trespass continued from 1865 to 1881, inclusive; consequently criminal suit is barred by the statute of limitation.

In view of the facts set forth, and the parties being reported to be financially responsible, I concur in the recommendation of the Commissioner, and have the honor to request that you will direct the U. S. Attorney for the proper district, if in his judgment upon examination he shall deem it for the interest of the United States, to institute civil suit against Buckner H. Robinson and the firms of A. Martin & Co. and J. O. Terry & Sons, to recover the value of six million, one hundred and twenty thousand (6,120,000) feet of timber at the rate of five dollars and fifty cents (\$5.50) per thousand feet, amounting to thirty-three thousand six hundred and sixty dollars (\$33,660). (See *Wooden-ware Co. v. The United States*, 106 U. S., 432).

PRIVATE CLAIM—CONFIRMATION.

THE RENAULT GRANT.

The application for patent is denied and the applicant referred to Congress for relief, it appearing that the grant is unconfirmed, and that the land included therein has been for many years improved and occupied in good faith by a large number of persons, while the claim has been frequently before Congress without definite action thereon.

Secretary Teller to Commissioner McFarland, February 18, 1885.

On the 15th of October, 1883, Andre Narcisse de La Mothe, by his solicitor, addressed to you a petition, wherein he prays that a patent be issued to him, or to the legal representatives of Philip Francois Renault, for certain lands granted by Boisbriant and Des Ursius in the year 1723 to said Renault.

The tract is located in Townships 4 and 5 S., Ranges 9 and 10 West of the third principal meridian, in the State of Illinois. By your letter of November 28, 1883, you refused to grant the prayer of the petition, and declined to issue the patent; and an appeal from your action is brought to this Department.

This grant has formed the subject of many letters in your office and this Department, and has on several occasions been presented to Congress for consideration.

Renault derived title from the King of France, through the "Western Company," and there seems little doubt that the grant was rightfully made, and with all necessary authority. There is, however, a question raised as to whether Renault did not abandon the grant when he returned to France, a few years after the grant was made; and some other questions have arisen affecting its present validity.

In 1763 France ceded to Great Britain, and in 1783, the latter government ceded to the United States, the territory embracing the grant. It is obvious to me that the grant of particular lands for which patent is now asked has never been confirmed under any of the various acts of Congress relating to grants derived from the French Government.

Hon. Reverdy Johnson, in an elaborate opinion (a copy of which is in the record), given in 1872, upon the subject of this part of the Renault grant lying in the State of Missouri, says: "The doctrine and practice have ever been maintained and acted upon, that for the complete validity of such a title a confirmation and patent from the United States *are necessary*. Until this is done the claimants have no way except by an appeal to Congress to make their title a perfect one. This being the case Congress has not only the right to confirm this grant, *but are bound to do so*, if they believe the facts which I have stated are true, as I have no doubt they are."

Hon. J. S. Black subsequently gave an opinion upon the same subject, which is also in the record. He concurs in the views expressed

by Reverdy Johnson that Congress should "order a patent to Renault's heirs."

My predecessor, Secretary Schurz, in a communication at length upon this subject, addressed to Hon. William R. Morrison, House of Representatives, January 16, 1879, expressed the opinion "that Congress has no authority to legislate upon the subject." This opinion is placed upon the ground "that the legal title to this tract is in the heirs of Renault" by virtue of the grant of the former government, and that "no government or individual can pass title to that which has been already lawfully granted to another."

It will be observed, however, that Congress has already legislated upon the subject of this grant.

By act approved March 26, 1804, the register and receiver of the District of Kaskaskia, in which the tract was situated, were made commissioners to examine and report upon claims founded upon grants made by France prior to February 10, 1763, and by Great Britain subsequently to that date and prior to September 3, 1783—the date of the treaty between the last named country and the United States. The commissioners, December 31, 1809, reported that all of that part of this grant lying between the Mississippi River and the hills (about one half of it) had been conveyed away by Renault in small parcels to sundry individuals. They were of opinion that the grant was valid, and recommended the passage of a law confirming the grant; the grant was confirmed as to that portion of the original grant lying south of the hills; and the part north of the hills was left *in statu quo*. (Stat. 2, p. 607; *ib.*, 678; Secretary Schurz's report, *supra*.)

These commissioners, after their term of office had expired, viz., December 31, 1810, made another report, affirming the legality of the remainder of the grant, and since then its confirmation has been repeatedly urged before Congress.

I agree with you that the confirmatory act cannot "be held to include within its provisions a confirmation of that portion of the said Renault grant lying back of the hills."

Even if your office had the authority to issue a patent for the unconfirmed part of the grant—which is doubted—I think, in view of the fact that the claim has been repeatedly urged upon Congress without definite action being taken by that body, it would be quite improper to issue a patent without legislative expression or authority, especially in the light of the information the department now possesses.

On the 9th of August last, Mr. N. P. Loveridge was appointed by you a special agent, and instructions given him to examine into the present condition of the tract in question, the number of settlers thereon, the amount of their improvements, etc. He visited the tract, and made a careful report, which shows that nearly all of it has been cleared and improved, and is now under cultivation, covered by about forty-five farms, producing fine crops of wheat and corn. Many of the farms have

thrifty orchards of apple and other fruit trees. There are twenty-eight occupied dwelling-houses upon the land, with the usual number of barns and other outhouses connected therewith. The number of actual occupants of the tract, residing there in good faith, at the time of the report, was one hundred and ninety-two, some of whom have lived there from twenty to seventy years.

I am aware, as before stated, that my predecessor expressed the opinion in his report aforesaid that Congress had no right to legislate upon the subject; but it does not appear that Congress entertains that view, and the opinions of very eminent counsel, obtained by the claimant and placed in the record, are to the effect that Congress not only has the right, but should exercise it, and authorize a patent to issue. While Congress would not create a legal title if one already existed by act of the former government, yet I see no impropriety in confirming such a title in a proper case, and directing a patent.

Your decision is affirmed.

PRACTICE—NOTICE.

WOOD *v.* KELLY.

Notice by publication based on the allegation that the address of the entryman is unknown, and improperly naming the defendant, held insufficient, it not appearing that the defendant had any knowledge of the pending contest.

Secretary Teller to Commissioner McFarland, February 19, 1885.

I have considered the appeal of Samuel Wood from your decision of July 10, 1884, dismissing his contest against Thomas F. Keeley.

It appears that Thomas F. "Kelly" made homestead entry June 7, 1879, for the SW. $\frac{1}{4}$ of Sec. 23, T. 102, R. 54, Mitchell, Dakota, and that May 12, 1881, Wood commenced a contest against Thomas F. "Keeley" for abandonment of the tract. Notice thereof was by publication. Kelly was not present nor represented at the hearing held July 8th following. The local officers sustained the charge and declared the entry forfeited. There was no appeal. Thereafter (at a date which does not appear, except that his affidavit and required proofs were sworn to August 16, 1882), Kelly applied to purchase the tract under the act of June 15, 1880, and you allowed the same March 26, 1883. Kelly completed his purchase June 22d following and certificate issued.

Your decision dismissed the contest because of its irregularity in respect to notice thereof.

The rules of practice require personal notice of contests in all cases when possible, when the party to be served is a resident in the State or Territory in which the land is situated, and allow notice by publication *only* when personal service cannot be made. They also require that when notice is by publication a copy thereof shall be mailed by registered letter to the last known address of the person to be notified.

In his affidavit of contest Wood only swore (in order to procure notice by publication) that the address of Keeley (Kelly) was unknown

to him. This has been repeatedly held insufficient, unless the contestant also shows that he has made due and unsuccessful inquiry to ascertain the address of the entryman, for such inquiry might have led to a knowledge of his address and personal notice have been given to him. A different rule would permit the institution of fraudulent proceedings and the loss of an entryman's rights without notice that they were endangered and is well illustrated by the present case. Had this entryman been properly notified, the proceeding would have been conclusively against him. But the notice by publication was unauthorized for the reason stated, and as it does not appear that Kelly was cognizant of any action against him, he should not suffer from this material defect upon the part of the contestant. (See *Wallace v. Schooley*, 3 L. D. 326.) Nor was notice mailed to him at his last known address. Notice was mailed to Thomas F. *Keeley*, but this was not notice to the entryman.

For the general reason that the whole proceeding was against "Keeley" and that no legal notice thereof issued to the entryman, the contest was erroneously held and conferred no preference right of entry upon Wood, nor was Kelly's right of purchase affected nor debarred thereby. It is as if there had been no contest.

Your decision is affirmed.

LAND DECISIONS.

WASHINGTON, D. C., *February 19, 1885.*

With a view to uniformity, and to facilitate research, it is ordered that hereafter, in the written opinions or decisions of the Secretary or Commissioner relating to public lands, where prior opinions or decisions of either are mentioned or cited, the reference shall be to the volumes of decisions published by the Department, (as 3 L. D., 2 L. D., or 1 L. D.,) if said opinions or decisions are to be found therein, in the text or foot notes.

H. M. TELLER,

Secretary.

PRACTICE.

BENSCHOTER *v.* WILLIAMS.

Where a "few seconds" intervened between two applications to contest an entry the right of precedence was awarded to the one first actually received.

An affidavit of contest is not defective because made outside the land district.

The allegation that "said Williams has failed to make more than one thousand trees grow on his claim . . . that said Williams has not planted or tried to raise any trees on said land for the three years last past" held sufficient in view of the fact that the contest was not begun until eight years after the entry.

An affidavit of qualification, accompanying the application to enter, though informally executed, is sufficient to give the applicant the status of a contestant in attacking an entry under the timber culture law.

Secretary Teller to Commissioner McFarland, February 19, 1885.

I have considered the case of Martin W. Benschoter *v.* Daniel B. Williams, involving timber culture entry No. 1039, Bloomington, Ne-

Graska, January 10, 1876, upon the NW. $\frac{1}{4}$ of Sec. 26, T. 8, R. 16, being on appeal by Benschoter from your decision of June 30, 1884, adverse to him.

On April 19, 1884, Benschoter presented application to contest the above entry, which was rejected, because of the pendency of a contest by Charles F. Robertson.

From this decision the former appealed, charging (1) that his contest was presented, if not prior to that of Robertson, certainly at the same time; (2) that the affidavit of contest of the latter was sworn to outside of the Bloomington land district; (3) that the allegations of said affidavit were not sufficiently specific as to the time of the occurrence of the alleged defaults, and of their continuance to the date of contest; (4) that no legal application to enter the land was filed by Robertson, inasmuch as his affidavit of qualification to make such entry was not sworn to within the Bloomington land district.

In your decision you consider only the last objection and rule on that adversely to Benschoter, citing *Bennett v. Taylor*, (2. L. D., 42).

In that case Bennett, who contested the timber culture entry of Taylor, did not file a formal application to make entry of the tract, but in his affidavit of contest asked "that he be allowed to enter said tract under the homestead laws." This was "regarded as sufficient to give him the status of a contestant within the meaning of the Bundy decision, which restricts a contest against a prior timber culture entry to one *who seeks to enter* under the homestead or timber culture laws." So in the case under consideration the filing of an application to make timber culture entry of the tract, accompanied by an affidavit of qualification, informally executed, as was done by Robertson, may be held to be a sufficient compliance with the law in accordance with the ruling in *Bennett v. Taylor*. I therefore concur in your decision on this point.

In his first objection Benschoter insists that his contest was presented, if not prior to that of Robertson, certainly at the same time. The facts disclosed do not substantiate the assertion. From a careful consideration of all those detailed in Benschoter's affidavit, on this subject, it appears—and the register also so states—the Robertson contest was received "a few seconds" before that of Benschoter. A few seconds is, comparatively, a short space of time, but it was sufficient to entitle Robertson to the priority, for it matters not how short may have been the interval between the presentation of the two contests, the one actually received before the other is entitled to precedence.

With regard to the second objection, viz.: that Robertson's contest affidavit was invalid because made outside of the land district, there is no rule or law declaring that this affidavit shall be made within the district where the land is located, as is required by the statute, prescribing the affidavit which shall accompany the application to make timber culture entry. The third rule of practice, whilst providing that an affidavit of contest shall be filed with the register and receiver, does

not designate the officer before whom it shall be made, or restrict the making of the same within any territorial limits. I do not, therefore, regard this objection as having any force.

Nor do I think said affidavit obnoxious to the third objection, for, after stating much that is irrelevant, it alleges that "said Williams has failed to make more than (1,000) one thousand trees grow upon this claim; . . . that said Williams has not planted or tried to raise any trees on said land for the three years last past." In view of the fact that Robertson's contest was filed more than eight years after the date of William's entry, I think the above allegations sufficiently show a failure to comply with the requirements of the law as to the growth and cultivation of trees, and also show the continuance of the defaults to date.

In the exceptions to your decision, it is further alleged, as ground of error, that the contest of Robertson "was collusive and filed in the interest of the claimant, D. B. Williams."

As this charge is not made by affidavit, or substantiated by any testimony whatever, it has not been considered by me.

All the exceptions of the appellant are overruled, and your judgment in the case is affirmed.

*
TIMBER TRESPASS.

HUGH H. AND WM. A. MCCOMB.

The trespass appearing to have been committed upon lands included within the homestead entry of another, the question at issue is between the entryman and the alleged trespasser.

Secretary Teller to Commissioner McFarland, February 19, 1885.

I am in receipt of your letter of the 14th instant, in reference to trespass alleged against Hugh H. and William A. McComb, of Estabuchie, Mississippi, in cutting and removing three hundred and forty (340) pine trees, producing one hundred and thirty-six thousand (136,000) feet, board measure, of timber, from certain described lands in said State.

The land, according to your statement, was entered as a homestead, by one William Landrum, October 8, 1880, with money furnished him by said Hugh H. and William A. McComb; "that thereafter the McCombs entered on the same, and felled and removed the timber therefrom; that the homesteader admits receiving the entry money from the trespassers, but claims that it was a loan, to be repaid by letting the McCombs have the timber *after* his having made final proof; that the timber was felled and removed in the face of protest on his part; that he was powerless to prevent the depredations; and desires to remain on the land, and duly prove up, notwithstanding the removal of the timber therefrom."

The Agent reports: "Landrum has a wife and four children and re-

sides on the land. His improvements are of a permanent character. He has in cultivation about ten acres of ground, inclosed by a good fence. There was every evidence that the entry was made in good faith."

You recommend that the Attorney General be requested to direct suit to be brought against the McCombs to recover the value of the timber at their mill.

The case must be dealt with upon one of two theories: Landrum either entered the land and holds it in good faith, or fraudulently. If his entry be of a character that it can be and ought to be canceled for fraud against the United States, then that fraud taints also the acts of the McCombs, for they have cut and removed timber belonging to the United States. But if it be conceded that Landrum has entered and is holding the land in good faith, the tract covered by the entry is to be considered as being to all intents and purposes Landrum's land, and if the McCombs have removed the timber therefrom without warrant, the question is one between them and Landrum; the local courts have jurisdiction in such cases, and Landrum can apply to them for protection, or for reparation of any injury that may have been done him.

In view of these facts, I do not concur in your recommendation that the Attorney General be requested to direct the institution of suit against the McCombs, but return the papers in the case for the files of your office.

MINING CLAIM—PROTESTANT.

MCGARRAHAN *v.* NEW IDRIA MINING CO.

The plaintiff having filed no adverse claim during the period of publication must be regarded as a protestant and therefore not entitled to the right of appeal. No error appearing in the proceedings below the application for a writ of certiorari is dismissed.

Secretary Teller to Commissioner McFarland, February 26, 1885.

I have examined the case presented by the application of William McGarrahan for an order suspending proceedings in the matter of the mining entries Nos. 80, 81 and 82, made by the New Idria Mining Company upon the San Carlos Nos. 1, 2 and 3, you having decided February 19, 1883, that said McGarrahan was not entitled to an appeal therein.

It appears that the mines were located August 6, 1879, by D. O. Mills, William Sharon and John W. C. Maxwell, and that the above named mining company thereafter acquired title thereto. The said company filed its application for patents in the local office at San Francisco, California, and due notice thereof was given by publication and posting, as required by law, from May 7, 1881, to July 9, 1881.

On June 15, 1881, William McGarrahan filed in the local office a protest against the issuance of patents to the said company, alleging,—

“1. That the said lands are embraced within the boundaries of the “Rancho Panoche Grande, which is owned and claimed by the protestant.

“2. That his claim to the same is now pending before Congress undetermined.

“3. If the grant is finally rejected, he is entitled to enter as a purchaser in good faith for a valuable consideration.

“4. But one mineral lode exists in the New Idria Mining District, and the company have already received a patent for a claim to this lode.”

The district officers did not recognize the protest, and McGarrahan on July 14, 1881, filed papers in the nature of an appeal.

You decided January 27, 1883, following the decision of this Department in the case of the New Idria Mining Company (6 Copp's L. O., p. 71), that the first and second grounds of the protest were not well taken, for the reason that the Panoche Grande Rancho grant had been held invalid and fraudulent by the United States Supreme Court, (*United States v. Gomez*, 3 Wall., 752, and *Secretary v. McGarrahan*, 9 Wall., 293,) and that the said mines were not within the limits of the alleged Mexican grant; that McGarrahan was not entitled to enter the land, in the event the grant was finally rejected, as a purchaser in good faith, under the provisions of Section 7 of the act of July 23, 1866, (14 Stat., 218,) because mineral lands were excepted from the operation of said section, and that there was now no law in force restricting a person to one location on the same lode, or forbidding the issuance of more than one patent to the same person or company for separate claims on the same lode.

February 5, 1883, McGarrahan by his attorneys filed a notice of appeal from your decision, but you held that he was only a protestant, and decided that he was not entitled to an appeal. February 9, 1883, McGarrahan filed his application to have the papers certified to this Department in accordance with Rules 83 and 84 of the Rules of Practice adopted by your office and this Department.

Section 2326 of the Revised Statutes provides for a stay of proceedings where an adverse claim is filed during the period of publication of notice of intention to apply for a patent, but McGarrahan has not filed any such claim, or instituted suit thereon as provided in said section; hence he can only be regarded as a protestant, and this Department has frequently held that such persons are not entitled to an appeal. *McGarrahan v. Cerro Bonito Quicksilver Mine* (*Sickel's Mining Laws*, p. 327); *Boston Hydraulic Gold Mining Co. v. Eagle Copper and Silver Mining Co. ibid.*, 320).

Your decision therefore denying the right of appeal was in accordance with the practice of the Department, and no error appearing in the proceedings which here requires revision, the application is dismissed.

CALIFORNIA—INDEMNITY SCHOOL LANDS.

STATE OF CALIFORNIA *v.* DODSON. (ON REVIEW, 3 L. D., 306.)

Certain lines of survey of a private claim having been determined by the Secretary of the Interior, the endorsement of approval on the plat of survey, thereafter made by the Commissioner of the Land Office, is merely a ministerial act that cannot affect the rights of the State.

The purposes of the first section of the act of 1864 and the sixth section of the act of 1866 should not be confounded, as one relates to vesting title to private claims in the grantees, and the other to settling the right of lieu selections in the State.

Secretary Teller to Commissioner McFarland, February 26, 1885.

I have before me a motion by Nelson H. Dodson for a review of departmental decision of the 9th ultimo in the case of the State of California *v.* Dodson. The argument accompanying said motion traverses the precise ground of that accompanying the original case, with one exception, and, as it has been carefully considered heretofore, its reconsideration now is unnecessary.

The new point raised is that the decision violates the provisions of Section 1 of the Act of July 1, 1864 (13 Stat., 332), which points out the mode of adjudicating private land claims in California, with a view to expediting the issue of patent, and, among other things, provides that the survey and plat shall be forwarded by the surveyor-general to the Commissioner of the General Land Office, "and if the survey and plat are approved by the said Commissioner he shall indorse thereon a certificate of his approval." The argument is that the survey is not final until such indorsement is made, and that, as it was not made until after the State's selection in this instance, the selection was premature and void.

There are two replies to this argument which are obvious, and which dispose of it thoroughly. First, the said indorsement is mere evidence of the Commissioner's approval; whereas the rule laid down by the Department in California *v.* Selby (3 C. L. O., 89) was that the right of selection by the State vested on the approval. In the case at bar the Secretary had exercised his supervisory power and finally approved two lines of the survey, of which the State had notice, and thereafter the Commissioner's indorsement as to these lines was not of a judicial nature, but was a mere ministerial act which could not possibly have any virtue in determining the rights of the State. Second, the object of Section 1 of the Act of 1864 was to provide for the means of vesting title to private land claims in the grantees; whereas the object of Section 6 of the Act of 1866 (14 Stat., 213), under whose provisions this case was decided, was to provide the means of vesting the right of lieu selections in the State. These purposes are clearly different, and should not be confounded. It is of the essence of correct judicial construction to interpret a statute so as to facilitate and promote its objects, and, espe-

cially in a remedial act like the act of 1866, so as not to hamper its force and effect by narrow and illiberal rulings. Such was the view that was heretofore taken in deciding the case, and such is the view which I now take in dismissing this motion.

MALHEUR INDIAN RESERVATION.

OVERFELT *v.* TONNINGSON.

The sale of agency buildings, and public lands therewith, contemplated in Sections 2122 and 2123 of the Revised Statutes, is confided by said statutes to the discretion of the Secretary of the Interior, subject to the limitations therein expressed, and independent of the general principles and statutes governing the administration of the public land system.

Secretary Teller to Commissioner McFarland, February 27, 1885.

I have considered your report of April 9, 1884, in the matter of the sale of the agency buildings of the late Malheur Indian Reservation in Oregon with two sections of land in connection therewith, under Sections 2122 and 2123 Revised Statutes, being sections 3 and 10 of 19 South, 38 East, Lakeview District, with relation to the proceeding had to effect said sale pursuant to Departmental instructions of May 23, 1883.

Action upon the report has been delayed at the request of claimants asserting certain rights claimed to have become vested under said proceedings.

The facts are fully detailed by you, of which the following only are deemed material.

1. The order of the Acting Secretary of May 23, 1883, did not provide the manner of sale, but directed it to be made "under your direction," "in accordance with the provisions of Sections 2122 and 2123," aforesaid.

2. By letters of May 31, and July 6, 1883, you instructed the register and receiver to sell to the highest bidder, after thirty days' published notice, fixing the day and hour, each section entire, or both together but not by subdivisions, and further directed that the sale should not be held open for any considerable length of time.

3. The register and receiver July 30, 1883, gave such notice, fixing 10 o'clock of Monday, September 10, 1883, as the hour of sale.

4. Bids were received, and T. M. Overfelt was declared the purchaser at \$7,000, and the sale was declared closed.

5. On the next day, without formal notice, the sale was again opened, Overfelt was declared to be in default of payment, and the property was struck off for the sum of \$3,850 to John H. Tonningson, who paid the money; whereupon cash certificate was issued in his name and transmitted to you by letter of 12th September.

6. Overfelt alleges and shows that on the day of his purchase, he, not

having cash in hand, telegraphed to Miller & Lux of San Francisco to deposit \$7,000 with the U. S. Assistant Treasurer, to the credit of the receiver; that the 10th being a legal holiday in California the deposit could not be offered; that on the morning of the 11th it was offered, but refused for want of explicit authority from the receiver to allow a deposit to his official credit; that the telegram was sent after consultation with the register and receiver, and as an act of good faith to secure and make payment to the United States of the amount of his bid; that the money was actually received at the sub-treasury and held in suspension without the issue of a certificate of deposit to await the final determination of the matter, and is still so held; that the telegram was drawn up by the register and is in his handwriting; that in the ordinary course of business an answer could not be had until the following day; that the receiver refused to recognize this deposit, or to authorize the placing of the same to his credit, or to receive checks for payment, and treated the non-payment in cash on the day of sale as an absolute default.

Various allegations accompany the record, respecting an understanding had by Overfelt with the register and receiver by which he was to be allowed time to complete the payment in the manner proposed; also as to what took place on the date succeeding when the property was again offered, many of which allegations are strongly discredited by affidavits of prominent individuals, and absolutely denied by the register and receiver, thus very seriously impeaching the statements of Mr. Overfelt as a straightforward and truthful recital. I therefore dismiss them from consideration, and proceed to settle the controversy, solely in the public interest, upon the conceded facts herein recited.

The contention on the one hand is that the law as enacted by Sections 2122 and 2123 is not limited by the general land laws governing public offerings for the purpose of bringing lands into market, but is a special statute confiding to the Secretary of the Interior in his discretion the duty of determining the mode as well as the propriety of sale; and that an accepted bid, even when the sale is by public auction, entitles the purchaser to a reasonable time of payment, not limited to cash in the hands of the receiver on the day of sale, but open for satisfactory compliance with his offer at the option of the Secretary.

On the other hand, it is strongly insisted that said sections are not independent of general legislation, save in the matter of creating a special power of sale in the head of this Department, leaving merely the discretion to sell, governed by the general statutes relating to public offerings as to all matters affecting the manner of sale, and controlled by all the incidents of such legislative restrictions, except as to details specially taken out of the general statutes by express mention. And it is urged, in this view, that the law relating to public outcry, as embodied in chapter seven of the Revised Statutes, required in this case:

- (1) That the land should be completely paid for on the day of sale by

cash in the hands of the receiver, and, (2), that if not so paid for it was incumbent on the register to resume the outcry on the following day, and so on, till upon an accepted bid within the limitation of two weeks, payment should be made in such manner. (Sections 2356, 2357, 2360, R. S.)

Both propositions are elaborately argued with citation of authorities by the respective counsel.

I do not think it necessary to go beyond the language of the law in this case to determine its construction. This is a provision for disposal of property having an exceptional value by reason of improvements created for Indian purposes. It was enacted March 3, 1843, (5 Stat., 611), in language almost identical with the revision, except that the Secretary of War was granted the power afterward vested in this Department by act of March 3, 1849, creating the same (9 Stat., 395). At the date of the act, therefore, it had no relation to the administration of the public land system, which then contained the same general provisions as now, and was under control of the Secretary of the Treasury. It can scarcely be claimed that the transfer of jurisdiction changed the course of administration or involved a new construction of the statute. Consequently the law was unchanged at least down to the enactment of the Revision, and, as before shown, sections 2122 and 2123 are substantially identical in terms with the original act. The history of the matter, therefore, furnishes no ground for holding that it was the intention to merge the statutes.

If the language of the law be considered, the same conclusion follows. "The Secretary of the Interior is authorized to cause to be sold, at his discretion, with each of such buildings as are mentioned in the preceding section, a quantity of land not exceeding one section; and on the payment of the consideration agreed for into the Treasury of the United States by the purchaser, the Secretary shall make, execute, and deliver to the purchaser a title in fee simple for such lands and tenements."

Here are three things, one of which is added to the discretion conferred by the previous section to sell the buildings, and becomes an incident to the proceeding, to wit, the sale of "a quantity of land." The other two are obligatory, and include (1) an agreement for a consideration and payment into the Treasury of the same, and (2) the making of a fee simple title "for such lands and tenements."

Now it is clearly unreasonable to construe a provision authorizing a regular agreement for a consideration, an afterpayment of such consideration into the Treasury of the United States, and commanding both execution and delivery of a fee simple title upon such compliance, as a statute which, because the Secretary directs a public outcry for the purpose of securing a fair price to the government, requires him to refuse to receive the payment agreed to be made on account of a reasonable delay whereby the purchaser is enabled the more securely to place the money in the Treasury, and pay a greater price than he could do in-

stantly, on the spot; by deposit with the receiver. The conveyance is not the ordinary patent for public lands, whatever it may be in form to suit the convenience of the Department, but is a conveyance of both "lands and tenements," like the deed of an individual in fee.

The transaction also differs *in toto* from a public offering to bring lands into market at a stated price for purposes of after disposal at private entry; and consequently there is no "reason of the law," requiring the application to it of any of the general principles or statutes governing the administration of the public land system.

Having no doubt upon the foregoing conclusions, I accordingly direct, under the discretion vested in me by the law, and pursuant to my convictions of my duty to the government to secure the full benefit of this sale without depreciation, that Overfelt be allowed to deposit the \$7,000 to the credit of the receiver as moneys on account of public lands, and that patent certificate be issued in his favor for the property in question. The sale to Tonningson having been irregularly made, outside the proper understanding of the instructions issued by the Department, and the price being inadequate, I decline to ratify the same. On compliance by Overfelt with this decision by carrying the deposit to the credit of the United States, Tonningson's entry will be canceled. And on account of the long delay already accrued, I further direct that the proceeding be consummated and patent issue at the earliest practicable moment.

RAILROAD GRANT—INDEMNITY LIMITS.

CARY ET AL. *v.* CHICAGO ST. P. M. & O. RY. CO.

An unexplained discrepancy having existed for many years between the indemnity limit diagrams on file in the local office, and General Land Office, respectively, and the rights of settlers in the meantime having intervened prior to selection, the company appear to be debarred from asserting a claim to the land.

In view of the irregularities in the proceedings and alleged bad faith on the part of the settlers a hearing is ordered.

Secretary Teller to Commissioner McFarland, February 27, 1885.

I have considered the case of Edward L. Cary and W. L. Allen *v.* The Chicago, St. Paul, Minneapolis and Omaha Railway Company, (successor to the St. Croix and Lake Superior Railroad Company, Bayfield Branch,) involving the W. $\frac{1}{2}$ of Sec. 13, T. 40 N., R. 6 W., Eau Claire-district, Wisconsin, on appeal by the plaintiffs from your decision of November 16, 1883.

The tract is within the twenty miles or indemnity limits of the grant by act of May 5, 1864, (13 Stat., 66,) to the State of Wisconsin for the purpose of aiding in the construction of a railroad from a certain point on the St. Croix river or lake. The company's withdrawal was made February 28, 1866, and it selected or applied to select the tract in question November 4, 1882, but the register and receiver rejected the application. Meanwhile, however, March 15, 1882, Cary and Allen had been

permitted to file declaratory statement No. 5213 for the NW. $\frac{1}{4}$ and declaratory statement No. 5214 for the SW. $\frac{1}{4}$, respectively, of Sec. 13 in question, alleging settlement March 12th and 13, 1882, respectively.

November 14th ensuing these pre-emptors submitted final proof, agreeably to published notice dated October 4th preceding; and it was by reason of their filings that the company's indemnity selection was rejected. But the register and receiver nevertheless rejected said proof, denying the pre-emptors' right to perfect their claims, upon the ground that said tracts were not subject to their filings, owing to an erasure, upon the diagram (recorded in the local office) of the aforesaid indemnity limits, from the center of Sec. 13 to the western boundary thereof, whereby the whole section was eliminated from the limits of said grant. The diagram in your office, however, shows that the line of the said twenty miles limit passes through the center of section 13. Although it would seem to be *prima facie* evident in the light of your records, as you state, that such erasure had been made by some one unknown, it is not quite manifest that the tract in question was not subject to said filings, for it will be observed that such discrepancy between said diagrams has existed for several years, antedating the official lives of the present incumbents of the local office, one of whom (the receiver) states that "he has no recollection of ever seeing it otherwise," while the present register found the diagram in the same condition when he assumed his official duties. It therefore behooved the company to see to it in the first instance that such patent discrepancy was either explained or rectified before any adverse claim had intervened, since it is not competent for the company to assert a paramount right in the premises by virtue of their laches.

Some features of this case would seem to bring it within the Valina Taylor case, (2 L. D. 557) while other some are found in the Prest case, (Ibid. 506) but in view of the manifest irregularity of procedure throughout the premises, and of the affidavits alleging bad faith on the part of these pre-emptors, I deem it expedient to direct that a hearing be ordered, upon due citation to all parties in interest, to the end that these pre-emptors may be accorded an opportunity to establish the validity, if any, of their claims. Your decision is accordingly vacated.

PRE-EMPTION; FINAL PROOF—SECOND ENTRIES AND FILINGS.

CRAIL WILEY.

The testimony of witnesses in pre-emption final proof may be taken before any officer competent to administer oaths.

The right to amend filings, homestead and timber culture applications, should not be abridged by technical rules, but determined upon the merits of each case.

Secretary Teller to Commissioner McFarland, February 27, 1885.

I have considered your report of the 6th instant upon the request of Crail Wiley, dated 23d January last, representing, as president, the

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action of a public meeting of the citizens of Coldwater, Kansas, to have recalled the ruling of your office of January 5, 1885, by letter to Inspector Hobbs, to the effect that final proof in pre-emption claims can not be made, except before clerks of counties or the district land officers. (3 L. D., 298.) You base your instruction upon the want of sanction by this Department of any regulation providing for the admission of testimony furnished by claimants' witnesses, when sworn before any other officer.

In relation to this matter I deem it only necessary to refer you to the original instructions of September 15, 1841, (1 Lester, 360,) "as prescribed by the Secretary of the Treasury," and issued immediately upon the passage of the act of the 4th of that month. On page 364 it is provided that "the witnesses are to be first duly sworn or affirmed to speak the truth, and the whole truth, touching the subject of inquiry, by some officer competent to administer oaths and affirmations," &c.

From that day to this it has been the practice to admit such proofs, the only requirement of an oath before the register or receiver being that of the final affidavit of the claimant as prescribed by law. It can scarcely be adjudged at this late day, after more than forty years of uniform practice, that the effort to give title under the law has miscarried in a matter so vital as the validity of the proofs required to substantiate the right of the settler.

You will please correct the instruction erroneously promulgated.

My attention has also been drawn to a matter kindred to this, embraced in your circular of October 23, 1884, touching application for amendment of filings and homestead and timber culture applications, and changing the existing and long recognized practice of the Department with respect to such corrections. (3 L. D., 161).

59-160, I do not deem it advisable to deny by arbitrary rules the right of settlers to apply voluntarily for such amendment as will enable them to secure the right to their homes, where clerical mistakes or conflicting claims have been made to their prejudice. It is the duty of this Department to aid rather than obstruct the prosecution of settlement rights, and all cases should be fairly heard and adjudged upon their merits, without the restriction of technical regulations.

I therefore revoke the authority of the circular in question and direct that the general regulations previously in force be observed.

See review of practice re amendment given in Christoph Kutschka, 1888, 7 PD 155

TOWN SITE; SETTLEMENT—PRE-EMPTION; FINAL PROOF.

KEITH *v.* TOWNSITE OF GRAND JUNCTION. (ON REVIEW. 3. L. D., 356.)

The rule by which the validity of a settlement is determined applies as well to town site settlers as to claimants under the homestead and pre-emption law.

It is not the intention of the law to withhold from pre-emption such lands as individuals may designate or select, without authority, as the site for a probable town.

The "right of pre-emption," referred to in sections 2257-2258 U. S. Revised Statutes, begins with settlement and lasts until the right of purchase has expired, and cuts off intervening claims to the tract so appropriated.

The pre-emptor is entitled to thirty-three months after settlement within which to purchase the land, and an offer to make final proof at an earlier date will not cut him off from afterwards claiming the benefit of the full statutory period.

It is not material to inquire whether pre-emption final proof has been made within the statutory period where the validity of the claim is called in question by a pending contest.

Secretary Teller to Commissioner McFarland, February, 1885.

I have before me a motion by the Townsite of Grand Junction for a review of my decision of July 21, 1884, in the case of Keith *v.* Grand Junction.

The lengthy argument urging it upon my attention is a remarkable one in several respects, and particularly in its perversion of various plain rulings in the decision. For example, on page nine of the brief, it is asserted that the decision "holds that the initiation of the claim, viz., the settlement of the pre-emptor, constitutes the right of pre-emption;" and, on page twenty-six, that it holds that a town of one hundred inhabitants living on forty acres, and entitled to enter three hundred and twenty acres, "may enter forty, and not three hundred and twenty, acres." Neither the letter nor the spirit of the decision includes any such doctrine, and, as I am bound to suppose that the assertion that it does contain such doctrine was made erroneously, and not willfully, I will, with a view to counsel's enlightenment, retrace briefly the actual findings of fact and law that were made, with some additional remarks addressed to the novel views now placed before me by contestee's argument.

The facts in this case showed that both Keith and the Townsite had settled on land within an Indian reservation, and it was held that thereby neither gained a right to the land. At the date of the release of the reservation they both duly asserted claims to the land. By the long-since-established rulings of the Land Department, founded upon fixed principles of law, as they stood upon an equality in respect of their legal rights, it was necessary to determine which had the superior equity; and that was determined, as it has been determined since the foundation of the pre-emption system, by ascertaining which of the two had first settled on the tract in controversy. The decision found

that Keith was the prior settler, and this determined that his was the superior equity, and, ultimately that he was entitled to enter the land. Said finding was based on the ruling that the anterior so-called selection of a townsite was not the selection contemplated by law. The decision also found that the subsequent selection by the incorporated town was made after a bona-fide settlement by Keith, and was made of six hundred and forty acres, when the inhabitants were authorized to select but three hundred and twenty acres.

My reasons for thus ruling that said first selection was invalid were plainly stated in the decision. I had no intention to, nor did I, rule that a townsite could not be selected by a few persons; but I found as a fact that the persons who made this selection were not settlers on the land, and that they did not go upon it for the purpose of then becoming settlers; and I ruled, as matter of law, that such persons were not competent to make a legal selection. The Land Department has always distinguished between settlement and an intention to settle, and it obviously cannot have one rule for pre-emptors and homesteaders, and another rule for townsite settlers; there must be formulated a definite principle for all classes of cases, in order that harmony in the administration of the various land laws may ensue.

I find, upon examination, that my ruling has been, substantially, the ruling of the Land Department from an early day. In discussing the acts of 1841 and 1844, both incorporated into the Revised Statutes, Mr. Attorney-General Cushing said in 1856 (7 Ops., 733): "That act supposes public land to be 'settled upon and occupied as a townsite,' and 'therefore' not subject to entry under the existing pre-emption laws. This description identifies it with the land 'selected for the site of a city or town' in the previous (the pre-emption) act;" and he points out that the general circular of July 3, 1838, had interpreted the pre-emption act of June 22, 1838 (5 Stat., 251), which had excepted lands "which have been actually selected as sites for cities or towns," as meaning lands "which *settlers* have selected with a view of building thereon a village or city," and holds that "the same considerations which induced this construction of the word 'selection' in the act of 1838 dictate a similar construction of the same word in the subsequent act," and that this definite construction having been given to the word, and repeated in the subsequent statute is "not merely a repetition of the word, but an implied legislative adoption even of such construction." And Mr. Secretary Thompson ruled, in 1858, in the case of the Townsite of Superior City (1 Lester, 432)—a ruling which was followed by the Supreme Court of Michigan in the Ontonagon Townsite case (*Idem*, 736)—that that clause in the pre-emption act "cannot be construed to recognize the right of selection by individuals for their own use and benefit," and that "it was manifestly not the object of the law to withhold from pre-emption such lands as individuals might designate or select without authority as the site for a probable or prospective city or town."

These rulings are in force to-day as they were in 1858, for the law in this particular is unchanged. The Revised Statutes, Sections 2380 to 2394, and the act of March 3, 1877, provide for reservations or appropriations by townsites. Section 2380 provides for a reservation by the President; Section 2382 for a reservation, "in cases in which parties . . . may hereafter desire to found a city or town" by filing "with the recorder for the county in which the same is situated a plat thereof," etc.; Section 2387, for a case where the lands "may be *settled upon and occupied* as a townsite," whether incorporated or not; and the act of 1877 contemplates "the existence or the incorporation" of a town, which must be construed as the existence or incorporation contemplated by the above provisions in the Revised Statutes. By none of these ways had the townsite of Grand Junction been appropriated at the date of Keith's settlement.

The next point that this motion urges is that, under Section 2257 and 2258 Revised Statutes, it is the "right of pre-emption," or the "rights of pre-emption," which are prohibited on lands selected for the sites of towns, or within their incorporated limits; it labors to prove that a right of pre-emption is, not the right of settlement, but the right of "entry and purchase;" and it insists that the rights of towns may not be dependent on such "shadowy claims" as are initiated by a legal pre-emption settlement. It, however, overlooks the fact that "the claim of a pre-emption is not that shadowy right, which by some it is considered to be" (9 How., 314); that the pre-emption law itself (Section 2273, Revised Statutes) makes it depend on priority of settlement; that "the patent upon a pre-emption settlement takes effect from the time of the settlement," "and cuts off all intervening claimants" (91 U. S., 330); and that only some subsequent express grant or expressly authorized subsequent appropriation by the United States can cut off the right of entry founded on such a settlement (15 Wall., 77). In consonance with these views the uniform ruling of the Land Department has been that, as expressed in the case of J. B. Raymond (2 L. D., 854), "the right to *hold the land before payment* is made therefor, upon promising to buy the same at a stipulated time, together with the right to purchase at such time, is the 'pre-emptive right' referred to in Section 2261; and such right is initiated by settlement and filing a declaratory statement." There is but one right of pre-emption referred to in said mentioned Sections; it begins with settlement, and lasts until the right of purchase has expired; and it cuts off all intervening claims to the tract so appropriated, by any other class of claimants. Those who contemplate founding towns have fair notice of what is a pre-emptive right by these constructions and decisions, and if they found a town in proximity to such settlers they do so with their eyes open. It may be justly said of the law authorizing the selection of townsites, as was said of the law authorizing certain State selections, that "the two modes of acquiring title to land from the United States were not in conflict with each other;

both were to have full operation, that one controlling in a particular case under which the first initiatory step was had," (*Shepley v. Cowan*, 91 U. S., 330.)

It is further urged by the motion that, because Keith made offer to prove up a certain time, and then declined to do so, he abandoned his claim; and that his failure to make final proof within the time limited by Section 2267, Revised Statutes, bars final proof hereafter. It is sufficient to reply to these arguments that, by the pre-emption law, the claimant had thirty-three months after settlement in which to pay for the land, and I can find no authority to force him to an earlier payment. It is true he may offer to make his proofs at an earlier date, and may subject himself in some cases to contest (on the question of priority of right, or compliance with the law,) by other claimants if he fails to proceed with them; but he has a statutory pre-emption right to hold the land for said thirty-three months, which the Land Department may not deny, except in the event of an adjudication upon a contest as suggested. In this case, promptly upon the townsite entry he took an appeal, and he is unquestionably before the Department as a bona-fide pre-emption claimant. If he has not made his proof and entry within the thirty-three months, it is because his claim is still in the custody of the law, and the regulations of the Land Department forbid any further action looking to the disposal of the land in controversy (Rule of Practice 53).

It is finally urged that Keith has abandoned the land by applying for it under certain local statutes. But I find nothing in either the letter or spirit of the law warranting the Land Department in holding such an act to be an act of abandonment.

For the reasons above recited, the motion for review is dismissed.

Accompanying the motion for review is a motion for rehearing for the purpose of showing the situation of his land in respect to the public square of Grand Junction, that the town authorities had taken possession of and built upon part of said land, and that his settlement was made for speculation. All of these facts were in evidence and duly considered when the case was originally before me. Hence they are not ground for a rehearing, and the motion is accordingly dismissed.

Since writing the foregoing, I am in receipt of another motion for rehearing based on the ground of newly discovered evidence, namely, that Keith has shown his speculative settlement by preparing to sell his land off as town lots, and that he has not complied with the law in respect to residence and improvement. As to the former allegation, it was held in *Plummer v. Jackman* (10 C. L. O., 71), that "the statute cannot be construed to mean that persons going to the frontiers, or along the lines of projected railways, and anticipating centers of population, shall not enjoy the benefits of their enterprise and foresight, though they believed that their claims would become of great value on account of their proximity to cities and villages, or that villages or

cities would even be built upon such claims, and thereby enable them ultimately to realize large prices for such lands." As to the second allegation, it is to be observed that the decision in this case only went to the extent of holding that "Keith will be allowed to prove up his claim," and only decided the issue raised by his contest, namely, the superiority of right to the tract as between him and the townsite. When he again offers to make his proof, questions concerning his non-compliance with the law in the respects referred to may be properly put in issue by the usual protest.

TIMBER ENTRY—PRE EMPTION CONFLICT.

MERRITT *v.* SHORT ET AL.

When a timber land claimant applies to purchase land embraced within a prima facie valid pre-emption filing, the pre-emptor should be cited to show cause why such application should not be allowed.

In such case however the burden of proof is upon the timber applicant to show the invalidity of the pre-emption claim.

An invalid prior existing pre-emption claim is no bar to purchase under the timber act.

Secretary Teller to Commissioner McFarland, March 3, 1885.

I have considered the case of Benjamin Merritt *v.* Oliver F. Short and Albert Philp, involving title to the W. $\frac{1}{2}$ of NW. $\frac{1}{4}$ of Sec. 25, and the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 26, T. 5 S., R. 21 E., M. D. M., Stockton, California, as presented by the appeal of Merritt from your decision of July 7, 1884, rejecting his timber land application for said tracts.

It appears from the record, that Short filed his pre-emption declaratory statement No. 8466 upon said tracts on October 17, alleging settlement July 28, 1880. On August 9, 1883, Philp filed his pre-emption declaratory statement upon said tracts, alleging settlement July 30, 1883. On August 20, 1883, Merritt filed his sworn statement and application to purchase said tracts under the timber act of June 3, 1878, (20 Stat., 89.) Due notice was given when final proof and payment would be offered for said land, and Short and Philp were summoned to show cause, at the same time and place, why Merritt's said application should not be allowed. Short did not appear. Philp and Merritt appeared in person and with counsel and offered their testimony. The register and receiver were of the opinion that Philp had no valid claim at the date of the timber application, that the land was of the character described in said act, and that Merritt should be allowed to enter said land.

On appeal by Philp, your office decided, citing Rowland *v.* Clements (2 L. D., 633), that "the local officers were in error in receiving the timber application as it covered the tract already covered by the two filings aforesaid."

On November 24, 1884, in the case of Showers *v.* Friend (3 L. D., 210), Rowland *v.* Clements was cited and commented upon at length, in the

following words: "In the case of Rowland, the only issue was as to the character of the land and whether it was subject to a timber entry, no question being made as to the bona fides of either party. In the present case the sole question respects the bona fides of Showers and whether he had a valid claim at the date of Friend's application. That although a claim may have a status of record, yet if illegal or invalid for any reason, it is not such an appropriation of the land as will prevent other disposition of it, upon a proper showing; and to test such questions arising under the act of June 3, express authority is granted parties by its third section."

Again, in the decision of this Department in the case of Crooks *v.* Hadsell (3 L. D. 258), rendered December 17, 1884, upon an application to purchase, under said act, land embraced in a prima facie valid pre-emption declaratory statement, it was held that "the question as to the character of the land is not a material one, so long as Hadsell's pre-emption claim is under consideration. So long as his filing is of record, the only matters to be considered are his good faith and compliance with the pre-emption law."

It appears, however, that in the case of Crooks *v.* Hadsell (*supra*), although the pre-emption claimant was notified to appear and show cause why the timber entry should not be allowed, and did appear pursuant to said notice, no testimony was taken in the case, except as to the character of the land, and you were advised that the timber "application be recognized, subject to Hadsell's pre-emption claim."

The first section of said act provides, "that nothing herein contained shall defeat or impair any bona fide claim under any law of the United States." The second section provides for the filing in the "proper district" by the applicant of a sworn statement, in duplicate, containing certain allegations, and providing penalties for any false swearing in the premises. The third section provides, "that upon the filing of said statement as provided in the second section of this act the register of the land office shall post a notice of such application," and also prescribes the manner of proof of publication, and the final proof required, "if no adverse claim shall have been filed."

The filing of a pre-emption declaratory statement does not reserve the land embraced therein from settlement or entry by any qualified person, subject, however, to the right of the pre-emption claimant.

When, therefore, the timber applicant applies to purchase land embraced in a prima facie valid pre-emption declaratory statement, and makes the sworn statement required by the second section of said act, notice should be given as required by the third section, and the prior pre-emption claimant should also be notified to appear at the time and place designated, and show cause why the timber entry should not be allowed.

The burden of proof is upon the timber applicant to show the invalidity of the pre-emption claim. If the testimony in the case shows that

the pre-emption claim is invalid, and the final proof conforms in all respects to the requirements of said act, the applicant is entitled to enter the land applied for, upon payment of the purchase money and fees required by law.

In the case at bar the testimony shows, by his own admission, that Philp removed from land of his own in the same Territory to reside upon the land in controversy. He could acquire no right of pre-emption under the second clause of Section 2260 of the Revised Statutes. It appears also that Short sold to Philp his possessory right and improvements on the land in July, 1883. A careful consideration of the testimony shows that the land is not of such a character as contemplated in said act. Your decision is therefore modified. The declaratory statement of Philp should be canceled, said timber application rejected, and the land in controversy held subject to settlement and entry by the first legal applicant.

TIMBER CULTURE—DEVOID OF TIMBER.

BARTCH v. KENNEDY.

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

Secretary Teller to Commissioner McFarland, March 3, 1885.

I have considered the case of Edward W. Bartch v. Owen Kennedy, involving timber-culture entry No. 1110, Bismarck, Dakota, March 22, 1883, for the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 18, Tp. 144, R. 86, being an appeal from your decision of June 18, 1884, adverse to him.

This contest was brought July 18, 1883—four months after entry—alleging the illegality of the latter, because the section within which it was made was not devoid of timber. A number of witnesses testified, and considerable diversity of opinion was displayed as to the character of the land, the quantity and quality of the wood or timber growth thereon. After sifting and weighing this testimony it may be summarized as follows: On the banks of the Knife River, which passes through the western half of Sec. 18, there are from five to six acres of trees of different kinds, probably twelve hundred in number of all sizes, varying from small saplings to a few trees of twenty inches through, and located mostly on the river bank, where the land is subject to overflow. The trees are such as are now recognized as "timber."

The timber culture laws were enacted for the purpose of furnishing by artificial means an adequate supply of timber for settlers upon the public lands, where such supply does not exist naturally. Conversely, if such supply exists the machinery of the timber culture law is not to be set in motion, and an entry made in pursuance of it, under such cir-

circumstances is improper, illegal, and should be canceled. The law-making power, speaking through the Act of Congress, has declared that ten acres of timber, or sixty-seven hundred and fifty living and thrifty trees of eight years' growth and culture, constitute an adequate supply of timber for the inhabitants of one section of the public lands. And if it shall be made to appear at the proper time that an entryman has, in pursuance of the requirements of law, secured the existence in proper condition of this quantity of timber he is entitled to receive a patent for the land so entered and cultivated.

Whilst the law thus defines what is deemed an adequate quantity of timber to the section, when planted and raised in pursuance of its purpose to promote the growth of timber, it does not declare, in terms, what quantity or quality of timber growing naturally on a section shall preclude it from timber culture entry. But, as before said, if such sufficient supply does exist naturally, it is not to be denied that the land is not subject to such entry.

If the prescribed quantity, when raised by artificial means, is an adequate supply, it certainly should be regarded as sufficient when the result of natural growth; and the standard thus fixed by Congress, as entitling the entryman to his patent, should be taken as a guide in determining whether the natural growth on a given section does or does not preclude it from entry under the timber culture law, because of containing an adequate supply of timber.

But it may be readily comprehended that no fixed or unbending rule can be adopted in cases like the present, because of the widely different circumstances which most probably would be presented in each case; yet the standard fixed by the Act of Congress should be always approximated as closely as possible.

Guided by these considerations, and keeping in view the above standard, I am very clearly of opinion that the testimony in the case under consideration fails to show that there is such a natural growth of trees, either as to quantity, quality or condition, upon the named section, as would make a timber culture entry thereon illegal. I therefore affirm your judgment.

PRIVATE CLAIM—PRELIMINARY SURVEY.

RANCHO SAN RAFAEL DE LA ZANJA.

Where a private claim for sixteen square leagues is pending before Congress for confirmation, the only question in dispute being the extent of the claim, and the preliminary survey already made covers four square leagues only, a second survey to fix the identity of the lands claimed will be allowed at the expense of the claimant.

Secretary Teller to Commissioner McFarland, Mich. 3, 1885.

I have considered the appeal of Colin Cameron from your decision of December 4, 1884, declining to authorize a preliminary survey of the

"Rancho San Rafael de la Zanja," in Arizona, to the extent of sixteen square leagues, a preliminary survey thereof having once already been made covering four square leagues only, and reported to Congress by Surveyor General Wasson's report of April 28, 1880, recommending confirmation to the latter extent only—transmitted to that body on December 9, 1880.

This claim has heretofore been the subject of departmental consideration in view of pending action by Congress, your recommendation of April 11, 1882, for confirmation by the larger boundaries having been overruled by my predecessor's letter of April 28, 1882, addressed to Hon. R. Pacheco, Chairman of the House Committee on Private Land Claims, wherein he adhered to the original recommendation of the surveyor general.

In view of the fact of such pendency before Congress and of the departmental opinion aforesaid, you decline to authorize the survey now applied for, holding that the executive jurisdiction of the subject matter is concluded.

It is true a recommendation has been made for a specific confirmation by surveyed boundaries, and if that were the conceded extent of the claim, and the question were one upon title alone, there could be no private claim outside that survey. But the extent is the only disputed matter before Congress,—except, it may be, the merely incidental one of ascertaining the names and whereabouts of a portion of the grantees—as the validity of the grant is not drawn in question, and it is admitted, so far as the opinions go that so much, at least, belongs to the same. Now, there being a claim pending in Congress—which was also presented to the surveyor general and decided adversely by him—to have a confirmation by the metes and bounds set up by the claimants, it is proper to inquire what lands are reserved by law. The statute defines them. "Until the final action of Congress on such claims, all lands covered thereby shall be reserved from sale or disposal by the government," etc. That is, all claims reported upon by him and in which he shall have given "his decision as to the validity or invalidity"—under his authority to "ascertain the origin, nature, character and extent." There being an issue here taken as to the validity of this claim for an extent greater than has been awarded by the surveyor general, the duty to reserve the lands is clearly incumbent on this Department, and if that can best be done by a preliminary survey to fix their identity, the claimants paying the expense, I am of the opinion it is lawful and should be allowed.

Of course nothing in such proceeding can be construed as a recognition of the validity of the claim, that being a matter for expression by authoritative opinion, when called upon by Congress for recommendation. The survey should simply show and exactly define the claimed boundaries, by the monuments of possession, leaving unaffected the final adjudication committed by law to Congress and not to this Department.

Your action is therefore modified in accordance with the foregoing.

SWAMP LAND—ADJUSTMENT OF GRANT.

STATE OF OREGON. (ON REVIEW, 3 L. D., 334.)

The plan of examination, provided by the instructions of the Department, was somewhat modified by the Commissioner of the Land Office, but such change was subsequently ratified by the Secretary of the Interior, and the State lost no right thereby.

Secretary Teller to Commissioner McFarland, March 3, 1885.

I have considered the motion of counsel for the grantee of certain alleged swamp lands in the State of Oregon for a review of the Acting Secretary's decision of January 24 last, holding that the State was concluded by its agreement upon a plan of settlement, and by the settlement thereunder made, of the question of the character of the lands; but that, for the reasons therein stated, and in order that ample justice might be done in the premises, the question of the swampy character of certain lands in Range 32½ would be re-opened.

Said motion is largely devoted to a discussion of questions of fact, and to objections to the findings thereon. I need hardly remind counsel that such objections are not sufficient ground of review. The facts referred to were in evidence when the case was here last, and I must therefore decline to reconsider said findings, including the fact that the original plan of adjustment was modified with the knowledge and consent of the State, and that upon such modified plan the adjustment was made.

It is urged that the Commissioner had no power to change the plan of examination as provided by the Secretary's instructions June 30, 1880. To this it is only necessary to reply that the Secretary has ratified said change, if it be deemed a change of a substantial nature. In point of fact, however, the change merely went to the manner of collecting evidence of the character of the lands, and not to a denial of the State's right to furnish evidence; it was a change in form, but not in substance. It is true that the State did not submit affidavits, etc., concerning each tract of land in question, but it did obtain the evidence through its duly-appointed and authorized agent, by personal inspection and inquiry, and that evidence was duly considered by the agents of the United States and of the State, in the manner provided in the modified plan, and was duly acted upon. The State was denied no right that it had. The Acting Secretary's decision simply denies it the right to repudiate that agreement, the evidence obtained under it, and the findings thereon.

I do not observe anything else in the motion which would lead me to differ with the Acting Secretary, and, concurring generally in the views expressed in his decision, I must adhere to it, and dismiss the motion for review.

PRIVATE ENTRY—LAND REDUCED IN PRICE.

WEIMAR ET AL. v. ROSS. (ON REVIEW, 3 L. D., 129.)

The Department having decided that the private entry was void, because when made the land had not been re-offered since its reduction in price, and hence no bar to pre-emption filings, such decision is vacated and the question held for further consideration.

Secretary Teller to Commissioner McFarland, March 3, 1885.

On October 2, 1884, I decided in favor of the claims of J. B. Weimar, Patrick D. Murphy and Nicholas Kirst, to be permitted to file as pre-emptors and enter certain claims upon even sections in Michigan, Marquette district, within the common limits of the grants made by act of June 3, 1856, (11 Stat., 21,) for the Marquette and State Line and the Ontonagon and State Line Railroads, so styled.

Weimar claimed the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 26, T. 43, R. 35, covered by location November 20, 1879, register and receiver's No. 728, Supreme Court scrip B., No. 615, in favor of John D. Ross. After my decision of October 2, he made final proof and cash entry No. 15,497, December 12, the scrip location having been canceled by your letter of October 7, 1884.

Murphy claimed the NE. $\frac{1}{4}$ of Sec. 36, T. 43, R. 35, covered December 12, 1879, by warrant location in favor of John D. Ross, register and receiver's No. 5781, warrant No. 114,362, one hundred and sixty acres, act of 1855; and under the same proceedings as in case of Weimar, made cash entry No. 15,499, December 12, 1884.

Kirst claimed N. $\frac{1}{2}$ of NE. $\frac{1}{4}$ of Sec. 26, T. 43, R. 35, covered November 20, 1879, by location in favor of John D. Ross, Supreme Court scrip, B. No. 614, canceled as in the other cases, and made cash entry No. 15,498, December 12, 1884.

Application for review of my decision in these cases having been duly filed, I instructed you, November 28, 1884, to permit final proof to be made, by the pre-emptors, "(without prejudice to the motions) but thereafter" to "suspend all further action therein until otherwise ordered."

This order would not have admitted the final payment and entry, but related to the receipt of proof only, and was not observed by the district officers in allowing payment to be made.

It further appears that on the 17th ultimo you approved said entries for patent, and on the same date forwarded the papers to me, for consideration in connection with the motion for review.

Argument on that motion has been heard, and also upon the general question involved, in connection with other private entries and locations in the same condition, and to which the doctrine of the decisions necessarily applies.

The decision of October 2 rested upon that of the Acting Secretary dated October 30, 1882, case of *Sipchin v. Ross*, (9 C. L. O., 181,) to the effect "that under the ruling of the Supreme Court in the case of *Eldred v. Sexton*, (19 Wall., 189,) the entry of Ross being unauthorized by law and therefore invalid—because the land had not been re-offered since its reduction in price by the joint resolution of July 5, 1862, (12 Stat., 620,)—must be set aside." The conclusion reached was that entries of this class were void *ab initio*—absolute nullities—and no bar to the entry of the land by any person entitled to take unoffered lands, and consequently the pre-emption claims were legal.

Two contentions are set up with respect to these lands in the common limits, by the counsel representing the different individual claimants; one to the effect that they have never been lawfully reduced to the minimum of \$1.25 per acre, because (it is claimed) the Ontonagon and State Line location has never been authorized to be changed, and has not been abandoned by the State, and the act of release by the Governor has not been, and can not be accepted by this Department as to that line, being without authority of law, and has on that account been disavowed by the State of Michigan. The other concedes the conclusiveness of the relinquishment, but insists that the decision in *Eldred v. Sexton* does not apply, because these lands had once originally been offered at \$1.25 per acre, and while in that condition were raised to the double minimum by the re-offering, and upon the passage of the joint resolution they were restored to their former condition as lands offered at \$1.25, without the necessity of a further sale at that minimum. This latter view is also insisted upon by those advocating the first proposition, in case that proposition be not sustained.

All the counsel for parties holding the private entries insist further, that even if the entries are invalid within the reasons of the *Eldred-Sexton* case, they are voidable only, at the discretion of the Department, for violation of law or regulation, but not made outside the jurisdiction of the Department, and may be, and in view of the transfer of titles and the property interests founded upon them, should be confirmed; that Section 2271 of the Revised Statutes has direct application to this case, prescribing that "The provisions of this chapter shall be so construed as not to confer on any one a right of pre-emption by reason of a settlement made on a tract of land theretofore disposed of when such disposal has not been confirmed by the General Land Office, on account of any alleged defect therein."

On account of the brief time allowed me to devote to the consideration of all these questions with respect to the lands affected, I am unable reach a determinate conclusion. I am satisfied, however, that without such careful consideration a decision ought not to be rendered, which would destroy large and valuable property interests acquired through or based upon the action of the Department officers in admitting these entries, whether valid or otherwise. If absolutely void, of course, no

action of the Department can avail to give them vitality. The disposing power of Congress could alone be invoked to effectuate the title. But if valid as claimed, or if merely voidable, no action should be taken looking to a recognition of conflicting claims initiated after their date, while they remain of record undisposed of upon their legal or equitable merits, after fair trial and examination.

Having strong doubts as to what the final conclusion should be, but being reasonably satisfied that upon any proper construction of law the entries if invalid are at the most voidable only and not void, I accordingly vacate and revoke my decision of October 2, 1884, and all conflicting rulings affecting these cases, and direct that the Sipchen-Ross case, in which patent has already issued, be not made a precedent, pending the final judgment of this Department hereafter to be rendered.

The approval of the entries of Weimar, Murphy and Kirst, having been made by you under a misapprehension of the true condition of the case in issue, is overruled. The locations of Ross will be reinstated and permitted to stand pending the final decision. The testimony in the pre-emption cases will remain as a part thereof, with opportunity for such further showing in the matter as may be proper on either side. The papers will remain on the Department file for such future examination as may be necessary, and you will forward at the proper time any further papers which may be filed, material to the pending cases.

PRIVATE ENTRY—WYANDOTTE SCRIP LOCATION.

H. C. ODEN.

At the date of the scrip location the land was not in reservation but "subject to pre-emption and settlement" and therefore open to such location under the provisions of the treaty.

The scrip is evidence of a right under treaty provision and its validity unquestioned.

Secretary Teller to Commissioner McFarland, December 18, 1884.

I have considered the appeal of H. C. Oden from your decision of December 10, 1883, rejecting his application to file pre-emption declaratory statement for the NW. $\frac{1}{4}$ of Sec. 10, T. 1 S., R. 2 W., M. D. M., San Francisco, California.

Said application was made April 27, 1883, with allegation of settlement March 6, 1883, and was rejected because the land had already been appropriated by the location thereon of Wyandotte scrip July 10, 1878.

It is claimed on appeal that the tract was within the claimed limits of the El Sobrante grant, which was at the date of the scrip location *sub judice*, and therefore that the disposal under the scrip was illegal

and without force. Your decision holds that the tract in question, except a small fractional portion of the SW. $\frac{1}{4}$ thereof, was originally a part of the San Ramon Rancho, and was excluded therefrom by final survey approved and patented April 7, 1866, and was accordingly public land prior to and on July 10, 1878; Further that no portion of the tract was ever embraced in any statutory reservation for the El Sobrante claim.

The status of the land relative to the Sobrante brings the case within the reason of departmental decision of July 15th last in the case of Joel Docking (3 L. D. 204).

That decision is applicable to this case, and affirms your view as above expressed.

The tract, except a small portion of the SW. $\frac{1}{4}$ thereof, falls without the Higley survey of the Morago Rancho claim, which survey was held by the Department in the Docking case to be the boundary substantially of said rancho as claimed. It was therefore at the date of the location of the Wyandotte scrip public land, not in reservation, but "subject to pre-emption and settlement" as required by Article 9 of the Treaty of January 31, 1855 (10 Stat., 1159).

Your decision rejecting the pre-emption application is affirmed.

REVIEW; MARCH 3, 1885.*

* * * * In deciding said case I held that the lands in question were, at the date of the location of the Wyandotte scrip, (July 10, 1878,) public land subject to pre-emption and settlement as required under Article 9 of the treaty of January 31, 1855, (10 Stat., 1159,) and therefore subject to the scrip location. Holding thus I decided that the homestead and pre-emption claims initiated after the location of the scrip must be rejected. This conclusion is objected to in the motion for review and a reconsideration asked, because (1) the appeals failed to properly present the questions at issue, (2) other cases involving the same question and in which the issue has been fully presented are now pending, and (3) as it is contended, the location of the Wyandotte float was illegal and void.

The questions involved, as between the scrip locations and the applications to file or enter, were carefully considered in making the decision, and, if it be true, as suggested, that counsel failed to properly present the grounds of appeal, I fail to see why such fact should furnish a good reason for review. I am also unable to see why the fact that other cases involving the same questions are pending in the local office should delay the consideration and decision of these cases by the Department.

As to the third ground for review, it is claimed in effect, first, that

* The cases of Samuel Weldon and Charles L. Perkins involving the same question were disposed of in this decision.

there was no authority of law for the issue of the Wyandotte scrip, and, second, if such authority exists, that said scrip was not properly locatable on the land in controversy, because at the date of location the township plat of survey had not been filed.

The treaty of 1842 specifically granted lands, to be selected, and that of 1855 in terms recognized that such grant had been made.

I have no doubt as to the validity of the scrip with which the location was made. It was simply a certificate under the grant contained in the treaties of the right to select a certain amount of public land subject to pre-emption and settlement. It was evidence of a right under treaty provision. The right thus conferred has been repeatedly recognized by the Supreme Court of the United States.

In *Walker v. Henshaw* (16 Wall., 436) the question of location of scrip of the very character and kind as that herein described was under consideration and no remark was made even suggesting the illegality of the issue of said scrip, nor is the right or authority of the Land Department to issue patents under locations therewith questioned.

The objection that the scrip was not properly locatable on the land in question because the township plat of survey had not been filed, is not in my judgment tenable.

The land was at the date of the location subject to pre-emption and settlement, and the treaty provisions made such land subject to selection and location as made in this case. That is, it placed claimants under these floats and pre-emption or homestead claimants on an equality of privilege. The claim first presented for land subject to pre-emption and settlement has priority. After full consideration of all the matter presented, the motion for review is denied and transmitted herewith.

PRACTICE—APPEAL; EVIDENCE.

DAVISON *v.* PARKHURST.

The record in separate cases should not be consolidated on appeal.

When it is desired to use testimony taken in another case, such evidence should be copied and filed with the case.

Acting Secretary Joslyn to Commissioner McFarland, March 6, 1885.

* * * It is observed that this case was transmitted with the case of *Davison v. Smith*, involving different tracts, and the parties stipulated that the testimony in each case should be used in the other so far as the same is applicable. Although separate reports were made in the cases and separate decisions were rendered by your office, yet the record was consolidated and transmitted as one case. This is bad practice and leads to confusion. Each case should be tried separately and if counsel wish to use testimony taken in another case, that portion upon which they rely should be copied and filed with the case, and the district land officers should be instructed accordingly.

The rule relative to appeals as laid down in *Griffin v. Marsh* and *Doyle v. Wilson* (2 L. D., 28) and *Southern Minnesota Railway Extension Company v. Gallipean et al.* (3 L. D. 166), must be observed.

SURVEY.

P. B. JANDON ET AL.

The original survey being obviously erroneous, a re-survey is directed to include certain lands omitted on the former survey.

Secretary Lamar to Commissioner McFarland, March 12, 1885.

I have examined your communication of the 7th ultimo transmitting for Departmental consideration the application of P. B. Jackson et al., for the survey of certain lands in Townships 21 and 23 S., R. 28 E., and 22 S., R. 27 E., Florida. The affidavits and diagrams which accompany the application go to show that the several tracts referred to were erroneously omitted in the original survey.

The allegations that said lands are outside the meanders of lakes in the townships mentioned; that they are timbered and of such elevation as to preclude the possibility of their having been covered by water at the date of the original survey, are sustained by an examiner of surveys sent by your office to inspect the lands. You conclude that it is shown that errors were made in the original surveys which should be corrected by re-surveys of so much of the townships mentioned as may be necessary to embrace the tracts referred to in the application under consideration.

I see no reason why re-survey may not be made as you recommend, and you are authorized to give direction to the surveyor-general of Florida accordingly.

RAILROAD GRANT—CONFLICT WITH ENTRY.

ST. PAUL, M. & M. R. R. CO. v. FORSETH.

When the withdrawal within the indemnity limits took effect, the tract involved was covered by a homestead entry and hence excepted therefrom.

An entry though allowed upon an insufficient showing as to the qualifications of the entry-man is not void, but voidable, and while so remaining of record constitutes an appropriation of the land.

In this case the entry existing at date of withdrawal was made through an agent, and the affidavit accompanying the application was sworn to before the commanding officer of the entry man, setting forth that he was a single man, and in the naval service of the United States. Held, that though the entry-man did not appear to have had the proper possession of the land at date of entry, he was authorized under the existing practice of the land office to make the same, and the defect therein was cured by the provisions of Sec. 2308 of the Revised Statutes.

Secretary Lamar to Commissioner McFarland, March 12, 1885.

I have considered the case of the St. Paul, Minneapolis and Manitoba Railway Company v. Martin Forseth, involving the W. $\frac{1}{2}$ of SE. $\frac{1}{4}$,

SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, of Sec. 5, T. 129, R. 35, St. Cloud, Minnesota being on appeal from your decision of November 15, 1883, permitting Forseth to make homestead entry of the tract as per his application.

The land in question is within the indemnity limits of the withdrawal for the benefit of the St. Vincent Extension of the St. Paul & Pacific Railroad, now the St. Paul, Minneapolis and Manitoba Railway Company, under the grant of March 3, 1865, which became effective February 12, 1872.

It appears that one George A. White made homestead entry No. 4873, April 25, 1868, on said tract, which entry was canceled November 29, 1875, for abandonment. On May 9, 1883, Forseth made application to enter. On notification, the railway company filed objections to said entry and prayed for a hearing, but the local officers without action forwarded the papers to you for consideration. On November 15, 1883, you held that Forseth was entitled to make his entry and the company appealed.

These facts would bring the case within the ruling of Secretary Teller in the case of *Prest v. Northern Pacific Railroad Company* (2 L. D., 506). But it is sought to except it from that decision, because, it is charged, the entry of White was null and void in its inception, having been made by an agent, the affidavit accompanying it being sworn to before the commanding officer of White; and setting forth that he was a single man and in the naval service of the United States.

There was no hearing in the case either in the local office or in yours, and I think the point presented by the company should be fully considered and determined by me. Under the homestead laws all applications to make entry are required to be accompanied by duly executed affidavits showing the qualifications of the party to make such entry. This requirement is made in order to show the good faith of the applicant, and is a matter, under the law, between him and the government. If satisfied with the showing, the application is allowed to be recorded; if not, it is rejected. If accepted on what may be thought an unsatisfactory showing of the necessary qualifications, or on a defective affidavit, either in form or substance, the entry is suspended and the party called upon to comply fully with the requirements of the Department. But such entry, if accepted, is not, because of the defective affidavit, absolutely null and void. It is an entry which may be perfected so that the party can obtain a patent for the land covered by it; or it may be avoided, because of defects, by the government, either with or without contest. But, having been accepted and recorded, until avoided, it is an entry, and as such segregates the tract from the public domain, precluding the claim of any one else to the land covered by it.

Had the local officers declined to receive the application their action would have been sustained. But in the absence of such action the

entry remained intact upon the records, with the privilege to the entryman to cure the defect.

This is the every day practice of your office; and under it many thousands of entries have been approved for patent. Were that practice to be now declared improper and it be held that such defects in entries could not be cured, because the latter were rendered thereby absolutely null and void, the result would be far reaching and disastrous, unsettling the title to many millions of acres of the public lands.

In this case the land authorities have twice passed upon the sufficiency and legality of White's entry—when it was made of record and when it was canceled—not for illegality but for abandonment. So far, therefore, as the entry is concerned, the official action of the authorities has stamped it with regularity sufficient to make it valid and subsisting, segregating the tract from the public domain prior to the time when the railroad grant became effective.

It is true, as contended by the company, that this action of your office does not bring the matter within the technical rule of *res adjudicata*, so far as the railroad company is concerned. But it is a determination, in due form by the proper authority, of the fact that the tract in question was covered by the entry when the grant to the company became active and operative; and the correctness of that determination can not be questioned at this time and in this proceeding.

But there is another view of the case equally fatal to the contention of the railroad company.

After the passage of the act of March 21, 1864, (R. S. Sec. 2293), authorizing parties absent in the United States service to make entries of the public lands, your predecessor, Commissioner Edmunds, on March 1, 1865, issued a circular in relation to said act, (2 Lester, 256,) wherein he declared that it was not necessary, at the time of entry, for the land to be in the possession of a member of the family or representative of the applicant, though the requirement of the act was plainly otherwise. Thousands of entries having been made in pursuance of this circular, Secretary Delano, in two communications, of February 27, 1871, and January 8, 1872, respectively, calling the attention of Congress to the great embarrassment caused by the circular and the evils likely to result therefrom, suggested the passage of a remedial law—the draft of which was furnished—and which was enacted June 8, 1872, constituting now Section 2308 of the Revised Statutes.

It will thus be seen that this act was passed to cure the very defect complained of in this case; and that it does cure it by declaring that actual service in the army or navy, at the date of entry, shall be to all intents and purposes, in the administration of the land laws, construed as the residence upon the land required by the act of March 21, 1864.

So that by legal intendment, White was residing upon the land at the time his application to enter was made, and his entry is not obnoxious to the objection of want of proper residence.

Your judgment is affirmed.

*HOMESTEAD; SETTLEMENT—CONTEST; COSTS.**WITTER v. ROWE.*

The arrangement in the form of a square of a few logs, left on the land by a former settler, and not followed by other acts of settlement and improvement, does not constitute a valid settlement.

Where a hearing was directed to ascertain in whom the right of entry existed the costs were equally apportioned between the parties.

Secretary Lamar to Commissioner McFarland, March 12, 1885.

I have considered the case of Hannah M. Witter *v.* Patrick Rowe, involving the SW. $\frac{1}{4}$ of Sec. 6, T. 2 S., R. 67 W., Denver, Colorado, on the appeal of Witter from your adverse decision of September 23, 1884.

July 3, 1883, Rowe made homestead entry of the tract described, and on the 23d of the same month Witter, through error in the local office, was allowed to make her homestead entry for the same tract. Subsequently, on the allegation of Witter that she settled prior to Rowe's entry, a hearing was ordered.

To summarize the evidence offered to establish the alleged settlement of Mrs. Witter, it appears that she went upon the land about May 20, 1883, and directed in person the laying of a foundation for a house from a few logs or poles that had been left on the land by a former settler; such foundation being made by simply arranging in the form of a square the said material. No further acts of settlement or improvement on the part of Mrs. Witter appear to have been performed on the land prior to Rowe's entry, nor is any reason furnished to account for such fact.

On this state of facts I am of the opinion that your ruling should be approved, except wherein you held that Mrs. Witter should be required to pay all the costs. The hearing was directed by your office, and while the right of entry is not accorded to her, I think the costs should be equally apportioned between the parties.

Your decision is accordingly modified as above indicated.

*PRACTICE—NOTICE TO INDIAN CLAIMANT.**JOHN S. BRUBAKER.*

Notice of all proceedings to secure title to lands embraced within former Indian homestead entries should be given to the Indian agent, and where practicable to the Indian claimant in person.

Secretary Lamar to Commissioner McFarland, March 12, 1885.

I enclose for your consideration certain papers respecting the claim of John S. Brubaker to the NE. $\frac{1}{4}$ of Sec. 14, T. 37 N., R. 6 W., late Traverse City district, Michigan, formerly embraced in an Indian homestead.

You will please investigate and adjudicate the case on its merits, subject to the regulations in force. Notice of all proceedings and decisions in cases of this kind should be given, in accordance with the Rules of Practice, to the Indian agent having charge of the district, and also, when practicable, to the Indian claimant in person.

FORFEITED RAILROAD LANDS.

TEXAS PACIFIC R. R. Co.

Notice should be duly given by publication that the lands are restored to entry.

Secretary Lamar to Commissioner McFarland, March 13, 1885.

I am in receipt of your letter of 11th instant suggesting instructions under the Act of February 28, 1885, "To declare a forfeiture of lands granted to the Texas Pacific Railroad Company and for other purposes."

I approve of the recommendation as made, to the effect that notice be given by publication for at least thirty days in each of the several districts, that the lands have been restored by the act, and that the books of the respective offices are open for entry and location of the same at the rate of \$2.50 per acre, as provided by law, under the homestead and pre-emption, and other general laws of the United States relating to the disposal of unoffered land.

LOCATION OF RAILROAD GRANT.

NORTHERN PACIFIC R. R. Co.

The Commissioner of the Land Office may modify the line showing the terminal limit of constructed road in order to truly represent the location of the grant.

Secretary Lamar to Commissioner McFarland, March 13, 1885.

I have considered your recommendation of 12th instant, to the effect that the line of terminal limit of constructed road of the Northern Pacific Railroad Company, as shown by diagram prepared by your office August 16, 1881, be modified so as to fall more nearly at right angles with the general course of the road, an apparent error having been made in the original diagram on account of a marked curvature of the line upon the last twenty miles, deflecting it in a direction toward the opposite of average general course.

The fixing of such limit is a matter of mathematical ascertainment, within the scope of your regular duties, and if a correction be necessary to truly represent the location of the grant on either side of the road, you are competent to make the same.

The letter of E. H. Morrison, Esq., in behalf of the company is returned.

PRE-EMPTION—FINAL PROOF.

BLANCHARD *v.* BISHOP.

Though the final proof submitted, and evidence brought forth on protest, may show that the pre-emption claim is subject to the right of another, the filing should not, in the absence of bad faith or illegality, be canceled, but allowed to remain of record subject to the assertion of the prior adverse claim.

Secretary Lamar to Commissioner McFarland, March 17, 1885.

I have considered the case of Orville B. Blanchard *v.* Louis W. Bishop, involving the title to the SE. $\frac{1}{4}$ of Sec. 35, T. 130 N., R. 57 W., Fargo, Dakota Territory, on appeal by Bishop from the decision of your office, dated June 20, 1884, adverse to him.

The record of your office shows that the township plat of survey was filed in the district land office on November 29, 1882, and that the land is unoffered. It appears from the record in the case that Blanchard filed his pre-emption declaratory statement No. 11,089, upon said tract on December 22, 1882, alleging settlement thereon July 20, 1882, and that Bishop filed a like statement, No. 12,172, upon the same tract on January 2, 1883, alleging settlement on July 20, 1882.

Bishop gave due notice of his intention to make final proof, and cited Blanchard to appear and show cause why he should not be allowed to make final proof and payment for said tract. Blanchard filed his protest, duly corroborated, and claimed priority of right to said tract under his pre-emption claim. Thereupon, a hearing was ordered for September 12, 1883, before the register and receiver, at which both parties appeared in person and by attorney, and offered their testimony. Upon the evidence submitted, the register and receiver decided in favor of Bishop's settlement, but expressed some doubt "whether his residence entitled him to make proof on June 25, 1883." On appeal by Blanchard, your office reversed the decision of the district officers, on the ground that the preponderance of proof shows that Blanchard was the prior settler; that he had acted in good faith and never intended to abandon said tract; that his absence was for the purpose of earning money to improve his claim, and that Bishop had not complied with the requirements of the pre-emption laws, since he has resided and carried on business in the town of Lisbon, thirty miles distant from the land in controversy and only made occasional visits to the land during the time he claims settlement and residence thereon. You, accordingly, held the declaratory statement of Bishop for cancellation, and directed that Blanchard be allowed to make final proof and entry for said tract "upon showing satisfactory compliance with the law as to residence within the life time of his filing."

I concur with your conclusion as to the facts in the case, and affirm so much of said decision as allows Blanchard to make final proof and entry for said tract, and reverse that part of said decision which holds

for cancellation Bishop's declaratory statement. The proof does not show that Bishop's settlement was illegal at its inception, or that he has not acted in good faith, and, in the absence of the adverse claim of Blanchard, he might have been allowed to offer additional proof as to residence.

In *Jones v. Finley* (10 C. L. O., 365,) this Department held that, in that case, the pre-emptor having failed to show compliance with legal requirements, should not be allowed another opportunity to furnish additional proof, and that Finley "having once invoked adjudication of the law and failed to establish his rights, he must abide the result."

It is observed that the evidence showed that Finley had not acted in good faith. Where the evidence submitted clearly shows bad faith on the part of the pre-emptor, or illegality in the inception of his claim, so that it cannot be perfected, in such cases the declaratory statement should be canceled. But it was not intended to prescribe a fixed rule, that in no case will a party, having once offered his final proof, which has been rejected, be allowed an opportunity to furnish additional proof within the time prescribed by law. This has been repeatedly allowed by this Department.

Bishop's declaratory statement will remain intact, subject, however, to the prior right of Blanchard.

PRE-EMPTION—NATURALIZATION—CONTEST—PRACTICE.

MANN *v.* HUK.

The pre-emptor filed his declaratory statement before having made declaration of his intention of becoming a citizen, but having cured such defect prior to the inception of an adverse right, he was allowed to purchase the land.

Where witnesses, acting under the instructions of an attorney, refused to submit to a proper cross-examination their testimony was not considered.

Secretary Lamar to Commissioner McFarland March 17, 1885

I have considered the case of *Herbert Mann v. Daniel Huk*, involving title to the NE. $\frac{1}{4}$ of Sec. 26 T. 98 R. 59, Yankton, Dakota, being on appeal by Mann from your decision of June 28, 1884, adverse to him.

Huk filed declaratory statement No. 6293 for said tract March 17, 1883, alleging settlement the same day, and on July 30, 1883, gave the usual notice of his intention to make final proof, payment and entry thereof on October 9, 1883. On July 30, 1883, Mann made homestead No. 7711 on same tract, and on October 9, 1883, filed protest against the proof of Huk, alleging insufficient residence and want of good faith. Hearing was fixed for January 8, 1884; at which time both parties appeared, in person and by attorney, and submitted testimony, at which time Mann also filed an additional objection, setting forth that Huk, who was alien born, had not, at the time of making his filing, qualified himself to do so under the naturalization laws.

The register and receiver overruled the objections, held that Huk had complied with the requirements of law, recommended that his proof be accepted and his entry allowed. On appeal, you affirmed this decision, from which affirmance Mann likewise appealed.

From the testimony, it appears that Huk was a "German-Russian," who came to this country with his father, who declared his intention to become a citizen in October, 1876, whilst the son was fourteen years old; and the latter, in ignorance of our laws, supposing he had become naturalized by this act of his father, after reaching twenty-one, made his filing. Being afterwards informed of his error, on June 2, 1883, made declaration of his intention to become a citizen, and afterwards on October 11, 1833, was fully naturalized, as he might have been at the time of making his declaration.

It is the settled ruling of this Department that where a defect of this sort exists it may be cured by fulfilling the requirements of law at any time prior to the intervention of an adverse claim, and otherwise showing good faith. As Huk made his declaration of intention June 2, 1883, two months before the entry of Mann on July 30, 1883, the defect in his case was thereby cured, as between him and the government, the only party then in interest, and he was at the date of Mann's entry a qualified pre-emptor. See *Kelly v. Quast*. (2 L. D. 627.) Naturalization case. (2. B. L. P. 157).*

At the hearing before the local officers several witnesses were sworn in behalf of Mann, and testified in support of his allegations as to the non-residence of Huk upon the tract. When these same witnesses were sought to be cross-examined, by the attorney of the latter, objections were interposed, by the attorney of Mann, to almost every question asked, because he insisted that the questions related to matters immaterial and irrelevant. This he had a clear right to do and to have his objections noted on the record. But when he went further and instructed his witnesses not to answer, he transgressed the bounds of legitimate action. Every witness on the part of the protestant, including himself, implicitly obeyed the instructions of this attorney and refused to answer hundreds of questions touching matters most material to the subject in controversy, and competent and proper to be inquired about. In vain the local officers instructed the witnesses to answer and protested against this arbitrary conduct of the attorney. They were powerless to control him or the witnesses. Thus Huk was deprived of his undoubted right

* *Naturalization case*—"You have recently submitted to the Department, for consideration by the Board of Equitable Adjudication, as special cases, the papers in numerous pre-emption entries, suspended because the pre-emptors had not declared their intention of becoming citizens of the United States at the time of filing their declaratory statements, although such declarations were made prior to proof. It is not deemed necessary that cases of this class be submitted for consideration by the Board, and you will not, hereafter, suspend the issue of patents thereon for such cause, in the absence of any adverse claim." (Secretary Teller to Commissioner McFarland June, 16, 1884. (2 B. L. P. 157).)

to cross examine, subject to exception, the adverse witnesses, by this high-handed and scandalous conduct of Mann's attorney, who set at defiance the rules governing the orderly administration of justice. It is not to be supposed that I will consider testimony taken under such circumstances as these, but rather that it should be discarded as unworthy of belief, because the protestant, speaking through the mouth of his attorney, was unwilling to submit his witnesses and himself to the test of a cross-examination.

On reading the testimony and proof submitted by Huk, I concur with you that he has shown a satisfactory compliance with the requirements of the pre-emption law as to settlement, residence and cultivation.

Your judgment is therefore affirmed, and Huk will be allowed to complete his final proof, and make entry of the tract upon paying for the same, when the entry of Mann will be canceled.

PRE-EMPTION—ADDITIONAL FINAL PROOF.

TOWEY v. CHAFFEE.

The pre-emptor's good faith being apparent, he is allowed to furnish additional proof showing residence since the date of submitting the original proof.

Secretary Lamar to Commissioner McFarland, March 16, 1885.

I have considered the case of Katie A. Towey v. Porter P. Chaffee on appeal by Chaffee from your decision of June 9, 1884, wherein you hold his pre-emption filing for cancellation.

Chaffee made declaratory statement No. 29, November 20, 1882, for the NW. $\frac{1}{4}$ of Sec. 6, T. 125, R. 61, Aberdeen, Dakota, alleging settlement November 19, 1882. Miss Towey made homestead entry No. 1704 May 12, 1883, covering the same tract. July 17, 1883, Chaffee presented final proof in support of his claim, against the acceptance of which Miss Towey entered a protest, charging him with failure to reside on and improve the tract prior to the date of her entry.

The testimony adduced at the hearing shows that Chaffee erected a cabin on the land November 18, 1882, and furnished it with articles necessary to a settler's comfort. The soil not being susceptible of cultivation, owing to the severity of the winter season, and his means being quite limited, he engaged himself as a laborer during such period with a farmer living some distance from the claim. It appears that he visited the tract whenever opportunity presented itself at reasonable intervals, and exercised such acts of settlement as to indicate an intent to sustain his claim. About May 15, 1883, as soon as travel would permit, he moved his family and the balance of his effects into the cabin; he then broke twenty-two acres of the tract, part of which was planted to corn and potatoes; dug a well, twenty-five feet in depth; erected a

barn and performed other necessary acts of improvement. Since the arrival of his family, they have occupied the place as their residence, up to the date of the presentation of final proof.

Chaffee's residence has not been sufficient under the law to entitle him to an entry on the proof presented; but in view of the absence of any showing of fraud against him and of his apparent good faith, I am disposed to exercise a degree of leniency in his behalf. He will be permitted to make further final proof, on notice to the homestead claimant, and if such additional proof shall show that he has maintained his residence from the date of original proof in good faith, he will be allowed to enter the tract.

Your decision is reversed.

PRE-EMPTION—FILING.

CORBIN *v.* ORR.

Where the pre-emptor did not file a declaratory statement until after the expiration of the three months succeeding his settlement, and bad faith was apparent, the filing was canceled in favor of an intervening homestead entry.

Secretary Lamar to Commissioner McFarland, March 19, 1885.

I have considered the case of John C. Corbin *v.* Christopher M. Orr, on appeal by Orr from your decision of June 20, 1884, wherein you hold his pre-emption filing for cancellation.

Corbin made homestead entry No. 2079, March 7, 1883, covering the NE. $\frac{1}{4}$ of Sec. 34, T. 112, R. 62, Huron, Dakota.

March 15, 1883, Orr presented a petition setting forth that his attorney promised to file a declaratory statement for the tract September 2, 1882; that on February 21, 1883, he was first made aware of the fact that his attorney had omitted to make the filing as agreed. On this *ex parte* showing, and the further allegation that he had faithfully resided upon and cultivated the tract, your office directed that his filing be received.

April 17, 1883, Orr was permitted to file declaratory statement No. 3280 for the tract, in which he alleged settlement as of August 21, 1882.

June 13, 1883, Orr presented final proof in support of his claim, which was met by a protest from Corbin denying the allegations set forth in Orr's petition, and charging him with general bad faith in his connection with the land. A hearing was held in pursuance of the protest, at which it was shown that Orr had papers drawn up during September, 1882, by his attorneys looking to the consummation of a filing of the tract, but that nothing was done further in the matter either by him or his attorneys. The testimony further shows that he has not established his residence on the tract, but has merely retained possession of the place apparently for the purpose of speculation; this view is sustained

by the fact that he consummated a sale of the improvements on the place during March, 1883, just prior to his offer to make final proof, and fearing that the removal of the house by the purchaser might nullify his final proof, arranged to have a shanty deposited on the tract in its place. It appears that his residence in fact has been at Pierre, Dakota, about one hundred miles west of the claim, and that he still retains his domicile with his family at that place. Orr admits that he was made aware of the non-filing of the declaratory statement during February, 1883, yet he presented no showing for a correction of the defect until March 15, 1883, some time subsequent to Corbin's homestead entry, notwithstanding the fact that during that period he was continually present in the immediate vicinity of the local land office. The testimony relative to his petition does not sustain the allegations therein, under which he was permitted to file his declaratory statement after the time for filing had expired, in fact his own statements contradict them, and show that he not only did not authorize the filing of the declaratory statement during September, 1882, but that he was entirely indifferent as to whether he obtained a record filing or not, apparently feeling satisfied to rest his claim upon his early settlement for protection. The circumstances surrounding this case show that Orr has not exercised the good faith in his relation as a settler on this tract which would enable this Department to extend him any relief. He acted with full notice of the penalty of his failure to secure his rights by obtaining a record filing at the outset, and again when he might have been enabled to cure his defective pre-emption. He saw fit, however, to ignore all heed of the law or his privileges, and he must bear the consequence of his own acts. Having failed to file his declaratory statement within three months from the date of his settlement as required by law, and not having exercised a sufficient degree of good faith in his relation as a settler of the public lands, and the adverse claim of Corbin having intervened, his declaratory statement will be canceled.

Your decision is affirmed.

MINNESOTA—INDEMNITY LANDS.

HANS JOHNSON.

A conflict arising between a State selection under the act of March 3, 1879, and a pre-emption claim, a hearing is ordered to ascertain the facts as to the alleged priority of the settlement over the selection.

Secretary Lamar to Commissioner McFarland, March 19, 1885.

I have examined the appeal of Hans Johnson (as presented by his attorney) from the decision of your office, dated June 30, 1884, affirming the decision of the district land officers at Redwood Falls, Minnesota, rejecting his application to file a pre-emption declaratory state-

ment upon the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, and the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 24, T. 112 N., R. 46 W., for conflict with a list of selections made by the State of Minnesota, under the act of March 3, 1879 (20 Stat., 352), granting lands in lieu of certain lands granted to the State of Minnesota by the fourth subdivision of section five of an act entitled "An act to authorize the people of the Territory of Minnesota to form a constitution and State government preparatory to their admission in the Union on an equal footing with the original States," approved February 26, 1857 (11 Stat., 166). By said subdivision it was provided that all salt springs within said State, not exceeding twelve in number, with six sections of land adjoining or as contiguous as may be to each, shall be granted to said State for its use, . . . Provided, that no salt spring or land, the right whereof is now invested in any individual or individuals, or which may be hereafter confirmed or adjudged to any individual or individuals, shall, by this article, be granted to said State."

The record shows that under date of July 10, 1880, a list of selections by said State, under said act, including said tracts, was transmitted to your office, and the same were rejected on August 11, 1880, on the ground that they were "unauthorized and invalid." On August 31, 1880, the register and receiver were advised by your office that the tracts in said selections were "reserved from disposal" until further notice, and on February 3, 1881, they were again advised that selections might be made under said act, "provided the State designates in the list the selections under act of February 26, 1857, in lieu of which the same were made."

In accordance with the last named instructions, the State selected the same tracts as those embraced in the former selections, and the same were duly transmitted to your office, but, as yet, no final action has been taken with reference to their certification.

It appears that Johnson offered to file his said statement, dated May 20, 1884, upon said tracts, alleging settlement thereon July 1, 1880, which was rejected by the district land officers for conflict with the prior State selection. On appeal, your office affirmed the decision of the register and receiver, on the ground that "the lands having been properly selected were thereafter withdrawn from entry or filing." It is alleged in the argument of counsel, that, with his declaratory statement, Johnson filed "his affidavit stating, among other things, that he settled on the tract on or about July 1, 1880, and has resided upon and improved the same ever since." No such affidavit is found in the record, nor is it referred to in the decision of your office.

It is also insisted, in the argument of counsel, that immediately after settlement Johnson applied to file his declaratory statement upon said tracts and the same was refused by the district land officers. There is, however, no evidence in support of such allegation.

In said act of March 3, 1879, it was provided that "the lands herein

granted shall be selected within three years, and from unoccupied lands of the United States lying within the State of Minnesota."

In view, therefore, of the allegations of counsel for Johnson as to his settlement, improvement, and continuous residence upon the land, I think an opportunity should be accorded him to prove the same. The decision of your office is, therefore, modified, and I direct that you suspend said selection so far as the same includes said tracts, and cause a hearing to be had under the Rules of Practice. The inquiry should be directed to the ascertainment of the date of Johnson's alleged settlement, the extent and value of his improvements, the duration of his residence upon said tracts, and the facts concerning his alleged application to file for said land immediately after settlement.

REPAYMENT.

JACOB MEHLHAF AND JOHANN METTLER.

Certain warrant locations having been canceled on the alleged fact that fictitious names were used by the locators, the repayment of fees on such locations was denied the claimed assignees.

Secretary Lamar to Commissioner McFarland, March 19, 1885.

I return without approval the applications of Jacob Mehlhaf and Johann Mettler for repayment of fees on location of military bounty land warrants Nos. 83,487 and 113,551, act of 1855, 160 acres each, made respectively by David Lang and Christoff Mehlhaf, at Yankton, Dakota, March 12, and April 16, 1875; for the NW. $\frac{1}{4}$ of Sec. 22 and SE. $\frac{1}{4}$ of Sec. 27, T. 98, R. 57.

The reason for cancellation of these locations is the alleged fact that fictitious names were used by the parties, thus showing the want of competent grantees of the United States in issuing the patents, and a consequent avoidance of the reputed assignments. If such be the fact, there is an equal want of parties to take the warrants by assignment, and no authority for the recognition of the claimed assignees to receive repayment.

Without further considering your action in making the cancellations, accepting the relinquishments, and returning the warrants, the case not being before me for that purpose, I have simply to direct your attention to the decision of the Supreme Court in *Moffat v. United States*, (112 U. S., 24), a case corresponding in all particulars to the alleged facts herein.

RAILROAD GRANT—CONFLICTING ENTRY.

WHITCHER *v.* SOUTHERN PAC. R. R. CO.

Until the title to a "floating grant" vests in the grantee, all the land comprised within the claimed limits of the exterior boundaries thereof are held in reservation for the benefit of the grant.

There is no basis for indemnity selection under the act of June 22, 1874, unless the railroad company be first found entitled to relinquish.

A homestead entry for 172.93 acres is approved, as the excess over a technical quarter section is less than the deficiency would be, were the quantity contained in the smallest legal sub-division of said entry subtracted therefrom.

Secretary Lamar to Commissioner McFarland, March 20, 1885.

I have considered the case of Thomas R. Whitcher *v.* Southern Pacific Railroad Company, involving Lots 2 and 3, the SW. $\frac{1}{4}$ of SW. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, and the SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, of Sec. 11, T. 16 S., R. 2 E., M. D. M. (aggregating 172.93 acres), San Francisco district, California, on appeal by Whitcher from your decision of August 1, 1883.

The tract is within the twenty miles, or granted limits of the grant by act of July 27, 1866 (14 Stat., 292), to the Atlantic and Pacific Railroad Company, which became effective March 12, 1872, and the withdrawal for which was made May 2, 1872. The tract is also within the thirty miles or indemnity limits of the grant (by the same act) to the Southern Pacific Railroad Company, whose withdrawal was made May 8, 1867. Neither company has constructed any road opposite the tract, which has not been selected by the defendant company.

The tract was also within the exterior boundaries or claimed limits of the Rancho Corral de Tierra, which was granted to Guadalupe Figueroa, minor daughter of Francisco Figueroa, on April 15, 1836, and the final survey thereof approved and patented to one Henry D. McCobb, January 21, 1876.

The township plat was filed in the local office December 6, 1875.

It appears that Whitcher made homestead entry No. 2933 of the tract September 12, 1877, and after due notice had been given by publication, he made proof August 22, 1882, before the judge of the superior court of Monterey county; whereupon final certificate No. 2,015 issued September 7, 1882. His proof shows him to be a qualified homestead claimant; that he settled upon the tract in the autumn of 1875, and had resided thereon continuously to date of proof; and that his improvements aggregate some \$1,500 in value.

It will be observed that the grant in question was for a specific quantity of land (one square league) situate and to be located at McCobb's election within larger exterior boundaries specified. Such a grant is termed a "floating grant," and confers upon the grantee a right to all the land within such boundaries until the Government vests in him the legal title to the specific portion set off to him in accordance with the final decree of confirmation. "But until the extent and exact locus of the grant were ascertained and approved in the manner expressly pre-

scribed by the statute, the rancho was an unknown quantity, so that no one could say to what lands the confirmees were certainly entitled." *Atlantic & Pacific Railroad Company v. Fisher* (1 L. D., 406).

Now as touching your suggestion that you would request the Atlantic & Pacific Railroad Company to relinquish its claim to the premises under the act of June 22, 1874 (18 Stat., 194), it will be observed that "the act of June 22, 1874, offers an inducement to such railroad companies as may be found entitled to relinquish in favor of such settlers, and receive other lands in lieu of those thus surrendered. Hence, unless the companies be found entitled, there is no basis for relinquishment and lieu selection. *Vide*, Circular Instructions touching the adjustment of railroad grants, approved by this Department November 7, 1879 (6 Copp, 141)." *Northern Pacific Railroad Company v. Adam Lamour*, decided by the Department March 26, 1884.

And with respect to defendant company's contention, to wit, that *Whitcher's* entry is "not for 'one quarter-section,' or its equivalent, but is for detached tracts in three quarter-sections, and covers 172.93 acres. Such an entry is prohibited by said section 2298" of the Revised Statutes. It is true that the tract is not a technical quarter-section, and that the several tracts embraced in said entry thereof aggregate 172.93 acres, as hereinbefore stated; but it is not true that the same are detached tracts, for the records of your office show them to be in all respects contiguous; and inasmuch as the excess in question is less than the deficiency would be were the quantity contained in the smallest legal subdivision of said entry subtracted therefrom, and since *Whitcher* has paid the legal price for such excess, as well as for the residue of his claim, his case comes clearly within the invariable rule governing such cases. See *G. G. Shaw* (1 C. L. L., 309), and foot-note; also *Peter Olsen Aanrud* (7 C. L. O., 103), *Bladen v. Co.* (9 *idem.*, 119), and *Owen L. Ramsey* (*ibidem*, 172).

Thus it appears that at the date the grant to the Atlantic and Pacific Railroad Company became effective the tract in question was *sub judice* or in a state of reservation, by reason whereof it was excepted from the operation of the grant.

Your decision is therefore reversed.

PRE-EMPTION—FINAL PROOF.

A. S. FRICK AND J. S. POWELL.

Final proof will not be approved where it appears that the published notice of intention to make the same does not properly describe the land claimed.

Secretary Lamar to Commissioner McFarland, March 25, 1885.

I have considered the appeals of A. S. Frick and James S. Powell from your decision of June 17, 1884, rejecting the final pre-emption

proof of each, because the published notice of intention to make such proof did not accurately describe the tracts claimed by them, respectively. Both cases are included in your said decision and were transmitted together. As the questions to be determined in both cases are identically the same, they will be considered together.

Frick filed declaratory statement No. 1133 October 18, 1883, alleging settlement August 2, 1883, on the N. $\frac{1}{2}$ of NE. $\frac{1}{4}$, SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$, and the NE. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of Sec. 22, T. 9, R. 25; Powell filed declaratory statement No. 715 April 4, 1883, alleging settlement March 17, 1883, on the S. $\frac{1}{2}$ of NW. $\frac{1}{4}$ and W. $\frac{1}{2}$ of NE. $\frac{1}{4}$ of Sec. 34, T. 9, R. 25, both tracts being in the land district of Las Cruces, New Mexico.

The published notice of Frick described his tract as the "E. $\frac{1}{2}$ " of NE. $\frac{1}{4}$, SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$, and the NE. $\frac{1}{4}$ of SE. $\frac{1}{4}$, of Sec. 22, T. 9, R. 25; that of Powell described his tract as the "S. $\frac{1}{2}$ " of NW. $\frac{1}{4}$ and W. $\frac{1}{2}$ of NE. $\frac{1}{4}$, of Sec. 34, T. 9, R. 25. The final proof was rejected by the local office, because of the misdescription, and this action was approved by you.

It is claimed in behalf of the appellants that the error in the description is a trivial and unimportant one; and, being caused by the register furnishing an incorrect copy of the original notice filed by claimant to the printer, or by the error of the latter failing to publish the notice correctly, they, the appellants, should not be made to suffer by the delay and expense incident to a new notice and proof.

I cannot admit that the errors in the description of the land, in these cases, are trivial and unimportant. On the contrary, I deem them to be grave and serious. To allow patents to be issued in these cases would be to give Frick title to forty and Powell to eighty acres of land not mentioned in their published notice. This the Department cannot do. For there is nothing connected with the obtaining title to the public land about which accuracy is so absolutely essential as the description of the tract claimed. And this rule should not be deviated from. As to the alleged hardships resulting from the carelessness or error of the register and printer, I find nothing whatever in the record to sustain the assertion. The register is the sworn and chosen officer of the law and as such every legal presumption must be in favor of the correct discharge of his duties, until the contrary is shown. No effort has been made to do this beyond a mere naked assertion of counsel.

It is true the act of March 3, 1879, requires the register to publish and post the notice, but it also makes it the duty of the pre-emptor to furnish such notice, and if he furnished a notice containing a correct description, it is not to be supposed that the register would substitute another therefor. The original notice delivered to the register and which ought to have been posted in the office, has not been filed in the case and therefore it does not appear that the posting in the local office, required by act of Congress, was done. The failure to furnish evidence

of compliance with this requirement would be additional cause for rejecting the proof in these cases.

Your judgment is affirmed, without prejudice to the parties to make final proof, payment, and entry after due and proper notice.

—

HOMESTEAD—COMMUTATION.

CAMPBELL *v.* MOORE.

The judgment should follow the substance of the notice and charge upon which the inquiry rests, yet where fraud is shown upon the trial, though not charged in the notice, it will justify cancellation.

In this case, while the inhabitancy shown was held insufficient to warrant commutation, the entryman was allowed to furnish additional proof of good faith in that respect.

Secretary Lamar to Commissioner McFarland, March 25, 1885.

I have considered the case of Robert S. Campbell *v.* Richard T. Moore, involving the application of the latter to commute to cash entry his homestead entry No. 339, made at Huron, Dakota, October 14, 1882, for the NE. $\frac{1}{4}$ of Sec. 25, T. 112, R. 61, on appeal from your decision of April 16, 1884, holding the homestead entry for cancellation.

The contest arose upon published notice by Moore of his intention to offer proof and commute his entry on May 14, 1883; whereupon Campbell filed a sworn protest, alleging "that said Moore has not resided upon and cultivated said tract according to law, and he therefore objects to said proof and protests against its being received by said register or receiver, and prays that a day may be set for hearing proof of the above allegations;" which day was accordingly set and hearing thereon was had.

In your decision you find that previous to this protest, but on the same day, Campbell had filed an affidavit of contest against the entry, alleging abandonment. This is nowhere shown in the report of the district officers, and rests upon a statement made by his attorneys in his appeal from the decision of the register and receiver. If such was the fact, however, it could not be considered here, as the notice and charge on which the trial was had did not go to the act of abandonment and change of residence for more than six months, and consequent liability to forfeiture, but only to the sufficiency of the residence to support a commutation under section 2301 of the Revised Statutes. Had the inquiry been directed to the failure to establish residence within six months, which your decision assumes to find from the evidence, it must have been also adjudged in the light of the act of March 3, 1881, (21 Stat., 511,) with respect to the climatic reasons which may permit an allowance of twelve months, which had not elapsed at date of this proceeding.

Your decision holding the entry for cancellation, upon the facts as found by you, was therefore erroneous, and outside the proper limitations of the case. It is not meant by this that an actual fraud upon the government, or the absolute want of good faith, if fairly shown upon the course of the trial, will not justify cancellation outright. whatever be the notice which brings the party or the entry within your jurisdiction. But I do not regard this case as presenting such justification for summary action.

The remaining question, being simply whether or not Moore has shown such inhabitancy of the land as will permit his purchase under Section 2301, will now be considered.

At date of entry he had already built a small temporary cabin on the land, and he afterwards built a larger sod house with roof of matched lumber, in which he placed and kept a bed, kitchen utensils, etc., and which he occupied with his wife from Friday or Saturday of nearly every week till the following Monday—spending the business days in Huron, where he kept a warehouse of sewing machines, organs, etc., and his wife carried on business as a milliner.

He swears that they regarded the land as their home; that they could not support themselves upon their homestead during the winter, or until crops could be grown thereon, and were obliged to earn support elsewhere; that he had no other home, their residence in town being in one of the rooms of the rented building occupied for their business, and that his object in entering the land was solely to secure a home for himself and family. He had broken six acres, and at date of hearing in June 1883 had planted the same in crops and vines.

Section 2259 of the Revised Statutes provides that every person, qualified as prescribed, who "makes a settlement in person on the public lands subject to pre-emption, and who inhabits and improves the same, and who has erected or shall erect a dwelling thereon, is authorized to enter," etc. Section 2263 prescribes that, "Prior to any entries being made under and by virtue of the provisions of Section 2259, proof of the settlement and improvement thereby required shall be made to the satisfaction of the register and receiver," etc., "agreeably to such rules as may be prescribed by the Secretary of the Interior." Section 2301 allows payment for a homestead "on making proof of settlement and cultivation as provided by law granting pre-emption rights."

In this case Moore has settled, erected a house and improved the land. The only defect charged is failure to inhabit, and it is shown that while there has been some inhabitancy, the amount is slight. The register and receiver held it sufficient. You hold it to be of such character as to establish the fact of bad faith and absolute fraud. I do not so regard it; and as it is alleged that claimant has made further inhabitancy and largely improved the land, having broken for cultivation nearly fifty acres, since the hearing, you will allow him to furnish proof

of such facts at a future day to be fixed by the register and receiver, when, if his good faith be shown, he will be entitled to make payment according to his application.

Your decision holding his entry for cancellation is reversed.

HOT SPRINGS RESERVATION.

JACOB KEMPNER.

The act of March 3, 1877, created a commission, authorized, among other things, to hear proof offered by claimants and occupants, and a claim not so presented is thereafter debarred.

Acting Secretary Muldrow to Commissioner Sparks, March 30, 1885.

I have considered the case presented by the appeal of Jacob Kempner from your decision of July 18, 1884, disallowing his application to purchase Lot 13, Block 127, Hot Springs, Arkansas.

May 6, 1884, Kempner applied at the local land office to purchase said lot at the appraised value (one hundred dollars). The application was rejected, for the reason that the lot had not been offered at public sale (it being embraced in the list of lands to be offered for sale on that day under instructions of January 18, 1884). In the course of the public sale the lot in question was sold (May 8, 1884,) to one John W. Bentz. From this action of the local officers Kempner appeals, presenting affidavits to establish the fact that he has had possession of the tract for the past eighteen years, and has improvements thereon; and that under the Atherton-Fowler decision (96 U. S., 518) "the party making the necessary settlement and improvement acquired the right of preference in the purchase," and that he "availed himself of the first opportunity to pay the government valuation of the land in question by tendering the purchase money to the receiver of the local land office."

In making this claim Kempner ignores entirely the act of March 3, 1877, (19 Stat., 377,) creating the board of commissioners to lay out Hot Springs Reservation. This act (Sec. 5) empowered the commission, created thereby, "to hear any and all proof offered by claimants and occupants . . . in respect to said lands and in respect to the improvements thereon; and to finally determine the right of each claimant or occupant to purchase the same, or any portion thereof at the appraised value, which shall be fixed by said commissioners: Provided, however, that such claimants and occupants shall file their claims, under the provisions of this act, before said commissioners, within six calendar months after the first sitting of the said board of commissioners, or their claims shall be forever barred."

By joint resolution of January 14, 1880, (21 Stat., 299,) the time within which claimants might purchase was extended for sixty days from the passage of said resolution.

Under the provisions of the act first above cited Kempner set up claim, and purchased, several lots in Hot Springs Reservation—including Lot 1 in this same block; but neither under the act of 1877 nor the joint resolution of 1880 did he set up any claim to Lot 13, in question. Said Lot 13, therefore, being one of the lots “that no one had an adjudicated right to purchase,” was, under Section 12 of the Act of 1877, sold to the highest bidder at public sale, May 8, 1884, as hereinbefore stated.

There is another act relative to the Hot Springs Reservation—that of June 16, 1880 (20 Stat. 288); but as that act relates solely to “any person, his heirs or legal representatives, in whose favor the commissioners . . . have adjudicated,” it can have no bearing upon this case.

The lot in controversy, being one for which no claim had been filed before the board of commissioners established by act of March 3, 1877, and having been, after proper public notice as required by law, sold to the highest bidder, was therefore properly disposed of; and I affirm your decision rejecting the claim of Jacob Kempner to purchase the same.

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HOMESTEAD—ENTRY BY ADMINISTRATOR.

CLEARY *v.* SMITH.*

While the possession of an administrator is, constructively, the possession of the heirs, such possession can only be maintained by cultivation of the claim until the expiration of five years.

Where the deceased entryman left a widow it is not competent for the administrator to purchase under section 2 of the act of June 15, 1880.

Secretary Teller to Commissioner McFarland, June 11, 1884.

I have considered the case of Frank Cleary *v.* Heirs of Cuthbert P. Smith, involving homestead entry No. 2946 of the N. $\frac{1}{2}$ of NW. $\frac{1}{4}$, of Sec. 32, T. 2 N., R. 11 E., M. D. M., Stockton district, California, on appeal from your decision of July 19, 1883, holding the entry for cancellation.

It appears that Smith made the said entry July 15, 1878; that Cleary initiated contest against the same February 1, 1883, by filing affidavit alleging Smith's abandonment of the tract; and that thereupon citation duly issued by publication, citing the said heirs to the hearing to be had March 23d ensuing. Hearing was accordingly had, whereat contestant and “F. W. McClenahan, administrator of estate of late C. P. Smith,” appeared.

The testimony thus adduced discovers that Smith some time resided in Dayton, Ohio, where he left his wife and two children in the year 1849, and joining the “Argonauts of '49,” went to California. Having made his entry as stated, he erected a cabin upon the land, where he resided until on or about September 1, 1881, when he was taken sick to the San An-

* Omitted from 2. L. D.

dreas Hospital, Calaveras County, California, where he died intestate October 12, 1881. It is not clearly shown what use he made of the land, although one witness stated that two or three acres thereof had been plowed. He was a native-born citizen of the United States, and his estate consisted of a "land possessory claim" appraised at \$100. Said administrator was duly appointed December 7, 1881, pursuant to an order of the superior court of said county, dated November 26, 1881, and had had the custody, control and possession of the land in question from date of his appointment to that of the hearing; having let the same to his brother, J. P. McClenahan for grazing, at twelve cents per acre for twelve months, but no improvements have been made upon the land since decedent's demise.

The register and receiver decided April 25, 1883, that the entry should be canceled, and the administrator having appealed in behalf of the heirs, you sustained the register and receiver's decision, and accordingly held the entry for cancellation. He has appealed from your decision, and filed an application to purchase the tract under the 2d section of the act of June 15, 1880, (21 Stat., 237).

Thus it appears that while decedent may have resided upon and cultivated a portion of his claim during his life-time, neither his widow nor his heirs nor any one else has resided upon, improved or cultivated the tract since his decease.

The homestead law requires actual residence upon and cultivation of the land by the claimant, and although it has been repeatedly held by this Department, notably in the case of *Dorame v. Towers*, (2, C. L. O. 131,) that the possession of an administrator or executor of a deceased claimant's estate is constructively the heirs' or devisees' possession, such possession can only be sustained by continual cultivation of the claim until the expiration of five years at least. But the record fails to discover any such compliance in the premises. The administrator's letting them to his brother for grazing purposes does not satisfy the demands of the law nor bring the case within the rule laid down by the Department in the case cited.

Neither is it competent for the administrator to purchase under the second section of the act of June 15, 1880, inasmuch as the same provides "that persons who have heretofore under any of the homestead laws entered lands properly subject to such entry" etc. may purchase, and section 2291 of the Revised Statutes expressly prescribes that not until the expiration of either five or seven years from the date of the entry shall the final certificate issue "to the person making such entry; or if he be dead, his widow; or in case of her death, his heirs or devisee."

The record shows that decedent left a widow and two children surviving him. Hence it would only be competent for the widow to apply to purchase the tract under the said second section, and should she so apply, you will entertain the same.

Your decision is accordingly affirmed.

SWAMP LAND.

ARANT *v.* STATE OF OREGON (ON REVIEW 2. L. D. 341).

It being shown that certain depositions as to the character of the land had been duly taken by the State, which were not with the case when under consideration, the former decision is vacated for the purpose of permitting the submission of such testimony.

Acting Secretary Joslyn to Commissioner McFarland, January 14, 1885.

On July 11, 1883, Secretary Teller affirmed your decision of April 14, 1882, in the case of *W. F. Arant v. The State of Oregon*, involving Lots 1, 2, 3 and 4 of Sec. 2, T. 40, R. 8 E., Lakeview, Oregon, and also on the same day affirmed your decision of April 22, 1882, in the case of *Henry Conn v. The State of Oregon*, involving the NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$, and Lots 5, 6 and 7 of Sec. 24 and Lot 3 of Sec. 23, T. 39, R. 8 E., in the same land district. The principal question in both cases was whether or not the tracts were swamp and overflowed lands, and as such inured to the State under the acts of Congress of September 28, 1850, (9 Stat., 519,) and March 12, 1860 (12 Stat., 3); and upon the testimony submitted he held that they were not of that character. His decisions were accordingly adverse to the State. Motions for their reconsideration were subsequently filed by the State upon the ground that certain depositions touching the character of the land were duly taken by the State, to be used in the cases, and were filed with the local officers, but were not forwarded by them to your office; and that, consequently, the cases were adjudicated without reference to the facts therein stated, either by your office or by this Department. It being alleged that these depositions sustained the claim of the State to the tracts, Secretary Teller, December 12, 1883, instructed you to request information from the local officers as to such depositions, to which they replied that their files and records failed to show that they were taken. Notwithstanding this, J. O. Allen, a justice of the peace within said State, states under oath that he was duly commissioned by these officers in the spring of 1879 to take testimony in these cases, and that in July of that year, by virtue of such commission, he took the depositions of John A. Fairchild, P. A. Dorris, George Nurse, John Brunette, William Hicks and Robert Whittle, relative to the character of the land involved in the two cases, after which he placed the same in an envelope, which he sealed and mailed prepaid, to said officers. Allen's affidavit is corroborated by that of Q. A. Brooks, the then agent of the State in land matters. I can not doubt, under these sworn statements, that such depositions were taken. Whether they were lost in transit to the local office, or whether there mislaid, does not appear and is not material. It is sufficient that they were (or presumed to be) pertinent and material to the issue between the parties, and that the State had a right to their consideration.

In view of these matters, Secretary Teller's said decisions are recon-

sidered, and you will instruct the local officers of the Lakeview district to retake before themselves or some disinterested and competent official, the depositions of the witnesses above named, and no others, limiting inquiry to the character of the land, on March 12, 1860 or as near to that date as the witnesses can testify; and upon report thereof, you will further consider the case in connection therewith.

It is however alleged by one John H. Miller, under oath, that the above named Conn executed a relinquishment to the United States of his claim to the tracts herein involved, in May, 1882, (which was subsequently to your decision of his case,) and that the same was forthwith transmitted to the local officers, who acknowledged its receipt. Miller's affidavit is corroborated by the above named Brooks, who states that the fact of such relinquishment is within his personal knowledge. But it does not appear from your files than it has been forwarded or announced to you. You will therefore instruct the local officers not to take testimony in the case of Conn, if it appears from their record that such relinquishment has been filed, for in that event he will be without present interest in the land. If it has not been filed they will first take testimony as to its execution and pertinent facts, and, reporting the same to you, await your action thereon. Should it appear that Conn has not executed such relinquishment, they will proceed to take testimony as to the character of the land embraced in his filing, under the directions above set forth.

TIMBER CULTURE—APPLICATION.

BROWNE v. RYAN.

The timber culture application of Browne was returned by the local office without action, because it did not contain his post office address, and Ryan allowed to enter the land before Browne could cure the defect in his application. *Held*, that as the said application of Browne was in all respects in conformity with the statutory requirements, he was entitled to enter as of the date when said application was first presented.

Acting Secretary Muldrow to Commissioner Sparks, April 1, 1885.

I have examined the appeal of Allen Browne from the decision of your office of May 16, 1884, approving the action of the district land officers, Niobrara, Nebraska, refusing his timber-culture application to enter the NE. $\frac{1}{4}$ of Sec. 12, T. 28, R. 12 West.

The record shows that said application, and the affidavit, with payment for the fees and commissions, were first received at the local land office on November 20, 1883, and were returned on the same day to the applicant, because the application failed to contain his post office address. The defect was at once remedied, and the papers returned to the local land office, on November 27, 1883; but the application was

refused for the reason that the land applied for was covered by timber-culture entry No. 4394, made by Stephen Ryan on November 24, 1883.

On appeal your office affirmed the action of the district land officers, for the reason that the land in question was vacant at the date of Ryan's entry.

The affidavit and application of Browne are exactly in accordance with the forms prescribed by the circular of instructions dated October 1, 1880, and comply strictly with the requirements of the act of June 14, 1878. Paragraph 1 of circular instructions of March 20, 1883, requires that the applicant must in every case state his place of actual residence and the post office address, and the register and receiver were instructed to deliver to applicants for land under the homestead, pre-emption or timber culture acts a copy of said circular. This circular was intended to furnish applicants with the proper information relative to the manner of making entries under the laws of the United States. It could not take away a right secured by law. When the timber-culture applicant's papers are received at the local land office, if they conform to the law, and are accompanied with payment for the required fees and commissions, his right of entry for the land applied for is complete. In *Banks v. Smith* (2 L. D., 44,) this Department held that an application erroneous in form, returned for correction, should take effect from the date when first received at the local land office. In the case at bar it is difficult to discover any good reason for the action of the register and receiver. They well knew the post office address of the applicant—for they returned his application to him, and without waiting for the return of the same, allowed Ryan to make entry for the same land. This action was clearly erroneous.

Your decision is therefore reversed. You will cause the entry of Ryan to be canceled without prejudice, and direct the register and receiver to allow the application of Browne as of the date when first presented, upon payment of the fees and commissions as required by law.

DONATIONS.

CHARLES F. WHITTLESEY ET AL.

While further residence and cultivation is not required by the heirs it is required of them that they shall show their ancestor to have fully complied with the law up to the date of his death, and until this is done, such heirs have only a possessory right to the land, the title thereto yet remaining in the government.

Failure to make continuous residence would defeat the settler's claim, so it would seem the failure of the heirs to make proof within a reasonable time would amount to an abandonment of the claim on their part by which their right to make such proof would be lost.

Acting Secretary Joslyn to Commissioner McFarland, October 28, 1884.

I have considered the appeal of Charles F. Whittlesey and Warren B. Hooker from your decision of April 9, 1884, refusing to allow them

to contest the donation claim of Michael Connell, embracing three hundred and twenty acres and including parts of Sections 25 and 26 in T. 20 N., R. 5 E., W. M., Olympia, Washington Territory.

December 12, 1853, Connell filed his notification, No. 518, for the land described, under Section 4 of the act of September 27, 1850, (9 Stat., 496,) and the acts amendatory thereof. It is set forth in Connell's affidavit that he was born in Ireland in 1828; that in August, 1848, at Philadelphia he made due declaration of his intention to become a citizen of the United States; that he arrived in Oregon in May, 1849, and was a resident thereof on or before December 1, 1850; "that he has personally resided upon and cultivated that part of the public land in that part of Oregon, now established as the Territory of Washington, particularly described in the annexed notification . . . continuously from the 15th day of August, 1853, to the 12th day of November, 1853." Corroborating affidavits showing cultivation and residence accompany the above.

Three affidavits filed as final proof also appear of record, in which it is stated that Connell personally resided upon and cultivated the said land from September 29, 1853, to October 29, 1855, at which last date the said Connell was killed by hostile Indians. Two of these affidavits are dated December 12, 1857, the other bearing date as of October 16, 1873, and executed before the register of the local office. There is nothing to show who filed this "final proof," or when it was filed, nor is there anything of record by which it may be known whether the donee left any heirs.

Up to the date of the donee's death, he appears to have fully complied with the law and to have been competent under the donation act to make final proof and secure the land. Now Section 8 of the act of 1850 provides, "that upon the death of any settler before the expiration of the four years continued possession required by this act, all the rights of the deceased under this act shall descend to the heirs at law of such settler, including the widow, where one is left, in equal parts; and proof of compliance with the conditions of this act up to the time of the death of such settler, shall be sufficient to entitle them to the patent."

It would appear then, under the law, that here is a claim that might have been carried to patent in 1855, the date of Connell's death, by his heirs on making the required proof, but that so far as is disclosed by the record no such heirs have yet claimed the land, or in any way sought to avail themselves of the rights conferred upon them under the law.

The applicants herein allege the non-existence of heirs, or if heirs do exist that they have wholly abandoned all claims to the land, and to show this state of facts ask that a hearing be ordered to the end that the land may be opened to their homestead entries.

Referring again to the section quoted, it will be seen that the heirs

succeed to "all the rights of the deceased under this act." It was held in *Hall v. Russell*, (101 U. S., 503,) that under the donation act the settler did not acquire a vested right, until he had complied with all the requirements of said act, and that prior to such compliance his rights were merely possessory. Then the rights to which the heirs succeed must also be possessory, and as further acts were yet to be performed by the ancestor before title vested, so further acts remain to be done by heirs before their right, under the law, will be sufficient to take the land. While further residence and cultivation is not required by the heirs, it is required of them that they shall show their ancestor to have fully complied with the law up to the date of his death, and until this is done such heirs have only a possessory right to the land, the title thereto yet remaining in the government. If this is true, it follows that ample jurisdiction is vested in your office and this department to inquire into the status of said tract, and if warranted by the evidence to declare the land open to settlement and entry.

It should be observed that Section 8 contains no provision as to the time in which the heirs should make the necessary proof, but this certainly cannot be held to operate as a perpetual reservation of the land, although no heirs appear to furnish said proof, but rather to grant to the heirs a reasonable time within which to make said proof. In this case a period has elapsed within which all minoritics must have expired so that any question on that point is fully answered by the facts. As the settlers failure to make continuous residence would defeat his claim, so it would seem the failure of the heirs to make their proof within a reasonable time would necessarily amount to an abandonment of the claim on their part by which their right to make such proof would be lost.

I am of the opinion that the applications should be granted, and your decision is accordingly reversed. You will therefore order a hearing to ascertain the exact status of said tract. In addition to what the applicants offer to prove, evidence should be furnished showing whether any person or persons are living upon or exercise any claim to said land or any part thereof, and if so the nature of such claim or occupation should be fully shown, together with the fact that all such claimants had due notice of the hearing.

AMENDMENT OF ENTRIES.

INSTRUCTIONS.

District officers may not allow the amendment of entries until authorized by the General Land Office.

Acting Commissioner Harrison to Inspector A. R. Greene, January 30, 1885.

Under date of the 19th inst., you reported, "I find the practice prevailing in some land offices in my district of allowing entrymen to

“amend their entries without consulting the Hon. Commissioner, provided the alteration is made before the abstracts are forwarded.” You are advised that such action upon the part of local officers is unauthorized and directly in violation of departmental instructions. The official regulations direct how and what is necessary to be done, to secure the amendment of an erroneous entry or filing. It no where authorizes the register and receiver to amend in either case without first being authorized so to do by this department. They are “*distinctly forbidden*” so to do by the general circular of March 1, 1884, p. 9. The order is as follows:

“Registers and receivers will not change an entry or filing so as to describe another tract, or change a date, after the same has been recorded.” It is your duty to promptly report to this office, all officials violating said order.

SOLDIERS' ADDITIONAL HOMESTEAD.

Locations for two or more non-contiguous tracts in the same district may be made under a soldiers additional homestead certificate, but must be included in one application and entered at one time.

Acting Commissioner Harrison to H. N. Copp, Washington, D. C., March 16, 1885.

A soldier's additional homestead certificate of right for eighty acres, or one for one hundred and twenty acres, may be located respectively upon two or three forty acre tracts, anywhere in the same land district, and the tracts need not be contiguous, but must be embraced in one application and entered at one time.

FORFEITED RAILROAD LANDS.

TEXAS AND PACIFIC R. R. CO.

The order restoring lands withdrawn for the Texas and Pacific should include lands along the branch line of the Southern Pacific where the same passes through the limits of the withdrawal for the former road.

Commissioner Sparks to the register and receiver Los Angeles, California, April 4, 1885.

By letter of this office of March 17, 1885, you were instructed to give public notice by advertisement that the odd numbered sections of land heretofore withdrawn for the Texas and Pacific railroad have been restored and are subject to entry under the public land laws as unoffered land. By letter of March 18, 1885, the foregoing instructions were modified so as to exclude from restoration lands along the Branch line of the

Southern Pacific railroad where the same passes through the limits of the withdrawal for the Texas and Pacific.

My attention having been called to the instructions of March 18, 1885, I have considered the subject and find no reason why such letter should have been written. The same is therefore revoked and you will be governed by the instructions of March 17, 1885, directing you to give notice of the restoration of all lands heretofore withdrawn for the Texas and Pacific railroad, the same being the odd numbered sections within twenty miles on each side of the projected line of the road from the eastern boundary of the State of California to the Pacific Ocean.

HOMESTEAD—ENTRY.

HERING *v.* SIDOW.

If the local office improperly rejects an application to enter, the remedy is by appeal, and the applicant will not thereafter, in the absence of appeal, be allowed to set up such action of the local office to defeat an intervening adverse claim.

Secretary Lamar to Commissioner Sparks, April 6, 1885.

I have considered the case of Gottlieb Hering *v.* W. F. Sidow, on appeal by Sidow from the decision of your office, dated May 8, 1884, wherein his homestead entry is held for cancellation.

Hering made homestead entry No. 614, November 23, 1882, for the SE. $\frac{1}{4}$ of Sec. 23, T. 122, R. 65, Aberdeen, Dakota.

On January 15, 1883, Sidow presented an application to make homestead entry of the tract, accompanied by an affidavit in which he stated that he presented a previous application to homestead the same land November 14, 1882; that owing to a mistake, such application was rejected by the local officers. Upon this showing he was permitted to make homestead entry No. 790 as of January 15, 1883, for the tract. By letter of your office, dated July 8, 1883, the local officers were directed to institute proceedings to ascertain his rights in the matter. Prior to the receipt of the instructions, however, Sidow had presented final proof in support of his claim to the land, and Hering having entered a protest, proceedings had been already commenced in pursuance of the protest.

Sidow furnished testimony at the hearing, relative to the charge of error against the local officers, in rejecting the previous application; which does not sustain his allegation so far as they are concerned. He is unable to produce the rejected document; the party who wrote it, and returned it to him on its rejection, and is not certain that it contained the description of this particular piece of land, nor does he know why the application was rejected, and the local officers have no recollection of the transaction. Sidow admits that on November 14, 1882, he knew the tract was vacant and that the local officers were mistaken in their

action. If this is a fact, it was his duty, if he still desired to secure the tract, to file an appeal from the action of the local officers at that time, and thus obtain a record showing of such intent. Instead of which, he took no measures to correct the alleged error, until two months later; in the meantime, the adverse claim of Hering had attached.

Taking another view of Sidow's claim, as presented by the testimony adduced on the hearing; it is clearly established to my mind that he performed no act of settlement or improvement on the tract until January, 1883.

The decision of your office canceling the homestead entry of Sidow is affirmed.

SWAMP LANDS.

STATE OF OREGON.

Although no appeal was taken from the finding of the district officers as to the character of the lands it was the duty of the Commissioner of the Land Office to review the testimony taken at the hearing.

The State elected not to take its swamp lands on the evidence furnished by the plats of survey and field notes, and is not bound by them, but this will not preclude the Department from consulting its records where the testimony is conflicting in order to ascertain the true character of the land.

Acting Secretary Muldrow to Commissioner Sparks, April 9, 1885.

I have examined the appeal of the State of Oregon from the decision of your office, dated October 22, 1883, holding for rejection her claim to certain tracts in Sections 2, 3, 4, 9, 10, 11, 13, 14, 15 and 24, in T. 41 S., R. 42 E., Lakeview, Oregon, land district, under the act of March 12, 1860, (12 Stat., 3,) as swamp or overflowed land.

It appears from the record and papers in the case that, on May 30, 1882, a former special agent of this Department, who had been engaged in the examination of lands claimed by said State under said act, transmitted to your office a letter, with several affidavits from parties, relative to the character of said lands, and alleging that the whole of said township and each and every legal subdivision thereof was barren desert land in 1867; that during that year Charles Bowling, Cornelius Ryan and Moses Siegel settled upon a part of said township; that since that time, they have constructed company ditches and by irrigation have reclaimed said land; and that if any part of said township is wet or overflowed land, the same is made so by the water brought upon the land through irrigating ditches.

On July 8, 1882, the register transmitted to your office the affidavits of seven parties, making substantially the same allegations and asking that a hearing be ordered to determine the true character of said land. Thereupon, in response to a letter from your office, dated July 24, 1882, calling for a report, the United States surveyor-general for Oregon, on

August 17th following, transmitted a copy of a list of lands in said township on file in his office and claimed by said State under said act, and advised you that he deferred sending his approval of said list, because of the too great discrepancy between the deputy surveyor's report and the State's claim.

On September 27, 1882, the claim of the State was held for rejection by your office, of which action the surveyor-general was duly advised. On January 6, 1883, the State's agent requested that a hearing be had to determine the character of the land, and the same was ordered by your office on February 1, 1883.

The hearing was duly held, and on May 18, 1883, the register and receiver reported that the township plat of survey was filed in the local land office on May 16, 1882; that on January 16, 1883, list No. 38, approved by the surveyor-general of Oregon, was filed in their office, in which all the lands in dispute are designated as swamp and overflowed; and that the record and the testimony show that Moses Siegel, Arthur W. Fish and Cornelius Ryan made desert entries for lands in this locality in 1877 and 1878 prior to the survey thereof, and that Robert Belton made desert entry No. 27 on December 8, 1881, for the S. $\frac{1}{2}$ and the S. $\frac{1}{2}$ of the N. $\frac{1}{2}$ of Sec. 10 in said township 41; "that the evidence shows conclusively that the lands, if not swamp and overflowed within the meaning of the act, were certainly an excellent quality of hay land, and that they were producing large crops long prior to the entries under the desert act;" that the tracts particularly described in their report, aggregating some sixteen hundred acres, were not desert lands at the date of said entries, but "were so swampy and overflowed on the 12th day of March 1860, as to preclude the cultivation of a staple crop without reclamation by drainage," and they would recommend that the claim of the State be approved.

On October 22, 1883, your office declined to approve the recommendation of the register and receiver, upon the ground that their "decision is not in accordance with the facts as developed at the hearing, but contrary to the law and the evidence." In said decision reference was made to the contents of the field notes and the plats of the United States survey of said tracts, and also to the contents of certain papers received by this Department from the Secretary of War, relative to the establishment of a "Hay Reservation," embracing a portion of the lands in controversy.

The errors insisted on by the State in its appeal are:

1. That since no appeal was filed from the decision of the register and receiver by any person in interest, your office had no jurisdiction to reverse their decision as to the facts in the case.

2. That if it be conceded that your office has the power to review and consider the testimony taken before the register and receiver at said hearing, in the absence of any appeal by a party in interest, then it

was error to give any weight or refer to the field notes and plats of survey of said tracts, or the papers relative to said Hay Reservation.

3. That upon a careful consideration of the whole evidence, the decision of your office should be reversed and that of the district land officers affirmed.

The grant under the act of September 28, 1850, (9 Stat., 519,) which is extended to the State of Oregon by the act of March 12, 1860, has uniformly been held to be a present grant, vesting an immediate interest in the State to the lands granted. The claim of the State is to be determined by the character of the land at the date of the grant, and if at that date the greater part of each smallest legal subdivision was swampy or overflowed, the land inures to the State under the grant, and if not of such character, the State's claim is at an end.

Section 2 of said act of September 28, 1850, makes it the duty of the Secretary of the Interior to make out an accurate list and plats of the lands granted, and transmit the same to the Governor of the State. It is also his duty to ascertain the fact whether the land is swamp and overflowed. *Railroad Company v. Smith*, (9 Wall., 95.) Since, by virtue of section 453 of the Revised Statutes, the Commissioner of the General Land Office is required to perform, under the direction of the Secretary of the Interior, all executive duties relative to the disposition of the public lands, it was, I think, the duty of your office to review the testimony taken at said hearing. *Smith v. Brandes* (2 L. D. 95).

The State elected on October 13, 1874, not to take her swamp lands by the evidence furnished by the plats of survey and field notes, and she is not bound by them, but may furnish other testimony, either to sustain or disprove their contents. *Millard v. State of Oregon* (5 C. L. O., 179). But such election will not preclude this Department from consulting its records where the testimony is conflicting, in order to ascertain the facts concerning the character of the land in controversy. Besides, a careful consideration of the testimony taken at the hearing fails to show that the lands in question were swamp and overflowed at the date of said grant. The witnesses for the State became acquainted with said lands in 1872, 1873, 1878 and 1883, while the witnesses against the claim of the State testify that they have known the land since 1867, and that at that time the lands were desert lands and not swamp and overflowed land. Their testimony is not successfully contradicted. *Millard v. State of Oregon* (supra).

The decision of your office is accordingly affirmed.

DOUBLE MINIMUM LAND.

WILLIAM MUNDS.

The even sections lying within the limits of the railroad grant are raised in price notwithstanding the fact that at the time the grant took effect said land was included within an Indian reservation.

Acting Secretary Muldrow to Commissioner Sparks, April 9, 1885.

I have examined the appeal of William Munds from the decision of your office dated June 24, 1884, requiring him to pay an additional sum of one dollar and twenty-five cents per acre for the land in the even numbered section covered by his pre-emption entry No. 158, Prescott land district, Arizona Territory.

The record shows that on May 15, 1880, Munds made said entry for the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 12, T. 15 N., R. 3 E., and Lot 2 of the NW. $\frac{1}{4}$ of Sec. 7, T. 15 N., R. 4 E., paying for all of the land at the rate of one dollar and twenty-five cents per acre. The land is within the forty mile limits of the grant of July 27, 1866, (14 Stat., 292,) to the Atlantic and Pacific Railroad Company, the right of which attached on March 12, 1872. It is insisted by the appellant that the land is also within the limits of the Camp Verde Indian Reservation, established by executive order on October 3, 1871, and restored by executive order on April 23, 1875, and, therefore, the tracts in the even section are not subject to sale at two dollars and fifty cents per acre.

In Section 2357 of the Revised Statutes it is provided, "That the price to be paid for alternate reserved lands along the line of railroads, within the limits granted by any act of Congress, shall be two dollars and fifty cents per acre." In *ex parte* William P. Maclay (2 L. D., 676), this Department held that, although certain odd sections did not pass to the railroad company under the grant, yet the fact that the odd, as well as the even sections, are reserved, all being within the geographical limits of the grant, ought not to affect the price of the even sections. In the case of Robert C. Hite (*idem.*, 680), it was held that the act of March 3, 1853, (10 Stat., 244,) embodied in said section of the Revised Statutes, fixed the price of alternate sections of public lands along the lines of railroads at two dollars and fifty cents per acre, and that no subsequent law has served to reduce the price of such land.

The decision of your office is affirmed.

LOCATION OF RAILROAD GRANT.

NORTHERN PACIFIC R. R. Co.

An order allowing an amendment of the terminal limit of the withdrawal of lands, on the definite location of the road, is vacated, as it does not appear that error occurred in the determination of the limit as originally fixed.

Commissioner Sparks to the register and receiver Walla Walla, Washington, April 11, 1885.

On March 20, 1885, a diagram was transmitted to you with office letter advising you of an amendment of the terminal limit of the withdrawal of lands in your district on definite location of the line of the Northern Pacific railroad, and you were instructed, in effect, that the railroad company would be permitted to select lands under its grant, within such extended limit.

It appears that this change was asked for in the interest of certain alleged purchasers from the railroad company of lands not subject to selection or sale by the company, under the order of the Commissioner of the General Land Office of August 16, 1881, fixing the terminal limit of said withdrawal.

My attention has been called to the matter by a complaint referred to me on the 7th inst. by the Hon. Secretary of the Interior, alleging that the interests of settlers upon 149,760 acres of land were prejudiced by this action in favor of purchasers of 2,000 acres from the railroad company.

The whole subject having thus been brought to my notice I have considered it and am satisfied that the action of the 20th ultimo was taken under a misconception of the purport of a letter from the Secretary of the Interior of the 13th ultimo in reply to a letter of the preceding day from the Acting Commissioner of this office asking instructions in the premises.

The Secretary stated that the fixing of the terminal limit is a matter of mathematical ascertainment, and if a correction is necessary to truly represent the grant on either side of the road this office is competent to make it.

Such limit was fixed by Commissioner's order of August 16, 1881, in accordance with a rule established in the adjustment of the early land grants for railroads, and adhered to from that period to the present time. It is not shown that any error was made in the ascertainment of that limit in the present case. It was clearly not the purpose of the Secretary to change the rule for fixing terminal limits which has been applied to all railroad land grants, nor to authorize the extension of the withdrawal on definite location beyond such terminal limit when already fixed by a mathematical ascertainment in which no error is discovered.

The action and instructions of March 20, 1885, being erroneous, are hereby revoked. Acknowledge this letter and also the receipt of telegram of this date advising you of this action.

FINAL PROOF.

INSTRUCTIONS.

The clerk of a court in taking proof, where protest is offered, should receive all the testimony presented, each party paying the costs of his own direct and cross-examinations.

In such cases the clerk has no power to dismiss a protest or case, to exclude testimony or make decisions, but should duly note upon the record all motions and exceptions.

Assistant Commissioner Harrison to L. E. McGarry, clerk, Dodge City, Kansas, April 11, 1885.

I am in receipt of your letter inquiring whether, in case of a protest being filed against any claimant making final proof before you, you should proceed to take the testimony of claimant and witnesses and submit the same with the protest to the register and receiver for further hearing, or whether proceedings should stop on the filing of a protest and the matter be submitted to the local office, or whether you should examine witnesses offered by claimant and also witnesses for protestant, and then submit the whole matter to the local officers, and, in the latter case, whether you should be governed by the same rulings as the local officers and be empowered to pass upon motions, rulings, orders, etc., subject to reversal by the local officers.

You are informed that when protest is offered, or any person appears to object to claimants' entry or proof you should take all the testimony offered on both sides, first examining claimant and his witnesses and then taking testimony on the part of protestant. Either party can cross examine the witnesses of the other side. Each party must pay the costs of his own direct and cross examinations. You have no power to dismiss a case or protest, nor to exclude testimony offered nor to make decisions. All questions propounded should be reduced to writing; also the answers thereto, and if exception be taken to either, duly note the same upon the record. Motions and exceptions should be properly noted on the record, and will be passed upon by the local officers when they consider the case.

RAILROAD GRANT—CONFLICTING ENTRY.

HASTINGS & DAKOTA RY. CO. v. UNITED STATES.

A homestead entry was made through an attorney in fact; the entryman's affidavit showing that he was in the military service of the United States, a single man, a citizen and resident of Wisconsin, was made before his commanding officer: *Held*, that such an entry though voidable was prima facie valid, and being of record when the right of the company attached excepted the land from the operation of the grant.

Acting Secretary Joslyn to Commissioner McFarland July 31, 1884.

I have considered the case of the Hastings and Dakota Railway Company v. The United States, involving the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 33,

T. 116, R. 32, Benson district, Minnesota, on appeal by the company from your decision of May 8, 1883.

The tract in question is within the ten miles or granted limits of the grant of July 4, 1866, (14 Stat., 87,) which became effective March 7, 1867.

It appears that one Nelson Bullis made homestead entry No. 1853 of the E. $\frac{1}{2}$ of NW. $\frac{1}{4}$ and E. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of said section May 3, 1865, and that one R. K. Beckham made homestead entry No. 1917 of the SW. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of said section May 24, 1865; and that both entries were canceled September 30, 1872.

Preston Souther made homestead entry No. 8010 of the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 33, November 9, 1877, but the same was canceled as to the tract in question pursuant to your predecessor's decision of November 1, 1880; which decision was declared May 23, 1881, to have become final by reason of Souther's failure to appeal therefrom. He based his entry upon the aforesaid canceled entries, and he now asks that it may be reinstated *in toto*, and applies to make final proof thereon in its entirety, as in such event he would be enabled to make an additional entry of land contiguous to that in question, but not otherwise.

By your decision of May 8, 1883, you held that "if the entry of Bullis was now for the first time under consideration by this office it would be held to have excepted the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said Sec. 33 from the operation of the grant named. Souther's claim, as between him and the company, to the SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ having, however, already been adjudicated under the prior rule, so far as homestead entry No. 8010 is concerned, that entry cannot at the present time again be considered . . . Under the present rules the SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ is held to be public land, and subject to entry, it not having been conveyed to the State of Minnesota, either by grant or by patent;" and you accordingly rejected the company's claim in the premises.

Although the company filed a list (No. 1) of selections March 3, 1883, embracing the S. $\frac{1}{2}$ of NW. $\frac{1}{4}$ of Sec. 33, you rejected its claim, as aforesaid, because such selection was in violation of the rules and regulations of your office touching railroad selections—to which railroad companies have ever been held to be amenable—and you therefore deemed it competent to re-adjudicate the case in Souther's favor.

Wherefore, the company appeals, specifying error (1) in setting aside your predecessor's final decision of November 1, 1880, and (2) in applying the Graham decision instead of the Kniskern.

The aforesaid decision of November 1, 1880, was based upon the theory that Bullis' entry did not except the tract in question from the operation of the grant, inasmuch as he was a single man. Such rule obtained under the departmental decision in the case of Kniskern *v.* Hastings & Dakota Ry. Co., (6 C. L. O. 50) wherein my predecessor, Mr. Secretary Schurz, held that such an entry made by a single man not the head of a family, in the military or naval service of the United States,

who had not made a *bona fide* settlement upon and improvement of the land as required by the statute, is void *ab initio*, and cannot except the land covered thereby from the operation of a railroad grant.

But in the case of *Graham v. Hastings and Dakota Ry. Co.*, (9 C. L. O. 236) it was held "that an entry of record, which on its face is valid, is such an appropriation of the land covered thereby as to reserve the same from the operation of any subsequent law, grant, or sale, until a forfeiture is declared and the land is restored to the public domain in the manner prescribed by law."

Bullis' is such an entry. It was made May 3, 1865, through one F. A. Conwell as Bullis' attorney in fact, pursuant to the provisions of the act of March 21, 1864, (13 Stat., 35,) as embodied in section 2293 of the Revised Statutes. He alleged in his affidavit, which he made before his commanding officer while engaged in the military service of the United States, that he was a resident of Calumet Co., Wisconsin, a single man over the age of twenty-one years, and a citizen of the United States.

It was made by a qualified party upon land subject to homestead disposal; it was admitted by the register and receiver, who had jurisdiction to entertain the application. Had the applicant appeared in person and made the affidavit before the register or receiver, or had he or any member of his family been residing upon the land, all the proceedings would have been perfect. As the facts now appear, the affidavit was defective, not being such as could be made before other than the district officers. It was such a defect, however, as in homestead cases, as well as under the pre-emption laws, it was the uniform practice of the Department to allow to be cured by the filing of a proper supplemental affidavit. It never was set aside for such informality, and no notice of the defect was ever brought to the attention of the applicant. His entry was finally canceled for specific cause, to wit, for abandonment, and so stands the record of your office to the present moment. This is not that case of an entry void *ab initio*, which is an absolute nullity. It falls clearly within the class of voidable entries, which may be treated as void at the discretion of the Department in a direct proceeding to vacate them by authority of supervisory action, or, if the law be substantially complied with on the part of the entryman, may be confirmed and pass into title by patent.

Thus it appears that although Bullis' entry was not regular in all respects, it was nevertheless, *prima facie* valid. And as it was extant both at the date of the grant and when the company's right thereunder attached, I am of opinion that the tract in question was excepted from the operation of the grant; for the reasons stated in the closing paragraph of the decision in the *Graham* case, touching the remedial act of June 8, 1872, (17 Stat., 333).

Your decision is accordingly affirmed.

TIMBER CULTURE—BREAKING.

FLEMINGTON *v.* EDDY.

The timber culture law does not require the breaking to be done by the claimant in person, and he may therefore adopt as his own the breaking done by another and abandoned.

Acting Secretary Joslyn to Commissioner McFarland, October 29, 1884.

I have considered the case of Alexander D. Flemington *v.* Thomas V. Eddy, involving the latter's timber culture entry No. 5955, made April 19, 1883, for the SE. $\frac{1}{4}$ of Sec. 10, T. 129 N., R. 63 W., Aberdeen, Dakota, on appeal by Flemington from your decision of January 5, 1884, reversing the decision of the register and receiver and dismissing his contest.

Said contest was initiated April 20, 1883, upon the allegation that Eddy "has not cultivated said tract according to law, in that he has failed to break or cause to be broken five acres of the tract claimed during the twelve months last past." Notice of contest issued May 5, 1883, fixing the date of the hearing June 20, 1883. You state that "no evidence of service of notice, either by publication or otherwise is produced." I find, however, in the record the affidavit of Leslie L. Goddard showing that personal service of the notice of contest was made by him on the claimant May 8, 1883. Both parties appeared at said hearing.

The testimony shows that one George Williams filed his pre-emption declaratory statement upon said tract May 6, 1882, alleging settlement thereon April 10, 1882; that he broke between five and six acres of said tract, built a small shanty and subsequently abandoned the tract and removed the shanty in the spring of 1883 prior to the initiation of the contest. It also appears that Eddy attempted to purchase said breaking from Williams on May 25, 1883, but failed because Williams would not take the purchase money. Williams afterwards sold the breaking to the contestant.

It is contended that, because Eddy did not break or cause to be broken five acres of said tract during the first year, his entry must be forfeited. It was proved by the contestant that the required number of acres on said tract was broken by Williams in the year 1882, so that, at the date of the contest, the law had been complied with so far as relates to the quantity of land required to be broken. When said entry was made, so far as appeared of record, the land embraced therein was vacant public land subject to entry by the first legal applicant. When, however, Williams filed his declaratory statement upon said tract, alleging settlement prior to the date of said entry, the right of the entryman became subject to the superior right of the pre-emption claimant, upon his complying with the requirements of the pre-emption laws. But, as we have seen, Williams abandoned the land and removed his shanty prior

to the commencement of the contest. His claim to the tract was at an end.

The entryman is not required to break the land in person. In *Gahan v. Garrett* (1 L. D., 164) it was held by this Department that the "object of the law is to encourage the growth of timber, and this is accomplished, whether the work be performed by the entryman, his agent, or vendor." And in the departmental decision in *Galloway v. Winston* (*ibid.* 98,) it was held that your decision in that case that, "as the statute is imperative in its requirements as to the first year's work, and this was not done by Winston, his entry should be canceled," was erroneous, and that the object of the law—the growth of timber—is attained if at the date of final proof the party has growing upon the land the required number of thrifty trees." The above decision changed the former rulings of this Department in conflict therewith. *Ewing v. Rickard* (1 L. D. 173) and *Cornell v. Chilton* (*id.* 180.)

Neither the attempted purchase of the breaking by Eddy, nor the payment for it by Flemington after the commencement of the contest, can have any weight in the determination of the rights of the parties in this case. *Etter v. Noble* (10 C. L. O., 196); *Quinby v. Conlan* (104 U. S., 420).

The testimony fails to show that the required number of acres were not broken during the first year. Your decision is accordingly affirmed.

TIMBER CULTURE—PREVIOUS BREAKING.

BEATTIE *v.* DOW.

Breaking done in some previous year cannot be deemed a compliance with law by a subsequent entryman, who does nothing himself, and makes no use of such breaking.

Acting Commissioner Harrison to register and receiver, Fargo D. T., December 28, 1884.

I have reconsidered the office decision of November 24, 1884, in the case of *John Beattie v. Drusilla Dow*, and find the same erroneous in construction of law governing the case.

It was shown by the testimony of contestant that in 1881, preceding Dow's entry, the whole quarter section had been plowed and back-set, but that the land had afterwards grown up to weeds, and that no plowing had been done and no improvement made on the land by the subsequent entryman during the year 1883, the first year of his entry (which was made Dec. 15, 1882), nor down to date of contest on which hearing was held Feb. 15, 1884.

In the case of *Whitman v. Thomas* Dec. 12, 1884, (on review) I held that "breaking done by one party in 1881 and grown up to weeds, is not breaking done in 1883 by another party for the cultivation of trees.

It is not the breaking required to be done by the second party, nor does it answer the purpose of a compliance with law by him." The case of *Beattie v. Dow* is the same in this respect as the case of *Whitman v. Thomas*, and my decision of Nov. 24, 1884, in the case of *Beattie v. Dow* is accordingly also revoked.

The rule relative to the effect of a previous breaking which has been utilized by a subsequent entryman for his benefit is stated in 4, C. L. O. 162, as follows: "When a party enters for timber culture, land which was formerly broken up and cultivated, he is not required to do the prescribed breaking on land not before broken, but he may go over the land formerly broken and again break it and prepare it for the reception of the trees to the extent of area and in the periods prescribed." In the case of *Gahan v. Garrett*, decided by the Secretary of the Interior, April 1, 1882, (1, L. D. 164) the defendant had rebroken land and continued the cultivation and planting of trees. In the case of *Winston v. Galloway*, (1 L. D. 169) the defendant had cured defects in the first year's work by subsequent acts before contest. In the case of *Flemington v. Eddy*, (3, L. D. 482) breaking was done by another (in that case through mistake), during the year when defendant was required to break, and it was held that the breaking having been done at the proper time the law was satisfied although such breaking had been done by another than the entryman. None of these decisions however, hold that breaking done in some previous year can be deemed a compliance with law by a subsequent entryman who does nothing himself, and makes no use of the previous breaking. Your decision in the case of *Beattie v. Dow* in favor of contestant appears to have been in accordance with the facts developed at the hearing, and in accordance with law and controlling decisions. No appeal having been taken therefrom, said decision becomes final, *Dow's* entry is canceled, and you will be governed accordingly.

FINAL PROOF.

INSTRUCTIONS.

Proof made on a date other than that fixed in the notice is irregular, and should be accepted only for the purpose of submission to the General Land Office.

Assistant Commissioner Harrison to Inspector F. D. Hobbs, March 9, 1885.

I am in receipt of your letter of the 6th ult., from Bloomington, Neb., relative to the practice of making proofs in homestead and pre-emption cases on a day different from the day advertised.

The law and regulations require notice of intention to make proof to be published—a time certain to be fixed—and the names of witnesses to be given. These requirements are for a purpose which is defeated if proofs are not made in accordance therewith. Proofs made on a date

other than the date advertised are irregular on their face. Such proofs ought not to be accepted by local officers unless accompanied by the most satisfactory evidence of the impossibility of appearance at the time fixed, and the reasons therefor, and then only for the purpose of submission for the consideration of this office.

A special report should in such cases be made by the register and receiver, and if proof was advertised to be made before some other officer than the register and receiver a corroborating certificate from such officer should be required. This certificate should state whether any person appeared to protest against the proof on the day advertised, and whether any notice, and what notice of the postponement of the proof was given.

RAILROAD GRANT—RELINQUISHMENT.

HASTINGS AND DAKOTA RY. CO.

The right of a railroad company to relinquish lands and receive indemnity therefor under the act of June 22, 1874, cannot be made to turn upon the legality, or illegality, of the settler's entry.

Secretary Lamar to Commissioner Sparks, April 18, 1885.

I have considered the appeal of the Hastings and Dakota Railway Company from the decision of your office, dated April 22, 1884, rejecting its application to select certain tracts therein described, in the Redwood Falls land district, Minnesota, under the provisions of the act of June 22, 1874 (18 Stat., 194).

The lands in question are within the primary limits of the grant, by act of Congress approved July 4, 1866, (14 Stat., 57,) for the benefit of said company. The selection of the company was rejected, because the lands relinquished were, with three exceptions, covered by entries at the date when the right of the company attached to the odd numbered sections within the primary limits of its grant. It is insisted by the company that said selections should be allowed, because "the parties in whose favor relinquishment is now made initiated their claims *subsequent* to stated executive withdrawal, but *prior* to filing of map of definite location."

This contention cannot be maintained. The act of June 22, 1874, applies to relinquishments made in favor of settlers whose entries and filings have been allowed under the pre-emption or homestead laws of the United States subsequent to the time when the right of said road is held by your office to have attached to such lands. It was expressly held by this Department, on motion for review of decision in case of South and North Alabama Railroad Company (3 L. D., 274), that "the right of the company to the indemnity asked can in no manner be made to turn upon the legality or illegality of the entries made by the settlers, for, by the terms of the act granting this indemnity right, it is

provided that the same shall be recognized where any of the lands granted be found in the possession of an actual settler, whose entry or filing *has been* allowed under the pre-emption or homestead laws of the United States subsequent to the time at which, by the decision of the Land Office, the right of said road was declared to have attached to such lands."

The decision of your office is accordingly affirmed.

TIMBER CULTURE—CULTIVATION PENDING CONTEST.

WILLIAMS *v.* PRICE.

The timber culture entryman should comply with the law during the pendency of a contest against his entry.

In this case however, the failure so to do is excused, as it was occasioned by the wrongful acts of contestant, and the entryman began to cure the default prior to the initiation of the contest based thereon.

Secretary Lamar to Commissioner Sparks, April 14, 1885.

I have considered the case of Thomas C. Williams *v.* Robert R. Price, involving the NE. $\frac{1}{4}$ of Sec. 28, T. 19 N., R. 5 W., Grand Island district, Nebraska, on appeal from your decision of June 28, 1884, dismissing the contest.

June 29, 1877, one Long made timber culture entry of the land. In August, 1877, Price purchased, for \$300, Long's improvements and interest in the land. Price filed in the local office a written relinquishment from Long, and Long's entry was canceled by your office. Price made timber-culture entry of the tract February 6, 1878. Long's improvements (sold to Price) consisted of a house and eight or ten acres of breaking. Prior to his sale of the house and improvements to Price, Long had permitted Williams to occupy the premises, the latter agreeing in return to plant and properly cultivate ten acres of trees.

Price, after obtaining the relinquishment and purchasing the improvements from Long, hired ten acres of the land broken (in June, 1878), with the purpose of planting timber thereon. It had been verbally agreed between him and Williams that the latter should be allowed to remain on the premises upon the same terms as had before been arranged between Williams and Long. Instead of living up to this agreement, however, Williams filed in the local office his own soldier's declaratory statement, alleging settlement on the day of the cancellation of Long's entry (January 25, 1878). When Price learned that Williams claimed the land, a contest arose between the two, which your office (June 23, 1881) decided in favor of Price. An appeal was taken to this Department, which (March 8, 1882) canceled Williams' filing.

During the pendency of the contest, Price had done nothing in the way of actually planting timber—Williams remaining in actual occupa-

tion of the land. Upon being informed of the decision in his favor, however, Price at once (through his agent) served upon Williams written notification to leave the premises, and the same day, (April 15, 1882,) laborers employed by him, began the work of plowing ten acres of land (including the re-plowing of a portion of that broken by him in 1878), and setting out cuttings—in the course of a month from the last named date setting out 27,900 cuttings.

Upon being notified to leave the premises, Williams (April 20, 1882,) initiated contest against Price's timber-culture entry, on the ground of failure to plant and cultivate; but the contest was dismissed by the local office for failure of contestant to make application to enter the tract. Williams at once initiated another contest, accompanying it with the proper application to enter; and a hearing in this case was held April 19, 1883.

At this (second) hearing it was shown—in addition to what has already been stated—that the most of the cuttings set out by Price's employés in the spring of 1882 had died; contestant claims, because of negligence in the manner of planting; defendant claims, on account of the unfavorable season, and that after finding that the cuttings had failed to grow, re-planting that season in the dusty soil, during the period of drouth, would have availed nothing. Early the next spring, however, Price's agent and workmen appeared upon the ground, for the purpose of re-planting; but were ordered off by Williams, who asserted the land was his and they would not be permitted to enter upon it "so long as he had a drop of blood in his body."

The question of the original rights of the respective parties in the case to the land in controversy is *res judicata*—having been conclusively determined by the Department decision aforesaid, (of March 8, 1882). The question of the timber culture contest initiated by Williams upon his receipt of, and dissatisfaction with, that decision is all that remains to be considered.

Two points are brought prominently forward in the evidence, and great stress laid upon them by counsel for contestant:

First: Price was grievously in laches in failing to plant timber upon the land during the period pending the decision of the former contest between him and Williams.

Second: He was further in laches in failing to plant timber properly, in the spring of 1882, and it was the result of his own (*i. e.*, his agent's) negligence that the cuttings then planted did not grow.

Referring first to the last-named point, in a proceeding involving forfeiture, the burden of proof is on the part of the contestant (*Ewing v. Rickard*, 1 L. D., 173); and in the case at bar I am of the opinion that the contestant has not affirmatively shown Price's failure to comply with legal requirements during the year 1882.

In omitting to plant during the period from 1878 till 1882, Price was unquestionably in laches. It would be unsafe to decide that a timber-

culture entryman is absolved from obligation to fulfill the requirements of the law pending the decision of a contest. But this is a peculiar and in some respects exceptional case. It is a case in which the Department has already once decided that the contestant has no equities; and the evidence shows him to have been ungrateful, false, and treacherous toward one who has shown himself to be unusually and almost unreasonably forbearing toward him. For years he has been a non-paying tenant upon premises upon which he agreed to plant timber in return for the rent; and having refused to fulfill his part of the agreement—having surreptitiously filed a claim for the land, and by duplicity, strategy and threats of violence held possession for years of property for which his employer had paid a valuable consideration—he now seeks to take advantage of his own wrong in failing to plant the timber as agreed upon. There is no reason why decision should be given in his favor unless absolutely demanded by the letter of the law.

Price's laches remained a question solely between himself and the Government, certainly up to the date (April 20, 1882,) when Williams initiated contest. Whether indeed it did not so remain until the initiation of the second contest (the first having been dismissed for omission to accompany the affidavit with application to enter the tract) need not now be considered. But April 15, 1882, Price's workmen began to plow the ground and plant cuttings thereon. He thus commenced to cure his laches before the initiation of contest. In view of these facts, I affirm your decision dismissing the contest.

PRE-EMPTION—FRAUDULENT CLAIM.

LA BOLT *v.* ROBINSON.

A pre-emption claim based upon a settlement and filing made for the benefit of another is void *ab initio*, and not susceptible of validation by the rescission of the contract under which it was initiated.

Secretary Lamar to Commissioner Sparks, April 21, 1885.

A motion for review has been filed in the case of John La Bolt *v.* Julia E. Robinson, wherein this Department, on March 2, 1885, affirmed the decision of your office rejecting her final pre-emption proof for the NE. $\frac{1}{4}$ of Sec. 33, T. 152, R. 35, Grand Forks, Dakota, and holding for cancellation her filing therefor.

For the purpose of fully presenting the question raised by this motion a brief recital of the facts involved is necessary.

On March 15, 1883, Robinson filed her declaratory statement for said tract, alleging settlement the same day. June 28, John La Bolt filed his declaratory statement for said tract, alleging settlement June 26, 1883. On the notice of Robinson that she intended to make final proof

on September 20, 1883, La Bolt filed a protest, and this contest arose thereon.

June 25, 1883, Robinson filed in the local office her affidavit to the effect that she had on that day signed a relinquishment of her right to said tract, being led thereto by fraudulent representations, and not knowing the effect of such instrument; that she desired to hold the land for her own benefit and requested, therefore, that said relinquishment should not be received if presented.

The proof submitted on September 20, 1883, was in regular form, showing that Robinson settled March 15, 1883, that her residence thereafter was continuous; that the improvements consisted of a house, barn, granary, and one hundred acres broken, all of the value of \$1500.

On the hearing Robinson testified that she made her settlement and filing, on and for said land, for the benefit of one S. M. Reed, in pursuance of a verbal agreement; that the improvements on the land were all placed there by Reed; that Reed with his family resided with her on the land, he furnishing the house and paying for the household supplies; that she made such agreement with Reed in good faith, intending to carry it out and expecting to receive therefor \$150; that Reed told her such an agreement was against the law and to say nothing about it; that Reed came to her with a paper, which he read to her and wanted her to sign, saying that it was a mere form so that neither would lose the land; that she did not understand its effect; that a notary made out a paper like the one read to her by Reed. This last paper was also read to her and signed by her in the presence of a witness, who signed also; that she supposed the relinquishment was going no farther than into Mr. Reed's hands; that she first made up her mind to hold the land for herself on June 23, 1883; that she was absent from the land from about June 26 to July 10, when she went back, and building a small house, moved into it, and stayed on the land till September 20, '883, when, having made final proof, she sold the house, and has not since been on the land. This house was the only improvement made by her.

It is also in evidence that on August 6, 1883, Robinson gave written notice to Reed that she formally rescinded the agreement she had made with him, and intended to enter the land for her own benefit.

Your office decided that Robinson's claim was, from its inception, in fraud of the pre-emption law, and void *ab initio*; rejected her final proof and held her filing for cancellation.

On behalf of Robinson it is claimed that while she made this agreement, it could not defeat her right of entry, especially in view of the fact that she had rescinded the same before she offered to make final proof.

There can be no doubt but that from the initiation of Robinson's claim to the execution of her relinquishment, she was willfully an active party

in a fraudulent attempt to secure, through the use of her pre-emptive right, this land for the benefit of Reed. She admits that she performed no acts of settlement or improvement on her own behalf, until after she had relinquished her claim; but granting that she is entitled to credit for all acts of improvement performed by Reed, even then, as her settlement was speculative and fraudulent, no right of entry can be acquired thereby, for *bona fides* in settlement is the fundamental principle upon which the right of pre-emption is founded. *Morgan v. Craig* (10 C. L. O., p. 234); *O'Claire v. Rondeau* (*id.*, 172).

The rescission of the contract did not operate to confer upon Robinson rights that she had never theretofore possessed. By the settlement and filing made for the benefit of Reed neither she nor Reed acquired, under the law, any claim against the land that could ripen into title, and it cannot be held that the rescission gave validity and imparted good faith and honesty of purpose to acts that, when performed, were absolutely invalid on account of their fraudulent character.

Finding no error in the decision of my predecessor, the motion is dismissed.

RAILROAD GRANT—ACT JUNE 15, 1880.

NORTHERN PACIFIC R. R. CO. *v.* BURT.

An existing homestead entry excepts the land covered thereby from the effect of a withdrawal on the filing of a map of general route, and upon the cancellation of such entry, prior to the definite location of the road, the land is subject to appropriation by the first legal applicant.

The right of purchase conferred upon the homesteader by the act of June 15, 1880, inures to the benefit of his widow. In this case, as the widow was entitled to purchase, under said act, when the road was definitely located, such right excepted the land from the operation of the grant.

Secretary Lamar to Commissioner Sparks, April 21, 1885.

I have considered the case of the Northern Pacific Railroad Company *v.* Elizabeth E. Burt, involving the S. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of Sec. 3, and the S. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of Sec. 4, T. 8 N., R. 2 E., Helena, Montana, on appeal by the company from the decision of your office, dated June 13, 1883, rejecting its claim to the tract in Sec. 3.

The record shows that William F. Burt made homestead entry No. 634, for both tracts, on November 1, 1871, and that the entry was canceled on July 24, 1879, for failure to make final proof within the time prescribed by law.

The land is within the granted limits of the withdrawal of the odd numbered sections for the benefit of the Northern Pacific Railroad Company, based upon the filing of the map of general route in your office on February 21, 1872. It is also within the granted limits of the withdrawal upon the filing of the map of the definite location of the road in your office on July 5, 1882.

On April 12, 1883, Mrs. Burt filed her affidavit duly corroborated by two witnesses, alleging that said William F. Burt, her late husband, made said homestead entry No. 634 on November 1, 1871; that he was killed on July 21, 1875; that from the time of making said entry until his death, he with his family resided continuously on the land covered by said entry; that no administrator, administratrix, or executor, was ever appointed for said estate, and she, therefore, applies to have said homestead entry re-instated, and that she be allowed to make final proof and payment for the land under the second section of the act of Congress, approved June 15, 1880 (21 Stat., 237).

The decision of your office held that "Burt's entry, subsisting at the date of filing the map of general route, excepted the tract in section 3 from the *withdrawal* and from the *grant*," and that it was unnecessary to re-instate said entry, as the cancellation thereof had no force in connection with said act.

The register and receiver were directed to admit the application, and the company appealed, as above stated.

The grounds of error insisted upon are,

1st, In holding that said entry excepted the land from the grant.

2d, In holding that the cancellation of said entry did not affect the right of the applicant under said act of June 15, 1880.

3d, In not rejecting Mrs. Burt's application.

The effect of Burt's entry was to except the land covered thereby from the operation of the withdrawal on the filing of the map of general route, and upon the cancellation of the entry prior to the date of definite location of the road, the land became subject to appropriation by the first legal applicant. Talbert *vs.* said company et al. (2 L. D., 536.)

The second section of said act of June 15, 1880, provides "that persons who have heretofore under any of the homestead laws entered lands properly subject to such entry, or persons to whom the right of those having so entered for homesteads, may have been attempted to be transferred by bona fide instrument in writing, may entitle themselves to said lands by paying the government price therefor, . . . Provided, This shall in no wise interfere with the rights or claims of others who may have subsequently entered such lands under the homestead laws."

If Burt was living, and could purchase said tract under said act, then his widow should be allowed the same right by virtue of section 2291 of the Revised Statutes. *Whitney v. Maxwell* (2 L. D., 98). It matters not that Burt's entry was canceled, the right of purchase is specifically granted by said act where the land was properly subject to the original entry, and is not excluded by the proviso. *John W. Miller* (1 L. D., 83).

The third section of the act of July 2, 1864, (13 Stat., 365,) granted to said company all lands to which the United States had full title, not

reserved, etc., "and free from pre-emption or other claims, or rights, at the time the line of said road is definitely fixed."

Mrs. Burt's affidavit alleges compliance with the requirements of the homestead laws by her husband during his lifetime, for a period of three years, eight months and twenty-one days. Had she continued to reside upon and cultivate said land until the expiration of five years from the date of said entry, she could have made final proof upon the same.

The map of definite location was not filed until more than two years after the passage of the act of June 15, 1880, which gave to Mrs. Burt the right to purchase said land. She should, therefore, be allowed the right of purchase under said act, or, if she should so elect, she should be permitted to show residence and cultivation for the necessary period to complete the five years required by law, when said entry may be reinstated and final proof made thereon.

It appears that on May 3, 1883, the register and receiver allowed Charles H. Lefever to make homestead entry (number not given) for said tract in section 4.

This was clearly erroneous, as Mrs. Burt's application reserved said tract until the final adjudication of her claim. Should Mrs. Burt exercise her right in either of the ways indicated above, you will cancel Lefever's said entry.

The decision of your office is therefore modified in accordance with the foregoing.

SWAMP LAND.

STATE OF CALIFORNIA.

The approval, by the surveyor general, of a segregation survey made under the third clause of Sec. 4 of the act of July 23, 1866, is not a finality, and the General Land Office has, thereafter, full jurisdiction to inquire into the correctness of such survey.

Commissioner Sparks to Surveyor General Brown, San Francisco Cal.
April 22, 1885

I have considered a motion made Feb. 27, 1885, by Messrs. Britton and Gray, attorneys for the State of California, for a review and reconsideration of the action of my predecessor of Dec. 29, 1884, in the matter of the segregation survey of township 29 north, range 4 east M. D. M., involving particularly the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of section 11, said township and range, wherein it was held that the survey was erroneous in describing said tracts as swamp and overflowed land. They also ask that the tracts mentioned be conveyed to the State of California under her grant of swamp lands. The survey in question was made in 1871, and reported Dec. 30, 1872, under the provisions of the third clause of the fourth section of the act of Con-

gress of July 23, 1866 (14 stat., 219), now paragraph 4 of section 2488, U. S. Revised Statutes.

On August 11, 1873, a petition was received from Mr. Robert A. Martin, of Tehama County, California, dated July 27, 1873, praying that the survey of the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of sec. 11, Tp. 29 N., R. 4 E., be set aside for the reason that the same was returned as swamp and overflowed land whilst in reality the tracts in question do not possess that character, and he transmitted affidavits in support of his statements. The surveyor-general was directed, under date of August 22, 1873, to investigate the matter and to report the result of his investigation to this office as a basis for further action.

The surveyor general did not comply with this order but reported, under date of Sept. 5, 1873, the proceedings which had been had up to that date, from which it appears that on August 4, 1871, soon after the survey was commenced by the deputy surveyor, Mr. Martin addressed a letter to the surveyor general complaining of the segregation; that affidavits in opposition to Mr. Martin's statements were filed with the surveyor general; that an examination in the field was ordered by the surveyor general that the report of the deputy intrusted with such examination sustained the segregation survey; that on July 31, 1872, Mr. Martin again addressed the surveyor general who replied asking Mr. Martin to forward any evidence he desired. The surveyor general reports that Mr. Martin failed to forward any evidence—that no affidavits were received from him, and that in default of such evidence the survey was approved Dec. 3, 1882. It appears from statements subsequently made by Mr. Martin that he transmitted certain statements to the surveyor-general which were not considered, not being in the form of affidavits.

On Sept. 20, 1873, in reply to a further communication from Mr. Martin to this office he was informed that an examination might be had before the surveyor general if desired at the expense of the parties in interest. Mr. Martin replied under date of Oct. 21, 1873, that he was willing to pay his own share of the expense.

Here the matter seems to have rested until Feb. 12, 1884, when Mr. Martin addressed a letter to the Secretary of the Interior alleging that the survey, and the examiner's report thereon, were both fraudulent; that the land was not swampy and not wet enough to make good grazing land every year without irrigation, and never too wet to produce a good crop of wild grass, clover, etc., and that when the alleged examination was made by the deputy who reported the survey as correct the land was covered by deep snow; that the deputy went to the summit of the mountain and looked down into the valley for a few minutes and remarked that if the land was not swampy it ought to be and that this was all the examination that was made. On May 31, 1884, Mr. Martin submitted several affidavits corroborating his statements in respect to the character of the land.

In view of the repeated allegations of fraud in this survey, Mr. John B. Treadwell, special examiner of surveys, was directed on Sept. 11, 1884, to examine the land and make a full report thereon. Mr. Treadwell made a detailed report under date of Dec. 10, 1884, transmitting with his statement a plat of the land with photographic views taken by himself.

In respect to the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of sec. 11 he specifically reports as follows:

"I have examined this 40 acre tract and failed to find a single acre of swamp and overflowed land. The surface is rolling with deep water course. The land is naturally drained and could not in any sense be classed as swamp and overflowed land."

The E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of sec. 11 he reports as "mountain, valley, and meadow land, with good grass in places and a large portion covered with timber (pine, fir and cedar). None of this land can be classed as swamp and overflowed. This land is at an altitude of about five thousand feet, and is inaccessible in the winter as the snows are very deep and remain late in the spring. These meadows are valuable only for dairying purposes and for grazing cattle. The cattle are driven to the Sacramento Valley in the fall returning in the spring after the snow has left."

The S.E. $\frac{1}{4}$ of the N.W. $\frac{1}{4}$ of sec. 11, also claimed by Mr. Martin, was found by Mr. Treadwell to be "timber and grass land."

It was the judgment of the Commissioner that the examination shows conclusively that the deputy surveyor erred in representing said lands to be "swamp and overflowed," and the matter was referred to the surveyor general "for appropriate action."

The application for a review and reconsideration of this action is based upon the proposition that the approval of the segregation map by the surveyor general was a finality, and that the Commissioner had no jurisdiction to inquire into the correctness of the survey. In support of this proposition reference is made to the decision of Mr. Secretary Schurz in the case of the Central Pacific R. R. Co. v. State of California (4 C. L. O. 150).

The Secretary in this decision construed the first and second clauses of the act of July 23, 1866. It is not necessary here to interpret or discuss the construction given to said clauses, because the present case comes under the third clause which provides for a different class of cases from the classes enumerated in the first and second clauses:

The third clause is as follows:

"In case such State surveys are found not to be in accordance with the system of United States surveys, and in such other townships as no survey has been made by the United States, the Commissioner shall direct the surveyor general to make segregation surveys, upon application to said surveyor-general by the governor of said State within one year of such application, of all the swamp and overflowed land in such townships, and to report the same to the Commissioner of the General

Land Office, representing and describing what land was swamp and overflowed under the grant, according to the best evidence he can obtain."

The survey under consideration was a segregation survey made in a township in which "no survey had been made by the United States." The case therefore falls specifically under this provision of the statute.

The duties of surveyors general are by law performed under the direction of the Commissioner of the General Land Office, and the supervision of the Secretary of the Interior. (Secs. 441 and 453, R. S.) The proposition that acts of subordinate officers of the land department are final of themselves, and that the Commissioner or Secretary have no power to inquire into or to revise their action, or to modify or reverse their decisions, has often been set up in arguments of counsel, but has never been sustained by the courts. Federal and State decisions have settled the law otherwise. In *Barnard's Heirs v. Ashley's Heirs* (18 How., 43), it was held that the act of July 4, 1836 (5 Stat., 107), provided for a direct supervision by the Commissioner of the General Land Office over registers and receivers, and therefore that their judgment is not conclusive in a case where proceedings were had before them after that date. In *Maguire v. Tyler et al.* (1 Black 195) the plenary powers conferred by the act of July 4, 1836, upon the Commissioner of the General Land Office to "supervise all surveys of public lands," including the jurisdiction and power "to adjudge the question of accuracy preliminary to the issuing of a patent," were fully recognized and affirmed, as also were the powers of supervision and appeal of the Secretary of the Interior. In *Snyder v. Sickles* (98 U. S. 203), in matters of survey wherein the acts of the surveyor general were sought to be regarded as final, the supervisory powers of the Secretary of the Interior over such acts, and his authority to disapprove a survey, were fully considered and affirmed. In cases arising before the act of July 4, 1836, where no appeal from decisions of registers and receivers was provided for, the acts and decisions of such officers are regarded as final only "when they acted within their powers, as sanctioned by the Commissioner, and within the law, and when their decisions were not impeached on the ground of fraud or unfairness." *Lytle v. Arkansas*, (9 How., 333). Though a public grant raises a presumption that every pre-requisite has been complied with, the jury could not safely be instructed that no fraud in a public officer could invalidate it. *Patterson v. Jenks*, (2 Pet., 216). Fraudulent and unlawful acts of officers under foreign jurisdictions are deemed invalid when brought in question in courts of the United States. *U. S. v. Arredondo*, (6 Pet. 691). *Villabos v. U. S.*, (10 How. 541).

It is a general rule that whatever is done in fraud of law is done in violation of it. *The William King*, (2 Wheat. 148.)

Fraud will vitiate any, even the most solemn transactions; and asserted title founded upon it, is utterly void. *U. S. v. The Amistad*, (15 Pet. 518).

The propositions that the correctness of a deputy surveyor's return of the swampy character of lands in a township plat of survey cannot be inquired into by the executive officers of the Government who are charged with the supervision of surveys and the adjudication of the swampland grant, and that the approval of a survey by the surveyor-general estops inquiry even in case of fraud, appear untenable when judged by established rules of law, or viewed in the light of the responsibilities and obligations of the executive department.

I find nothing in the act of July 23, 1866, which implies finality of determination of the character of lands by the mere return by a surveyor general of a plat of segregation survey. Congress could undoubtedly have confirmed irregular and even illegal surveys previously made, although such confirmation might amount to an additional grant, but it would require very clear language to justify a conclusion that Congress intended to confirm in advance future irregularities or illegalities, or to make a future executive confirmation of such irregularities or illegalities obligatory, or to invite false and fraudulent surveys by making acts of the surveying officers a finality binding upon the Executive, and compelling the President of the United States to issue patents upon surveys whether false and fraudulent or not.

Segregation surveys made subsequent to the passage of the act of 1866, are by the act to be reported to Commissioner of the General Land Office by the surveyor general, "representing and describing what land was swamp and overflowed, under the grant, according to the best evidence he can obtain." This provision does not import that such return is conclusive against further or better evidence, nor that the Commissioner has not authority to inquire into the correctness of the return or the sufficiency of the evidence. The Commissioner's general authority to perform, under the direction of the Secretary, "all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and, also, such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the Government," is a part of the law. Is the report of the surveyor general made to him only that he shall carry into effect, without question, without scrutiny, without supervision, the determination of a subordinate officer, or is it made to him in order that in the exercise of his powers and duties consequent upon his supervisory authority he shall himself judge of the sufficiency and reliability of such report?

The statute itself answers this question.

Sec. 5. "It shall be the duty of the Commissioner of the General Land Office to instruct the officers of the local land offices and the surveyor general, immediately after the passage of this act, to forward lists of all selections made by the State referred to in section one of this act and lists and maps of all swamp and overflowed lands claimed by said State, or surveyed as provided in this act, for final disposition and de-

termination, which final disposition shall be made by the Commissioner of the General Land Office without delay.

The report of the surveyor general is therefore made, as expressly provided in the statute, for "final disposition and determination" by "the Commissioner." The words "disposition and determination" import adjudication in its fullest sense. To the Commissioner only, (under the general supervisory direction of the Secretary), does the law give jurisdiction to "determine" what lands are swamp lands under the grant. No power, jurisdiction or authority is given to the surveyor general to "determine" anything. He simply "reports." He is bound to report "according to the best evidence he can obtain." That is the extent of his function. The Commissioner "determines" whether the report is sufficient. Such report is therefore not conclusive upon the Commissioner. The plats of survey, if evidence at all, are merely prima facie evidence. The Supreme Court of California has so said.

"The township plats were not offered in evidence to prove that the lands were in fact swamp and overflowed land, nor for any particular purpose expressed at the time of their introduction. The general objection on the ground that they were irrelevant and incompetent was not well taken. If they were admissible for any purpose, they were clearly admissible to prove that the lands had been surveyed by the United States, and as tending to prove that the title had vested in the State, under the provisions of the act of Congress of July 23, 1866." *Thompson v. Thornton* (50 Cal. 145).

The plats of survey simply "tend to prove" the swampy character of land—they do not prove it. The grant of swamp and overflowed lands to the State of California was of lands that were, at date of grant, "swamp and overflowed and rendered thereby unfit for cultivation." Lands not of that character were not granted. A false return by a deputy surveyor, although approved by the surveyor general, does not constitute a grant.

"Assuming that the register and receiver have a jurisdiction to decide on the facts of a pre-emption claim if they undertake to grant land which Congress have declared shall not be granted, their act is void." *Wilcox v. Jackson*, (13 Pet. 266).

It is apparent that under the act of July 23, 1866, the surveyor general has not a "lawful jurisdiction" to "decide" the facts of the swampy character of land shown by a plat of segregation survey. He merely "reports" the evidence he has. Such report does not of itself give title, nor determine the right of the State to receive title. "Whether the State has even a prospective or inchoate title to swamp lands, depends entirely upon the single question, are they swamp lands within the act of Congress?" If they are not, neither the State nor its officers have any right, power, or authority to sell or convey them." *Kile & Thompson, v. Tubbs*, (23 Cal., 441.) "Whether a given subdivision of land is within the act is a question of fact to be determined,

not upon official certificates, but upon evidence competent to prove the fact in an issue between private persons." *Keeran v. Griffith*, (31 Cal., 465).

Even the approval and certification by the Commissioner and Secretary of lands not granted, is declared by law, (sec. 2449 R. S.), and held by the Supreme Court of California not to pass the title to such lands. "The certifying of lands to this State to which said act (23 July, 1866), did not apply, did not transfer the title under said act." *Sutton v. Fassett*, (51 Cal. 12.)

How then can a patent be issued for lands not granted, and which are known or which might be known not to have been granted?

The Executive officers of the government can pass the title of the United States only by authority of law. A patent is void at law if the officer who issued the patent did so without authority of law. *Polk v. Wendall*, (9 Cr., 99.) In such case the patent is not merely voidable but absolutely void. *Sherman v. Buick*, (93 U. S. 216.)

To issue patents for land upon the return of a survey impeached for error or fraud, would appear to be an indefensible proceeding. In the present case the correctness of the survey has been impeached. Under his general powers of scrutiny and examination of the acts of subordinate officers of the land department, and the duties imposed upon him to determine the validity of a swamp land claim, involving the correctness of the surveyor's return, and under the special authority of acts of Congress making appropriations for the examination of surveys in the field, my predecessor directed a special examination of the particular survey now in question. The result of this examination was regarded by him as conclusively showing that the survey was erroneous. I find no cause for reversing that judgment. If the State claims that the land involved is in fact swampy in character, and desires to present evidence upon that point, a hearing may be applied for, but with the evidence now before me I decline to accede to the request for the issue of patents for said lands.

ENTRY—FEE AND COMMISSIONS.

JAMES M. BOYD.

The circular of December 1, 1883, is so modified as to allow credit for fee and commissions paid, where the person whose entry was canceled applies to enter the same tract.

Assistant Commissioner Harrison to register and receiver, Huron, Dakota,
April 27, 1885.

James M. Boyd made homestead entry No. 1697 for the S $\frac{1}{2}$ NW. $\frac{1}{4}$ and N $\frac{1}{2}$ SW. $\frac{1}{4}$ Sec. 5, T. 114, R. 64, January 10, 1883, during the existence of his pre-emption filing for another tract and prior to making proof and payment thereon.

By letter "U" of this office, March 18, 1885, the entry was canceled for illegality, and Mr. Boyd allowed to re-enter the same tract subject to any prior valid adverse claim upon proper payment.

April 1, 1885, you transmitted a homestead affidavit and application of entry by Boyd to re-enter same tract accompanied by a request for credit for fee and commissions paid on his former entry.

The practice of allowing a person, making a homestead or timber culture entry, credit for fee and commissions paid on a canceled prior entry was discontinued upon the issuance of the office circular of ("M") December 1, 1883 (2 L. D. 660 and 10 C. L. O. 306.)

Upon a consideration of said circular, I have decided to modify it by exempting all parties, who apply to re-enter the same tracts and upon which the payments have previously been made, from making second payments of fees and commissions and to allow them credit for the former payments.

In view thereof, I return the application papers of Mr. Boyd and you are directed to place his entry of record, allowing him credit for fee and commissions paid. Hereafter proceed in like manner with similar cases.

PRE-EMPTION—SETTLEMENT—FINAL PROOF.

HUNT *v.* LAVIN.

Though the filing was made before settlement, such defect having been cured prior to the inception of an adverse claim the pre-emption right is not impaired thereby. Failure to make final proof and payment within the statutory period defeats the right of pre-emption in the presence of an intervening adverse claim.

Secretary Lamar to Commissioner Sparks, April 29, 1885.

I have considered the case of James A. Hunt *v.* Anders P. Lavin, involving Lot 13, Sec. 6, T. 5 S., R. 8 E., Concordia, Kansas, as presented by the appeal of Lavin from the decision of your office dated October 26, 1883, rejecting his pre-emption proof and holding for cancellation his pre-emption declaratory statement No. 1,745. The record shows that the land in controversy was "offered" on August 6, 1860.

Lavin filed his said pre-emption declaratory statement upon said tract on November 23, 1877, alleging settlement thereon October 25th, same year. On February 28, 1883, Hunt made an adjoining farm homestead entry No. 16,961 for the same tract. On April 30, 1883, Lavin gave notice by publication of his intention to offer proof and payment on June 25th following, and Hunt was notified to appear and offer testimony in support of his claim to said tract.

Both parties appeared at the time and place designated, and offered their testimony. Upon the evidence submitted, the register and re-

ceiver were of opinion that Lavin's proof should be rejected for failure to make the same within the twelve months allowed by law, and that his said filing should be canceled. On appeal, your office affirmed the action of the register and receiver, as above stated.

The testimony shows that Lavin's settlement was made subsequently to the date of his filing, but prior to the intervention of any adverse right. The defect, therefore, was cured, and cannot affect his rights in the premises. *Kelley v. Quast* (2 L. D., 627); *Martinson v. Rhude**, Charles H. Martin (3 L. D., 373); *Mann v. Huk* (*ibid.*, 452).

It is insisted by the counsel for appellant that, Lavin should be excused for his failure to make proof and payment for so long a time, because of poverty and of his belief that he had seven years within which to make final proof, as in the homestead laws, and also for the reason that he is a foreigner and ignorant of the public land laws.

The plea of poverty is refuted by Lavin's own testimony. He admits that he would have raised the money, if he had supposed that it was necessary. While it is shown that Lavin cannot read English, yet he can read and write in the Swedish language very well. He never attempted to offer proof and payment until long after the expiration of his filing, and the intervention of a valid adverse claim put an end to his right to complete his entry by proof and payment for the land. *Lunney v. Darnell* (2 L. D., 593); *Steele v. Engleman* (3 L. D. 92); *Helge Gulleckson* (*ibid.*, 379); *Johnson v. Towsley* (13 Wall., 90).

A careful review of the evidence fails to disclose any error in the decision of your office, and it is therefore affirmed.

* MARTINSON v. RHUDE.

Secretary Teller, June 9, 1884 (2 B. L. P. 135)

The contest arose on the offer of Rhude to make final proof, Martinson, a homestead entryman, protesting against the reception of the same on the grounds that Rhude removed from land of his own to reside upon the tract in question, and that he was the owner of three hundred and twenty acres of land. . . . "From the foregoing it will be seen that at the time Rhude filed he was not a qualified pre-emptor, in that he came within the second clause of section 2260 of the Revised Statutes, but that when he actually established his residence on the pre-emption claim, he was not within the prohibition of said law. The disqualification that otherwise would have defeated Rhude's claim had ceased to exist, and Rhude was residing on the land in good faith at the time Martinson made his entry; hence following my decision in the case of *Kelley v. Quast* (10 C. L. O. 257) I must hold that as Rhude had cured the defect in his claim, prior to the intervention of an adverse right, he is entitled to purchase the land under the pre-emption law. My conclusion as to the first objection raised against the proof, leaves no room for the consideration of the second as both rest upon the same facts."

RAILROAD GRANT—STATE SELECTION.

SOUTHERN PACIFIC R. R. Co. (BRANCH LINE) *v.* BRYANT.

A voidable State selection, existing at the date when the grant to the road took effect, excepted the land covered thereby from the operation of the grant.

Secretary Lamar to Commissioner Sparks April 27, 1885.

I have considered the case of the Southern Pacific Railroad Company, Branch Line, *v.* William Bryant, involving the SW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Sec. 11, T. 1 S., R. 10 W., S. B. M., Los Angeles district, California, on appeal by the company from the decision of your office, March 26, 1883, in favor of Bryant.

The tract is within the twenty miles or granted limits of the grant by act of March 3, 1871, (16 Stat., 579,) to the company, the right whereof attached (upon filing the map of designated route in your office) April 3d ensuing, and the withdrawal for which was made May 10th ensuing. A portion of the tract was also within the claimed or exterior limits of the Rancho Azusa, the final survey whereof was approved and patented by your office May 29, 1876, to one Henry Dalton. The tract was selected by the State of California May 17, 1879, as indemnity school land (per register and receiver No. 2079); but her selection was canceled January 18, 1882, for invalidity.

The township plat was filed in the local office April 21, 1877.

It appears that Bryant applied at the said office June 8, 1877, to file a declaratory statement for the tract, alleging settlement December 20, 1875; but the register and receiver rejected his application on the ground that the tract was covered by a State school indemnity selection, and was within the company's withdrawal limits.

He thereupon appealed, alleging that the tract having been within the rancho limits at the date of said withdrawal, was therefore excepted from the railroad grant.

December 2, 1879, your office denied Bryant's application and the company's claim, and awarded the land to the State; but by your office letter of May 27, 1880, said action of December 2, 1879, was revoked, pending the adjudication of the case of Dalton *v.* Hanes et al., (involving said tract), wherein the Department rendered decision May 24, 1881, rejecting Dalton's claim and reversing your office decision of May 14, 1880, awarding the land to him.

Dalton's claim having been thus disposed of, and the State's selection canceled January 18, 1882, your office considered the case as between Bryant and the company, and under authority of the decision rendered February 5, 1883, in the case of said company *v.* Eberle, (10 Copp, 13,) held the tract to be public land subject to Bryant's filing, which your office permitted.

Barring the authority under which said filing was allowed, I affirm said decision, for the reasons stated by my predecessor in the case of the Southern Pacific Railroad Company *v.* State of California, (3 L. D., 88,) wherein it was held that although the State's selection was invalid, having been made prior to the final survey of the rancho claim, it nevertheless operated as an appropriation of the land, which excepted the same from the railroad grant; inasmuch as such selection had been made (in the year 1867) when the invariable practice obtained of allowing such selections prior and subject to the determination of the loss of land in place, by reason of an unadjusted rancho claim, so that such selection was not void, but merely voidable.

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TIMBER CULTURE—PREVIOUS CULTIVATION.

BEEKEN v. MARTIN.

The work done by a timber culture entryman's vendor, or his agent, is equivalent to work done by himself.

Secretary Lamar to Commissioner Sparks April 29, 1885.

I have considered the case of George Beeken *v.* Robert Martin, involving the SW. $\frac{1}{4}$ of Sec. 25, T. 98, R. 53, Yankton, Dakota, on appeal by the first named from the decision of your office of May 8, 1884, dismissing his contest. Martin made timber culture entry for the tract January 27, 1882, and Beeken initiated contest March 22, 1883, filing with his affidavit also his application to make timber culture entry to cover the same land. The ground of contest is that claimant "failed to break or cause to be broken five acres of land during the first year after entry." A hearing was had June 13, 1883. The evidence taken thereat shows that during the year named contestee had only about an acre and a half or two acres broken, but it further shows that he had before making entry purchased the improvements and possessory right of a former timber culture claimant. Said improvements consisted of about twenty-five acres broken and ten or twelve acres planted to trees. It has long been held by the Department that work done by a timber culture entryman's vendor, or his agent, is equivalent to work done by himself. If an entryman purchases improvements found on his land at the date of his entry, he thereby makes them as much his as if they had been put there by his own hand.

Applying this rule to the case under consideration, it is clear that up to date of contest the claimant had fully complied with the requirements of law. I find nothing tending to show want of good faith.

The decision dismissing the contest is affirmed.

CERTIORARI—APPEAL.

REUBEN SPENCER.

Certiorari is not a writ of right, but an application addressed to the sound judicial discretion of the Department, and may not be invoked for the purpose of reviewing decisions that have become final through failure to appeal.

In this case, as it appears that the entry was improperly canceled, and that without the entryman having been heard, a hearing is directed.

Secretary Lamar to Commissioner Sparks April 29, 1885.

I have considered the application of James L. Ayres, Esq., attorney of Reuben Spencer, for an order to have certified the record in the matter of the denial by your office, on February 6, 1885, of his appeal from your decision of December 2, 1882, canceling his timber culture entry No. 9909, Huron, Dakota Territory, for the SW. $\frac{1}{4}$ of Sec. 12, T. 111, R. 61.

It appears from the papers transmitted that one Urania Adams, on June 17, 1879, made timber culture entry No. 1620 on said tract, against which contest was filed January 16, 1882, by George L. Beckett. On August 23, 1882, the relinquishment of Adams was filed, and also a waiver of his preference right of entry under his contest by Beckett; whereupon the entry was canceled, and that of Spencer made. December 6, 1882, you directed the cancellation of Spencer's entry and the reinstatement of that of Adams, because the former was made in violation of rule 53. June 6, 1883, he made application for re-instatement of his entry, which was rejected. On June 11, 1884, appeal was prayed by Spencer from your decision of December 2, 1882, which appeal was refused, because not taken in time. Of your decision canceling his entry, Spencer's attorney seems to have had notice. In explanation of the failure to appeal in time, the attorney says that he had filed with his application for re-instatement of the entry an argument, and the affidavit of one Mulharky; that supposing your said decision had been made after full consideration of this affidavit and argument, he did not appeal. But that afterwards, on April 7, 1884, whilst in Washington City, he made a personal examination of the papers in the case and failed to find among them said affidavit and argument, and on inquiry ascertained they had never been received or considered.

Certiorari is not a writ of right, but an application addressed to the sound judicial discretion of the proper tribunal; and will not be granted if substantial justice be done though the record should show the proceedings to have been informal and defective. Conversely, when it appears that error has been committed, whereby injustice has been perpetrated and parties deprived of rights, a case is presented where this Department may exercise its supervisory power. But it is not to be inferred that the use of this procedure is to be tolerated for the sole purpose of reviewing decisions, which have become final by reason of failure to appeal in time, nor when relief may otherwise be readily obtained.

In the present case it appears from the papers before me that the entry of Spencer was improperly canceled, and this too, virtually, without his having a proper hearing—his day in court—for at the hearing which he applied for, his argument and additional testimony filed were not considered, having in some way been lost or mislaid. Under the supposition they had been considered, he was satisfied to abide the result; finding he was in error in this, he asks that his case be fully heard. His petition in this respect should be granted. I therefore decline to order the papers in the case to be certified to me, but you will accord him a hearing in said matter with opportunity to file his new testimony and argument.

RAILROAD GRANT—ACT OF JUNE 22, 1874.

ST. PAUL & SIOUX CITY R. R. CO. *v.* UNITED STATES.

Under the act of June 22, 1874 a railroad company is not authorized to relinquish unselected lands lying within the indemnity limits of its grant and select other lands in lieu thereof.

Acting Secretary Muldrow to Commissioner Sparks April 29, 1885.

I have considered the case of the St. Paul & Sioux City Railroad Company *v.* The United States, involving certain particularly described tracts (aggregating upward of six thousand acres) of land situate in the Worthington district, Minnesota, on appeal by the company from your predecessor's decision of January 25, 1882.

The company asserts claim in the premises as grantee of the State by virtue of the act of March 3, 1857, (11 Stat., 195,) and the 7th section of the amendatory act of May 12, 1864, (13 id., 74:) and having relinquished certain odd-numbered tracts lying within the indemnity limits, which, it is alleged had been thereby granted, but subsequently settled upon and entered by homesteaders and pre-emptors, it thereupon, June 22, 1876, selected the tracts in question in lieu of the other tracts, agreeably to the provisions of the act of June 22, 1874. (18 Stat., 194.)

Your predecessor, however, rejected such selection upon the ground (*inter alia*) that said act does not authorize railroad companies to surrender lands lying within the indemnity limits of their grants, which they had not selected, and select other lands in lieu thereof.

Such construction is in accord with your office regulations and the rulings of this Department, whereby it has been repeatedly held, notably in the cases of the Northern Pacific Railroad Company *v.* Lamour (decided by the Department March 26, 1884), and Whitcher *v.* Southern Pacific Railroad Company (3 L. D., 459), that "the act of June 22, 1874, offers an inducement to such railroad companies as may be *found entitled* to relinquish in favor of such settlers, and receive other lands in

lieu of those surrendered. Hence, unless the companies be found entitled, there is no basis for relinquishment and lieu selection."

In the case of the Kansas Pacific Railroad Company *v.* Atchison, Topeka and Santa Fé Railroad Company (112 U. S., 413), the U. S. Supreme Court held that the grant to Kansas "gave no title to indemnity lands in advance of their selection."

And in the case of the St. Paul and Sioux City Railroad Company and another *v.* Winona & St. Peter R. R. Co. (112 U. S., 720), the court decided likewise (January 5, 1885), upon substantially the same state of facts that exist in the premises. After construing the several acts aforesaid (*inter alia*), and stating that after the lapse of nearly twenty years no selection of these lands had ever been made by the company, or by any one for it, the court says: "Was there a vested right in this company, during all this time, to have not only these lands but all the other odd sections within the twenty-mile limits on each side of the line of the road, await its pleasure? Had the settlers in that populous region no right to buy of the Government because the company might choose to take them, or might, after all this delay, find out that they were necessary to make up deficiencies in other quarters? How long were such lands to be withheld from market, and withdrawn from taxation, and forbidden to cultivation? It is true that in some cases the statute requires the land department to withdraw the lands within these secondary limits from market, and in others the officers do so voluntarily. This, however, is to give the company a reasonable time to ascertain their deficiencies and make their selections."

I am therefore of the opinion that it was not competent for the company to select the tracts in question, and barring the proposition that to permit such selection "would be giving the companies indemnity for indemnity," etc., I affirm the decision of your office.

HOMESTEAD—RESIDENCE.

J. J. CAWARD.

Although certain statutory exceptions have been made with respect to the residence required of the homesteader, he may not invoke their aid in order to maintain two separate residences on public lands.

Secretary Lamar to Commissioner Sparks April 30, 1885.

I have considered the *ex parte* case of J. J. Caward on appeal by him from the decision of February 5, 1883, wherein your office rejected his application for homestead entry, on the ground that he held another tract under the pre-emption laws, for which he had not made final proof and payment.

Caward made pre-emption declaratory statement for one parcel of land May 25, 1882, and on December 22, 1882, while his claim for the

land held under the pre-emption law was yet incomplete, presented an application to make homestead entry, under section 2304 of the Revised Statutes, for the W. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of Sec. 23, and the W. $\frac{1}{2}$ of NE. $\frac{1}{4}$ of Sec. 23, T. 116, R. 65, Huron, Dakota, for which he filed homestead declaratory statement June 27, 1882.

Section 2291 of the Revised Statutes provides that no patent shall issue for public land—under the homestead law—until the entryman shall prove that he has resided upon such land for five years immediately succeeding the date of the homestead entry.

It is my opinion that the law contemplates that the residence of the homestead claimant commences from the date on which he makes entry, and while exceptions have been made in his behalf in the statutes, still he can not invoke such aid to enable him to maintain two separate residences on public lands, under two separate and distinct laws, either of which exacts a single continuous residence.

The decision of your office is affirmed.

RAILROAD GRANT—CONFLICTING ENTRY.

ST. PAUL, MINNEAPOLIS & MANITOBA R'Y CO. *v.* LEECH.

A voidable homestead entry of record, made by a man in the military service of the United States—whether married or single—under the Graham decision, reserves the land from any subsequent appropriation, until it is restored to the public domain.

Secretary Lamar to Commissioner Sparks April 30, 1885.

I have considered the case of the St. Paul, Minneapolis & Manitoba Railway Company *v.* John F. Leech, involving homestead entry No. 10,400, made by the latter April 12, 1879, for the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, and the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 1, T. 128, R. 34, St. Cloud district, Minnesota.

The tract is within the indemnity limits of the grant for the benefit of said railroad, the withdrawal for which became effective February 12, 1872.

November 17, 1865, the SW. $\frac{1}{4}$ of the section was entered under the homestead law in the name of David Merritt, whose application sets forth that he was the head of a family and in the military service of the United States. This entry was canceled for abandonment February 29, 1872.

November 17, 1865, the SE. $\frac{1}{4}$ of the section was entered under the homestead law in the name of James Scofield, whose application sets forth that he was a single man and in the military service of the United States. This entry was cancelled for abandonment March 24, 1874.

The Railroad Company has never made selection of either of these tracts.

Your office held that the entries of Merritt and Scofield exempted the land covered thereby from the withdrawal, and that upon their cancellation the land became subject to entry by the first legal applicant. From this decision the company appeals.

This case is ruled by that of the *Hastings & Dakota Railway Company v. The United States*, decided by my predecessor July 31, 1884, (3, L. D., 479) in which it was held that the homestead entry of a man, whether married or single, in the military service of the United States—being not void *ab initio*, but merely voidable—was such an entry of record as, under the prior decision in case of *Graham v. Hastings & Dakota Ry. Co.*, (9 Copp, 236,) “reserved the tract covered thereby from the operation of any subsequent law, grant or sale, until a forfeiture is declared, and the land restored to the public domain in the manner prescribed by law.” See also *St. P., M. & M. Ry. Co. v. Forseth*, (3 L. D., 446.)

The remaining portion of Leech's homestead claim—the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of said Sec. 1—was covered by the pre-emption declaratory statement of one A. J. Sylvester, filed January 8, 1872. You have ordered a hearing upon the questions of Sylvester's qualifications, the date of his settlement, the duration of his residence, and the nature and extent of his improvements. If such hearing has been had, the record thereof has not been transmitted; whatever action has been taken, if any, has not been appealed from by the railroad, and therefore is not a matter for consideration in connection with this case.

I concur in your decision awarding to Leech the land in controversy in the present case.

HOMESTEAD CONTEST—PRACTICE.

KILPATRICK *v.* WHITE.

Proof that an entryman failed to settle upon and improve his homestead claim within six months after filing therefor, under Section 2304 of the Revised Statutes, will not sustain a general charge of abandonment.

Acting Secretary Muldrow to Commissioner Sparks April 30, 1885.

I have considered the case of Robert J. Kilpatrick *v.* John S. White, involving the SE. $\frac{1}{4}$ of Sec. 34, T. 5, R. 17, Boise City, Idaho, on appeal by Kilpatrick from the decision of your office of July 1, 1884.

On February 7, 1883, White made homestead entry No. 1403 for said tract and on March 1, 1883, Kilpatrick filed contest against the same, alleging that “he is well acquainted with the tract of land embraced in the homestead entry of John S. White No. 1403, February 7, 1883, . . . he has wholly abandoned the tract and changed his residence therefrom for more than six months since making said entry and next prior to the date herein; that said tract is not settled upon and culti-

vated by said party as required by law . . . he asks . . . that said homestead entry may be declared canceled."

The notice recited that complaint had been made against the defendant "for abandoning his homestead entry No. 1403, dated February 7, 1883, . . . with a view to the cancellation of said entry," and he was cited "to respond and furnish testimony concerning said alleged abandonment." Hearing was had on April 6, 1883, when defendant by his counsel moved to dismiss the contest "upon the ground that the affidavit of contest and notice in said cause show upon their face that said contestee has not abandoned his homestead entry No. 1403 for the period of six months." This motion appears to have been overruled, probably because of non-concurrence of both officers, though not so stated. A written statement of facts was then agreed upon and filed, which is in substance, that, prior to making his said homestead entry, White, on August 7, 1882, filed soldier's declaratory statement on same tract, and that no settlement or improvement had been made thereon prior to the filing of contest. On this statement, plaintiff submitted the case without further testimony, while defendant offered some evidence, tending to show an intention and efforts to make settlement within six months after filing.

The local officers disagreed as to their decision—the register holding that the entry should be canceled, and the receiver that the contest should be dismissed. In this latter view your office concurred, deciding that the charge was "inconsistent and untenable," being "in effect that an entry made only twenty-two days before the date of initiation of contest had been abandoned for more than six months" prior to that time. These views I think eminently sound and proper.

It has been repeatedly held by this Department that a contest involving the forfeiture of an entry is in the nature of a penal action, and the contestant is held to a strictness of allegation and proof. Being also somewhat analogous to an action of ejectment, the plaintiff must recover upon the strength of his own case, not the weakness of that of the defendant.

In the contest affidavit in this case—and which stands for a declaration—the appellant seeks to cancel the homestead entry, because of abandonment "for more than six months since making *said entry* and next *prior to the date*" of contest. The notice was to the same effect, citing the party to defend against the charge of "abandoning his homestead entry, No. 1403, dated February 7, 1883."

The allegations being thus unequivocally set forth by the plaintiff, and the defendant called upon to defend it specifically, the former was bound to sustain it by proper proof. That allegation being abandonment of the land held by virtue of homestead entry No. 1403, of February 7, 1883, for *more* than six months *since* making entry, can not be sustained by showing failure to commence settlement and improvement *within* six months after filing declaratory statement of August 7, 1882.

The two claims are different; the obligations devolving upon the claimant under each are different; the allegations to enforce forfeiture would be different and the defenses different. The issue joined was as to the abandonment or not of the homestead for more than six months after it was filed, and the agreed statement of facts as to the defendant's declaratory statement had no more to do with that issue than would have had an agreed statement that defendant had theretofore made a timber culture entry.

If the plaintiff wished to have canceled the homestead entry of defendant, because being made under Section 2304 of the Revised Statutes, the entryman had not made settlement and improvement on the land within six months after making filing thereon, the necessary facts should have been clearly set forth by way of inducement and then the default specifically charged. But such contest can not be maintained on the allegations made in this case.

Entertaining these views, it is not necessary to pass upon the other questions discussed so elaborately by counsel, but which are not essential to the determination of this cause.

The judgment of your office is affirmed.

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HOMESTEAD—ADDITIONAL ENTRY.

HIRAM S. THORNTON.

Under a fair construction of the original homestead act, and the legislation supplemental thereto, conferring the right, under Section 2306 of the Revised Statutes, to make an additional entry, such right is held to be exhausted when once used, although for a less quantity than sufficient to make up one hundred and sixty acres.

Acting Secretary Muldrow to Commissioner Sparks April 30, 1885.

I am asked to review and revoke the departmental decision of July 7, 1884, affirming the decision of your office of January 29, 1884, rejecting the application of Hiram S. Thornton for certification of his right of an additional homestead entry under Section 2306 of the Revised Statutes.

On November 28, 1867, Thornton made homestead entry No. 1716 for the W. $\frac{1}{2}$ of NE. $\frac{1}{4}$ of Sec. 18, T. 16, R. 1, and on July 30, 1875, additional homestead entry No. 3104 for Lot 2, of Sec. 2, T. 15, R. 1, comprising 55.25 acres—both entries being made at East Saginaw, Michigan. On March 21, 1883, he made application to you to be allowed to make an entry additional to the above for a quantity of land sufficient, I presume, with the two previous entries, to aggregate one hundred and sixty acres. Accompanying this application, which is in blank as to the *locus in quo* and the number of acres to be entered, is the usual affidavit of qualification and another setting forth that the reason why the

*W. Darling
26 Feb 193
says this case*

"will not be followed"

See also 8/54

applicant "did not enter the full amount of land, when he made the additional entry of July 30, 1875, was because there was no more government land adjoining said description."

In affirming your decision, it was concisely stated that it was the settled ruling of the Land Department to allow but one entry to parties qualified to make entry under said section, and that no good reason was seen in this case for making it an exception to that rule.

The present application for review is urged with much earnestness, because it is said that the practice of the Department in restricting parties to one entry is erroneous and ought not longer to prevail; that the law by express enactment gives to its beneficiaries, without limitation, the absolute right to take by entry sufficient land to make in the aggregate one hundred and sixty acres; that the rule of the Department is one made by construction and puts a restriction upon the right of entry which the language of the law does not authorize, and which contravenes its spirit.

It is also alleged that at the time of making the additional entry, the rule of the Department had not been promulgated, or, if so, Thornton was ignorant of it, and therefore only made entry of forty acres, supposing he could take up the balance thereafter. It is further urged that while the Department has established the rule of one entry, no argument or reason in support of it has ever been advanced, except the one of convenience to the land office; and it is asked that a full examination be made of the statutes relating to the subject matter, and a proper conclusion arrived at, so that parties, by a mere arbitrary rule, may not be deprived of statutory rights.

As there is no case reported wherein the reasons for the rule are discussed, in deference to the able and elaborate argument of counsel the subject has been fully reviewed.

Section 2306 of the Revised Statute is based upon the second section of the act of April 4, 1872, chapter 85, as amended by the act of June 8, 1872, chapter 338, and the act of March 3, 1873, chapter 274. These acts are all supplemental to and amendatory of the original homestead act of May 20, 1862, chapter 75, which is entitled "An Act to secure homesteads to actual settlers on the public domain;" the act of April 4, 1872, is entitled "An Act to enable honorably discharged soldiers," etc., "to acquire homesteads on the public lands of the United States;" the act of June 8, 1872, "An Act to amend an act relating to soldiers' and sailors' homesteads," and that of March 3, 1873, "An Act to amend an act entitled, an act to enable honorably discharged soldiers" etc. "to acquire homesteads."

This mere recital shows that all of these acts related to the one subject of the acquisition of homesteads on the public lands, and their purpose was to establish a system whereby the common object was to be accomplished. They are therefore to be taken together as one law and construed in pari materia within the general scope of their purpose.

At the time of the enactment of the first of these supplemental acts⁹ the original homestead law had been in operation some nine years; rules and regulations pointing out and establishing the mode by which entries thereunder should be made had been promulgated, practiced under and fully understood during that period. That act provided that any one qualified should "be entitled to enter one quarter section or a less quantity" of unappropriated minimum public land. It is to be observed that here is no expressed restriction upon the right of entry, so far as the numbers thereof are concerned, but there is the emphatic declaration that the party should be "entitled" to make entry to the extent of one quarter section and no more. Yet the Department, viewing the context of the whole act, construed the above general provision as to the right of entry to mean that but one entry could be made, whether for a whole quarter-section or less. This rule established shortly after the passage of that act has been adhered to consistently and persistently ever since.

It is true that act required the Commissioner of the Land Office to establish rules necessary to carry out the provisions thereof, but it also required that such rules should be "consistent" with the act. So that if the rule thus established was inconsistent with the act, in letter or spirit, it was void, and could acquire no vitality from the fact that it was established by the Commissioner; and it is safe to say that it would long since have been rescinded, either by the Department or by legislative act. The existence of this rule and its continued maintenance for nine years before the enactment of supplementary legislation should be sufficient to put at rest all question as to its correctness and wisdom.

With a full knowledge of and acquiescence in this construction of the existing law by the Executive Department, Congress passed the supplementary acts, authorizing the classes named to make entry "on compliance" with the provisions of the original act "as hereinafter modified." Now the question is, whether the system thus established by the original act, approved of and extended by the supplemental legislation, was so modified or intended to be by the latter as to authorize more than one additional entry, by its beneficiaries, thereunder.

It will not be claimed that this supplemental legislation, incorporated into and made a part of the homestead system, was intended or had the effect to change the original provisions of the homestead act, or to alter the settled construction thereof. In the absence of such purpose and effect, if the present contention is correct, it has resulted that Congress, whilst emphasizing its approval of the system, as administered, by extending its benefits to others, instead of preserving its harmony throughout, attached to it a provision utterly inharmonious and inconsistent with the rulings adopted and then in force. Nothing short of the express declaration of Congress so to act should carry conviction of such purpose.

This express declaration is not claimed or found; but it is sought to establish the purpose by implication, inference and verbal criticism.

Scarcely any statute exists, with regard to the construction of which ingenious counsel may not, by the same process, erect a plausible theory sustaining their case. Indeed, no argument has been advanced in this case, in favor of entries *ad libitum*, under the supplemental acts, that would not with more force apply to the original law itself.

So far from sustaining the theory of the appellant's counsel, by implication or inference, every intendment must be that the purpose of Congress was to have the new legislation administered by the executive, in full harmony and accord with that to which it was supplementary. Much more might be said showing the fallacy of the positions assumed, but it is not deemed necessary; the views expressed being considered conclusive as to the correctness of the construction adopted by the Department in relation to the supplementary legislation.

The motion is overruled.

CONTEST—PRACTICE.

DURKEE *v.* TEETS.

Where a third party desires to begin a contest against an entry already involved in a pending suit, the affidavit for such new contest should be received, but no action taken thereon until the pending case is determined.

Acting Secretary Muldrow to Commissioner Sparks April 30, 1885.

I have considered the case of George W. Durkee *v.* Edward Teets, on appeal by Durkee from the decision of your office of October 4, 1884, dismissing the contest.

Teets made homestead entry No. 2078, March 5, 1883, covering the SW. $\frac{1}{4}$ of Sec. 28, T. 113, R. 60, Huron district, Dakota. On July 9, 1884, Durkee filed an affidavit of contest, alleging abandonment of the land by Teets.

Your office decided that the affidavit of contest was erroneously received, for the reason that Teets was then pursuing a contest on final appeal, involving the question of priority of right to the tract in the case of Teets *v.* Campbell; and to allow a contest against his entry during pendency of the appeal would lead to confusion and complication.

I think that, under the law, the local officers acted properly in receiving the contest affidavit, but erred in allowing contest to proceed pending final decision in the Campbell case, for the reason that if the decision in that case should be adverse to Teets it would be liable to result in the cancellation of his entry.

I have this day rendered a decision in the case of Teets *v.* Campbell, affirming your decision in that case, by which the declaratory statement filing of Campbell, involving the tract under consideration, is canceled.

A hearing will be directed to be held, in the case at bar, to determine the facts relative to the charge of abandonment of the tract in question by Teets, made by Durkee.

The decision of your office is accordingly modified.

TIMBER CULTURE CONTEST—PRACTICE.

BUTLER *v.* MOHAN.

A contest begun since the promulgation of the decision in the Bundy case must be accompanied by an application complete in its essential parts.

In this case however as the entryman at the hearing did not object to the defective application, such defect, so far as he is concerned, is held to be waived, and will not be considered on appeal.

An affidavit of contest may be properly made upon information and belief.

Acting Secretary Muldrow to Commissioner Sparks, April 30, 1885.

I have considered the case of Edward J. Butler *v.* John P. B. Mohan, involving the NW. $\frac{1}{4}$ of Sec. 22, T. 114, R. 32, Redwood Falls, Minnesota.

On June 28, 1876, Mohan made timber culture entry No. 394 of the above tract, and on March 24, 1883, Butler filed contest against the same, alleging failure to comply with the requirements of the law after entry: personal service of notice of contest, and of hearing on May 2, 1883, was made. On said last day, on the application of the plaintiff, a continuance was granted until June 2, 1883, at which time testimony was submitted by contestant, on which the register and receiver held the entry for cancellation. Mohan did not appear on either day of hearing, but appealed from the decision of the register and receiver. That decision your office reversed March 15, 1884, and dismissed the contest of Butler. On March 24, 1884, the relinquishment of said entry was filed in the local office, and on the same day James P. Mohan made timber culture entry No. 1456 of the tract. On June 4, 1884, the local officers were informed by your predecessor that the entry of John P. B. Mohan had been canceled upon the records and the contest of Butler closed. Appeal from said decision was filed by the latter in the local office May 6, 1884, but not transmitted to your office until July 10, 1884. It thus appears that the action of your office in closing the contest before ascertaining whether an appeal had been taken, was premature. The appeal of Butler, taken in time, nullifies such action and brings the case before me, on the record, to ascertain the rights of the parties in interest as fully as though said action had not been taken, and it will thus be considered.

The contest was dismissed by your office because the application of Butler to make the entry of the tract, at the time of filing his contest, was not accompanied by an affidavit showing his qualifications therefor. In this decision the ruling in *Scott v. Liedtke*, (2 L. D., 292.) is quoted and followed.

The third section of the act of June 14, 1878—timber culture law—declares, in effect, that, in case of the failure by an entryman, under said act, to comply with its requirements, his entry shall be forfeited to a party who is qualified and intends to make entry of the tract in question either under the homestead or timber culture laws. As evidence

of said qualification and intention the party seeking to avail himself of these provisions is required to file an application to enter the tract as above and to give notice to the prior entryman of the fact that claim is made to the same because of his failure to comply with the requirements of the law.

Inasmuch as said section practically declares that the failure of the prior entryman to comply with any of the requirements of that act *ipso facto* makes the tract subject to entry by a new applicant, it follows that the application of the latter to make entry, then and there presented, should be as complete in all its parts, as in the case of an ordinary application to make a like entry upon any land subject to the same. Necessarily this is so, because the application then filed is the entry which, if the contest be successful, appropriates the tract from the date it was filed and notice given to the defaulting claimant. It is true, the new application is not to be recorded until the forfeiture of the old entry is declared, but the right of entry exists from the date of filing the application and giving notice; and when the application is recorded, it constitutes the entry, relating back to the date of its presentation.

When the decision in *Bundy v. Livingston*, (1 L. D., 179,) was promulgated, November 14, 1882, it was intended that the loose practice of initiating contests under said act, without complying with the provisions of the third section thereof, should cease; and that thereafter no one should be recognized as having the status of a legal contestant, unless at the time of initiating his contest he also filed therewith a proper application to make entry of the tract in controversy.

In pursuance of this purpose the circular of December 20, 1882, (9 C. L. O., 198,) was issued. It was soon seen, however, that a rigid enforcement of the rule, thus laid down, in all contests then pending would work great hardship and injustice to contestants, who had been, in many instances, misled by the land officers into the careless practice of initiating proceedings under said act without filing at the time a proper, and in many cases, any application to make entry. Because of this seeming harshness, without intending to abrogate it, the rule thus established was relaxed in a number of cases, as for instance in that of *Bennett v. Taylor*, (2 L. D., 42,) where Bennett was allowed the status of a legal contestant, though he had filed no formal application to make entry, but only stated his desire to do so. In all of this class of cases the record disclosed the fact that the contests therein were pending prior to the promulgation of the decision in the *Bundy* case. And if the rule has been relaxed in any other than the above described class it was erroneously done.

The case under consideration does not come within this indulgent practice, but the contest therein having been initiated March 24, 1883, is within the rule of said decision and of the circular of December 20, 1882, and therefor entitled to no indulgent consideration.

This being so, it follows that if the application of Butler filed with his contest is defective, defective in any of the essentials of a complete application, it is not the application contemplated by law, and fails to give him the status of a legal contestant.

It does not appear that his said application was accompanied by an affidavit showing his qualifications to make such entry, and because of the want of such affidavit it would have been held defective, if the objection had been made at the proper time—at the hearing before the register and receiver.

But this course was not pursued by the defendant, who, instead of appearing at that time, though actually and personally served with notice of contest, seen and talked with by witnesses in relation to the case, on the day of hearing, in close proximity to the land office, thought proper to stay away and take his chances of thereafter defeating the contest on technical grounds. The objection being made by him for the first time on appeal comes too late: for having failed to appear and protect his rights at the proper time, he can not afterwards and in this way assert them, but the defect so far as he is concerned will be treated as though specially waived. Your office therefore erred in entertaining the point and dismissing the contest thereon.

Another specification of error contained in Mohan's, appeal and not passed upon by your predecessor, though not of much force, will be considered.

The contest affidavit alleges failure to "comply with the requirements of the law in the matter of cultivation and planting trees in the years 1880, 1881 and 1882," whilst at the hearing before the register and receiver contestant swore that he first saw the land in January, 1883. It is insisted by Mohan that the contest should be dismissed, because it is thus shown that the plaintiff had no personal knowledge of the facts sworn to in said affidavit, as a basis for contest.

A contest affidavit is in the nature of an information, and the party making the same need not necessarily do so on his own personal knowledge and observation of the facts therein stated, but may base his assertions upon information and belief. The register and receiver having accepted and acted upon the information tendered by issuing notice to the defendant, when service of the latter was made, jurisdiction in the case attached, the truth or falsity of the charge is the matter to be inquired about and determined at the hearing, and not whether contestant had sufficient knowledge on which to base his allegations. See *Houston v. Coyle*, (2 L. D., 58.) Were the contention of Mohan, in this respect, to be approved, the ability to contest entries would be limited to but few indeed, and the machinery provided for contesting abandoned or neglected entries, if not brought to a stand-still, would be so clogged as to be almost useless to accomplish the results for which it was authorized and for which its operations are encouraged.

As might be supposed from the conduct of the defendant in evading

the hearing or in failing to make a meritorious defense to the contest, the evidence taken before the register and receiver shows that he did no more than make a very slight pretext of complying with the law as to planting and cultivating trees, notwithstanding nearly seven years had elapsed since entry and before contest was brought.

I therefore think the register and receiver were right in holding the entry of Mohan for cancellation, and that your office erred in reversing their judgment and dismissing Butler's contest.

Mohan's entry having been canceled by relinquishment pending contest and a new entry made on the tract, you will notify Butler that he will be entitled, by virtue of his contest, to preferred right of entry on the land for thirty days on filing a proper affidavit showing that he is qualified so to do. If within that time he makes entry, that of James P. Mohan will be canceled; otherwise it will remain intact.

CERTIORARI—APPEAL—NOTICE.

JACKSON *v.* MCKEEVER.

An appeal will lie from an order refusing to grant a hearing if it amount to a denial of right.

The affidavit upon which publication of the notice of contest rests should show diligence in the matter of attempting to secure personal service.

Acting Secretary Joslyn to Commissioner McFarland, January 12, 1885.

I have considered the case presented by the application of Wilson McKeever for an order under Rule eighty-three, requiring the proceedings in the case of Joseph E. Jackson *v.* McKeever to be certified to this Department for review.

September 19, 1878, McKeever made homestead entry for lot 2 and the E. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of T. 21 S., R. 25 W., Larned, Kansas.

October 12, 1883, Jackson began contest against McKeever's entry, alleging in his affidavit of contest that McKeever "has wholly abandoned said tract, that he has changed his residence therefrom for more than five years since making said entry, that said tract is not settled upon and cultivated by said party as required by law, never having resided on said (tract) since date of entry." It was also set forth in said affidavit, that "personal service cannot be obtained on defendant in the State of Kansas, his address being unknown to this affiant."

On these allegations, the local office ordered publication of notice, fixing the hearing for November 24, 1883. On the day set for hearing proof was submitted by the contestant to the effect that McKeever had never resided upon or improved the land in question. McKeever not making appearance, the local office forthwith held his entry for cancellation.

March 26, 1884, McKeever filed in the local office an application for permission to appeal from the adverse decision and for a rehearing, setting forth as grounds therefor, under oath, that he was not served with

notice of the contest or decision, and had no knowledge of the contest prior to March 26, 1884, though he had resided in Kansas and within fifteen miles of the tract in dispute, from the time the contest was initiated to the time of his application, and that he had a legal defense to said action.

March 31, 1884, your office canceled McKeever's entry.

April 18, 1884, acting on McKeever's application, you denied the same, deciding that "the proceedings had appear to have been regular. I perceive no good reason for admitting the appeal at this late date for if permitted to be filed it would not avail defendant anything under the state of facts presented. Nor can defendant's further request for a rehearing be entertained on the insufficient showing made by him," relative to the character of his defense.

From this decision McKeever appealed, but July 5, 1884, you held that as the decision of the local office had become final, "and as appeals do not lie from the decisions of this office relative to hearings, I must deny McKeever's right of appeal from my decision of April 18, 1884."

An appeal will not lie from a decision of your office ordering a hearing, and the Department has so uniformly held; but a refusal to grant a trial may, if it amount to a denial of right, be appealed from, and this is also well settled. *Guyselman v. Schafer*. * *Bailey v. Olson* (2 L. D., 40.)

* *GUYSELMAN v. SCHAFFER ET AL.*

(Secretary Teller, June 7, 1883.)

I have considered the case of George R. Guyselman *v.* J. R. Schafer and Oren H. Henry . . . on appeal by Guyselman from your decision of November 6, 1882, refusing to order a hearing to determine their respective rights in advance of any application by him to make proof and payment for the land under his pre-emption claim, each of the other parties having made additional homestead entry for a portion of the land covered by his filing.

It has been the invariable practice from the beginning to allow any legal form of entry upon land covered by a pre-emption filing, and hold the same subject to the right of the pre-emptor to make final proof and payment within the prescribed period. So that, even if the right to make such payment were fully proved, there could under the rules be no cancellation until the claimant had paid his money, and secured for himself a vested right in the land. The act of March 3, 1879 (20 Stat., 472,) now requires publication of intention to make such proof, and since its passage, a hearing fixed by the register and receiver or by your office, for the purpose of allowing it to be made in any other time and manner would not be legal. And under the rule referred to by you, as laid down by this department in *Hanson v. Berry*, (8 C. L. O., 188) and since adhered to, there can be no propriety in cumbering the records of the office with files and recital of proceedings not required by law nor by the circumstances of the case, and entirely unnecessary for the protection of individual rights. The matter of hearings is also by the rules confided to your sound discretion, and although a refusal to grant a trial may, if it amount to a denial of right, be appealed from, your judgment upon the propriety of such action will not be lightly reversed, and will be set aside only upon the most substantial grounds of error.

Your decision is accordingly affirmed.

I do not concur in your conclusion that the proceedings had before the local office appear to have been regular. The order for publication of notice was made upon a showing altogether insufficient. In the case of *Ryan v. Stadler* (2 L. D., 50), the Department held, that the affidavit upon which publication is authorized must show diligence in the matter of attempting to procure personal service, and that an allegation to the effect that the whereabouts of the defendant is unknown, did not warrant publication of notice. The rule thus announced, and in keeping with your decision in the case of *Hewlett v. Darby* (9 *id.*, 230), has since been followed without exception in this Department. *England v. Libby* (11 *id.*, 2); *Sweeten v. Stevenson* (3 L. D., 249).

It is therefore apparent that the publication of notice in this case was irregular, and not sufficient to confer jurisdiction upon the local office to hear and determine the issue presented by the contestant.

The contest might be very properly dismissed and would be, were it not for the gravity of the charges against McKeever's entry, which are apparently sustained by the evidence adduced at the hearing, and I therefore conclude that a rehearing should be had, as requested by the entryman.

The application is therefore granted. Your decision is reversed, and a rehearing will be ordered, the entry of McKeever being re-instated for that purpose.

REPAYMENT.

HOWARD W. LANG.

The entry not having been procured through any fraud or wrong of the pre-emptor repayment will be made.

Acting Secretary Joslyn to Commissioner McFarland, January 19, 1885.

I have considered the appeal of Howard W. Lang from the decision of your office of July 19, 1884, declining "to recommend repayment" of the purchase money on pre-emption cash entry No. 1842 for the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, the E. $\frac{1}{2}$ of SW. $\frac{1}{4}$ and SW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ Sec. 27 T. 14 N., R. 16 W., Grand Island, Nebraska.

The record shows that on January 31, 1881, Lang filed his pre-emption declaratory statement No. 5250, upon said tracts, alleging settlement November 1, 1880. On June 30, 1883, after due notice by publication, Lang made proof before one George Hunter, county judge of Sherman county, Nebraska, and on July 3, 1883, he made the affidavit required by Sec. 2260 of the Revised Statutes before the register.

Upon the proof offered, and the payment of the purchase money, required by law, said cash entry was allowed. On November 6, 1883, the register transmitted to your office the affidavit of said Lang, corroborated by two witnesses, stating, in substance, that he made home-

stead entry No. 5235, April 21, 1874, final certificate No. 3593, June 23, 1880, for the NW. $\frac{1}{4}$ of Sec. 34, T. 14 N., R. 16 W., in said State; that he purchased the improvements on the land embraced in his cash entry from one Draper for the sum of \$50; that he was entirely ignorant of the requirements of the pre-emption law regarding settlement; that he has acted in the utmost good faith in the premises, and has not attempted in any way to commit a fraud upon the United States; that he mortgaged his homestead to procure funds to make payment for the lands embraced in said cash entry; that, although he removed from his homestead to make settlement upon his pre-emption claim, he honestly believed that he had a right so to do; and that having improved said land in good faith, he asks that his cash entry be approved for patent. On February 28, 1884, your office, upon the admissions of Lang, held his cash entry for cancellation. May 5, 1884, Lang having waived his right of appeal, your office canceled said cash entry, and directed the register and receiver to advise him "that his application for repayment of purchase money will be considered if presented through the proper channel." On July 5, 1884, the register transmitted to your office the application of said Lang for repayment, which appears to be regular in all respects, and the same was denied, as above stated.

The second section of the act of June 16, 1880 (21 Stat., 287), provides that "where from any cause the entry has been erroneously allowed, and cannot be confirmed, the Secretary of the Interior shall cause to be repaid" the purchase money upon certain conditions, which in the case at bar have been performed.

Section 2262 of the Revised Statutes sets out the affidavit required of the pre-emption claimant, and further provides that "if any person taking such oath swears falsely in the premises, he shall forfeit the money which he may have paid for such land, and all right and title to the same."

A careful inspection of the proof offered fails to show any false swearing upon the part of Lang. The testimony of the witnesses and of the claimant was taken upon blanks used in making final homestead proof with the printed word "homestead" erased and "pre-emption" written instead. It does not appear that the question was asked of either witness or claimant whether the claimant left land of his own to settle upon his pre-emption claim, as required by the rules and regulations of your office. It was the duty of the register and receiver to see that the proof contained answers to the questions prescribed, and if the answers showed that the claimant was not qualified, his application to enter should be rejected.

In the case of U. A. Linstrom (2 L. D. 685) this Department held that his application for repayment must be refused, because, "though he himself did not swear to non-removal, he did produce two witnesses who swore that he did not remove from his own land," and "had he not deliberately falsified the facts, entry would not have been allowed."

In the departmental decision of Duthan B. Snody* it was held, that repayment will be allowed under act of June 16, 1880, where a second and therefore illegal homestead entry was made through ignorance of the law.

There is nothing in the record to show that the entryman has been guilty of any fraud or intentional wrong, and to refuse to refund the purchase money in this case would be a kind of confiscation unwarranted by law, and manifestly unjust.

I therefore reverse your decision and direct the repayment of the purchase money.

FINAL PROOF—PUBLICATION OF NOTICE.

ANDREW E. PHILLIPSON ET AL.

Registers may use their discretion in designating the paper in which shall be published the notice of intention to make final proof, where there are several papers any one of which might come within the meaning of the law.

Assistant Commissioner Harrison to register and receiver, Bloomington, Nebraska, February 28, 1885.

I am in receipt of your letter of September 29, 1884, transmitting the following final homestead proofs, viz: Andrew E. Phillipson, homestead

DUTHAN B. SNODY.

(Secretary Teller, Mar. 9, 1883.)

* * * Snody had made homestead entry, previous to the one above mentioned, which he had abandoned.

The proof shows that he made the second entry in good faith, settled upon and improved it, and at the proper time made his final proof, believing his entry to be valid; that at that time no affidavit or other statement was required to the effect that he never had made any other entry and that he did not learn until after he had made his final proof that he could make but one entry, but supposed he could make another because he had not obtained any land under the first. Upon learning, however, that he could not, he executed in due form a release and quit-claim to the United States of all his interest in the land described in his second entry. At the time of the last entry there was no inquiry to develop the fact of the former entry, and there was no fraud and no intentional concealment by the claimant. . . . The law does not favor forfeitures, and the object of this act was to prevent them in certain cases, to the extent of fees, commissions and purchase money. The effect of the maxim that ignorance of the law does not excuse, is removed to a great extent by the act, because the cases provided for are those of erroneous entries "from any cause," which would include errors of law as well as of fact; and it would be a singular construction to limit the errors to those committed by the Government officers, who are presumed to know the law at least as well as the settlers and other persons dealing with them. The statute is one of remedies; and remedial statutes "are to be construed liberally and beneficially, so as to promote as completely as possible the suppression of the mischief intended to be remedied, and to give life and strength to the remedy." (Maxwell, 203.) The fact that the acts of the entryman have contributed to or caused the erroneous entry ought not, under the statute, to deprive him of the remedy in cases where he has acted in good faith. The claimant in this case was guilty of no fraud or intentional wrong. He acted innocently, but ignorantly; and his second entry was erroneous. I think his claim comes within the scope and intent of the act. I reverse your decision and direct repayment of the fees and commissions in this case

entry No. 4447, . . . ; Andrew E. Phillipson, administrator of estate of Erick E. Fosse, deceased, on homestead entry No. 7157, . . . ; Ole O. Holmast, homestead entry No. 7154, . . . ; also an appeal in each case from your decision in rejecting the same—the ground of rejection being that “notice was not published in paper designated.”

It appears from your letter that you designated the “Monitor” of Cambridge, Neb., as the paper in which the notices should be published, as your postal map showed that paper the nearest to the land, and that you so noted on the notices and returned them to the applicants for publication, and that soon after you received a letter from the publisher of the “Arapahoe Pioneer” stating that the parties had given him the notices and asked if they could not remain in his paper as they were already published, and that you replied that the notices must be published in the paper designated. You state your instructions were disregarded and the notices were put in the “Pioneer.”

The act of March 3, 1879, provides that the notice of intention to make proof is to be published in a newspaper to be designated by the register as nearest the land. The appeals claim that the “Pioneer” is about one mile nearer to the land than the “Monitor.”

It is clearly set forth in official circular “A,” July 31, 1884, that registers may use their discretion in designating the paper for the purposes above named, where there are several papers any one of which might come within the meaning of the law, and “in the reasonable and honest exercise of that discretion they will not be interfered with by this office,” and “you are not to construe the word ‘nearest’ as binding you to any rule of strict geographical distance.” Your decision is approved and you will so notify the interested parties.

SWAMP LAND—ACT OF JULY 23, 1866.

STATE OF CALIFORNIA *v.* UNITED STATES.

Only the fourth section of the act of July 23, 1866, relates to swamp and overflowed lands, and under the first clause of said section the State has no claim unless the land appears upon the approved township survey and plat as swamp and overflowed.

Where there is a discrepancy between the general description and the field notes of the boundary lines of the particular tract in question, the latter must control.

The claim of the State under the second clause of said section is rejected, as the survey relied upon is not in conformity with the requirements thereof.

Land subject to periodical overflow but susceptible of cultivation does not pass under the swamp grant.

Acting Secretary Muldrow to Commissioner Sparks, May 1, 1885.

I have considered the case of the State of California *ex rel.* H. H. Thurston *v.* The United States *ex rel.* William Herrington, involving the NE. $\frac{1}{4}$ of Sec. 27, T. 3 N., R. 7 E., M. D. M., Stockton land district, California, as presented by the appeal of the latter from the decision of

your office, dated May 24, 1882, holding that said tract inured to said State as swamp and overflowed land, under the first clause of Section 2488, Revised Statutes of the United States.

The record shows that on July 24, 1876, Herrington applied to the district land officers to file his pre-emption declaratory statement upon said tract, but his application was rejected, for the reason that the official plat of survey showed that a part of the land in the southern portion of the township was subject to periodical overflow. An appeal was taken from said decision, and on September 4, 1876, your office ordered the United States surveyor general for California to hold an investigation to determine the true character of the land in question.

The investigation was duly held, and, upon the testimony taken, the surveyor general decided that the tract was not shown to be of the character contemplated by the act of September 28, 1850, (9 Stat., 519,) and that the claim of the State ought to be rejected. This decision was reversed by your office, as above stated.

The counsel for the appellant insists upon eight specifications of error, which may be briefly grouped under three heads, viz :

1st. In holding that the returns of the surveyor general represent this land as swamp within the meaning of the act of September 28, 1850.

2d. In holding that this land is confirmed to the State by the first clause of Section 2488 of the Revised Statutes.

3d. In ignoring the grounds upon which the investigation was ordered, and not deciding that, upon the evidence submitted, said tract was not swamp and overflowed within the meaning of the swamp land act.

The decisions of the courts and the rulings of this Department have uniformly held that the swamp land act was a present grant, and gave title to the State in which they were situated to all lands of the character designated by the act. *Railroad Company v. Fremont County* (9 Wall., 89). *French v. Fyan et al.* (3 Otto, 169). *The County of Buena Vista, Iowa, v. The Iowa Falls and Sioux City Railroad* (U. S. Sup. Ct., November 10, 1884). *Nall v. State of California* (2 C. L. L., 1048). *Central Pacific R. R. Co. v. State of California* (ibid 1052).

By the circular of instructions, issued from your office, dated November 21, 1850, the States entitled to the provisions of said act were allowed to adopt the field notes of government survey as a basis for selection, or they could have their own agents select the lands claimed by them, and report the same to the United States surveyor general for the State, with proof as to the character of the lands. The State of California did not adopt either of the above methods, but disposed of large quantities of land, as swamp and overflowed, of which many tracts were not of the character granted by said act. To protect innocent purchasers, and to quiet land titles in California, Congress passed the act of July 23, 1866, (14 Stat., 218). Only the fourth section of said act relates to swamp and overflowed lands, and it is substantially re-enacted in Section 2488 of

the Revised Statutes. *Kile et al. v. Tubbs* (6 C. L. O., 108); *Kile v. Tubbs* (59 Cal., 191); *Sutton v. Fassett* (51 Cal., 12).

The first clause of said section is as follows: "It shall be the duty of the Commissioner of the General Land Office to certify over to the State of California, as swamp and overflowed lands, all the lands represented as such upon the approved township surveys and plats, whether made before or after the 23d day of July, 1866, under the authority of the United States." Under this clause, it is clear that the State has no valid claim to the land in question, unless it is represented upon the approved township survey and plat, as swamp and overflowed land, and, if the tract is so represented, then it matters not what the real character of the land is, whether swamp and overflowed or dry, the State is entitled to the tract. *Central Pacific R. R. Co. v. California* (4 C. L. O., 151).

The essential inquiry then is, what is the representation upon the plat and survey made under the authority of the United States?

The report of the register, dated November 26, 1880, shows that the official plat of said township was filed in the district land office on October 18, 1865, and he further certifies that the only land designated on said official plat, as swamp and overflowed land, is situated in the N. $\frac{1}{2}$ of section 5 of said township. A careful inspection of the approved plat of said township on file in your office confirms the report of the register, as to the amount and locality of the land designated thereon as swamp and overflowed land.

But it is strenuously contended by the counsel for the State that the field notes and the general description made by the deputy surveyor show conclusively that said tract is represented as swamp and overflowed land, and if the approved plat does not so designate the same, the error is the mistake of the draughtsman, and can not affect the title of the State.

It appears, however, that the subdivisional survey of said township was made in April, 1865, by John Wallace, a deputy United States surveyor. Upon the plat of said survey the tract in question, with others, is designated as "land subject to periodical overflow," and upon the margin appears this note, "the lands represented upon this map as 'subject to periodical overflow,' can be cultivated, and crops raised thereon, as returned by the deputy." There is nothing in the field notes to contradict the above statement, unless it be found in the general description, which is as follows: "The soil of the township is of an average character, with some of superior quality in the southern portion, which is subject to inundation by the overflow of the Calaveras river and its branches, and is thus rendered incapable of being cultivated for the raising of crops, except by means of banks and levees, which have been erected to prevent such overflow. . . . The numerous sloughs are nearly all dry during the summer, but water can be obtained at a depth of from twelve to thirty feet." This general description does not necessarily apply to the land in question. While it may

be true, that, where the legend upon the plat does not correctly represent the return of the deputy surveyor, "the sworn and duly approved field notes as returned by the deputy" must be taken as the survey, yet, where there is a discrepancy between the general description and the field notes of the boundary lines of the particular tract in question, the latter must control. Is evident, therefore, that taking into consideration the whole return of the deputy surveyor, and the plat upon which is represented the amount and the particular section in which is situated the only swamp and overflowed land in said township, there was no such return of said land as is required by the first clause of said section 2488.

Again, the approved plat of survey of this township and the return of the deputy have been passed upon by this Department in the case of *Wallace v. State of California* (5 C. L. O., 22,) involving the NW. $\frac{1}{4}$ of section 23, which corners upon the section embracing the land in controversy. In that case, it was held that "the township was surveyed by the United States prior to July 23, 1866, and the land is returned by the surveyor general as subject 'to periodical overflow,' and not as 'swamp and overflowed,' as provided in the statute, hence it is not subject to certification to the State by virtue of the return of the surveyor general;" and also that where a question is raised as to the correctness of the return of the officer, a hearing should be ordered in accordance with the provisions of the fourth clause of the fourth section of the act of July 23, 1866.

It is, however, urged that if the State is not entitled to said tract under the first clause, she has a right to the land by virtue of the second clause of said section 2488, which provides that "the surveyor general of the United States for California shall, under the direction of the Commissioner of the General Land Office, examine the segregation maps and surveys of the swamp and overflowed lands, made by said State; and where he shall find them to conform to the system of surveys adopted by the United States, he shall construct and approve township plats accordingly, and forward to the General Land Office for approval."

This claim cannot be maintained. The only evidence offered in support thereof, is a copy of a survey No. 992 of the W. $\frac{1}{2}$ of Sec. 26, and the E. $\frac{1}{2}$ of Sec. 27, in said township made April 17, 1865, by the county surveyor, under the act of the State legislature, approved April 27, 1863, and the application of Stephen Rogers to purchase said land under said act, dated May 22, 1865, approved by the State surveyor general on November 22, 1865. It appears that said application was for "overflowed lands," and the word "swamp" is omitted.

It does not appear that any other survey was approved by the State surveyor general, prior to July 23, 1866, showing a State segregation of said land, nor was any application made to the United States surveyor general to approve any plat and survey representing said tract as

swamp and overflowed under said second clause of Section 2488, or that said tract has been certified over to the State under said section. On the contrary, there is filed the certificate of the State surveyor-general, William Minis, dated February 19, 1877, to the effect that the swamp land survey No. 1258 of said tract filed for Thurston on September 3, 1868, and the swamp land application of Thurston for the E. $\frac{1}{2}$ of said tract filed July 27, 1876, "are the only applications or surveys in this office for the above described land." Although said survey was received and filed on September 3, 1868, it was not approved until January 7, 1879.

It is further shown by the record that on June 8, 1867, said Rogers made pre-emption cash entry No. 1630 for the SW. $\frac{1}{4}$ of section 26, embraced in said survey, and that each of the other quarter sections within its limits, except the tract in controversy, has been disposed of under the pre-emption laws of the United States. Without deciding as to the effect of a State segregation map and survey of the swamp and overflowed land in said State, made prior to said act of July 23, 1866, and in strict compliance with the second clause of said Section 2488 of the Revised Statutes, where the land embraced therein has not been listed to the State, I am of the opinion that the survey relied upon by the State does not conform to the requirements of the law. *State of California* (6 C. L. O., 29); *Sutton v. Fassett* (51 Cal., 21); *People v. Cowell* (60 Cal., 403); *Sacramento Valley Reclamation Company v. Henry E. Cook* (61 Cal., 244).

Under the provisions of the last clause of said Section 2488 of the Revised Statutes, the hearing was had before A. W. Von Schmidt, U. S. deputy surveyor, and it was stipulated by the counsel for all parties that the testimony taken before him should be admitted as evidence and considered by the United States surveyor general. It was also agreed by the parties, that Mr. Von Schmidt, with others, should make a personal inspection of the tract in question, which he did in company with the State surveyor general. Mr. Von Schmidt reports, under date November 22, 1880, that "the land in dispute never was in my opinion swamp land. That it has been overflowed from time to time there is no doubt. These overflows occur when heavy rains occur, sometimes lasting several weeks, at other times a few hours." A careful consideration of all the evidence shows that said tract is subject to periodical overflow in the winter or spring months, but the overflows subside so as not to render the land unfit for successful cultivation by reason of the overflow. The land, therefore, is not swamp and overflowed land within the meaning of the swamp land act, and the claim of the State must be rejected. *Thompson v. Thornton* (50 Cal., 143); *Wallace v. State of California* (Sec'y, February 25, 1881); *State of Oregon* (2 L. D., 651).

The decision of your office is reversed.

PRE-EMPTION—ENTRY.

MEYERS *v.* SMITH.

In consideration of the valuable improvements and residence of the pre-emptor, and the absence of an adverse right, an entry based upon a filing made when the land was embraced within an uncanceled desert land entry was allowed to stand.

Acting Secretary Muldrow to Commissioner Sparks, May 6, 1885.

The case of William Meyers *v.* S. B. Smith has been considered on appeal by Meyers from the decision of your office, dated June 5, 1884, wherein his application, under the homestead law, to enter land situated in the Deadwood district, Dakota, was rejected, to the extent to which it conflicted with the pre-emption entry of a prior settler.

The record shows that Stephen B. Smith filed declaratory statement No. 1471 January 5, 1882, covering the S. $\frac{1}{2}$ of NW. $\frac{1}{4}$, N. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of Sec. 33, T. 6, R. 6, in the said district, alleging settlement January 4, 1882; for which cash entry certificate No. 546 was issued December 22, 1883.

March 15, 1884, Meyers presented an application under the homestead law to enter the NW. $\frac{1}{4}$ of NW. $\frac{1}{4}$, S. $\frac{1}{2}$ of NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of said Sec. 33, which was rejected March 30, 1884, so far as it relates to the S. $\frac{1}{2}$ of NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ of SW. $\frac{1}{4}$, which has been appropriated by Smith under his cash entry.

Meyers, in his appeal, sets forth that Smith was permitted to file his pre-emption declaratory statement for the tract in question, pending a prior uncanceled entry which embraced the same land.

The following state of facts is presented by the records of this Department:

On July 3, 1878, Meyers made desert land entry No. 7, for three hundred and twenty acres of unsurveyed land, which embraced the tract in controversy. The question as to whether the tract covered by such entry was desert land, was presented to this Department on appeal, and a decision rendered in the negative July 3, 1882, in the case of Wood *v.* Meyers; whereupon the desert entry was canceled by your office August 22, 1882.

The proof of Smith shows the purchase of valuable improvements, and residence on the land from early in 1881, continued to date of entry, December 22, 1883. The original desert land entry was canceled August 22, 1882. Smith duly published notice of final proof and was permitted to make the same and consummate the entry without protest or opposition. Meyers did not apply to make homestead entry until several months afterward. He was therefore in no condition to set up any alleged prior equities or rights, and the question is solely between Smith and the government. Smith having shown sufficient improvements and inhabitancy of the land, his entry will be approved, and the decision of your predecessor rejecting the homestead entry of Meyers is affirmed.

RAILROAD GRANT—CONFLICTING ENTRY.

ST. PAUL, M. & M. RY. CO. ET AL. v. MCALMOND ET AL.

Title to the additional lands granted by the act of March 3, 1865, does not pass without some act of selection on the part of the grantee.

Acting Secretary Muldrow to Commissioner Sparks, May 8, 1885.

I have considered the case of the St. Paul, Minneapolis and Manitoba, and Hastings & Dakota Railway Companies v. Robert McAlmond *et al.*, involving the NW. $\frac{1}{4}$ of Sec. 3, T. 117, R. 29, Benson, Minnesota, on appeal from the decision of your office, dated February 4, 1884, adverse to said companies.

It appears that the tract described falls within the fifteen miles, or indemnity, limits of the grant of March 3, 1857, (11 Stat., 195,) for the benefit of the St. Paul and Pacific, now the St. Paul, Minneapolis and Manitoba Railway Company, and was originally within the withdrawal under said grant.

The grant having been adjusted to the west line of range 38, the tract in question was included in certain lands restored to market by proclamation No. 700, which was transmitted to the local officers June 3, 1864. Said restoration was made with full consent of the company. Thereafter said tract was public land, and on the 18th of November, 1864, one William F. Flick made homestead entry therefor, which entry remained of record until September 30, 1872, when it was canceled.

The land also falls within the ten miles withdrawn by the Department, under its construction of the act of March 3, 1865, (13 Stat., 526,) which increased the grant of 1857, above mentioned, to ten sections per mile. Withdrawal under the extension was made in July, 1865.

The tract in question was, at the date both of the grant of 1865 and of the withdrawal thereunder, appropriated by the homestead entry of Flick.

It is also within the twenty miles indemnity limits of the grant made by the act of July 4, 1866, (14 Stat., 37,) for the benefit of the Hastings and Dakota Railroad Company, the withdrawal for which was made in July, 1866, at which time the Flick entry was still of record.

Said tract was selected by the first named company May 26, 1880. On these facts, your office held that it was excluded from the grant for the benefit of either of the companies mentioned, and that Flick's entry having been canceled, the land was open to settlement and entry by the next legal applicant.

Applications to file or make entry for the tract were offered by McAlmond and several other parties named in your office decision. These were all rejected by the local office, and appeals taken to your office, which, as already stated, ruled adversely to the companies, and held the railroad selection mentioned for cancellation.

It will be observed that of the several applications to file or enter, only one, that of Robert McAlmond, was made prior to the date of selection by the St. Paul, Minneapolis and Manitoba Railway Company.

It appears that McAlmond in October, 1883, relinquished all claim to the land, but it is now claimed by him that said relinquishment was procured through fraud and duress. It is also alleged by his wife that he is of unsound mind, has deserted her, is dependent upon the county for support, and that she has supported herself and children, and has continued to reside upon and improve the land.

As to the effect of the company's selection, the Supreme Court of the United States has in a recent decision, in the case of the St. Paul and Sioux City R. R. v. Winona & St. Peter R. R. Co. (112 U. S., 720), declared that "There is nothing in either of these statutes (those of 1857 and 1865 cited *supra*) which indicates or requires that the six-miles limit of the original grant is to be enlarged, so that within a limit of ten miles all the odd sections fall immediately within the grant on the location of the road."

In that case the Court hold that the "additional lands granted to appellant . . . are lands to be *selected*, and that some selection on the part of the appellee, or for its benefit, must be shown." In view of said decision, the case is remanded to your office, without judgment, for further action to be had, pursuant to such inquiry as will bring out the facts relative to McAlmond's mental condition, his abandonment of the land and of his family, and ascertain what right he or his wife may have to the land by virtue of what one or both of them have done in the way of settlement, improvement, etc., prior to selection by the railroad company.

PUEBLO LANDS OF SAN FRANCISCO.

Certain lands excluded from the survey to be withheld from present disposal, pending inquiry as to their proper disposition.

Acting Secretary Muldrow to Commissioner Sparks May 8, 1885.

Upon the completion of the survey and patent of the Pueblo lands of San Francisco, a small strip of land was excluded from the former claimed boundary, as represented by the original Stratton survey on the south line of the city, which by your predecessor's orders of July 24, 1883, and May 15, 1884, under sanction of the Department, was withheld from entry or disposal until further order should be made respecting it.

On the 14th of February, 1884, William H. Green addressed a communication to the Department, respecting the pre-emption claims of himself and others upon a portion of these lands, and by several communications from your office of August 11, 1884, applications were submitted, respectively, of George Heart and J. B. Haggin to purchase certain of said lands, and of B. B. Newman for their survey and the recognition of settlers' claim thereon.

To make proper disposal of this tract in its anomalous condition will require the exercise of care and discretion, if not a resort to legislative sanction; and I accordingly remand all said papers to you, to the end that such steps may be taken as shall seem best in reaching a just and speedy adjustment of the whole matter.

Due notice should be given to parties interested as to the pendency of the inquiry, with a view to such adjustment, and in the meantime the withdrawal of the lands should be maintained.

CONTEST—PRACTICE.

ERICKSON *v.* ANDERSON.

The publication of notice of contest four consecutive times, in a newspaper issued weekly, held sufficient under rule thirteen of the rules of practice.

Acting Secretary Muldrow to Commissioner Sparks May 8, 1885.

The case of Erick Erickson *v.* Henry Anderson has been considered, on appeal by Anderson from the decision of your office dated June 10, 1884, wherein timber culture entry No. 1657 made by him March 9, 1882, covering the NW. $\frac{1}{4}$ of Sec. 34, T. 149, R. 59, Grand Forks, Dakota, is held for cancellation for failure to comply with the requirements of the timber culture law.

April 18, 1883, Erickson filed affidavit of contest, in which he alleged failure by Anderson to break five acres of the tract up to the date of initiation of contest. Information being furnished to the satisfaction of the local officers that personal service could not be made, it was ordered that notice should be served by publication. On August 1, 1883, the day set for hearing, Anderson by his attorney appeared specially and filed a motion to dismiss the contest on the ground that the notice by publication was not advertised a sufficient number of times. The affidavit of the publisher of the newspaper, in which the notice was printed, shows that it was published four consecutive times, commencing June 28, 1883, and ending July 19, 1883.

Rule 13 of the rules of practice provides that, "notice by publication shall be made by advertising the notice at least once a week for four successive weeks." If the rule directed that the notice should be published for the period of four weeks, then, under the practice of this Department, it would require five consecutive issues of the advertisement to cover the time. But, as it simply directs that the notice shall be advertised once a week for four successive weeks, it must be concluded that the four advertisements shown to have been made in this case, answer the requirement of the rule.

It having been proved that Anderson failed to comply with the requirements of the law, as alleged in the affidavit of contest, his entry will be canceled.

The decision of your predecessor is affirmed.

PRACTICE—APPEAL—CERTIORARI.

HEITKAMP *v.* HALVORSON.

An appeal does not lie from an order for a hearing, and the proceedings in the case will not be ordered up under rules 83 and 84 of the Rules of Practice where no good reason appears why such a hearing should not be had.

Acting Secretary Muldrow to Commissioner Sparks May 11, 1885.

In the case of M. F. Heitkamp *v.* Kittle Halvorson an application has been filed on behalf of Halvorson to have the proceedings therein certified to the Department under rules 83 and 84 of the Rules of Practice.

Halvorson made timber culture entry May 17, 1879, for the NE. $\frac{1}{4}$ of Sec. 14, T. 111, R. 53, Watertown, Dakota. Heitkamp began a contest against said entry June 26, 1883, and a hearing was ordered for September 6, 1883. This contest appears to have been dismissed for the want of proper notice by the decision of the local office, but on appeal to your office the case was re-instated and hearing set for April 24, 1884. On that day the case was postponed to the 25th, on the receipt of a telegram from defendant's attorney, and ultimately continued to May 15, 1884.

Contestant appeared April 24th and submitted *ex parte* testimony. On May 15th the parties with counsel were present; the contestant appearing specially for the purpose of objecting to any evidence that claimant might offer, on the ground that claimant was in default on April 24th, and that the continuance of the case was improperly allowed. It was proposed by contestant to submit for cross-examination the witnesses that had testified on the 24th of April, but to offer no further testimony. Thereupon the local office dismissed the contest. Heitkamp appealed. Your office by its decision of September 20, 1884, remanded the case for another hearing, and held January 14, 1885, on the presentation of Halvorson's appeal from the decision of September 20th, that he was not entitled to an appeal from said decision, as it was merely an order for a hearing.

It is to be noticed that this case has never reached a condition when its disposition on the merits could be effected, while your office has, in effect, twice held that the charges against the entryman were of sufficient gravity to warrant an investigation. The nature of the allegations against the entry, or the character of the defense thereto, does not appear. Your office properly held that an appeal to this Department would not lie from an order for a hearing, and as no reason is made to appear why such an order should not issue, the application herein is dismissed.

TIMBER CULTURE CONTEST—PRACTICE.

MYERS *v.* LYDENSTRICKER ET AL.

Where an affidavit of contest apparently was filed during the pendency of a prior contest, the actual date of filing may be shown by competent testimony, and the apparent irregularity may not be taken advantage of by a stranger to the record.

Acting Secretary Muldrow to Commissioner Sparks May 13, 1885.

I have considered the case of James G. Myers *v.* John F. N. Lydenstricker and Herbert H. Cooley, involving Lydenstricker's timber-culture entry No. 2611, made July 28, 1878, for the SE. $\frac{1}{4}$ of Sec. 10, T. 111, R. 56, Watertown (formerly Yankton) district, Dakota, on appeal by Myers from your predecessor's decision of August 20, 1884, dismissing his contest.

Before Myers initiated contest, one George W. Burd had done the same, March 2, 1883; but on the 9th of the same month Burd withdrew his contest. Myers' contest was initiated, according to the local officers' report, March 9, 1883—and after the withdrawal of Burd's contest. On the 15th of the same month, one Herbert H. Cooley applied to contest the same entry; but his application was rejected by the local officers because of the pending contest of Myers.

A hearing was had in the case of Myers *v.* Lydenstricker on May 14, 1883, which resulted in a decision by the register and receiver that the entry had been forfeited and should be canceled. On the transmittal of this decision, with the evidence and accompanying documents, to your office, your predecessor discovered that although the local officers had previously reported Myers' contest as having been initiated March 9, 1883, after the withdrawal of Burd's contest, yet Myers' affidavit of contest bore the endorsement "Filed March 8, 1883, at 11 o'clock a. m.;" and an explanation was requested of the local officers. Thereupon said officers forwarded to your office affidavits of V. V. Barnes, Frank N. Dewey and C. L. Campbell, attorneys representing said Myers and said Burd, stating in substance the following facts: That Myers' contest papers reached the local land office on the afternoon of March 8, 1883; that an arrangement having been entered into between said attorneys, having full knowledge and authority to act in the premises, early on the morning of March 9th said Barnes went to the land office and withdrew the contest papers of said Myers—which were handed to him from a "pigeon-hole" where they had been temporarily placed, not yet having been put on record or formally filed: that he then withdrew the contest of said Burd; that afterward he re-presented the contest of said Myers, "doing so advisedly and with knowledge of the rules; that the fact of there being an endorsement on said contest of Myers was noted, and that General Pease" (the receiver) "stated that the proper order would be shown; that the same must have been in-

advertently overlooked or passed by through some clerical oversight in the pressure of business."

In his letter to your office (July 19, 1884), transmitting the above-mentioned affidavits, with others corroboratory thereof, the register says: "I have made a thorough investigation as to the date of filing of the affidavit of contest of Myers, and am convinced that the filing on which the hearing was based was March 9, 1883. . . . Mr. Barnes asked to withdraw the affidavit, on the 9th, . . . when the affidavit was again filed it took its standing as of the 9th, and our report is correct, notwithstanding the failure to correct the endorsement on the affidavit. At that time it was the practice of this office to permit the withdrawal of contest at any time before the case was transmitted to the General Land Office. . . . Myers' contest . . . was entertained only by having been *filed on the 9th.*"

Thereupon your predecessor (August 20, 1884), decided that "parol testimony furnished by an interested party can not be allowed to subvert the record in a case where the rights of another party would be vitally affected:" and therefore dismissed Myers' contest—at the same time permitting Cooley's affidavit of contest to be used as the basis of a hearing to be held after due notice. From this decision Myers (November 3, 1884,) appealed to the Department. By letter of May 6, 1885, you forward to me Cooley's withdrawal from the contest—thus leaving the question at issue one solely between Myers and Lydenstricker.

It will be seen that the allegation that Myers' affidavit upon which hearing was based was in fact presented on the 9th of March, does not rest solely on "parol testimony furnished by an interested party," but that the register asserts it as a matter of fact not susceptible of doubt. Indeed, the statements herein bearing upon that point are not denied in any quarter—Cooley relying solely upon the technical point that the local officers had neglected to note upon Myers' affidavit of contest the date of its second presentation.

I think the apparent irregularity is sufficiently explained. It could not be taken advantage of by a stranger, after contest brought; and Lydenstricker is not complaining. As to him there is no equity; up to the time of hearing (four years and nine months from date of entry) he had allowed the tract in controversy to remain "wholly uncultivated and unoccupied, no trees, seeds or cuttings having been set out or planted by any person."

I therefore reverse your predecessor's decision, and direct that Myers' entry be allowed.

PRE-EMPTION—RESIDENCE.

CLEAVES *v.* FRENCH.

The residence required of a pre-emptor is not satisfied by an occasional visit to the land.

The plea of climatic reasons to excuse failure to improve the land and reside thereon will not be accepted when want of good faith is apparent.

Secretary Lamar to Commissioner Sparks April 30, 1885.

I have considered the case of Theodore Cleaves *v.* William G. French, involving the SW. $\frac{1}{4}$ of Sec. 4, T. 49 N., R. 5 W., Bayfield district, Wisconsin, on appeal by Cleaves from the decision of your office of September 11, 1884, awarding the land to French.

French filed declaratory statement No. 802, for said tract, November 11, alleging settlement November 9, 1882. Cleaves filed declaratory statement No. 867, for the said tract, April 7, alleging settlement April 6, 1883. French submitted final proof June 19, 1883. Cleaves was present with his attorney, and objected to French's final proof, alleging non-compliance with the law in the matter of inhabitancy and improvements. French protested against the testimony of Cleaves and his witnesses being entertained, on the ground that it was contrary to rule eight of the rules of practice, which says that "at least thirty days' notice shall be given of all hearings before the register and receiver." The local officers overruled this objection, and heard the testimony offered by Cleaves and his witnesses, in contradiction of that of French and his witnesses. The local officers rejected French's application to purchase, on the ground that the proof showed "that the claimant, French, never established a residence on the land prior to the date of his making proof."

French appealed (July 9, 1883) to your office, on the ground above set forth. Your predecessor decided that "the protest was well taken, and would be sustained," and directed the local officers to dismiss the contest. This was error. The correct practice is that enunciated in your circular instructions of September 27, 1884: "A formal contest is unnecessary in case of conflicting pre-emption claims. . . . Notice to make final proof is an invitation to all the world to contest the right of the party to make proof; and full testimony should then be taken on both sides, witnesses cross-examined, and the record made up for action and decision in the case."

Cleaves thereupon, giving the notice demanded, instituted formal contest; and your office ordered a hearing, which was begun February 26th, ensuing. Cleaves in the mean time had published notice of his own intention to make final proof, so that at the hearing both parties were claimants. The register and receiver reported that French had not in good faith complied with the demands of the pre-emption law; and furthermore, that Cleaves had done so.

Your office, by decision of September 11, 1884, reversed that of the local officers, held French's residence and cultivation to be in good faith and sufficient, and ordered the cancellation of Cleaves' subsequent filing.

A careful examination of the testimony adduced at the hearing, however, shows that French's "cultivation" of the tract consisted of planting a "garden patch," perhaps ten rods square, with vegetables that never were harvested or even hoed, and which the witness who worked for him testified "were not worth hoeing." French's presence upon the tract was the rare exception, and his absence the general rule. He, with his wife, and children, and father, had a recognized home in the village of Ashland, sixteen miles distant; and at the same time when he alleges that he was "residing" upon his claim, he was carrying on the business of grocer and produce merchant in Ashland. No member of his family except himself ever even so much as visited the land.

In view of all the facts, I must conclude that French's occasional visits to the land and his very scant improvements, are not sufficient evidence of good faith to warrant the allowance of his entry. The law authorizes entry by a pre-emption claimant who has made "a settlement in person on the public lands, subject to pre-emption, and who inhabits and improves the same, and who has erected or shall erect a dwelling thereon." In my judgment, claimant, French, has not complied with either the letter or spirit of the law. His plea of climatic reasons for failure is scarcely good, in view of the fact that he applied to prove up when but a little more than half the time which the law gave him within which to make proof had elapsed—and this notwithstanding the summer was just opening and he would thus be enabled to show his good faith by taking advantage of favorable weather in which to make improvement and inhabitancy.

Your decision in favor of French is necessarily a judgment adverse to the claim of Cleaves; but as that finding is a relative one as between the parties in contest, and as Cleaves' case has not been adjudged by the local office or your office on its merits, independently of its relation to any other claim, it does not appear to me that good practice calls for a judgment at this time on the part of the Department. I therefore leave his case for such action as may be deemed proper in the regular course of business.

SANTEE SIOUX INDIAN RESERVATION.

INSTRUCTIONS.

Commissioner Sparks to register and receiver, Niobrara, Nebraska, May 8, 1885.

By direction of the Hon. Secretary of the Interior the following rules and regulations will govern you in allowing entries and filings for lands in the Santee Sioux, or Niobrara Indian Reservation:

When this reservation is opened to settlement and entry on May 15,

1885, the following course of procedure should be observed at the local office :

1. Parties desiring to make entry should be present in person, with their applications duly prepared, or be represented by some one fully authorized to act in the premises, and so acquainted with the facts upon which the alleged right of entry rests as to be prepared to show the same satisfactorily.

2. Due announcement should be made when the office is ready to receive applications, and of the order in which the same will be received and considered.

3. The register will then announce that he is ready to receive applications for lands in a given section, and inquire whether there are any applications therefor, and thereupon receive and act upon the applications that may then be presented for the land within said section ; and in the event of the probable failure of persons present to gain access to the register on account of the number of applicants in the office, the announcement that said section is open for applications, and inquiry for such applications, shall also be made by outcry at the door of the office, and due time allowed such persons to present their applications, and thus proceed until all the applications for lands subject to entry in said section are disposed of, following the same course with reference to the remainder of the lands subject to entry in the reservation.

4. In the case of conflicting homestead applications, thus presented, for the same tract, they shall be treated as made simultaneously, and the right to enter determined in the usual manner, with due attention to settlement rights.

5. In the event of conflicting timber culture applications, so presented, either for the same tract, or the right to enter in a given section, they shall be treated as made simultaneously, and the right to enter awarded to the highest bidder. The bidding being confined to the regular applicants.

6. In the event of conflicting applications thus filed by timber culture applicants and homesteaders for the same tract, they shall be treated as filed simultaneously, and when no question of settlement or improvement arises, upon which the right of entry can be determined, it shall be awarded to the highest bidder of said applicants.

7. There is no reason why the same person may not make entry of two tracts, one as a homestead, and one under the timber culture law.

8. All applications to enter or file thus allowed or rejected will be subject to the appeal of parties aggrieved.

9. Applications to file pre-emption claims will be received and made of record as a matter of course, and when in conflict with a simultaneous application to enter the filing and entry shall be admitted subject to the further regular and proper adjudication.

10. In cases where on the showing made, it does not clearly appear

with whom the right of entry lies, the applications therefor shall be received subject to the determination of such question on a subsequent hearing, allowing, pending such determination, no entry for the land embraced within the conflicting applications.

The foregoing will be adopted by you as a method by which priorities may be fairly ascertained, when the lands are first opened to entry, and prevent actual settlers and bona fide claimants from loss of any right through the combination of parties seeking to take advantage of the first rush to secure the most desirable lands. You are directed to rigidly adhere to the same.

PLACER CLAIM—WATER RIGHT.

ROBERT S. HALE.

Where the claim in effect is for a water right only, it is not competent to issue patent therefor as a placer claim.

Acting Secretary Muldrow to Commissioner Sparks, May 9, 1885.

I have considered the appeal of Robert S. Hale from your predecessor's decisions of November 16, 1882, holding for cancellation his mineral entry No. 732 of the placer claim designated as Lot No. 81, T. 8 N., R. 5 W., containing 95.88 acres, situate in Jefferson County, Helena district, Montana, and January 24, 1884, declining to revoke the former decision.

It appears that appellant seeks to procure patent to such claim solely upon the basis of a mere water right, consisting of two large and several smaller reservoirs, made by damming the outlets of natural lakes or basins which are connected by an aqueduct or ditch alleged to be some twenty-five miles in length; and that the aggregate cost of the same, together with two cabins, was \$20,300. This seems to have been constructed for the sole purpose of conducting the water power thus stored to distant placer claims situate in another township.

It is true the field notes state that the improvements, which consist of the said reservoirs, were constructed for placer mining purposes, but it nowhere appears, nor is it even so much as alleged, that they were constructed for the requisite purpose of developing the particular claim in question.

The most important feature of the proofs required by your office regulations under the mining laws is that touching the mineral value of the particular tract claimed, together with that showing labor performed or improvements made either by the claimant or his grantors to develop the claim. Now the proof furnished in the premises is so exceedingly meager as to be virtually incompetent or insufficient. There is not a scintilla of proof establishing the existence of mineral within the claim in question. Indeed, the only allusion to such existence is contained in the claimant's own affidavit and that of one Benjamin F. Marsh, U. S.

deputy surveyor, who states that he has been informed and believes that a placer deposit of gold exists along the bed of the streams delineated upon the official plat of survey. But he also states that no placer mining work has been done upon said claim, the aforesaid reservoirs, which are the only improvements thereon, having been constructed by the applicant at great cost, for the sole purpose of conducting water to placer mines situate in another township.

It is true that applicant's attorney filed two affidavits in your office on or about January 23, 1883, in support of his motion for reconsideration of the aforesaid decision of November 16, 1882, alleging that some portion of the claim in question might be profitably worked for mineral, but their allegations are based upon prospecting done in the years 1872 and 1875, and do not show that the claim was at the date of the affidavits, or that it had ever been, worked as placer ground, either by the claimant or his grantors.

I therefore concur in the opinion that the patent is not actually sought for a placer claim, but for a water right, and that it is not competent to issue such a patent. See Chessman Placer claim, (2 L. D., 774.)

I accordingly affirm said decisions.

RAILROAD GRANT.—PRACTICE: REVIEW.

MANSFIELD v. NORTHERN PAC. R. R. CO. (ON REVIEW 3 L. D. 302.)

The provisions of the Northern Pacific grant contain an absolute inhibition from sale, entry, or pre-emption of the granted sections, either before or after survey—except as specifically provided—upon filing the map of general route.

The decision of the head of a department is binding upon his successor except where the whole case was not presented in the first instance.

Motions for review should be in accordance with legal principles applicable to motions for new trials at law.

Acting Secretary Muldrow to Commissioner Sparks May 15, 1885.

I have considered the motion (filed in this Department March 30, 1885, in behalf of Isaac S. Mansfield) for a reconsideration of Departmental decision rendered January 6, 1885, in the case of Isaac S. Mansfield v. The Northern Pacific Railroad Company, involving the NE. $\frac{1}{4}$ of Sec. 27, T. 4 N., R. 34 E., W. M., La Grande (formerly Oregon City) district Oregon.

The petitioner's attorneys ask for such action "for the reason that said decision is manifestly against law in this that said Northern Pacific Railroad has never been definitely located opposite said land so as to give said company a vested interest in the same."

Said attorneys cite several recent decisions of the U. S. Supreme Court in support of their theory of this case, and urge that if my predecessor's

attention had been called to them, "or rather if they had existed, he would have been controlled by them in his decision." These are they: The Kansas Pacific Railway Company *v.* Atchison, Topeka and Santa Fe Railroad Company, (112 U. S., 414,) and the Kansas Pacific Railway Company *v.* Dunmeyer. (113 id., 629.)

Neither of these decisions is applicable to this case, inasmuch as the provisions of the Northern Pacific grant are different from those of the grants construed in the cases cited. Those of the former are unique, in that they contain an absolute inhibition from sale, entry, or pre-emption of the odd numbered sections thereby granted, either before or after survey (except as specifically provided), upon filing the map of general route. See sixth section of the act of July 2, 1864. (18 Stat., 364.)

It will be observed, however, that while the act of July 1, 1862 (12 idem., 489,) and the amendatory act of July 2, 1864, (13 id., 356,) require the Department to withdraw the land within certain specified limits from "pre-emption, private entry and sale," upon the company's filing its map of general route in this Department, the act of July 3, 1866, (14 Stat., 79,) did not prescribe the same directions touching such withdrawal; but it declared that such lands should be reserved from *sale only*, upon the filing of such map, and not from pre-emption or homestead claims. See decision of the court in the Dunmeyer case (*supra*).

But independently of the foregoing considerations, it is well settled that the decision of the head of a Department is binding upon his successor, with certain notorious exceptions, notably, to wit, that the whole case had not been presented in the first instance. The petitioner urges such exception (*inter alia*) as a ground for his motion. Scrutiny of the record, however, satisfies me that there is naught in this case to bring it within the category of exceptions to this well known general rule. But the material facts having been correctly stated by your predecessor's decision of August 22, 1883, it was deemed unnecessary to recite them in the departmental decision in question.

Said motion covers the identical points that had been duly considered before the decision in question was rendered. No new evidence is presented, nor is there even a pretense that any such has been discovered; but the motion is based upon the bald assumption that the Department erred in its construction and application of the law governing the facts in the premises, the finding whereof is conceded to have been correct.

Rule 76 of practice authorizes motions for review or reconsideration of departmental decisions when "in accordance with legal principles applicable to motions for new trials at law," etc. This motion is not in accordance with such principles, but in direct contravention of rules 77 and 78 of practice.

The motion is therefore denied.

PRACTICE—APPEAL—REVIEW.

WITHEE *v.* MARTIN.

An application for review or rehearing does not admit the correctness of the decision, nor cut off the right of appeal.

A motion for a re-hearing in a case pending before the local office should be promptly passed upon by the district officers.

The time between the filing of a motion for a re-hearing or review and the notice of the decision thereon, is excluded in computing the time allowed for appeal.

After an appeal has been taken a motion for review will not lie.

Acting Secretary Muldrow to Commissioner Sparks, May 19, 1885.

I have considered the case of Joseph N. Withee *v.* Robert Martin, involving the right to the NW. $\frac{1}{4}$ of Sec. 25, T. 98, R. 53, Yankton, Dakota Territory, as presented by the appeal of Withee from the decision of your office dated May 3, 1884, dismissing his contest against Martin's homestead entry covering said tract.

The record shows that Martin made homestead entry No. 5466 for said tract on January 27, 1882, and on October 27, 1882, gave due notice of his intention to make final commutation proof and payment before the clerk of the district court for Turner county, in said Territory, on December 11, 1882.

It appears that Withee offered his affidavit of contest against said entry on December 9, 1882, which was refused by the district land officers, because Martin had given notice of his intention to make said proof. On the day set, Martin failed to appear. Withee, however, appeared and filed his protest against the allowance of Martin's proof.

It further appears that one Peter E. Myrick filed a contest in the local land office on December 11, 1882, and February 20, 1883, was set for a hearing in the premises. On the day set for the hearing, it was decided by the local land office that Withee had the prior right of contest, from which decision no appeal appears to have been taken. The hearing was continued by agreement until March 25th, same year, at which both parties appeared, in person and with counsel, and offered testimony.

Upon the evidence submitted, the register and receiver, on February 4, 1884, rendered their joint opinion that said claimant had not acted in good faith and that his entry should be canceled. On February 21, 1884, Martin filed in the district land office a motion for a rehearing in said case, on the ground of newly discovered evidence, and, at the same time, submitted several *ex parte* affidavits, alleging that he had acted in good faith, and had fully complied with the requirements of the homestead laws, as to residence and cultivation. On March 1st, same year, Withee filed his affidavit and the argument of his counsel against said motion for a rehearing. On March 6, 1884, the register and receiver, without rendering any judgment upon said motion, transmitted the same to your office, together with their said decision of February 4th, and all of the papers in the case. The decision of your office held

that the application for a rehearing should be refused, because the evidence shows that the judgment of the district land officers was erroneous and must be reversed.

The grounds of appeal are: 1st, Error in reversing the decision of the local land officers; 2d, Error in dismissing said contest, since the claimant has never appealed from the decision of the register and receiver, and, by asking for a rehearing, he thereby admits the justice of their decision.

It is apparent upon the face of the record that there was irregularity in the action of the register and receiver. Rule seventy-seven of the rules of practice provides that motions for rehearings and review must be filed in the office wherein the decision to be affected by such rehearing or review was made, or in the local land office for transmittal to the General Land Office. Rules seventy-nine and eighty (*ibid*) provide that the time between the filing of a motion for rehearing, or review, and the notice of the decision upon such motion, shall be excluded in computing the time allowed for appeal, and that after an appeal has been taken no motion for a rehearing will lie.

The motion in the present case was filed in the local land office strictly in accordance with the rules of practice. It was clearly the duty of the register and receiver to act upon said motion promptly, and, in case of its refusal, an appeal from the original decision would bring the whole case regularly before your office. It does not necessarily follow that, because Martin applied for a rehearing, he thereby admits the correctness of the decision of the local officers. The filing of the motion did not cut off his right of appeal, and it is quite reasonable that he should wish to strengthen his proof by such additional evidence as had been subsequently discovered. Although it would have been more regular to have required the register and receiver to pass upon the motion for a rehearing, yet, since the contestant has appealed from the decision of your office, he can not deny the jurisdiction of this Department to pass upon the whole record. *Griffin v. Marsh* (2 L. D., 28).

It was held in said decision that not one of the allegations of the contestant was substantiated by the testimony offered by him. A careful examination of the testimony shows that the conclusions, as set forth in said decision are correct, and it is accordingly affirmed.

MINING CLAIM; SURVEY.

CIRCULAR.

Commissioner McFarland to U. S. Surveyors General, and Registers and Receivers December 4, 1884

1. The rights granted to locators under Section 2322, Revised Statutes, are restricted to such locations on veins, lodes or ledges as may be "situated on the *public domain*." In applications for lode claims where

the survey conflicts with a prior valid lode claim or entry, and the ground in conflict is excluded, the applicant not only has no right to the excluded ground, but he has no right to that portion of any vein or lode the top or apex of which lies within such excluded ground, unless his location was prior to May 10, 1872. His right to the lode claimed terminates where the lode, in its onward course or strike, intersects the exterior boundary of such excluded ground and passes within it.

2. The end-line of his survey should not, therefore, be established beyond such intersection, unless it should be necessary so to do for the purpose of including ground held and claimed under a location which was made upon public land and valid at the time it was made. To include such ground (which may possibly embrace other lodes) the end-line of the survey may be established within the conflicting survey, but the line must be so run as not to extend any further into the conflicting survey than may be necessary to make such end-line parallel to the other end-line and at the same time embrace the ground so held and claimed. The useless practice in such cases of extending *both* the side lines of a survey into the conflicting survey and establishing an end-line wholly within it, beyond a point necessary under the rule just stated, will be discontinued.

3. These instructions will be observed by surveyors-general in all cases where surveys have not been approved by them prior to receipt hereof.

4. If, however, a survey under the old practice has been approved by the surveyor-general prior to the receipt by him of these instructions, application for patent thereon, if otherwise regular, will not be rejected.

5. In applications filed prior to receipt hereof at the local land office and applications allowed under the preceding paragraph entry will be allowed as heretofore when the necessary proofs under former regulations are complete.

6. In case of applications and entries allowed under paragraphs 4 and 5, amendment of the survey will be directed by this office, if found necessary.

7. After the receipt of this circular at the local land office all applications for mineral patents, applications to purchase, register's final certificates of entry and receiver's receipts must not only describe the ground claimed but must state specifically what conflict or conflicts with other surveys, lots or claims are excluded, giving the number of each conflicting survey or lot. The published and posted notices must contain the same information.

8. As this circular does not affect any rights which an applicant has under the law its enforcement in pending cases cannot operate injuriously, and it will therefore be carried into effect at once in the adjudication of cases by this office. In the form of patents to be issued the

same rule will go into operation as soon as the necessary blanks and records can be prepared.

9. A strict observance of these regulations will be required.

Approved.

H. M. TELLER,

Secretary.

MINING CLAIM—SURVEY.

CIRCULAR OF DECEMBER 4, 1884, AMENDED.

Commissioner Sparks to U. S. Surveyors General, and Registers and Receivers, May 11, 1885.

Circular "N" of December 4, 1884, is hereby amended as follows:

1. In entries made prior to the receipt by the register and receiver of said circular the survey, if free from objection under the former practice, need not be amended to conform to the provisions of paragraph 2 of said circular.

2. All decisions under said circular in conflict with the foregoing amendment may, to that extent, be recalled.

Approved.

L. Q. C. LAMAR,

Secretary.

TIMBER TRESPASS.

JOSEPH W. HOWARD.

A homestead entry for the sole purpose of obtaining the timber growing on the land will not protect the entryman in a suit for timber trespass thereon.

Acting Secretary Muldrow to Attorney General Garland May 19, 1885.

I have the honor to transmit, herewith, copy of letter, dated the 15th instant, from the Commissioner of the General Land Office, inclosing report of Special Agent R. A. Warren, relative to public timber trespass alleged against Joseph W. Howard, of Arkansas.

The report shows that, during the summer and fall of 1882, said Howard cut or caused to be cut from the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 13, T. 13 N., R. 30 W., Arkansas, two hundred and five (205) oak trees, producing one thousand two hundred and thirty (1,230) railroad ties, which he disposed of to Hugh F. McDaniel, of Fayetteville, in said State, at the rate of twenty-four dollars (\$24) per hundred.

The land described was entered by Howard, February 12, 1881, as a homestead; but the entry was canceled by the local office, April 2, 1885—having been relinquished by him after notice to him of a hearing upon allegation that he had entered the land solely for the purpose of obtaining the timber therefrom, and not as a *bona fide* settler.

The agent is of the opinion that McDaniel was unaware of the source whence the timber was originally procured, but that he could have readily ascertained the same by proper inquiry.

In view of the facts set forth, I concur in the recommendation of the Commissioner of the General Land Office, and have the honor to request that you will direct the U. S. Attorney for the proper district, if in his judgment upon examination he shall deem it for the interest of the United States, to institute criminal suit against said Howard for his violation of law, and civil suit against Howard and McDaniel, jointly, for the purchase value of said one thousand two hundred and thirty (1,230) railroad ties (\$24 per hundred), making a total of two hundred and ninety-five dollars and twenty cents (\$295.20).

PRE-EMPTION—RESIDENCE—IMPROVEMENTS.

LEWIS F. SPINK.

The plea of poverty to excuse want of residence and improvement not accepted, in view of the fact that proof and payment were made within the earliest time possible under the law, and the land immediately thereafter sold.

Acting Secretary Muldrow to Commissioner Sparks, May 19, 1885.

I have considered the appeal of Lewis F. Spink from your predecessor's decision of December 9, 1884, holding for cancellation his cash entry No. 1912 (Watertown series), made January 10, 1882, for the SW. $\frac{1}{4}$ of Sec. 34, T. 123, R. 63, Aberdeen district, Dakota, based upon his declaratory statement No. 5590, filed June 18, alleging settlement June 16, 1881.

On November 22, 1883, Special Agent Jaycox submitted a report in this case, upon the basis of which the entry was held for cancellation by your office letter of April 11, 1884, for failure to comply with the law in the matter of residence. Claimant applied for a hearing, which was had June 19, 1884. It was proved thereat that he built a frame "shanty," eight by ten feet (possibly ten by twelve), with door, window, and board roof; claimant's own statement was that it was papered inside, and floored except in one corner, which he used as a fireplace until he procured a stove. This shanty was sufficiently supplied with furniture. The only other improvements were between four and five acres of breaking, and the beginning of a well—a hole between four and five feet deep.

Claimant testified that he resided, slept, and cooked upon this claim during July and August, obtaining what employment he could in the vicinity. This not being sufficient to supply him with the necessaries of life, he obtained work, draying (in the employ of one Kenyon), at Aberdeen; but every Saturday night he returned to his claim, where he remained until Sunday evening, cooking and eating in his shanty. Two

or three witnesses testify to having seen him on the land several times; and one of them remained with him in his shanty over night.

The witnesses for the government—two of whom live within a mile or a mile and a quarter of claimant's "shanty," and in full view thereof—testify that if Spink had ever resided there they must have known of it; but that they never saw Spink on his claim, nor saw any smoke arising from his shanty. Shortly after final proof was made the land was sold to a speculator, and the shanty was removed—Spink establishing himself in the drug business at Aberdeen. When the special agent visited the land there was nothing to indicate that it had ever been occupied—no ashes nor refuse to indicate where the shanty had stood.

The circumstances do not show good faith on the part of Spink. He had no well to furnish him water, and omitted to make the improvements generally that would be made by a *bona fide* settler: His plea of poverty as a reason for lack of continuous residence is insufficient, in view of the fact that he proved up and paid for the land six months (the earliest time possible) after alleged settlement. His immediate sale of the land, taken in connection with the manifest want of continuity of his previous settlement, would furnish a corroborative indication of speculative intent, and militate against his good faith.

I therefore concur in the opinion that Spink complied with neither the letter nor the spirit of the pre-emption law, and affirm the decision of your office holding his entry for cancellation.

DEATH OF PRE-EMPTOR PENDING CONTEST.

CUMMINS v. BURT.

Where a pre-emptor dies, with contest pending against his claim, the Department will proceed upon the record and make its conclusions as if the original parties to the contest were still alive, without inquiry as to whether there are any heirs.

Acting Secretary Muldrow to Messrs Julian and Meloy, Washington, D. C., May 19, 1885.

I am in receipt of a letter, dated 14th instant, from you, as attorneys for Cummins in the case of David S. Cummins *v.* George B. Burt, involving the NW. $\frac{1}{4}$ of Sec. 25, T. 1 N., R. 10 W., Los Angeles, California, on appeal from decision of December 19, 1884, by the General Land Office favorable to Burt as pre-emption claimant.

You suggest the death of the appellee and request that the proceedings be therefore abated, and that the successor in interest, if any, be required to come in within a reasonable time; to be designated, and that meanwhile your time for filing argument be continued. On the 11th of April you asked thirty days in which to examine the case and file argu-

ment, since which date you have filed nothing in the case save the letter to which this is a reply.

I see no reason for abatement of proceedings in the matter of the appeal. It is the practice of this Department in such cases to proceed upon the record and make its conclusions as if the original parties to the contest were still alive. It is presumed that the attorneys of record for appellee will, if it becomes necessary, intervene for the proper legal representatives.

Section 2269 provides in case of death of a pre-emption claimant before consummating his claim, that "it shall be competent for the executor or administrator of the estate of such party, or one of his heirs, to file the necessary papers to complete the same."

It does not devolve upon the Department the duty of inquiring if there are any heirs, but if it should be found that there are, the entry would be made in the name of "the heirs," leaving the question as to who they are to be settled by those having charge of the settlement of the estate.

This case will in its regular order be considered and determined on the record as it may be found. It will not in regular course be reached for some weeks, and you will yet be permitted to file such argument as you may desire relating to the questions at issue on appeal; and notice to the attorneys of record on the other side of filing such argument will be considered satisfactory.

PRE-EMPTION—RESIDENCE.

LAUREN DUNLAP.

Good faith being apparent from the value of the improvements and acts of the pre-emptor, his temporary absences from the land are held to be excused by the exigencies of business, it appearing that he in fact made his home upon the land.

Acting Secretary Muldrow to Commissioner Sparks, May 20, 1885.

I have considered the appeal of Lauren Dunlap from your predecessor's decision of December 12, 1884, rejecting the final proof made on the commutation of homestead entry for lots 11, 12, 13, and 14 of Sec. 3, T. 112 N., R. 75 W., Huron, Dakota.

The proof submitted by Dunlap showed that he had resided on the land from about April 17, 1883, to December 19, 1883; his improvements consisting of a one story frame dwelling, twelve by sixteen feet, shingle roof, addition ten by twelve feet, and fifteen acres broken and backset. The value of the whole being \$350. Attached to the proof, and forming a part, was an affidavit of the entryman to the effect that he is a newspaper correspondent and in the prosecution of his business was frequently absent from the claim, taking his wife with him, but that he had no fixed abode save on said land. On the examination of the

proof your office suspended the same and called for additional proof, explanatory of the said absences, whereupon Dunlap submitted affidavits showing that he was at no time absent to exceed a week or ten days, and that much of his work as correspondent was performed while at home upon the land.

The proof as to residence was held insufficient and from the rejection of the same Dunlap appealed.

The value of the improvements and the fact that the settler made no attempt to conceal the actual facts relative to his residence preclude any suspicion as to his good faith. The policy upon which this class of cases is decided rests upon a recognition of the necessities that may properly excuse a temporary absence on the part of the settler, he having prior thereto established an actual residence upon his claim. In such cases, however, where presence upon the land is shown to be the rule and absence the exception, the settler is held to be entitled to absent himself for reasons arising from sickness, poverty, and the exigencies of business. *J. H. Abrams* (3 L. D., 106); *Morgan v. Doyle* (id., 6); *Henry Buchman* (id., 223).

This case appears to present no good reason for refusing to accept the settler's residence as satisfactory under the law, and the decision of your predecessor is therefore reversed.

PRACTICE—RELINQUISHMENT.

MITCHELL *v.* ROBINSON.

The validity of an affidavit accompanying an application to enter may not be considered for the first time on appeal, or upon the motion of a stranger to the record.

The local office should not refuse to act upon a relinquishment on account of the form in which it is executed.

Where, pending contest, a relinquishment is filed by a stranger to the record, with application to file declaratory statement, the filing should be received subject to the right of the contestant.

The preference right of entry accorded the contestant rests entirely upon his success in the contest he has initiated, and that right may not be defeated by means of a relinquishment, dated prior to the contest but filed during its pendency.

Acting Secretary Muldrow to Commissioner Sparks, May 20, 1885.

I have considered the appeal of John Mitchell from the decision of June 7, 1884, declaring his homestead entry No. 3180, made May 6, 1884, at Walla Walla, Washington Territory, for the S. $\frac{1}{2}$ of NE. $\frac{1}{4}$; NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of Sec. 17, T. 10, R. 43, subject to the declaratory statement of R. H. Robinson for same tract.

The records disclose that one Cyrus Long made timber culture entry No. 750, February 21, 1879, for said tract; that on March 20, 1884, contest was filed against the same by John Mitchell, hearing of which was

fixed for May 6, 1884. On April 4, 1884, the relinquishment of Long was presented at the local office, together with the declaratory statement of Robinson. The entry was canceled, but the declaratory statement was rejected, the officers holding that Mitchell, by virtue of his contest, had a preferred right of entry on the tract, and on May 6, 1884, he was allowed to make homestead entry thereon.

On appeal by Robinson this decision was reversed by your office on the ground that Mitchell's contest was invalid, because the affidavit accompanying his application to enter the tract was made before the clerk of a court and did not show that the affiant, or some member of his family, was residing on the land, and therefore he, Mitchell, had no preferred right of entry.

This objection if there be force in it, which is not now conceded, could only have been raised by the local officers at the time of the offer of contest, or by Long at the hearing before them. Nor could the latter have raised it for the first time on appeal before your office. Certainly Robinson, a stranger to that contest would not have been permitted to appear therein and raise it at any time, and, *a fortiori*, it cannot be considered when presented by him for the first time on appeal from the decision of the register and receiver rejecting his application to make a pre-emption filing on the tract—a proceeding collateral to, distinct and apart from the contest between said parties. Therefore your office erred in going into the inquiry and deciding the contest to be invalid, because of the alleged defective affidavit.

Among the papers transmitted to your office with the appeal of Robinson is an affidavit of Long, the entryman, dated May 13, 1884, in which, after stating that he had a meritorious defense to the Mitchell contest, he says that on March 18, 1884, he sold his improvements upon the tract and wrote a relinquishment of his entry upon his duplicate receipt, which he signed and delivered to his assignee, who is not named.

This relinquishment, it is further said, was presented to the register, who refused to receive it, because not acknowledged in accordance with the requirements of your general circular of October 1, 1880, page sixteen. It was afterwards duly acknowledged and returned to the office and the entry canceled. He states also that said relinquishment was signed before he was aware that any one intended to contest his entry.

The attorneys of Robinson, in their argument and specification of errors accompanying said affidavit, state that said relinquishment was presented at the local office on the day of its date by Robinson, who at the same time offered declaratory statement for that tract, claiming settlement the same day, and that both papers were rejected, for the reason aforesaid.

These statements of the attorneys are not sustained by testimony, except in so far as they may be corroborated inferentially by the relinquishment, which, your predecessor and the local officers state was dated

March 18, 1884, and by said affidavit of Long as to its execution on that date, its sale and delivery to the assignee, its subsequent return and acknowledgment by its maker. His further statement as to its presentation and rejection by the local officers has but little weight, as he neither gives the date of its alleged presentation nor professes to speak thereof from his personal knowledge. In relation to this matter the local officers are silent. If, however, the facts be true, as stated by the attorneys, the local officers ought to have received the relinquishment on its presentation on March 18, 1884, canceled the entry and filed the declaratory statement of Robinson. The entry having thus been canceled, two days prior, the contest of Mitchell would not have been received. Whilst there is no satisfactory evidence of the above facts, there are circumstances disclosed which give color to the probability of their truth, and which will have due weight in the consideration of the case.

The fact that Robinson did not appeal from said alleged rejection of his declaratory statement should not operate to his prejudice when it is considered that the local officers were acting under the published instructions of your office, when they refused to receive the relinquishment and cancel the entry of Long; until which was done Robinson's declaratory statement could not be received by them. It would be a great and undue hardship to cause him to lose his rights, because your office had misunderstood and misled him as to the law. He should not be required to know it better than the officers appointed to administer it.

But independent of the foregoing allegations and the consideration thereof, the records before me disclose that on May 4, 1884, the relinquishment of Long, dated March 18, 1884,—two days before the contest of Mitchell was filed—was presented at the local office, accompanied by declaratory statement of Robinson, claiming settlement March 18, 1884; that the former was received, the entry canceled, and the latter rejected. This action of the officers was erroneous, because the land being then vacant, they should have filed the declaratory statement, subject to any rights which Mitchell might acquire by virtue of a successful termination of his then pending contest. However, the application of Robinson was rejected and on May 6, 1884, without any testimony being submitted, hearing had, or judgment rendered in his favor, the entry of Mitchell was allowed and made, as a preferred right by virtue of his contest.

Here again was error—not in allowing the entry of Mitchell, because there was then no entry upon the tract—but error in allowing it as a preferred right, arising out of his untried contest, because of the filing of the relinquishment of Long pending the same. The relinquishment was accompanied by an adverse claim to file upon the land, and before Mitchell could acquire a preferred right of entry by virtue of his pending contest, it was necessary for him to pursue it to a successful termination and obtain forfeiture of the entry.

If the contestant obtain a judgment, his preferred right of entry is not to be defeated, because the relinquishment antedates, if presented after, the contest. For it is not to be permitted that the rights of vigilant contestants shall be thus defeated by the execution and retention of relinquishments.

I thus find error in all of the rulings of the register and receiver; also in your decision dismissing the contest for cause alleged, and holding the entry of Mitchell subject to the declaratory statement of Robinson.

In his declaratory statement Robinson alleges settlement on March 18, 1884,—the day when it is claimed the entry of Long ought to have been canceled, on the first presentation of his relinquishment, and the declaratory statement of Robinson accepted. This allegation of settlement, at that time or at any other prior to the entry of Mitchell, is strenuously denied by the latter, who has filed before me quite a number of *ex parte* affidavits, well calculated to create a grave doubt on the subject. Whether Robinson made settlement on the land prior to the entry of Mitchell is, in my view, the only practicable question which now remains to be determined in the case; and for the purpose of arriving at a proper conclusion in relation thereto, all anterior proceedings will be set aside, leaving the homestead entry of Mitchell on the tract subject to the declaratory statement of Robinson, if he show settlement prior to the date of said entry, on a hearing which you will order for that purpose.

OFFICER DE FACTO.

JOSEPH PALMER ET AL.

The official acts of an officer *de facto*, in so far as they affect the rights of the public or third parties, are recognized as valid.

Acting Secretary Muldrow to Commissioner Sparks, May 21, 1885.

I have considered the appeal of Joseph Palmer *et al.* from the decisions of your office rendered December 16, 1884, and January 12, 1885, relative to certain desert land entries, numbered from four to twenty inclusive, made in the Miles City land district, Montana.

The declarations and affidavits on which these entries were allowed were executed on or about December 4th, 5th and 6th, 1883, before R. C. Webster, as deputy clerk of the district court. December 10, 1883, the said entries were made on the proofs submitted, but by decision of December 16, 1884, your office held these entries for cancellation, on the ground that Mr. Webster's appointment as deputy was without authority of law, and therefore the declarations and affidavits, executed before him, were improperly received as the basis for said entries. January 12th following, this decision was modified by your office to the extent of va-

cating the order of cancellation, and substituting therefor judgment to the effect that said affidavits and declarations should be rejected for the reasons stated, and the parties required to make new proof

November 28, 1883, Theophilus Muffley, Clerk of the United States Court for the 1st Judicial District of Montana, appointed Mr. Webster as deputy for the counties of Custer, Dawson, and Yellowstone, for the sole purpose of thus conferring upon said deputy authority to take affidavits and proof in land cases; and while acting in such official capacity, the affidavits now in question were executed in due form before said Webster, he in each instance attesting the execution of the same under the signature of "Theo. Muffley, Clerk U. S. 1st Dist. Court for Custer County, Montana, by R. C. Webster, Deputy Clerk."

Your office had the question, raised by the aforesaid acts, before it for consideration December 3, 1884 (3 L. D., 220), and reached the conclusion then that the official acts of Webster were null and void, and directed the local office to thereafter reject all applications and proofs thus prepared. This decision furnished the basis for the later action of your office from which appeal is now taken.

In the decision of December 3, the provisions found in the laws of Montana, with respect to the appointment of deputy clerks, and the duties of the same when appointed, were discussed at some length and to the conclusion that no authority was to be found therein for an appointment like that of Mr. Webster's.

Among the papers in the case are two affidavits, one from Mr. Muffley, the clerk, and one from Mr. Webster. In the former, it is stated that the appointment of Mr. Webster was made on the request of the then register of the local office, to the end that applicants for land might thus avoid the expense and delay otherwise attending their applications. In the latter Mr. Webster sets forth that when appointed he at once qualified and thereafter entered upon his duties in good faith; "that he believed then and still believes that he was and is now fully and legally empowered to act as such deputy"; and that the declarations and affidavits made before him as deputy were so made and executed in good faith.

Without entering into the question as to the authority of the clerk to appoint a deputy for the purpose of performing duties that were rather incident to the office than otherwise, it must be conceded that Mr. Webster was an officer *de facto*. It is a well settled principle that the official acts of such officers, in so far as they affect the rights of the public or third parties should be recognized as valid. *De Long v. Hine* (1 L. D., 557,) *Walker v. Sewell* (2 L. D., 613).

Attorney-General Black said (9 Ops., 432), in discussing the legal status of certain official acts performed under color of right, or authority, that "the legality of his appointment can never be inquired into except upon *quo warranto*, or some other proceeding to oust him,

or else in a suit brought or defended by himself, which brings the very question whether he was an officer *de jure* in issue."

In *Walker v. Sewell* (supra) the question was raised on the authority of one Moore to receive an application in the absence of the register of the local office. The evidence showed that in fact Moore was not appointed as register's clerk at the time that he received the application, but that he was then in charge of the office, under the direction of the register, and authorized by him to act in his absence. The Department held that Moore was register's clerk *de facto*, "and that his acts as such, as respects third persons, have equal validity as though he was a clerk *de jure*."

Now, it would appear from the foregoing that when affidavits like those now under consideration are presented by an applicant for land, showing the oath to have been taken before an officer qualified under the law to administer the same, it is not competent for your office, or this Department, to inquire into the authority by which such officer exercises the rights of the office, as a preliminary necessary to be settled before accepting such affidavits.

It is to be observed that the official signature attached to the jurat in these cases is that of Theo. Muffley, clerk, "by R. C. Webster, deputy clerk;" so that the act of administering the oath and the attestation thereto is thereby made the act of the clerk, concerning whose authority to perform such acts there is no question, thus leaving the question of the acting deputy's right to have so done to be settled as between him and the clerk.

There does not appear to be anything in the case as submitted that would in any manner tend to impeach the good faith of the officer, or the parties that availed themselves of his services, hence, under the rule as above stated, the action of your office rejecting these affidavits was erroneous, and is therefore reversed.

PRACTICE—REHEARING.

WHITE *v.* DOHERTY.

It is incumbent upon the contestant to come to trial fully prepared to establish his charges, and a new trial will not be granted on his petition except for the most cogent reasons.

Acting Secretary Muldrow to Commissioner Sparks, May 22, 1885.

I have considered the application of Eugene White to have the papers in the case of Eugene White *v.* Hugh Doherty, involving homestead entry by the latter upon the SW. $\frac{1}{4}$ of Sec. 28, T. 135 N., R. 57 W., Fargo, Dakota, certified up for my supervisory examination and action.

After the notice a hearing was regularly had in the case before the register and receiver, who, pursuant to said hearing, dismissed the con-

test. Appeal was taken to your office, and the action below was on the 1st of July, 1884, affirmed. A new hearing, based upon allegations of newly discovered evidence, was asked for, and was denied by your office on the ground, in substance, that the proposed evidence was not new but merely cumulative. The proposition seems to have been simply to introduce additional witnesses in support of the allegations made in the affidavit of contest, filed in the former trial. From said refusal to grant a new hearing, an appeal was filed, which your office refused to recognize, holding that an appeal does not lie on a question of this character. Hence the petition for certiorari, which is now before me. After a careful examination of the same, in connection with your office decisions, I must conclude that no reasons are presented which would warrant my interfering in the action had.

The plea of incompetency of the attorney having charge of the case at the hearing, and that the evidence was incompletely presented on the side of contestant, while fully presented on the part of contestee, amounts to an admission that the weight of evidence in the case is on the side of contestee. It cannot, therefore, be consistently urged that the finding was against the evidence. The petitioner in this case was the attacking party—the plaintiff in the suit. The contest having been brought and the hearing had at his instance and on his motion, it was to be presumed that he would come to trial fully equipped and prepared to substantiate his charges and prove his allegations. It appears he did not do so. That he did not was no fault of the court. He did not appeal to the Department on the merits of the case as he might have done, but instead asked, and now asks, a new trial. He had his day in court in a suit brought by himself. Only the most cogent reasons would in good practice and in the interest of common justice warra t the granting of a new trial in a case like this.

Such I do not find in any statement made in the petition, and it is therefore dismissed.

PRE-EMPTION—SETTLEMENT.

*McAVINNEY v. McNAMARA.**

Acts of settlements performed upon land embraced within a homestead entry confer no legal claim during the existence of such entry.

A valid settlement may be made without residence, but residence must follow settlement within a reasonable time thereafter.

Secretary Teller to Commissioner McFarland, October 26, 1883.

I have considered the case of Thomas McAvinney v. Patrick McNamara, involving the SE. $\frac{1}{4}$ of Sec. 28, T. 102, R. 57, Mitchell, Dakota, on appeal by McAvinney from your decision of May 22, 1883. Each party filed declaratory statement July 8, alleging settlement May 8, 1882.

* Omitted from 2 L. D.

The tract was formerly embraced in the homestead entry of one Toole, which was canceled on the local records June 7, 1882. Both parties allege and prove certain acts which each claims as a settlement on the tract prior to cancellation of Toole's entry. But it is well settled that a homestead entry is an appropriation of the land covered thereby, pending which no pre-emption right can attach. Although one may do acts which, were the tract unappropriated, might constitute him a settler, the same acts give him no legal status during the existence of the former entry. If, however, a person is on the land claiming it as a pre-emptor when the former is extinguished, no new act of settlement is necessary to constitute him a settler, because as held in *Peterson v. Kitchen* (2 C. L. O. 181) his every day life is one continuous act of settlement, and there being no intervening time between cancellation of the former entry and his continued or new settlement, his right instantaneously attaches, and thus the rule that there must be some act of settlement subsequent to cancellation of a former entry to give the party pre-emption rights is satisfied.

Both your decisions which found in favor of McNamara, and that of the local officers in favor of McAvinney, are based on the alleged residence of the parties on the land prior to cancellation of Toole's entry. But as held in *McInness v. Strevell*, (9 C. L. O. 170,) residence is not essential to an original pre-emption settlement. There may be valid settlement without residence, but residence must follow settlement within a reasonable time thereafter. He who does some act on the land indicative of an intent to claim the benefit of the law and thus in fact becomes the first settler, has the prior claim, and not he who is the first resident. The question of first residence on the land is not therefore the essential point in this case, but who performed the first act of settlement.

The testimony shows that McAvinney erected a shanty on the land in February, 1882. It was most meagerly furnished and of doubtful inhabitancy. He occasionally visited it, and slept in it a few times, but in no fair sense was the land his actual residence. He did not cultivate any portion of it, nor make other improvements thereon prior to the twenty-seventh of June, twenty days after the cancellation of Toole's entry, when according to his own testimony he broke not exceeding one-half an acre. By other testimony this work was not done prior to July tenth, and did not exceed one twenty-third part of an acre. It also appears that McNamara erected a house on the land May twenty-ninth, which he thereafter continuously occupied and that he followed this act by breaking about six acres, commenced June thirteenth, which was prior to McAvinney's breaking.

McAvinney was not in my opinion a *bona fide* settler nor resident on the land at the date of cancellation of Toole's entry and in view of all the facts McNamara must be held the prior settler, and entitled to the tract as held by your decision, which is affirmed.

PRIVATE CLAIM.

WILLIAM GARVIN.

All patents for private claims sent to the local office for delivery should be delivered to some party having an interest in the land patented.

Assistant Commissioner Harrison to register, Gainesville, Florida, January 17, 1885.

I am in receipt of the papers on appeal transmitted here with your letter of the 30th of October last. The papers enclosed are the following:

1st. Certificate of the clerk of the Court of Brevard county, Florida, certifying that there were no conveyances of record in his office made by William Garvin, to any party or parties whomsoever.

2d. A certificate of the clerk of the court of Volusia county, similar to the above, that no conveyances from said Garvin were found of record in his office.

3d. Affidavits of W. T. Garvin and Jonathan C. Greeley, to the effect that W. T. Garvin is one of the heirs of William Garvin, deceased.

4th. A letter, dated November 15, 1883, from W. T. Garvin, requesting that the patent issued to William Garvin be delivered by you to L. G. Dennis.

5th. Appeal of L. G. Dennis, by his attorney, to this office, from your refusal to deliver the patent issued in favor of William Garvin.

In reporting this case you admit that the Garvin patent is in your custody; but that you refused to deliver the same to Mr. Dennis upon the papers presented. You also state that you informed Mr. Dennis that, in order to receive the custody of said patent, it would be necessary for him to file with the above mentioned papers a certificate of the judge of probate, of the county in which the land in question is located, showing that W. T. Garvin is one of the legal heirs of William Garvin, deceased, the patentee, accompanied by a duly-executed power of attorney authorizing him, Dennis, to receive said patent. You refer to the instructions given you on the 19th of August, 1878, as to the delivery of patents in cases similar to that of Garvin's.

These instructions directed you to invariably deliver all private land claim patents, transmitted to you from this office, to one of the three following parties, preference being given in the order named, namely, " (1) the party in whose favor the patent is issued, taking his receipt therefor; (2) the party claiming under the original grantee, as shown by an unbroken chain of title to be filed by you with the papers in the case for future reference; or (3) the party who shall file in your office a power of attorney from the patentee, or his legal representatives, authorizing such attorney to receive the patent applied for." These instructions were intended to govern your action, so that all patents for private

claims sent you for delivery should be delivered to a party having some interest in the land patented.

The patentee, Garvin, being dead, it should be shown whether he died seized of this land, whether he died testate or intestate, and also whether or not the party now seeking to obtain custody of said patent has a present interest in the land patented. The papers now before me on appeal, and upon which you based your action refusing to surrender said patent, do not show what disposition was made of the estate of William Garvin, the patentee, after his death, and do not show that W. T. Garvin has a present subsisting interest in the land patented; therefore your refusal to deliver said patent upon the evidence presented is sustained, and you will so advise the appellants.

REPAYMENT—RIGHT OF ENTRY.

JAMES McCORMICK.

The right to repayment for money paid on a bid for the privilege of making a timber culture entry is not saved because such payment was made under protest. In case of simultaneous applications to make timber culture entry, the right may be properly accorded to the highest bidder.

Acting Secretary Muldrow to Commissioner Sparks, May 21, 1885.

I am in receipt of your letter of March 30th last, enclosing application of James McCormick, for review of my predecessor's decision of January 3d last, denying his claim for repayment of money paid as highest bidder (of two simultaneous applicants) for the right to make timber culture entry of a certain tract of land in the Devil's Lake district, Dakota.

Counsel for applicant claims that the local officers acted without authority in submitting to the highest bidder the right to make timber culture entry, "as has been decided by the Hon. Secretary of the Interior on January 12, 1885, in case of *Downs v. McGee*" (3 L. D., 311).

The case of *Downs v. McGee* is not in point. In that case the Department decided that the local officers erred in submitting to the highest bidder two *different* tracts of land, one under the timber-culture law and the other under the homestead law, when an investigation would have shown, and did show, settlement and residence on the part of the homestead party seven months preceding. There is not a sentence in that decision that can be made to apply to the case at bar, unless forcibly wrenched from its connection with the remainder. True, in that decision my predecessor said, "There is no provision in the statutes for pursuing such a course," (i. e. awarding the right of entry to the highest bidder) "in entries of any class"—having reference, of course, to other than private entry, in which bidding is specially authorized by Sec. 2365 R. S. But he recognized the validity and propriety of "the regu-

lation of your office authorizing an award to the highest bidder in case of simultaneous applications to enter the same tract of land under the homestead law . . . where neither party has improvements on the land." By what other means can conflicting claims be decided in homestead cases when there are no settlement rights to be adjusted? *Helfrich v. King*. (3 C. L. O., pp. 19, 164.) In timber-culture entries, since ordinarily there are no settlement rights to be adjusted, the reason for the rule is equally manifest, and has been recently recognized in the instructions of the 8th instant respecting the lands in the Santee Sioux or Niobrara Reservation in Nebraska. (3 L. D. 534.)

McCormick claims that he has a right to repayment because the money which he bid for the privilege of making said timber-culture entry was paid under protest. This point was decided in the case of *Woodward* (2 L. D., 688). *Woodward* claimed, as McCormick now claims, "that he saved all his rights by the protest." But the Department held the contrary, because the protestant "did not proceed in his action;" holding that "to do so it would have been necessary for him to refuse to bid, and if his contest were dismissed, to appeal to your office; whereas he adopted an entirely different mode of settling the question, and paid over the sum named in order to acquire the right. There was no mistake of fact in the payment, for he might have appealed; he voluntarily paid the money to the local officers, with full knowledge of the facts."

Again, in the case of *Charles W. Price*, decided by my predecessor March 7, 1884, (2 L. D., 689,) it was held that the money paid for the privilege of making timber-culture entry, though paid under protest, was not a payment under compulsion, and the protest did not save any right of repayment.

The application for review is denied.

FORT BROOKE MILITARY RESERVATION.

ON REVIEW (2 L. D. 606).

As the questions raised by the motion for review are the same as those adjudicated in the decision and no additional evidence is offered the motion is dismissed. Attention directed to the provisions of section 2 of the act of July 5, 1884.

Acting Secretary Muldrow to Commissioner Sparks, May 21, 1885.

On June 14th last a joint motion was filed by the attorneys for the several applicants, for a review of Departmental decision, dated May 16, 1884, relative to the status of lands in the Fort Brooke Military Reservation, at Tampa, Florida.

In said decision, my predecessor, Secretary Teller, held that the act of August 18, 1856, (11 Stat., 87,) relative to the disposition of lands heretofore reserved for military purposes in the State of Florida, and the act of July 2, 1864, (13 Stat., 374,) incorporated in section 2364 of

the Revised Statutes, must be read together; that they furnish the rule for the disposition of military reservations in Florida; and that claimants are charged with notice of the whole law upon the subject.

It was also held that the filing of the plat in the district land office, without further instructions, did not foreclose further action by your office under provisions of said section 2364; that the filings and entries made on said reservation were premature, and that the decision of your office of December 17, 1883, refusing said applications, and the subsequent decision of January 22, 1884, holding for cancellation certain entries and filings made on said reservation, must be affirmed. The grounds set forth in said motion are almost identical with the questions adjudicated in said decision. No additional evidence is offered, or authorities cited, in support of said motion. Said decision appears to have been well considered, and a careful examination of the same fails to disclose any error therein.

The motion is, therefore, denied.

On the 17th ultimo M. D. Brainard, Esq., attorney for Frank Jones, one of the applicants, filed a letter in this Department, calling attention to the provisions of section 2 of the act of July 5, 1884, (Statutes at Large, 1883-84, p. 103,) relative to the rights of actual settlers upon said reservation. Said letter is herewith inclosed for your consideration and such action as in your judgment is warranted by said act, to which reference is made therein.

SIoux HALF-BREED SCRIP—PRE-EMPTION.

RENVILLE v. GIVENS.

Land upon which a pre-emptor has prepared the foundation and material for a dwelling-house and broken several acres is not subject to scrip location as "unoccupied."

Acting Secretary Muldrow to Commissioner Sparks, May 23, 1885.

I have considered the case of Julia C. Renville v. Nathaniel B. Givens, involving the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 32, T. 1 N., R. 26 E., Bozeman District, Montana, on appeal by Renville from your predecessor's decision of May 29, 1884, dismissing her contest.

Givens filed pre-emption declaratory statement for the NE. $\frac{1}{4}$ of said section September 5, alleging settlement August 31, 1881.

December 14, 1881, William Renville located Sioux half-breed scrip No. 3 on the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of said Sec. 32.

May 4, 1882, Givens gave the usual published notice of intention to make final proof on the 14th of June following.

When Givens appeared with his witnesses and submitted final proof, one Arthur H. O'Connor filed an affidavit, setting forth that he was attorney in fact of one Julia C. Renville, sole heir of William Renville, alleging bad faith and non-compliance with the law on the part of Givens, and asking for a hearing. A hearing was appointed to be held

August 29, 1882; but being interrupted by an interlocutory proceeding, was continued September 24, 1883.

At the hearing it was proven that in May, 1881, Givens laid the foundation for a house, and between that time and the date of his filing (August 31) plowed several acres of land. Between the last of August and the 14th of December (the date of the location of the half-breed scrip), he dug a well, hauled boards, joists, studding, etc., which he (being a carpenter) framed and piled together near the foundation before mentioned, preparatory to erecting a building. As there was but one mill in the vicinity, and that was constantly occupied in sawing timbers for the Northern Pacific Railroad Company, it was very difficult to procure lumber, and impossible to obtain doors, window-sash, or shingles, wherewith to put up his house that fall; but he did so as early in the following spring (March) as the weather would permit. During February he lived in a tent upon the tract; at no time had he any other home, nor did he at any time express, indicate, or entertain any other purpose than to take up his residence upon the land at as early a date as possible.

In this case there is no dispute as to the facts; contestant's attorney himself testifies to seeing the breaking upon the tract in the fall of 1881, and the lumber piled upon the spot where the house was afterward erected. There is but one question in the case as presented for my consideration, and that is a question of law: Is a tract of land upon which several acres have been broken, the foundation laid for a house, and as much lumber as could be obtained, prepared for its place in the building and piled together, but upon which the pre-emptor has not yet (within three months and ten days after filing his declaratory statement) taken up his actual residence—is such a tract subject to location of Sioux half-breed scrip, under the act of July 17, 1854, (10 Stat., 314,) which provides that such scrip may be located upon “unoccupied lands?”

In my opinion the tract in controversy was legally “occupied” at the time of the location of the scrip aforesaid, and the entry made therewith should therefore be rejected.

The decision of your office is affirmed.

ARSENAL ISLAND—REVIEW.

ROBERT CARRICK.

A decision by the head of a Department will not be disturbed by his successor except under different facts, a change of law, or other exceptional or anomalous circumstances.

Secretary Lamar to Commissioner Sparks, May 25, 1885.

On September 1, 1883, Robert Carrick made application to your office for the survey of an island in the Mississippi River, opposite the city of St. Louis, commonly called and known as “Arsenal Island,” for

the purpose of having the land placed in the market for disposal in accordance with the provisions of law and the regulations of the land office—he (Carrick) alleging settlement and improvement thereon and his qualification to pre-empt the same. After due notice to all parties interested or supposed to be interested, and upon due consideration, your office concluded that the title to said island was in the city of St. Louis, but, while rejecting Carrick's application, referred the matter to this Department for examination and instructions.

On May 16, 1884, my predecessor, Secretary Teller, after a full review of all the facts and the law touching the matter, while not committing himself as to the question of title, concurred with your office, and rejected Carrick's application. (2 L. D., 456.)

A motion for review of that decision was filed, on the ground that error had been committed in holding that the testimony showed the island to be a mere moving mass of alluvial deposit, from one end to the other; and with the motion were filed the affidavits of two civil engineers, who stated that from their personal knowledge the island had become permanent and fixed land. It was held that this testimony only had the effect of producing a conflict with that on file at the time of the former decision, and was not sufficient of itself to cause a reversal of the same on review; and further that inasmuch as the War Department, under the appropriation acts for the improvement of the Mississippi River, was operating upon the island, and it was unknown to what extent or for what purpose the Government might require the same in connection with the great public work about which it was engaged, it would be improper under the circumstances to order a survey. So the application for rehearing was denied by Acting Secretary Joslyn (2 L. D., 468).

On March 21, 1885, the attorney for Carrick filed another application for review, alleging no new matter for consideration further than that the Acting Secretary had denied said motion without the knowledge of counsel, or without hearing oral argument—for making which an opportunity is now asked.

The fact that the opportunity for an oral argument is now sought adds no force to the application, which after all is but an effort to obtain a review, not only of the decision of my predecessor, but of his refusal to revoke the same; and this, too, not on any new grounds or testimony, but on the bald assumption that error was committed in the conclusions arrived at.

It has been the well-settled practice, since as far back as 1825, to regard a subject once disposed of by the proper Executive Department as having been finally settled, except under different facts, a change of law, or other exceptional or anomalous circumstances. (4 Op. Atty. Gen., 341; 15 id., 315.) No circumstances are here presented which would warrant a departure from this wise and conservative rule.

Indeed were the application for review now presented for the first time it would be denied, for the sufficient reasons given by Acting Secretary Joslyn.

The motion is overruled.

CONTEST—PREFERENCE RIGHT.

KIRTLAND *v.* HUTTO.

The question of the right of a successful contestant to waive his preference right of entry is one with which the government has no concern.

A contest against a homestead entry based on want of residence must be in conformity with section 2297 of the Revised Statutes.

Acting Secretary Muldrow to Commissioner Sparks, May 27, 1885.

The case of Francis R. Kirtland *v.* Christopher C. Hutto has been considered, on appeal by Mrs. Kirtland from the decision of your office dated April 16, 1884, dismissing the contest.

Hutto made homestead entry No. 14,029 January 15, 1883, covering the SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$; NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ and S. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of Sec. 14, T. 6, R. 27, Montgomery, Alabama.

March 13, 1883, Mrs. Kirtland filed an affidavit, setting forth her residence on the tract for more than two years; that her husband abandoned her in December, 1882; that he relinquished their rights to the tract without her consent; and charged Hutto with not being an actual resident of the land. On these allegations a hearing was ordered by the local officers, at which both parties appeared.

The record of the case shows that Benjamin T. Kirtland, the husband of Mrs. Kirtland, contested homestead entry No. 6463 for the tract, made by Abram Reese January 22, 1875, which entry was canceled by your office January 11, 1883, and notice received by the local officers January 15, 1883.

Kirtland, instead of exercising the privilege of entry inuring to him under section 2 of the act of May 14, 1880, (21 Stat., 140,) by reason of the cancellation of the Reese entry, sold the improvements on the land to Hutto and executed a relinquishment of his claim to the tract.

On January 15, 1883, Hutto presented the Kirtland relinquishment to the local officers, and was permitted to make homestead entry of the tract.

The question of the right of Kirtland to waive his preference right is one with which the government has no concern.

No charge of fraud is made against Hutto in his connection with the affair, and there was no reason for citing him to a contest on a charge of want of residence for a period of less than two months subsequent to his entry. See Section 2297 of the Revised Statutes.

I affirm said decision.

PRACTICE—ORAL HEARING.

GEORGE T. BURNS.

Oral arguments in ex parte cases are not encouraged except in special cases and on good reasons shown therefor.

Acting Secretary Muldrow to M. C. Burch, Grand Rapids, Mich., May 27, 1885.

Referring to your letter of the 30th ultimo, in which you state that "yesterday, I sent you by mail a brief in the case of George T. Burns," and ask that you may have a reasonable notice of the time for the hearing of said case, in accordance with the letter of this Department, dated February 25, last, you are advised,

1st. That your brief has not been received.

2d. That oral hearings are governed by No. 110 of the Rules of Practice, and that in ex parte cases oral arguments are not encouraged, except in special cases, and good reasons shown therefor.

3rd. That in the letter from this Department, above referred to, you were advised, not that you would receive "notice of the time for the hearing of said case," but "that you will have ample time for preparation before the same will be reached in due course of business."

The case is now regularly reached, but action will be suspended therein for fifteen days, to enable you to forward a duplicate of your brief, or take such further action as may seem best to you.

SURVEY OF ISLANDS.

ANTHONY WYLAND.

In the survey of an island situated in a river due regard should be had for the rights of owners on either bank thereof.

Acting Secretary Muldrow to Commissioner Sparks, May 27, 1885.

I have examined the matter presented by your letter of the 21st instant, relative to the application of Anthony Wyland for the survey of an island situated in the Mississippi River, in Sec. 17, T. 28 N., R. 23 W., 4th Meridian, Minnesota, and said to contain about twelve acres. It appears the improvements thereon (a frame dwelling and three-fourths of an acre of ground cleared) were made by applicant; also that said island is about ten feet above high water mark and two hundred feet from the nearest shore. Due notice was served on the owners of the land opposite the island, since which nearly a year has elapsed and no protest has been filed. You state that no objection to the survey is known to your office, but no recommendation in terms is made.

The Department sees no objection to a survey as asked, and it may be made at your discretion.

It appears from your letter, and from the plats, that there is in the immediate vicinity of the island in question at least one other, unsurveyed. If any survey is to be made, it would be well to have it include all unsurveyed islands in the locality mentioned, which are properly subject to survey, due regard being had, under the rule laid down by the Supreme Court in the case of *Railroad Company v. Schurmeir* (7 Wall., 272,) for the right of owners of lands on either bank of the river.

APPEAL—HEARING; SETTLEMENT—RESIDENCE.

TURNER *v.* ROBINSON.

The appellant is estopped by his appeal from denying the jurisdiction of the Department to pass upon the whole record.

While an appeal may be taken from the refusal of the Commissioner to order a hearing, his decision will not be disturbed except on substantial grounds of error.

Settlement upon land covered by a homestead entry confers no legal right so long as the entry remains uncanceled.

It is no valid objection to residence that it was maintained in the upper story of a building erected for purposes other than residence.

Acting Secretary Muldrow to Commissioner Sparks, May 27, 1885.

I have considered the case of *Elias Turner v. Edward M. Robinson*, involving the right to the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 28, T. 27 S., R. 23 E., Gainesville, Florida, as presented by the appeal of Turner from the decision of your office, dated August 9, 1884, dismissing his contest against Robinson's homestead entry, No. 11185, covering said tracts.

The record shows that Robinson made entry on January 2, 1883.

On August 22, 1883, Turner initiated a contest against said entry on the ground of abandonment, and a hearing was duly held before the district land officers at Gainesville, Florida, on February 12, 1884, at which both parties appeared. The register and receiver, upon the evidence submitted, rendered their joint opinion that there was no evidence that Robinson had ever established a residence upon the land, and that said entry should be canceled.

On May 17, 1884, the register and receiver transmitted to your office all of the papers in the case with the statement that "an appeal has been filed which find enclosed."

The action of the local land officers was reversed by your office in said decision, upon the ground that the evidence clearly established the fact that Robinson commenced his residence within the six months required by law; that his temporary absences were satisfactorily explained, and that he intended in good faith to maintain his residence upon and im-

prove said land during all of the time that he was absent therefrom. Under date of September 22, 1884, Turner, through his counsel, filed in your office a motion for review of said decision of August 9, upon several grounds therein stated, and on September 26, same year, he filed an application for a rehearing before the district land officers. On October 13, 1884, your office denied both the motion and the application for a rehearing, and an appeal was duly taken from said original decision upon the following grounds:

1st, The Commissioner erred in reviewing the decision of the register and receiver, because Robinson failed to file an appeal therefrom.

2d, In holding that Robinson established and maintained a bona fide residence upon the land covered by his homestead entry.

3rd, In deciding that the testimony did not sustain the charge of abandonment.

4th, In refusing to order a new trial to show that Robinson had abandoned the land in question since the date of the last trial.

It appears from the record that a paper was duly filed in the office of the register and receiver that was treated by them as an appeal, and so considered by your office. It is true that said appeal is not as specific as the rules require, yet no objection was made to the filing thereof, nor was any notice given to Robinson to perfect the same.

Again, since Turner has appealed from the decision of your office, he is estopped from denying the jurisdiction of this Department to pass upon the whole record. *Griffin v. Marsh* (2 L. D., 28).

A careful examination of the testimony shows that the second and third grounds of error are not well taken.

Great stress is laid by counsel for the appellant upon the fact, that Robinson established his residence in the upper story of a building upon the land in question, which had been used some years before by the Masonic fraternity. The first story was used by the public for religious worship, debating exercises, and singing school gatherings.

That Robinson established his residence in the second story of said building prior to the expiration of the six months from the date of his entry, there can be no question. It was within the time prescribed by law. *Bennett v. Baxley* (2 L. D., 161); *Baxter v. Cross* (*ibid.*, 69).

It can make no difference that the house occupied by Robinson was placed there by the public and the upper story used by the Masonic fraternity. The Masons abandoned it long prior to Robinson's entry. No one was in possession of the building, and no one claimed to control or own that portion occupied by him for a residence. *Lansdale v. Daniels* (100 U. S., 113).

It is shown that Robinson is a single man; that he made said entry while on his way to the State of Georgia to visit his aged mother; that he was detained there much longer than he expected by her sickness and death; that he hastened back to his homestead claim and arrived

there a few days prior to the expiration of the time for commencing his residence thereon, without a dollar in his pocket; that he immediately went to work upon the land to improve it; and that his absences from the land were temporary, and for the purpose of earning an honest livelihood. It is not shown that Robinson did not at all times intend to return to the land, and his absence, teaching school and "boarding around" in the neighborhood, do not militate against the good faith of his residence. *Waldo v. Schleiss* (1 C. L. L., 234); *Edwards v. Sexson* (1 L. D., 89); *Sandell v. Davenport* (2 L. D., 157); *Clark v. Lawson* (*ibid.*, 149).

The fourth ground of error is equally untenable.

It has been uniformly held by this Department that the matter of hearings is confided to the sound discretion of the Commissioner of the General Land Office, and, although his refusal to order a hearing may be appealed from when it amounts to a denial of right, yet his decision upon that question will not be lightly reversed or set aside, except upon the most substantial grounds of error. *Guyselman v. Schafer et al.* (3 L. D., 517); *Leitner v. Hodge* (2 B. L. P., 291).

In the case at bar there was full opportunity for the contestant to present his testimony at the hearing and to cross-examine the witnesses of the claimant, and it is not pretended that there is any newly discovered evidence in the case. The refusal of your office to order a rehearing was correct. *Rancho Las Virgenes* (2 L. D., 345).

It is further insisted by the appellant that said decision should be reversed, for the reason that Turner went upon the land embraced in said entry and made valuable improvements under the advice of a special agent of your office.

It is well settled that a homestead entry segregates the land covered thereby, and that acts which would constitute settlement, if the land was unappropriated, can give no legal right so long as the entry remains uncanceled. *McAvinney v. McNamara* (3 L. D., 552). It was no part of the duty of said special agent to determine the result of the contest, and when Turner went upon said tract and made his improvements he did it advisedly and took his chances in the result of his contest.

If it be true that Robinson has abandoned said land since the initiation of said contest, I see no legal reason why Turner, or any other person, may not commence another contest, after the final determination of the present proceedings, and, upon a successful prosecution of the same, acquire a preference right to enter the land. *Houston v. Coyle* (2 L. D., 58).

A careful consideration of the whole record fails to show any error in the decisions of your office upon the merits of the case, and upon the motion for review and application for a rehearing, and they are accordingly affirmed.

*DISCONTINUANCE OF SUIT.*UNITED STATES *v.* HAWFORD.

Discontinuance of suit advised on the facts stated.

Assistant Secretary Muldrow to the Attorney General, May 28, 1885.

Your letter of 26th March last, inclosing a copy of the letter from the Solicitor of the Treasury, of March 14, 1885, together with a copy of the bill in equity in the case of the United States *v.* Hawford, pending in the U. S. Court for the Eastern District of Louisiana, was received and referred to the Commissioner of the General Land Office. I have the honor to inclose herewith copy of his report on the subject, under date of the 22d instant. He is of opinion that the suit against Hawford should be discontinued, in view of the facts that Hawford has died insolvent, and that the matter is now pending in the Court of Claims. In this opinion I concur.

*CONTEST—ENTRY.*McKIBBEN *v.* DONOVAN.MANGIN *v.* DONOVAN ET AL.

Where the contestant failed to appear at the hearing and the contest was dismissed, he thereby lost all right to proceed therein, a subsequent contest having intervened.

Two contests against the same entry at the same time cannot be recognized. No legal claim can be founded by settlement upon land covered by the timber culture entry of another.

Acting Secretary Muldrow to Commissioner Sparks, May 29, 1885.

I have considered the case of Charles H. McKibben *v.* Cornelius Donovan, involving the SW. $\frac{1}{4}$ of Sec. 23, T. 103 N., R. 71 W., Mitchell, (formerly Springfield,) Dakota, on appeal from your decision of November 20, 1884, favorable to McKibben. The appeal is brought not by Donovan, the defeated party to the contest, but by James G. Mangin, whose standing in the case will fully appear in the following recital.

Donovan made timber culture entry for the tract in question November 20, 1879.

McKibben having filed affidavit of contest, (together with application to enter,) charging abandonment and failure to comply with the requirements of the law relative to cultivation, and planting trees, seeds or cuttings, a hearing was ordered and had in January, 1884, pursuant to notice under the rules.

Donovan failed to appear, either in person or by counsel. The testimony submitted by contestant was considered and found by the reg-

ister and receiver to sustain the allegations contained in the affidavit of contest. A judgment of forfeiture was therefore entered against contestee, Donovan, from which judgment no appeal was taken. On November 20, 1884, your office approved the finding of the local office, and on the 9th of December following McKibben made entry under the timber culture law.

Thus much for the contest of record in the case of McKibben *v.* Donovan.

Now, as to James G. Mangin, the present appellant, it appears that with the letter of the register and receiver, transmitting the record in the McKibben-Donovan case, were enclosed certain *ex parte* affidavits, filed by Mangin to be forwarded. Among these is one by Mangin, (the others are filed as corroborative,) to the effect that he settled upon the tract June 8, 1883, built a house, broke thirty acres, and made other improvements involving altogether an expenditure of \$1,200; and that he has resided with his family thereon continually since.

He further states that on the day of settlement (June 8, 1883,) he initiated contest against Donovan's entry, and that due proceedings were had thereon to the day of hearing, when he (Mangin) failed to appear and submit testimony, the reason for such failure being that he had been informed by one Clark, a real estate agent, that his appearance was unnecessary; that by reason of his default the contest was dismissed; that he had no notice of said dismissal, until November 12, 1883; that on the next day (November 13) he presented at the local office another application to contest said Donovan's entry, when he found that the contest of McKibben had just been filed and that because of the pendency thereof his could not be recognized.

On the 8th of August, 1884, the register and receiver transmitted to your office several affidavits which had been presented by McKibben (including his own) intended to controvert many of the allegations made by Mangin, in the affidavits above referred to. As you have said, the affidavits filed in support of the allegations of Mangin and McKibben, respectively, were made by the same affiants, which fact would detract much from their weight, if they were to be considered in this connection. It is apparent, however, that their consideration can, under the circumstances, have no weight or influence in reaching a conclusion in the case as before me, and a reference to them is only useful by way of recital to show how Mangin comes to be in the case as an appellant.

In view of what has been said, the case resolves itself simply into this: Mangin, by reason of his default at the hearing on his original contest, lost all right which he might otherwise have asserted thereunder, and he does not now deny the correctness of the action dismissing said contest. The refusal of his second application on the ground of the pending contest of McKibben was also proper, as two contests against the same claim at the same time cannot be recog-

nized. The entry of Donovan was canceled, and properly so, on evidence furnished by contestant, McKibben, who thereby secured a preference right of entry.

The proceedings throughout appear to have been regular, and it is clear that under them Mangin can have no legal claim by virtue of his settlement and residence, since at the alleged date of settlement the land was appropriated by Donovan's entry, and upon its cancellation McKibben, by virtue of his contest and application, succeeded to a full right to enter, which right he promptly exercised. This entirely cut off any claim which Mangin might otherwise have had by virtue of his settlement. Any hardship which may inure to him is due wholly to his own laches in not pursuing the remedy which at one time he had in his hand, and might have made effectual, to wit, his contest against Donovan. It is not in the power of the Department to give relief in a case like this, where rights of other parties, under the law and regulations, have intervened.

The decision of your office is affirmed.

CONTEST—ENTRY—CANCELLATION.

SULLIVAN *v.* SEELEY.

DUDGEON *v.* SEELEY.

The local officers have no authority to cancel an entry except on the filing of a relinquishment under the act of May 14, 1880.

The finding of the local office, on a hearing, that an entry should be canceled will not effect such cancellation without the order of the Commissioner of the Land Office, although no appeal is taken from the decision of the local office.

Acting Secretary Muldrow to Commissioner Sparks, May 29, 1885.

On October 13, 1882, Elsie Seeley made homestead entry No. 10,004, Bloomington, Nebraska, for the NE. $\frac{1}{4}$ of Sec. 25, T. 5, R. 23, and on June 9, 1883, Nathan Sullivan filed contest against the same, alleging abandonment, etc. After hearing, on January 10, 1884, the register and receiver sustained the contest, recommending the cancellation of the entry. On January 24, 1884, there was filed in the local office a written withdrawal and dismissal of the Sullivan contest; and on the same day the papers in the case were forwarded to your office.

On February 26, 1884, J. A. Dudgeon applied to file declaratory statement on the premises; his application was rejected and he appealed. On June 19, 1884, your predecessor informed the register and receiver that, on their report, the contest of Sullivan *v.* Seeley was "closed," and that their judgment rejecting the declaratory statement of Dudgeon was affirmed. From this last decision the latter appealed.

On July 17, 1884, Dudgeon also filed contest against Seeley's entry, alleging abandonment, etc. Hearing was had and on October 7, 1884,

the register and receiver decided in favor of defendant, and Dudgeon appealed. Without action on this appeal, your predecessor forwarded the papers in that case to this office—thus both appeals are now before me.

It is insisted in behalf of the appellant that by the failure of Seeley to appeal from the action of the register and receiver, their judgment in contemplation of law became final; the entry canceled; the land reverted to the government without further action under Section 2297 of the Revised Statutes, and Dudgeon having presented the first legal application therefor, the same ought to have been received.

This contention is in entire conflict with the approved theory and settled practice which has for many years prevailed in the administration of the Land Department. From the time of the passage of the homestead law in 1862 down to May 14, 1880, it was uniformly held that the local officers had no authority, expressed or implied, to cancel an entry either directly or indirectly by judgment or findings in a contest or otherwise. On the latter date, Congress made an exception to this rule by enacting, that when a relinquishment was filed in the local office the land covered thereby should "be held as open to settlement and entry without further action on the part of the Commissioner of the General Land Office."

The language here used is in marked contrast with that contained in Section 2297 of the Revised Statutes, which was section 5 of the original act of 1862, and which merely provides that after proof of abandonment "to the satisfaction of the register . . . then and in that event the land so entered shall revert to the government."

Reading these two provisions, the implication is clear that Congress recognized the fact that where land had once been appropriated, the action of the Commissioner was necessary to restore it to the public domain, and, for reasons satisfactory to the legislative mind, it was determined to make an exception to this general rule, where relinquishment of the claimant was filed; therefore it was plainly said that such land should at once be "open to settlement and entry without further action on the part of the Commissioner." With this exception the aforesaid rule is unchanged to this day.

The procedure by contest to procure the cancellation of an entry closely resembles, in many respects, an ordinary trial by jury. Just as a jury find a verdict, "according to the evidence," in favor of plaintiff, so the register and receiver find the facts on which is based their recommendation for cancellation. As the court enters up or refuses to enter judgment on the verdict of the jury, so does the Commissioner act in relation to the findings of the local officers. In each case the finding is that of a tribunal "of competent, though limited, jurisdiction," in the language of counsel. But it can not be that the findings of the register and receiver, as claimed by him, any more than the verdict of a petit jury, "at the expiration of the time allowed for appeal, become final,"

and in effect a judgment. The findings of the register and receiver can no more effect the cancellation of an entry, *proprio vigore*, than the verdict of a petit jury can of itself authorize an execution—the one requires the vitalizing approval and order of the Commissioner and the other the formal judgment of the court, before the desired end is attainable. The final action of the Commissioner or the court may never be taken, and the findings of the local officers and the jury, alike, would be of no effect whatever.

Entertaining these views, and considering that the findings of the local officers in the Sullivan contest were not approved; and that the entry of Seeley was intact on the records, actually and legally, at the time of the presentation of Dudgeon's declaratory statement, I must hold that said application was properly rejected and affirm the judgment of your predecessor in that respect.

Other points were presented and argued, with much ingenuity and plausibility, which I do not deem it necessary to pass upon here, as after full consideration of them I have been brought to the above conclusion.

In regard to the contest of Dudgeon against Seeley's entry, the papers are returned that you may act in the case before the same is presented to me for review.

TIMBER CULTURE CONTEST—PRACTICE.

BOWERS ET AL. *v.* OLSON.

An affidavit of contest, of record, on which no action has been taken does not necessarily constitute a bar to the subsequent suit of another.

Where the contestant in his suit failed to properly describe the entry attacked, through misinformation derived from the local office, his rights were held to be not prejudiced thereby.

Acting Secretary Joslyn to Commissioner McFarland, August 29, 1884.

I have considered the case of Edward A. Bowers and Jacob W. Kraft *v.* John T. Olson, as presented by the appeal of Bowers from your decision of October 11, 1883, wherein you refused to dismiss the contest of Kraft against the timber culture entry of Olson for the S. E. $\frac{1}{4}$ of Sec. 18, T. 124, R. 60, Aberdeen, Dakota, and allow Bowers to proceed with his contest against said entry.

October 2, 1880, Olson made entry for the land described. November 28, 1882, Bowers filed an affidavit of contest in which the said tract was properly described, but the name of the entryman and the number of the entry were incorrectly stated therein, and at the same time he made the requisite application to enter said land. March 3, 1883, Kraft began a contest against the Olson entry, accompanied with an application to enter, and May 12, 1883, was designated for the hearing therein.

About April 20, 1883, Bowers filed in the local office a corroborated affidavit to the effect that prior to filing his affidavit of contest he in

person, at the local office, applied for information from the records as to the name of the party whose entry then existed upon said tract, and the number of said entry, such application being in writing and properly describing the land; that he received from a clerk in said office a written statement, purporting to be from the records, showing that "Nathan P. Lee" was the entryman, and that the number of the entry was "3665." That he accordingly relied upon such information, and prepared his affidavit of contest in accordance therewith. The notice of the contest thus begun was issued and its publication commenced, and he thereafter supposed his contest to be in all respects properly initiated, until he observed that the publication of his notice had been discontinued, when he learned that the proper name of the entryman was Olson, and that the number of the entry was 3666, and also learned of the intervening contest begun by Kraft.

On this statement of facts he asked that Kraft should be cited to show cause why his (Kraft's) contest should not be dismissed, and he (Bowers) be permitted to proceed on an amended affidavit of contest.

Acting on the affidavit of Bowers, the local office, April 23, 1883, issued notice to Kraft requiring him on May 12th, that being the day fixed for the hearing of his contest, to respond to the allegations of Bowers. This notice was duly served upon Kraft.

On the hearing Bowers fully established all that he had alleged with respect to his diligence in preparing the affidavit of contest and his subsequent acts in connection therewith. Kraft offered no testimony in response thereto.

The local office held that the misinformation was not to the prejudice of Bowers for the reason that on November 27, 1882, one Nickerson had begun a contest against said entry, which would have constituted a legal bar to the reception of Bowers' contest on November 28, and accordingly allowed Kraft to proceed with his contest. Bowers appealed.

On the evidence submitted by Kraft, the local office recommended the cancellation of Olson's entry.

It should be observed that the papers in the Nickerson contest do not appear with this case, hence the only information to be had concerning the history of that contest must be derived from the allusions thereto in the report of the local office with reference to this case.

In the receiver's letter of July 5, 1883, sending up the appeal, it is stated that the contest of Nickerson *v.* Olson was on the docket when Bowers applied for the information referred to in the foregoing, and that said "Nickerson's contest was withdrawn March 3, 1883, and Kraft *v.* Olson entered instead."

It does not appear that any steps were taken under the Nickerson contest to secure service of notice, or that notice ever issued therein.

On this state of facts it is evident that the only person on November 28, 1882, entitled to resist the alleged right of Bowers to contest Olson's entry was Nickerson, and that he, at the time Bowers applied for the

right to amend his contest affidavit, had withdrawn his contest, and thereafter had no rights that could be urged as against Bowers; and that from November 28, Bowers had the proper application on file to enter the land in dispute.

Therefore, when Kraft began his contest the land was covered by the application of Bowers, who, by such application, was entitled to proceed with his contest and clear the land of Olson's entry.

It does not dispose of Bowers' right to say that if he had received the proper information as to the name of the entryman and number of the entry, he could have made no use of it then. What he might have done had the facts been otherwise cannot be used against him now. He was entitled to receive what he had asked, and thereafter take such course to secure the land as he might deem best, with a full knowledge of all the facts. Such an opportunity, through the misinformation he received, was denied him.

Keeping in mind the fact that the application to enter is the statutory essential upon which rests the right to contest a timber culture entry, and that Nickerson has no rights that can be abridged by the allowance of Bowers' contest, it becomes apparent that Bowers should have received the benefit of his diligence, and, on the showing made by him, been allowed to proceed with his contest after securing due service of notice upon Olson.

Your decision is therefore reversed. The contest of Kraft *v.* Olson is dismissed, and Bowers permitted to proceed as indicated in the foregoing.

SWAMP LAND INDEMNITY.

STATE OF OHIO.

Memorandum respecting the legality of certifying the allowance of cash indemnity to the State of Ohio upon lists submitted by the Commissioner of the General Land Office—being the amount of purchase money for public lands sold by the United States between the swamp land acts of September 28, 1850 (9 Stat., 519) and March 3, 1857 (11 Stat., 251), upon due proof made by the State that the same were swamp lands within the meaning of the former act.

Assistant Attorney-General McCammon to Secretary Lamar, April 14, 1885.

By the act of September 28, 1850, the whole of the swamp and overflowed lands made thereby unfit for cultivation, remaining then unsold, were granted to the several States in which such lands were situated. The duty of ascertaining the character of the lands and furnishing lists to the Governors, as a basis for patent when requested to issue the same, was devolved upon the Secretary of the Interior. Much delay occurred in making such lists, and many sales and locations were entered upon

the books in favor of private individuals, disposing of lands actually swamp, owing to the fact that without examination either of the lands or the field notes of survey, it was impossible to make withdrawal of the same from market, and the operations of the land system could not be stopped by general suspension to allow the adjustment of this single grant.

To quiet the confusion of titles thus resulting, Congress by act of March 2, 1855, (10 Stat., 634,) authorized the President to cause patents to issue to the individual purchasers and locators, and granted the purchase money and equivalent certificates of location to the States for all or any portion of such lands which should by due proof be shown to have been within the descriptive meaning of the original act. This statute was renewed by act of March 3, 1857, which act also enlarged the original swamp grant by a confirmation to the States of all selections reported to the General Land Office prior to its passage.

Under these laws the right to claim indemnity has constantly been claimed by the States and conceded by this Department. A question arose as to whether or not the acts were retrospective only; which was decided affirmatively in accordance with the opinion of the Honorable Attorney General of 20th April, 1866 (11 Op., 467).

Upon the revision of statutes by act of June 22, 1874, the indemnity provision was in terms inserted in Section 2482 to the effect that "upon proof by the authorized agent of the State, before the Commissioner of the General Land Office, that any of the lands purchased by any person from the United States prior to March 2, 1855, were swamp lands within the true intent and meaning of the act entitled, 'An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits, approved September twenty-eight, eighteen hundred and fifty, the purchase-money shall be paid over to the State,'" etc., with provision for scrip indemnity, and further provision that the decision of the Commissioner shall be first approved by the Secretary of the Interior, as in the act of 1855. Sections 2483 and 2484 contain further provisions on the subject, including the confirmation of selections made prior to March 3, 1857.

A question arose upon this legislation as to the true limitation of the period for which indemnity could be claimed upon the disposals of swamp lands, in view of the insertion of the date March 2, 1855, instead of March 3, 1857, in Section 2482, re-enacting the indemnity provision. This was submitted to the Attorney General by Department letter of July 10, 1877; whereupon it was held by opinion rendered July 25, 1877, (15 Op., 340,) that proof might be received as well for the period between March 2, 1855, and March 3, 1857, as for that between September 28, 1850, and March 2, 1855, "notwithstanding the omission in section 2484 of that part of the act which granted the indemnity; that the right had "accrued" to the States prior to the revision, and "is saved by section 5597 of the Revised Statutes from

being affected" by the general repeal of omitted portions of statutes made by Section 5596.

The question is clearly discussed and I am of the opinion that it was rightly adjudged upon the reasons presented.

With respect to the manner of proof, two modes have been recognized, depending upon the election of the State and the sanction of the Secretary of the Interior as to which should be adopted. One was the examination of the original field notes of survey, noting the description of the land as returned by the surveyor with respect to its swampy character, and abiding thereby as a finality; the other permitting, in addition to the showing of the field notes, of an examination in the field by agents of the States and of the General Land Office, and the taking of the testimony of witnesses in the vicinity of the lands as to its condition at the date of the passage of the swamp land grant. By whichever of these modes the evidence was reached, the lists were prepared and patents issued where the lands were found vacant, and indemnity was certified in case of disposal within the period limited as heretofore recited.

The States of Michigan, Wisconsin, and Minnesota originally agreed to accept of the adjustment by field notes. Other States took by proof furnished by testimony of witnesses. In the long period which has elapsed, adjustments have been delayed by various causes—witnesses are dead or removed, who were familiar with particular localities—unsettled wildernesses have been reached and brought into condition for disposal concerning which no man can testify from personal knowledge in 1850. Consequently several States, which at the first proceeded to make partial selections upon testimony furnished, have recently elected to allow resort to the field notes, accept what is thus shown to be swamp, and relinquish all further effort to prove that any lands not thus described as within the grant ought to be included.

Among these are Alabama, Mississippi, and Ohio, the Governor of which last named State, by communication of 14th November, 1884, advised this Department that said State elects to abide by the examination of the field notes, and urged a speedy adjustment of all claims on that basis. On the 10th of February last, the Secretary of the Interior, concurring in the recommendation of the Commissioner of the General Land Office made on the 2d of December, 1884, advised him that such plan would be recognized, and authorized the settlement of the grant accordingly.

The legality of this mode is at this late date beyond question. In fact no doubt appears to have been entertained in the beginning with respect to it. Mr. Secretary McClelland on the 7th of July, 1855, (1 Lester, 552,) immediately following the passage of the indemnity act of 1855, after discussing the sufficiency of the "due proof" thereby required in certain cases, said:

"This principle is not to be regarded as extending to land *shown by*

the field notes to be swampy, your office having, it is understood, regarded such indications as conclusive."

January 22, 1858 (1 Lester, 559), Mr. Commissioner Hendricks said:

"In all cases where the plats and field notes represent the lands as swampy, or subject to such overflow as to render them unfit for cultivation, they belong to the State under the law and will be so certified."

Direct sanction to this view was given by Mr. Secretary Thompson in the California case January 17, 1859 (1 Lester, 567), and in the Wisconsin case August 1, 1859 (1 Lester, 571) wherein the reason of the policy with respect to the proper ascertainment of the legislative intent is specially considered.

I do not regard anything which may have subsequently been attempted in particular States, where the other mode of procedure was adopted in the first instance, as militating against the soundness of the policy or the legal construction thus fixed by the Department in this regard, and consequently am fairly of the opinion that on the whole question the law requires the certification of the allowances made by the Commissioner in favor of the State.

FORT MEADE MILITARY RESERVATION.—BOUNDARIES MODIFIED.

* * * * *

WAR DEPARTMENT,

Washington City, May 26, 1885.

To the PRESIDENT.

SIR: I have the honor to request that the Military Reservation of Fort Meade, Dakota Territory, declared by Executive order dated December 18, 1878, with boundaries, as announced in general orders No. 27, Department of Dakota, December 31, 1878, may be modified to embrace the following described tract of public land, viz:

Commencing at the flag-staff on the parade ground at Fort Meade and running thence north $2^{\circ} 18'$ west, seventeen thousand and forty-eight (17,048) feet to the initial point; thence north $89^{\circ} 18'$ east, five thousand one hundred and seventeen (5,117) feet to the northeast corner; thence south $0^{\circ} 55'$ west, thirty-two thousand five hundred and forty-five (32,545) feet to the southeast corner; thence south $87^{\circ} 50'$ west, ten thousand five hundred and sixty (10,560) feet to the southwest corner; thence north $1^{\circ} 10'$ east, thirty-two thousand four hundred and ninety-eight (32,498) feet to the northwest corner; thence north 86° east, five thousand two hundred and eighty (5,280) feet to the point of beginning.

The object of the proposed modification is to correct certain inaccuracies in the original description discovered by a survey made in

August, 1884, by Lieut. John Biddle, Corps of Engineers, Chief Engineer Office, Department of Dakota. A map of the Reservation, according to the survey of Lieutenant Biddle, is enclosed herewith.

I have the honor to be, Sir, with great respect, Your obedient servant,
 WM. C. ENDICOTT,
Secretary of War.

EXECUTIVE MANSION, *Washington, May 27, 1885.*

The within request is approved and the modification of the reservation is made and proclaimed accordingly.

The Secretary of the Interior will cause the same to be noted in the General Land Office.

GROVER CLEVELAND.

ACCOUNTS.

CIRCULAR.

Commissioner Sparks to special agents, May 27, 1885.

Much delay in auditing the monthly accounts of special agents of this office is caused by their failure to properly fill out and transmit the weekly report blanks with which they are provided. To obviate this difficulty and secure uniformity, you will be governed by the following instructions in making such reports:

For each day state in the proper column the day of the month, the day of the week, and the name of the place at which you then stopped or visited.

Under the head of "nature of business," state daily the time of departure from and arrival at each place visited, and mode of transportation (initials of railroad), and when using transportation requests state T. R., and the number thereof; also state, in brief, the object of the visit and the nature of the business transacted. (You must complete the work you are engaged upon, and dispose of all cases in which you have information in any certain locality before removing to another, and as far as possible so arrange your business as to avoid the necessity of frequent returns to the same place within short intervals.)

When investigating cases in the field, state the names of the parties to the cases and describe the land examined—by section, township, and range—each day. (You will make a special and full report of each case investigated at as early a day thereafter as practicable.)

When serving personal notices upon witnesses or claimants, state each day the names and residences of the parties so notified, and the case in which they are summoned to appear.

When in attendance in court or before a U. S. commissioner or before the register and receiver of a local land office as a witness or as prose-

ctor in any case or cases, state each day the names of the parties to the cases against whom you appeared. (Upon the termination of any case in which legal proceedings have been instituted you must *at once* make a separate report to this office stating the result of the trial.)

Important information which is to be a matter of record in any case must be made the subject of a special report.

Weekly reports must be transmitted *promptly* at the end of each week. They should not be made out and submitted as a mere matter of form, but every statement contained therein must be *absolutely correct*, and such as may be substantiated by statements appearing in other reports of special character.

You are as accountable for the proper use of the time for which you are paid by the Government as are the clerks in this office, and it is imperatively necessary that your weekly reports shall be so full and complete as to furnish satisfactory evidence that you have been constantly employed on official business during each day charged for in your accounts. *Per diem* and expenses will be disallowed for all time not so accounted for.

A failure to comply with any of the above instructions will subject your monthly accounts to suspension.

Approved.

H. L. MULDROW,
Acting Secretary.

EXPIRED PRE-EMPTION FILINGS.

CIRCULAR.

Commissioner Sparks to registers and receivers, June 4, 1885.

By official circular of April 2, 1881, (8 C. L. O., 8), it was ordered, in cases of homestead or preëmption claimants appearing to make final proof, whose claims should be found to be covered by preëmption D. S. filings, shown by the records *prima facie* to have expired by lapse of time, that you should give notice to the parties representing the D. S. filings, allowing them sixty days in which to show cause why their filings should not be canceled and the claims of the homestead or preëmption applicants completed; and if no response should be received within seventy days from date of your notice, that they should be held to admit the invalidity of their claims, and you should proceed to cancel their filings on your records and report the facts, with dates of cancellation, to this office.

The present practice in such cases is that homestead and preëmption claimants, desiring to perfect their claims, shall give public notice of their intention, pursuant to the act of March 3, 1879, which affords opportunity to adverse claimants, if any, to make objection. It is also

held by the Department that expired D. S. filings are to be regarded as abandoned claims, not requiring to be formally canceled on the records. (University of Alabama case, 3 L. D., 315.)

In view of the foregoing, and the ravages of grasshoppers, that gave occasion to the circular in question, having since abated, the delay and labor required for giving the notices and otherwise carrying out the instructions mentioned, at the public expense, are no longer considered necessary or proper; and said circular is therefore hereby rescinded, and the proceedings therein enjoined dispensed with. Instead thereof, in any such case in which the claimant, whose filing appears to have expired, shall have filed the prescribed notice of intention to claim the benefit of the grasshopper extension acts, (see page 10, circular of March 1, 1884,) you will forward such notice, with the other papers, to this office, that it may be duly considered before final action had.

Approved.

H. L. MULDROW,

Acting Secretary.

MILITARY RESERVATIONS.

FORT SULLIVAN.

A military reservation acquired by purchase within a State having no public lands, and placed under the control of the Secretary of the Interior in accordance with the provisions of the act of July 5, 1884, should be disposed of in the manner therein provided.

Acting Secretary Muldrow to Commissioner Sparks, June 4, 1885.

By act of July 5, 1884, Chapter 214, it is provided that whenever a military reservation, or any part thereof, shall become useless for military purposes, the President shall place the same under control of the Secretary of the Interior for disposition as therein provided.

On July 24, 1884, by direction of the President, the Secretary of War turned over to your office for disposal under said act a number of military reservations, and among them Fort Sullivan, Maine.

By letter of April 10, 1885, you ask, in view of the fact "that there never were any public lands in that State (Maine) . . . whether or not said act (July 5, 1884,) should be so construed as to authorize the transfer of the fort in question, or any fort or military reservation on lands outside of the public land states or territories."

Fort Sullivan is located at Eastport, the southeast corner of Maine, and comprises within its present limits about twelve and one-half acres, which were purchased by the United States at different times.

Prior to May 1, 1820, the purchase of land for the purposes of fortification was left to the discretion of the Executive, restricted by the general appropriations made and the necessities therefor. These ap-

appropriations were sometimes in the annual bills for "the support of the military establishment," and sometimes in bills "for fortifying the ports and harbors of the United States," by which sums in gross were appropriated, and rarely naming any place where they were to be expended.

During the existence of the "Embargo," which was laid by the act of December 22, 1807, (2 Stat., 451) these appropriations were frequent and liberal, aggregating from January 8, 1808, up to June, 1809, about two millions of dollars.

The fort seems to have been established in 1808, long before the admission of Maine into the Union as a state, and the first purchase of land therefor was made June 2, 1809, when three acres were bought from John and Rebecca Clark, and paid for, it is presumed, out of money appropriated as above, as there was no specific appropriation for the same.

By act of May 1, 1820, (3 Stat., 567) it was provided "That no land shall be purchased on account of the United States, except under a law authorizing such purchase." Thereafter special authority was given and appropriations made for the purchase of the other tracts which now constitute Fort Sullivan.

By act of March 2, 1827, (4 Stat., 217,) was appropriated the sum of \$1800, "for purchase of house and lot of land at Eastport, Maine, required for garrison duty at that post." Under this act was purchased April 3, 1827, the lot from John Clark and William F. Penniman for \$650. By act of May 14, 1834, (4 Stat., 674,) was appropriated \$3,300, "for the purchase of land adjoining Fort Sullivan, Eastport, Maine," and the property of Erastus Richardson was bought for that sum on August 21, 1834. By act of July 2, 1836, (5 Stat., 78,) the sum of \$3,750 was appropriated, "for the purchase of land adjoining Fort Sullivan and the buildings thereon." Under this act was made the purchase, October 3, 1836, from Charles Perry, for \$1500, from Juda Dana and others for \$1500, and from Jesse Gleason, on November 15, 1836, for \$750.

The United States having recovered judgment against one Jonathan Bartlett, issued execution and by virtue thereof became the owner of certain lots adjoining the Fort, which, on application for that purpose by the Secretary of War, were by order of the President, on April 7, 1831, reserved from sale and annexed to the Fort, in accordance with the provisions of the act of April 28, 1828, (4 Stat., 264.)

It is thus seen that all the land within the Fort Sullivan site or reservation belongs to the United States absolutely by right of purchase, and in this respect does not differ from the other lands generally known as the "public domain" some of which were bought from foreign powers and some were ceded by the original thirteen States, and a large tract bought from the State of Texas. But the estate of the Government in

all the lands is the same, being allodial or absolute, and its title is, in contemplation of law, one acquired by purchase.

There is then no difference in legal effect in the mode by which the title to the land covered by the site of Fort Sullivan was acquired and that by which what is generally called the "public domain" was acquired—it all bears exactly the same relation to the government, who is the trustee for the whole people.

There ought not then to be a doubt that a "military reservation," in official terminology, can be on lands belonging to the government and located elsewhere than in what you designate as "the public land states and territories." No reason to the contrary is presented by you and none suggests itself to me. The title by which the lands are acquired is the same in the one place as the other, the estate in them the same, they are excepted by the same power from the operation of the same laws, and are alike dedicated to the same purpose, and I am clearly of opinion that Fort Sullivan properly comes within the term "military reservation" as used in the act of July 5, 1884.

But this matter is not left alone to me to determine.

By proclamation of July 22, 1884, the President directed that Fort Sullivan with other military reservations be placed under the control of the Secretary of the Interior, as provided in said last mentioned act, they having, in his opinion, become useless for military purposes.

The above proclamation is a full and complete answer to your inquiry, which is thus formally and officially determined by the Chief Executive; and which determination is not to be questioned by any of his subordinates. He thus declares that Fort Sullivan, though not within "the public land states and territories," is "a military reservation" within the meaning of the act of Congress and is to be disposed of in accordance with its provisions.

No further action, on the part of the President or Secretary of War, is needed in order to inaugurate proceedings under the act of Congress as to said military reservations; but it becomes the duty of this Department to proceed to dispose of the same. You will observe that all of said land must be disposed of as provided in the act of July 5, 1884. You will, therefore, prepare proper regulations for putting in operation the machinery thereby provided to accomplish that end, and when the mode of procedure is formulated you will transmit it to me.

Herewith are sent copies of deeds from the within named parties for the tracts purchased from them respectively; also copy of Executive Document No. 34, transmitted by the President to the Senate January 7, 1884, in which will be found the history of the acquisition of the Bartlett tract, also a plat of the whole reservation; also a report of May 9, 1885, by the Acting Chief of Engineers, U. S. A., in relation to the title to Fort Sullivan, and a copy of the President's proclamation of July 22, 1884,—all of which papers were received from the Secretary of War.

INDIAN HOMESTEADS.

INSTRUCTIONS.

The proviso in the third section of the act of January 18, 1881, limits annuity payments to such of the Wisconsin Winnebagoes as bring themselves within its terms in the matter of entering or selecting land for a homestead.

Acting Secretary Muldrow to the Commissioner of Indian Affairs, June 4, 1885.

I have considered your letter of the 3rd instant requesting to be instructed whether in making an annuity payment to the Winnebago Indians of Wisconsin under section 3, of the Act of January 18, 1881, (21 Stat., 315), "a Winnebago is found who has been overlooked at the previous payment (and is now enrolled for the first time), it is required by the 2nd section of the Act of January 18, 1881, and in view of the Act of February 21, 1863, (12 Stat., 658)—that he or she first take up or select a homestead or is a member of a family, the head of which has done so; or, in other words shall this and future annuity payments be made to these Indians without regard to the requirements of the proviso in reference to homesteads in section 2 of the Act of July [January] 18, 1881?"

The law of January 18, 1881, referred to was enacted for the special purpose of providing for a re-adjustment of certain funds of the Winnebago tribe of Indians, and with special reference to securing to those Winnebagoes who had become permanently located in the State of Wisconsin their proper share of said funds.

Section 1 of said Act provides for separate census lists, one of those Winnebagoes in Nebraska and one of those in Wisconsin. Section 2 provides for the adjustment and pro rata expenditure of funds therein specified for the benefit of the Winnebago Indians in Wisconsin, on the basis of the census taken as required by section 1 of the act, with, however, the following conditions:

Provided, That before any person shall be entitled to the benefits accruing under this act, it shall be made to appear that the person claiming its benefits, or the head of the family to which such person belongs, has taken up a homestead in accordance with the said act of March third, eighteen hundred and seventy-five, or that, being unable to fully comply with the said act by reason of poverty, he or she has made a selection of land as a homestead, with a bona fide intention to comply with said act, and that the money applied for will be used to enter the land so selected, and for the improvement of the same."

The right to share in the pro rata division of future distributions of annuities required to be made by section 3 of the act is clearly one of the "benefits accruing under this act;" therefore before such payment

can be made the party claiming it, if found otherwise entitled thereto, must first comply with the conditions prescribed in the law as laid down in the proviso above quoted. Such compliance is clearly required by both the spirit and the letter of the law.

PRACTICE—CONTINUANCE.

HICKS v. BARRUM.

A motion for continuance filed by contestee after the submission of the contestant's testimony and part of the contestee's, and without setting forth the facts expected to be proved by the absent witnesses, was properly overruled.

Acting Secretary Muldrow to Commissioner Sparks, June 5, 1885.

I have considered the case of Henry M. Hicks v. James R. Barrum, involving the right to the SE. $\frac{1}{4}$ of Sec. 2, T. 4 N., R. 19, W., Bloomington land district, Nebraska, as presented by the appeal of Barrum from the decision of your office, dated May 12, 1884, holding for cancellation his homestead entry No. 9,799 covering said tract.

The record shows that said entry was made May 6, 1882. The affidavit of contest charging abandonment and failure to establish his residence upon said tract for more than six months from the date of said entry, was filed in the district land office on November 9, 1882, and on the same day notice was issued that a hearing would be held before the register and receiver on January 10, 1883, and personal service of the same was made on the defendant on November 14, 1882. On the day set for trial the contestant, appeared in person and with counsel. The defendant did not appear in person, but was represented by his attorney.

It appears that after the contestant had introduced his testimony and the witnesses testifying in his behalf had been examined by the defendant's counsel, and after the witness for the defendant had testified, counsel for the defendant filed an application, dated January 8, 1883, that a commission issue to take the deposition of the defendant and the testimony of three other witnesses, and counsel further asked that a continuance be granted to enable him to procure said testimony. Said application is verified by the defendant and alleges that he and Susan C. Barrum are temporarily residing in Hastings, Adams county, Nebraska, more than fifty miles from said tract, and that on account of sickness and want of means he and his witnesses are unable to attend said hearing.

The register and receiver overruled said application and motion, to which ruling the counsel for defendant excepted. He offered no more testimony, nor did he state what he expected to prove by his absent witnesses, but immediately filed an appeal from the action of the register and receiver in overruling said motion and application. On No-

vember 11, 1883, the next day after the filing of said appeal, the district land officers rendered their joint opinion that "with the exception of an observation or looking over the tract November 6, 1882, and the plowing of a few furrows on the 7th of November, 1882, the defendant has not resided upon nor cultivated said tract since date of entry," and they recommended that said entry should be canceled.

On appeal, your office affirmed the decision of the district land officers, on the ground that they were correct in their findings of fact, and that no error was committed in overruling said application and motion, because the same did not comply with the rules of practice.

Only two grounds of error are insisted upon by the appellant.

1st, Error in not remanding the case to the local office to allow the defendant to introduce further testimony in his behalf.

2d, Error in not dismissing said contest.

It is shown that the defendant was personally served with notice and had ample time to prepare for trial.

No proper showing was made for a continuance as required by Rule of Practice No. 20, nor was the contestant given an opportunity to admit what the absent witnesses would testify if present as required by Rule No. 22.

Again, the counsel for defendant made no motion for a continuance until after the testimony for both parties had been submitted, nor was the application for said commission presented before the trial was had. It is not pretended that the counsel for defendant was surprised at the testimony for the contestant, or that his own witness had in any way deceived him. The defendant was denied no right, and a careful examination of the record fails to disclose any error therein.

The decision of your predecessor is accordingly affirmed.

HOMESTEAD ENTRY—RESIDENCE.

INSTRUCTIONS.

An entryman who can show four years of military service may not make final proof until after residence and cultivation for a period of one year.

*Commissioner Sparks to the register and receiver, North Platte, Nebraska,
June 5, 1885.*

I am in receipt of your letter of the 20th ultimo, asking if a party who has four years military service can make proof one year from date of entry, notwithstanding the fact that he has only maintained an actual residence on the land during the six months preceding the date of proof.

In reply I have to inform you that a party making a homestead entry, who can show four years military service will be required to reside

on and cultivate the land entered for a period of one year before making proof.

Section 2305 of the Revised Statutes provides that "no patent shall issue to any homestead settler who has not resided upon, improved and cultivated his homestead for a period of at least one year after he shall have commenced his improvements."

SWAMP LAND INDEMNITY.

THE STATE OF OHIO.

Cash indemnity for swamp lands sold during the period intervening between the passage of the acts of September 23, 1850, and March 3, 1857, may be allowed, and the field notes of survey on file in the General Land Office are sufficient evidence as to the character of the lands sold.

Attorney-General Garland to Secretary Lamar, May 6, 1885.

I return herewith the two statements of account between the United States and the State of Ohio, which accompanied your letter of the 21st ultimo, showing amounts found due that State by the Commissioner of the General Land Office as cash indemnity for swamp lands sold during the period intervening between the passage of the swamp land acts of September 28, 1850, and March 3, 1857; and in reply to your inquiry, whether the case presented in these statements authorizes your approval of the accounts, I have the honor to state that in my opinion such approval is fully warranted thereby.

Two points only seem to call for consideration in connection with these accounts, one of which relates to the period of the sales, the other to the proof relied upon to determine the character of the lands sold.

In regard to the latter point, it appears that the field notes of the public surveys on file in the General Land Office were resorted to and deemed sufficient. The evidence afforded by such notes, in this class of cases, was early regarded and accepted by the Land Department as satisfactory, and it is, perhaps, the most satisfactory of any now obtainable for the purpose of determining whether lands were swampy at the passage of the swamp land act of 1850 and covered by the grant thereby made.

The former point involves the question whether, in view of section 2482 Revised Statutes, sales of swamp lands made subsequent to March 2, 1855, and prior to March 3, 1857, are (as they were under the law in force previous to the Revision) authorized to be included in the account. Respecting this question, I beg to refer to an opinion of one of my predecessors, dated July 25, 1877, (15 Opin., 340,) which covers the same subject, and in the conclusions of which I concur.

TIMBER CULTURE—PLANTING; PRACTICE—DEPOSITIONS.

HARTMAN *v.* LEA.

Where the requisite breaking and planting were done within the proper time, but the seeds so planted failed to grow, it was held that the entry should not be forfeited. Depositions taken without the required notice will not be considered.

Acting Secretary Muldrow to Commissioner Sparks, June 10, 1885.

I have considered the case of Fred. Hartman *v.* Washington W. M. Lea, involving the NE. $\frac{1}{4}$ of Sec. 24, Tp. 11 N., R. 17 W., Grand Island district, Nebraska, on appeal by Hartman from your office decision of December 17, 1884, dismissing his contest against Lea's timber culture entry of the tract.

Lea made timber culture entry No. 2574 September 10, 1879, agreeably to the provisions of the act of June 14, 1878, (20 Stat., 113.)

Hartman initiated contest against the entry November 13, 1883, alleging generally Lea's failure to break and plant as required by law, and especially that there were not more than six trees dead or alive upon said claim.

Citation having duly issued, hearing was accordingly had January 11, 1884, whereat contestant appeared by attorney, and defendant in person and by attorney, who moved, however, to suppress and expunge from the record the depositions which had been taken December 29, 1883, (under a commission issued by the register November 23d preceding,) in behalf of contestant; upon the ground that a copy of the interrogatories had not been served either upon him or his attorney. The register and receiver having overruled this motion he excepted to their action, but nevertheless proceeded to trial upon the merits. Upon the testimony thus adduced the register and receiver decided that although contestant had sustained his allegation touching the number of trees growing upon the tract, there had been, nevertheless, sufficient breaking thereon to evidence the defendant's good faith in the premises, and that this contest should be dismissed. Wherefore contestant having duly appealed from said decision, your office affirmed the same.

Now, as touching the point of practice raised by your office decision, I concur in the opinion that it was error in the register and receiver's overruling defendant's motion to expunge contestant's depositions from the record. Under the rules, such testimony was incompetent. Rules 23 and 24 of Practice expressly and explicitly prescribe certain regulations as conditions precedent to the issuance of a commission to take depositions. The record fails to discover that such regulations had been complied with by or in behalf of contestant. Hence the motion should have been granted and the depositions in question excluded as of course.

The testimony regularly adduced at the hearing can therefore alone

be considered as containing evidence, if any, touching Lea's compliance or failure to comply.

Your office affirmed the register and receiver's decision upon the ground "that while it is proved, however, as alleged, that there were not more than five or six trees growing on the land when contest was begun, (November 12, 1883,) it is nevertheless shown that the requisite number of tree-seeds were planted in the spring of 1882 and 1883, but that most of them failed to grow, because, the defendant testifies, he 'thinks the seeds were not good, yet he thought them good at the time.'"

I affirm said decision.

FIVE PER CENT. EARNINGS KANSAS PAC. RY. CO.

UNION PACIFIC RY. CO. *v.* U. S.*

In determining the amount due the government from the subsidized portion of road the mileage basis is accepted for the purposes of the pending case.

Secretary Lamar to Attorney-General Garland, June 13, 1885.

In response to your inquiry by letter of the 1st instant respecting the counter claim of the United States for five per cent. of the net earnings of the Kansas Pacific Railway in the suit pending in the Court of Claims between the Union Pacific Railway Company and the United States, I enclose a copy of the report of the Commissioner of Railroads, dated the 5th instant.

He states that the subsidized portion (about 394 miles) of said road earns proportionately more per mile than the other portion (about 244 miles), and the accounts of the whole road should be, but have not been, except for the years while in the hands of a receiver from 1876 to 1879, so kept as to show the actual earnings of these separate portions. He further states that a computation under the administration of his predecessors for the years mentioned showed an excess of about forty-one per cent. over the *pro rata* of the mileage earnings of the whole road taken as an entire line, which percentage was up to the year 1878 added to the *pro rata* mileage, and that such addition was agreed to by the company as late as April 1, 1880, as a proper basis of settlement, as appears by the exhibits referred to in his report.

The letter of Commissioner McCammon to Sidney Dillon, Esq., President of the company, of date November 28, 1881, recites this acceptance, but states that upon motion of the United States Attorney to amend the petition in the U. S. Court in Kansas so as to include the settlement agreed upon, the company refused to consent to the rendition of judgment on that basis.

The Commissioner thus summarizes his conclusions: "Since 1879

*Judgment was subsequently rendered in accordance with the suggestions herein made.

the mileage method has been used because the accounts of the two divisions of the road have not been kept separate. It is understood in this office that Mr. Dillon and Mr. French adopted by verbal agreement, in 1881, the mileage method.

“ ‘The net earnings liable to the claim of five per cent. are only those produced on the first $393\frac{1}{6}$ miles,’ and those net earning cannot be ascertained by mixing the accounts of the aided and non-aided portions of the road and taking an average, as has been done. It is certain that the accounts of the railroad should be so kept as to make it practicable to separate the net earnings of the two portions, and ‘establish by evidence the actual earnings of the aided portion.’ To do so, however, in this office, would involve great labor for which the present force is entirely inadequate and necessarily consume much time, and it is questionable whether the difference between the amount to be so obtained and that produced by insisting upon the forty-one per cent. basis would justify such inquiry. I suggest that the company be required to so keep their accounts as to show distinctly the net earnings of the subsidized portion of their road.”

In view of these facts and suggestions the question becomes one of considerable difficulty and delicacy. The Supreme Court in *U. S. v. Kansas Pacific Railway Company*, (99 U. S. 455,) respecting this identical matter, said: “But the net earnings liable to the claim of five per cent. would be only those produced on the first $393\frac{1}{6}$ miles, or if these cannot be ascertained, then a *pro rata* amount of the whole net earnings of the road.” From this I understand that the actual production of the subsidized portion is clearly declared to be the proper basis. The alternative *pro rata* method is only to be resorted to in case the true production of the part cannot be ascertained. But how ascertained? From the accounts as rendered and adjusted, or by new accounts and adjustments for which perhaps the necessary force has not been provided by the annual appropriations? Say that it was the duty of the Company to furnish separate accounts, and the question recurs whether or not the government has required it to be done, or even insisted upon making the adjustment upon that basis. The record is certainly very confusing, and the fact remains that in the beginning in both suits it was not made an issue, and has only been sought upon the eve of judgment by petition for leave to amend—substituting, not actual results, but a percentage to be added to the *pro rata* first sued for or claimed.

Upon the whole, considering the ascertainment of actual earnings in this suit up to the close of the period fixed as practically beyond reach under existing circumstances, I am inclined to recommend that the mileage basis be accepted for the purposes of the pending case, as a final judicial determination to that date, but with the distinct understanding that for all subsequent adjustments the government will insist upon actual earnings of $393\frac{1}{6}$ miles, and will require such account to be rendered as will show such earnings month by month as the same have accrued or shall hereafter accrue.

RAILROAD GRANT—DEPOT GROUNDS.

UNION PACIFIC R. R. CO.

An application for additional lands under section 2 of the act of July 1, 1862, should be accompanied by an explicit showing as to the necessity of such land to the company in the operation of its road.

Acting Secretary Muldrow to Commissioner Sparks, June 13, 1885.

I have before me the request of Hon. John F. Dillon on behalf of the Union Pacific Railway Company for a reconsideration of the departmental decision in the matter of the application of said company of March 21, 1883, for additional lands for railway purposes at Fort Wallace, Kansas.

April 4, 1883, your office forwarded to this Department an adverse report on the aforesaid application, and acting thereupon my predecessor, under date of April 6, 1883, informed the company that its application was denied. May 22, 1883, on the application of the company for a rehearing, my predecessor directed your office to inform the president of said company "that the Department requires a specific showing of the necessity of not to exceed one quarter section for reservoir purposes, and another quarter section for other purposes, the whole in no contingency to exceed one-half section and that quantity only on the most explicit proof of its necessity. A new plat should be furnished you reduced to the limits herein stated.

June 2, 1883, your office returned to the company the plat it had filed with its original application, accompanied with a copy of the departmental letter of May 22.

The company did not comply with the above requirements, but, on December 4, 1883, addressed a letter to the Department with reference thereto, which in effect was a showing on behalf of the company why said requirements should be waived by the Department, it being alleged therein that the land desired was of no agricultural value, upon which, however, "vicious and lawless persons" from time to time located and against whose debauching influence it was desired to protect the employés of the company, numbering with their wives and children some two or three hundred people. "The company wants the control of it (the land), so that it may be fenced and people kept off who are not employés of the company. It is only common prudence in the company to so secure itself as to prevent the sale of whiskey within the reach of its employés," etc. Other reasons, akin to those above cited, were also urged on behalf of the original application.

The claim of the company is under authority of section 2 of the act of July 1, 1862, (12 Stat., 489,) which grants the right of way "to the extent of two hundred feet in width on each side of said railroad, where it may pass over the public lands, including all necessary grounds for

stations, buildings, workshops and depots, machine shops, switches, side tracks, turn tables and water stations." It was in accordance with the above that my predecessor required the company to furnish explicit proof as to the necessity of the land to the company in connection with its operation of the road.

As the application now stands before the Department, there is practically nothing presented upon which action can be taken. No plat appears with the papers, nor statement showing how much land is desired, or the description of said land, and the uses to which it is proposed to be dedicated beyond what is herein shown. It is therefore apparent that further consideration of this matter while in its present condition can result in no conclusion more favorable to the company than that already announced by my predecessor.

The motion is denied.

PRACTICE.

BIDWELL ET AL. *v.* BECKER.

Orders for continuance should be properly noted of record.

One who, with notice, fails to present his claim at the proper time will not be subsequently treated as an adverse claimant.

Though a portion of the testimony is not properly authenticated it is under the circumstances entitled to consideration.

Acting Secretary Joslyn to Commissioner McFarland, January 16, 1885.

I have examined the record called for by departmental letter of August 5, 1881, in the case of Franklin B. Bidwell *v.* Nicholas Becker, involving the SW. $\frac{1}{4}$ of Sec. 34, T. 101 N., R. 61 W., Mitchell, Dakota.

Becker made homestead entry for the tract June 23, 1881. His entry was contested November 21, 1884, by W. N. Blackman for abandonment. Upon his allegation that the whereabouts of the entryman was unknown, he was allowed to give notice by publication. January 27, 1883, was set for trial, and a continuance to March 27, 1883, was granted on the request of some one, not named, representing himself as attorney for Blackman. The reason given for asking continuance was that the time for giving notice had been consumed in efforts to get personal service on Becker, and the reason given why the request was made by personal application of attorney, rather than by the contestant himself was that he (the contestant) was not available to make written application or affidavit for continuance.

The manner of noting the continuance on the records in the local office was to say the least peculiar, and should be discountenanced. It was done by erasing from the back of the affidavit of contest the abbreviation "Jany.," and inserting in lieu thereof the word "March," so

to make the date of hearing read March 27 instead of January 27, 83.

Between these two dates, viz., on the 10th of March, one Henry Armrecht applied to contest Becker's entry, charging abandonment. His affidavit of contest was received, but was subsequently rejected and turned on account of conflict with the pending contest of Blackman. When the 27th of March arrived, Blackman defaulted. On the next day the contest affidavit of A. B. Bidwell, charging failure to establish residence, was allowed. This affidavit bears date March 28, 1883, and marked as filed in the local office on that date. The hearing on Bidwell's contest was set for June 7, 1883. Neither party to the contest appeared and the case again went by default. On the same day an affidavit of contest by Franklin B. Bidwell was filed, and August 17, 83, fixed for hearing, notice of which was duly published.

Pursuant to a motion in behalf of Armbrecht, that A. B. Bidwell's contest be dismissed, your office ordered an investigation by special agent, and upon his report you dismissed F. B. Bidwell's contest and allowed that of Armbrecht. Bidwell then asked a hearing in the matter, which was refused by your office. He then appealed from your decision dismissing his contest and from your refusal to grant him a hearing. By your letter of May 31, 1884, to the register and receiver, you refused to recognize the appeal. Hence, the application for certiorari, which the papers were ordered up for examination and consideration at the Department. From the foregoing it appears, following the record made in the case, that when Armbrecht applied to contest Becker, the application of Blackman was still of record and pending; that Armbrecht had notice of the hearing set for March 27, 1883, in the case of Blackman *v.* Becker; that he did not appear at said hearing to intervene, nor in any way to object to the proceeding, nor did he appeal from the action of the local office rejecting his affidavit of contest. Upon the default of Blackman, the record was clear for the affidavit of contest filed by A. B. Bidwell on the 28th of March.

On the 29th of May, 1883, Armbrecht, abandoning all claim under his original affidavit of contest, filed another, which has endorsed thereon in pencil the words "to attach," and at the same time filed a motion to dismiss A. B. Bidwell's contest. Both of these were denied, and the action was not appealed from, nor did Armbrecht intervene to assert his rights on the 7th of June, 1883, the day set for trial in the case of A. B. Bidwell *v.* Becker. Upon default of A. B. Bidwell, June 1883, his son, F. B. Bidwell, filed his affidavit of contest against Becker, and August 17, 1883, was set for hearing, of which publication was duly made. Armbrecht did not appear at that hearing to urge his claim or enter his protest. It thus appears that he failed to assert what he conceived to be his right, or to pursue his remedy of intervention and protest at one or more of these several hearings, as he might have done. It can not be said that he was unaware of these contests,

for he filed motions to dismiss two of them. In view of these facts, I can not regard him as properly before this Department as an adverse claimant.

I do not regard the report of Special Agent Burke as establishing collusion between the several successive contestants; and further, Bidwell is here on the record as contestant, while Armbrecht comes entirely without standing of record up to the date of your decision.

The testimony corroborative of that given by contestant F. B. Bidwell as sworn to before the register on August 17, 1883, is defective in that the register failed to sign the jurat, but having duly signed that pertaining to the testimony of contestant, on the same paper, I have no doubt that the witnesses were present and testified, and that the omission was an inadvertence. In view of the facts that the whereabouts of contestee, Becker, is and has for a long time been unknown, and that he defaulted at three successive hearings, I think the proof furnished by F. B. Bidwell may, notwithstanding the informality mentioned, be considered as sufficient to show abandonment by Becker.

Your decision is reversed. You will dismiss the contest of Armbrecht, reinstate that of F. B. Bidwell and allow him the preference right of entry usual in such cases.

SAME—ON REVIEW.

A contest will not be allowed during the pendency of another.

It is immaterial that on the original decision the applicant herein had an appeal pending which was not considered, for said appeal could not in any event have resulted favorably to him.

Acting Secretary Muldrow to Commissioner Sparks, June 15, 1885.

I have considered the application of Henry Armbrecht for a review of departmental decision of January 16, 1885, in the case of Franklin B. Bidwell *v.* Nickolas Becker, involving the SW. $\frac{1}{4}$ of Sec. 34, T. 101 N., R. 61 W., Mitchell Dakota.

The decision referred to was the result of an application by Bidwell for certiorari, and was in favor of petitioner.

Mr. Armbrecht, who asks the review, avers, however, that sufficient attention was not given to his interests in the matter at issue, that his acts as an applicant to contest Becker's entry were such as to give him a standing superior to that of Bidwell, and that his contest rather than Bidwell's should have been considered and acted upon. The case appears to have been very fully and carefully considered when before the Department on certiorari. Armbrecht's relations to the case were fully discussed and considered. The motion for review presents no new facts and raises no new questions, save one.

Armbrecht's application to contest Becker having been rejected by the

local office, because of the pending contest of Blackman, he filed an appeal from said rejection.

That appeal, it appears, was not with the papers before the Department when the case was decided. It should have been in the case, but its presence could not have affected the decision. Under the rules and practice of the Department, that a contest can not be allowed while there is a pending contest of record, the necessary decision on the question raised by such an appeal would have been adverse to appellant. Besides, as stated in the decision the review of which is asked, Armbrecht by his subsequent acts showed that he elected new and different methods of procedure, thereby waiving and abandoning all claim under the original affidavit of contest, for he could not pursue two remedies at one and the same time.

After a careful consideration of the decision of January 16, 1885, in connection with the motion for review, I see no reason for disturbing said decision. The application is denied.

RED CLIFF INDIAN RESERVATION.

Under the treaty of September 30, 1854, a railway company can only secure, as an easement, the right of way through this reservation.

Acting Secretary Muldrow to the Commissioner of Indian Affairs, June 15, 1885.

I have considered your report of the 12th instant and its accompanying papers, in the matter of the application of the Bayfield Transfer Railway Company, a corporation organized under the laws of the State of Wisconsin, for a right of way through the Red Cliff Indian reservation as a portion of a line of railroad which it has been authorized by law to construct, maintain and operate.

In the third article of the treaty with the Chippewas of September 30, 1854 (10 Stat. 1109) it is provided that "all necessary roads, highways, and railroads, the lines of which may run through any of the reserved tracts, shall have the right of way through the same, compensation being made therefor as in other cases."

I fully concur in your views that under this clause of the treaty only a "right of way" as an *easement* can be secured by the railroad company. Such right of way does not carry with it any *fee* in the land over which it passes.

The authority heretofore granted by the Department for preliminary survey of the route of the railroad, etc., over the unallotted and the allotted and patented lands of the reservation, does not contemplate the acquisition by the railroad company of any greater interest in or to said lands than is provided for by the term "right of way," as above defined.

No instruments of writing in the nature of agreements, relinquishments, or otherwise, whereby any greater interest in and to said lands than a "right of way" is sought to be conveyed to said railroad company, will be sanctioned or approved by this Department.

I also concur in your views that the width of the right of way to said railway company through the reservation should be limited to 100 feet, to conform to the limit fixed by the State of Wisconsin for right of way to railroads through public lands owned or held by that State.

When the Bayfield Transfer Railway Company shall have been advised of this action, and shall have made their further wishes on the subject known to your office, the question as to the form of relinquishment to be used by the Indians collectively and by the individuals through whose patented tracts the route of the railroad may pass, in granting the right of way sought, can then be considered and adopted if necessary.

TIMBER CULTURE CONTEST—PARTIES.

GORDON *v.* WILSON.

Suit should be against "the heirs or legal representatives" of the entryman in case of contest against the entry of a deceased timber culture claimant.

Acting Secretary Muldrow to Commissioner Sparks, June 18, 1885.

I have considered the application of counsel for Gordon to have the proceedings in the case of Bishop Gordon *v.* Edward Wilson certified to this Department under Rule 83 of the Rules of Practice.

The petition is based on the following facts: On the 6th of May, 1884, Gordon filed an application to enter under the timber culture law the W. $\frac{1}{2}$ of NE. $\frac{1}{4}$ of Sec. 24, T. 112 N., R. 40 W., Redwood Falls, Minnesota.

He at the same time applied to contest Edward Wilson's timber culture entry of said tract. After the usual affidavit as to inability to ascertain the residence or address of said Edward Wilson notice by publication was made under Rules 13 and 14 of Practice, a copy of which published notice was sent by registered letter to said Edward Wilson at Marshall, Minnesota, his last known post office address.

It appears that Edward Wilson had been dead for more than three years prior to the initiation of the contest, and that the notice mailed to him was received and receipted for by Mrs. Edward Wilson.

On the day set for hearing Mrs. Wilson appeared by counsel and moved the dismissal of the contest, on the ground of want of legal notice to the heirs, consisting of the widow, one son and two grand-children. No administration had been had on said Edward Wilson's estate. The motion to dismiss was overruled by the register and receiver, who held that legal service had been made. The case then went

to hearing, when counsel for the widow of contestee objected to any evidence on the part of contestant, on the ground of no legal service of notice. The objection was overruled; the case proceeded to trial; the local office found for contestant and held Edward Wilson's entry for cancellation.

From this decision appeal was taken to your office, which set aside the proceedings had below, as irregular, the ground of the decision being that the contest was not properly brought; that it should have been instituted against the "heirs or legal representatives of Edward Wilson, deceased," and the case was remanded to the local office for a new hearing, after due notice.

From this decision an appeal was filed, which you refused to entertain, holding that it was from an interlocutory order or decision on a matter within your discretion and from which an appeal does not lie. Hence the proceeding in certiorari.

After a careful examination of the question involved I do not find that which would, in my opinion, justify my interfering with the action taken by your office, or which calls for supervisory action by the Department.

The requirement of a new hearing with due notice to the heirs seems to me proper. The notice under which the hearing was had was certainly not such an one as a court would recognize under similar circumstances; and the Department should as nearly as possible follow the rules which would govern a court of justice in disposing of questions of law or fact in controversy between man and man. The requirement may seem a hardship to contestant in this case, but the precedent which a different rule would establish might and would be likely to work great injustice in many cases.

The application for certiorari is refused.

RELINQUISHMENT.

PORTER v. FISHER.

The validity of a relinquishment cannot be impeached on the ground that it was not executed by the entryman when the whereabouts and identity of such alleged entryman are not shown.

Acting Secretary Muldrow to Commissioner Sparks, June 18, 1885.

I have considered and transmit herewith an application filed by J. A. Sibbald, attorney, in behalf of Menzo W. Porter for an order of certification under Rules 83-84 of Practice in the case of said Porter v. Charles G. Fisher, involving their respective homestead entries Nos. 9610 and 8558, Fargo, Dakota, upon the NE. $\frac{1}{4}$ of Sec. 22, T. 143 N., R. 51 W.

By your letter of the 9th instant to Mr. Sibbald, denying his right of appeal from previous action, you state that Charles G. Fisher made entry No. 8558, June 8, 1883; that on June 23, 1884, a purported relinquishment was filed and the land entered by Porter; that subsequently Fisher

by his attorneys alleged that the relinquishment was false and fraudulent, whereupon the matter was referred to a special agent, who reported that the Fisher who signed the relinquishment was not the same person who made the entry; that on April 2, 1885, you re-instated the entry and ordered "a hearing to determine the rights of Chas. G. Fisher and Menzo W. Porter under their said entries, as well as the character of both entries, at which all parties in interest should be cited to appear;" that on April 21, 1885, the register and receiver forwarded an application by Porter to contest Fisher's entry, to which you replied May 7, stating "that no formal application to contest was necessary," and directing them to proceed with the hearing.

The claimant alleges, however, that he had, before obtaining the relinquishment of Fisher, instituted contest against the entry for abandonment, and on being informed that Fisher was an inmate of the Minnesota State Prison, he visited him, fully believing that he was the same person who made the entry, and obtained from him the relinquishment, duly supported by affidavit that he was the identical person, and that he had lost the duplicate receipt. He further alleges that his appeal was taken from your refusal to re-instate his contest as prayed for by him.

No other Charles G. Fisher has been found. The claim that the party making relinquishment was not the individual who made entry was presented by Thompson & Gross, alleged attorneys of the latter, but the man is not produced, nor his whereabouts stated, nor is there any offer to produce him or explain his absence or place of residence, the only allegation being that one Frank J. Thompson "is acquainted with" him. Your decision finds that the man so alleged to have made the entry does not appear to have ever been seen or heard from by any person interested in this land. The special agent after diligent search was unable to learn his whereabouts.

So far as shown by the record placed before me by this application, it would seem that substantial justice might be done by leaving the entry of Porter intact upon the record, subject to complaint by the true Charles G. Fisher, if he indeed appear to be other than the Fisher who has upon oath alleged that the entry was his, and made the formal relinquishment, upon which Porter's entry has been regularly made. If there be any other Fisher, and he has complied with the law, he certainly ought to be found somewhere as a party to these anomalous proceedings. The record is with Porter, and the attack comes from a reputed attorney who declines to make known the identity and whereabouts of his alleged principal.

But as you have ordered a hearing on the whole case, which order by its terms appears to be broad enough to include the restoration of Porter's contest, if that shall be found necessary to the protection of his right, which is the object of the present application on his behalf, I decline to interpose the authority of the Department at this stage of the proceeding.

ADDITIONAL RULE OF PRACTICE.

* * * * *

Acting Secretary Muldrow to Commissioner Sparks, June 19, 1885.

The following additional rule of practice has been adopted by the Department:

“Motions for review before the Secretary of the Interior, and applications under rules 83 and 84 shall be filed with the Commissioner of the Land Office, who will thereupon suspend action under the decision sought to be reviewed, and forward to the Secretary such motion or application.”

You will please make due promulgation of the above.

PRACTICE—RES JUDICATA.

STATE OF OREGON.

The privilege of discussing a case orally before the Secretary is accorded within the discretion of the Department, but not as a matter of right.

The final decision of the head of a Department is binding upon his successor, subject to certain well defined exceptions.

Rule of Practice No. 76 does not keep a case open for thirty days, following a decision dismissing a motion for review.

Acting Secretary Muldrow to Commissioner Sparks, June 19, 1885.

I have considered the motion of counsel for the State of Oregon, for a reconsideration of my predecessor's decision of March 3, 1885, (3 L. D. 440) and a re-instatement of their motion for a review and revocation of the Acting Secretary's decision in the case of said State against the United States (3 L. D. 334), rejecting the claim of the State under the act of March 12, 1860, (12 Stat., 3) to certain tracts of land as swamp and overflowed in the Lakeview land district, Oregon.

It appears from the record that the decision of the Acting Secretary was signed on January 24, and due notice of the same was received by said counsel on February 4, 1885.

Motion for review and revocation of said decision, with a request to be allowed to make an oral argument before my predecessor, Secretary Teller, was filed on February 28, and decided adversely to the State, by this Department on March 3, 1885.

Counsel have been heard in oral argument, and their elaborate brief in support of said motion has been carefully examined. The grounds upon which said motion is based are,

1st, That counsel were not allowed “the privilege or right accorded to counsel by the rules of practice and the settled usages of the Department of making oral argument in support thereof.”

2d, That said motion for review was dismissed without due and proper consideration of the points made and urged by counsel for the State.

Rule No. 110 of the rules of practice referred to by counsel provides that "should either party desire to discuss a case orally before the Secretary, opportunity will be afforded at the discretion of the Department, but only at a time specified by the Secretary, etc."

Since it is a matter of discretion with the Department and not a matter of right, the failure to accord such opportunity can not be considered a good reason for re-instating said motion for review.

Again, it appears that said motion and request for an oral argument was filed late in the afternoon on Saturday, February 28, 1885, and counsel well knew that it was wholly impracticable to have an oral argument, owing to the necessary pressure of public business, and yet no reason is given for the delay in filing said motion, although it is alleged that the errors insisted upon are patent upon the face of the record. It was a question for the Department to determine, and having denied the motion for review, the application for oral argument was necessarily refused.

It is not pretended that any new facts have been discovered, or that the whole record was not before the Department when said motion for review was denied. It has long been considered a settled rule of administrative law, that the final decision of the head of a Department is binding upon his successor in the same Department under well defined exceptions none of which embrace the present case.

In 2d Opinions, 464, Mr. Attorney General Taney says, "Where a claim has been presented, and, upon the whole evidence, rejected by the accounting officers, and upon an appeal to the Secretary of War, their decision has confirmed, I doubt whether it is regular for his successor in that office to review his decision."

In 5 Opinions, 29, Mr. Attorney General Toucey says, "There is no law which authorizes the head of any Department to supervise the acts of his predecessors. . . . The principle of *res judicata* would seem necessarily to apply to a claim thus deliberately considered and rejected. If not, and this decision, without any new grounds, might be reversed, then the reversal might be reversed, and so on in endless confusion, according to the whim or caprice of successive incumbents."

Mr. Attorney General Reverdy Johnson, (*ibid.*, 123,) says, "That the adjudications of the different departments of the government upon matters submitted to them are, in general, to be considered final, has never been doubted." And on page 177, he re-affirms the doctrine above stated in these words: "The safety of the government and the desired certainty of the law alike establish the soundness of the doctrine. Errors in calculation may be corrected, but not errors of decision upon controverted facts."

The same principle has been repeatedly affirmed by successive Attor-

neys General: by Black, (8 Opin., 34;) by Bates, (10 Opin., 231;) (by Stanberry, 12 Opin., 358); by Hoar, (13 Opin., 33); by Akerman, (13 Opin., 387); by Bristow (*ibid.*, 457); and by Devens (15 Opin., 208). The fact that said motion for review was dismissed on the last day of my predecessor's administration can have no bearing in the case.

Mr. Attorney General Black (in 9 Opin., 100,) very concisely and forcibly says, "It is true that this was done on the 4th of March, only three days before Mr. Guthrie went out of office. He retired on the 7th of the same month. But I do not see how that can make any difference. He had the same power and authority in the matter, down to the last hour of his service, that he had at any previous time. The rule is not that the early decisions of a Secretary shall stand, and the late ones be reversed, but that all shall stand."

It is, however, contended that 76th Rule of Practice keeps open said decision dismissing said motion until the expiration of thirty days from the rendition of the same.

Such contention can not be maintained. Said rule evidently refers to motions for reviews of a decision upon its merits, and not to a decision dismissing a motion for review. Any other construction would enable a party to renew his motion indefinitely upon the same state of facts, and thus prevent any final determination of the case.

The cases cited by counsel in support of the motion do not seem to sustain the theory claimed by them. In the case of *Leitensdorfer v. Craig*, now pending in the United States Supreme Court, and also in the case of *Gwin v. Breedlove* (15 Peters, 284,) no final judgment had been rendered by the court and the changes in the orders of the court were made during the term.

In the case of *The Bank of the United States v. Moss et al.*, (16 How., 31,) Mr. Justice Woodbury speaking for the court, said, "And we have repeatedly decided, as to judgments of this court, that they could not be changed at a subsequent term in matters of law, whether attempted on motion or a new writ of error, or appeal on the mandate to the court below."

I deem it quite unnecessary to enter into any consideration of the correctness of the decision of my predecessor, or of the Acting Secretary. Each had jurisdiction of the case before him. That is admitted by the appeal of the State. *Griffin v. Marsh* (2 L. D., 28).

Since the decision of my predecessor has become final and it is not shown that the case comes within any of the exceptions to the general rule, I must decline to disturb the same. *Robert Carrick* (3 L. D. 558).

The application is therefore denied.

SIOUX INDIAN RESERVATION.

LANDS RELEASED FROM ORDER OF SUSPENSION.

Acting Secretary Muldrow to Commissioner Sparks, June 20, 1885.

In reply to the Assistant Commissioner's letter of 9th instant, respecting the release from suspension of the lands in the late Sioux Indian Reservation in Dakota—such suspension having been ordered September 8, 1881, for the purpose of correcting the fraudulent survey of said lands, which correction has been duly made by authority of Congress, and the cash entries adjusted thereto—you are advised that the Department sees no reason for its longer continuance, and filings and entries of actual settlers may now be admitted under the act of March 3, 1863, (12 Stat., 819,) providing for the disposal of said lands.

Prior filings under the old survey will, of course, be amended to conform to the description upon the new plats, and ample opportunity for such correction should be given, before allowing entries which may possibly conflict with *bona fide* claims under such filings.

PRACTICE—RECONSIDERATION.

ADMINISTRATOR DE BONIS NON OF MARY GATES.

A case will not be re-opened where after full opportunity for its presentation on review a final decision was rendered in which no error is now specified.

Acting Secretary Muldrow to Commissioner Sparks, June 20, 1885.

On the 15th of May, 1884, my predecessor, Secretary Teller, affirmed an adverse decision made by your office in the matter of the application of the administrator *de bonis non*, with the will annexed, of Mary Gates, widow and sole legatee of Horatio Gates, deceased, for the issue of Revolutionary bounty land scrip for 5,833½ acres of public land alleged to be due the representatives of said decedent, in addition to 17,500 acres granted him in the year 1783, on account of his services as major-general in the war of the Revolution. (2 L. D., 9.)

On the 10th of June, 1884, O. S. X. Peck, Esq., of New York, as attorney for said administrator, asked a reconsideration of departmental decision above mentioned.

Not having specified any error in said decision, he was on the day following (June 11) notified that a reasonable time would be allowed him for that purpose, and on the 17th of the same month he advised the Department that other pressing professional engagements would occupy his time for fifteen days, after which he would prepare and file his exceptions and arguments thereon. After waiting until August 6, 1884, more than thirty days from the expiration of the fifteen days referred

to, no assignment of error having been filed, no further time asked for, and no affidavit having been presented (as required by the Rules of Practice) that the motion for rehearing had been made in good faith and not for the purpose of delay, the Department dismissed the motion and transmitted the papers to your office.

The attorney, Mr. Peck, now, by letter of April 30th, asks that the case be re-opened and that he be permitted to file specifications of error in the decision of May 15, 1884. He has filed therewith the usual affidavit of good faith, and states by letter as reason for his apparent laches, that when the time for filing the assignment of error, under the rules, had arrived, he was seized with a serious illness, which unfitted him for professional work and forced him to leave his home and business for medical treatment.

More than a year has elapsed since the decision which Mr. Peck now seeks to have reopened was made. Not until nearly two months after his motion for review, and not until he had been notified that no specification of error had been assigned, and had been granted an extension of time within which to file the same, did my predecessor refuse to reconsider.

No error in the decision has yet been pointed out, and no reason suggests itself to me why at this late day the case should be reopened or further considered. I take it that no court would under similar circumstances grant a petition such as that here presented, and, in my opinion, this Department cannot in consonance with good practice, or in accordance with legal principles applicable to motions for new trials, grant what is asked by Mr. Peck.

His application is therefore denied.

DEPOSIT SURVEYS.

CIRCULAR.

*Commissioner Sparks to surveyors-general and registers and receivers,
June 24, 1885.*

The circulars and instructions of this office dated prior to June 6, 1885, relative to deposits by individuals for the survey of public lands under sections 2401 and 2402 United States Revised Statutes, and section 2403 as amended by act of March 3, 1879 (20 Stat., 352), and act of August 7, 1882 (22 Stat., 327), are hereby revoked and the following substituted therefor :

1. The persons who are authorized to apply for surveys are "the settlers" under the pre-emption and homestead laws of the United States in the townships desired to be surveyed. Settlers are persons who have attached themselves permanently to the soil. None others are authorized to apply for surveys. Nomadic persons and persons employed by

others to make applications for surveys, or to make alleged settlements for the purpose of acquiring a title to lands to be transferred to others, are not settlers within the meaning of the law and are not lawful applicants for surveys. The law contemplates bona fide surveys upon bona fide applications by actual settlers, and not otherwise, and no other applications or surveys are permissible under the statute.

2. As applications must be made by "the settlers" in the township, the body of such settlers must join in the application. There must also be a sufficient number of settlers to show good faith, and to indicate that the survey is honestly desired for the benefit of existing actual settlements as contemplated by the law.

3. The deposit system being restricted by law to surveys for pre-emption and homestead settlers is not applicable to the survey of desert lands or desert land claims, nor to swamp lands, nor to lands valuable chiefly for timber, nor to waste or uncultivable lands of any character, nor to lands occupied, inclosed, or controlled for other than settlement purposes, nor to private land claims.

4. Townships within known mineral belts or known to contain mineral lands are not surveyable under this system.

5. Surveys under the deposit system are authorized only where "the township so proposed to be surveyed *is within the range of the regular progress of the public surveys embraced by existing standard lines or bases for the township and subdivisional surveys.*" Under this provision of the law it will be held that only township exteriors and subdivisional lines are surveyable, and that the deposit system is not applicable to the survey of standard lines or bases.

6. Retracement, or the resurvey of lines previously surveyed, will not be deemed authorized under the deposit system.

7. Applications must be made in writing, and must designate, as nearly as practicable, the township to be surveyed, and state that the applicants are actual bona fide settlers therein under the pre-emption and homestead laws of the United States, that they are well acquainted with the character and condition of the land included in said township, and that the same is not mineral or reserved by Government. Such applications must also particularly describe the land sought to be surveyed, stating whether the same is cultivable, grazing, timber, desert, swamp, mountainous, rocky, etc., and the reasons why it is claimed to be non-mineral, and must state the number of settlers in the township, the character and duration of their inhabitancy of the land, the extent and value of their improvements, the uses made of the land and the quantity under cultivation. The situation of the township in respect to lines of public communication, and the progress of the settlement of the country should be described, and all facts and circumstances stated which will enable an intelligent judgment to be formed in respect to the propriety of making the survey applied for. These statements must be verified by affidavit, and applicants must also declare that their appli-

cations are made in good faith and not for the purpose of enabling a surveying contract to be obtained, nor at the instance or in the interest or for the benefit of any other person.

8. Surveyors-general will critically examine all applications for survey, testing the accuracy and reliability of the statements made by their knowledge of persons and lands and the best information they can obtain. They will reject all applications not believed by them to be made in good faith, upon truthful statements of fact, and for honest settlement purposes.

9. When an application for survey is approved by the surveyor-general, he will transmit the same to this office, with the required proofs and his report upon the same, giving his reasons in full for the recommendation made. It is not believed that fictitious applications, or applications procured at the instance of surveyors or of operators in contract surveys, or applications designed to open unsettled townships to fraudulent entry can successfully be imposed upon vigilant and faithful officers. Surveyors-general will therefore be held to strict accountability for their recommendation of applications or contracts hereafter found to be fictitious, fraudulent, or speculative.

DEPOSITS.

10. If the application is approved by this office it will be returned to the surveyor-general with authority to furnish the necessary estimate to applicants, and, upon proper deposit being made, to enter into contract for the execution of the survey.

11. The surveyor-general will furnish applicants with two separate estimates, one for the field work and one for office expenses. He will estimate adequate sums, and the practice of requiring additional deposits to cover excess costs will be discontinued except when expressly authorized by this office.

12. Upon receiving such estimates, applicants may deposit in a proper United States depository (which should be in the land district in which the township to be surveyed is situated) to the credit of the Treasurer of the United States on account of surveying the public lands and expenses incident thereto, the sum so estimated as the total cost of the survey, including field and office work. If there be no public depository in the land district in which the lands are situated, the deposit may be made in an adjacent land district.

13. For convenience in the use and application of certificates, the deposit should be made in such sums as that no certificate shall bear a face value of more than two hundred dollars.

14. Applicants must be instructed fully as to the necessity of transmitting the *original* certificate to the Secretary of the Treasury, the *duplicate* to the surveyor-general, and the retention of the *triplicate*.

15. When evidence of the required deposit is furnished in accordance

with the foregoing regulations the surveyor-general will invite proposals for the survey by notice posted in his office for a period of thirty days, specifying the survey to be made, and stating that the contract will be let to the lowest responsible bidder (being a practical and reliable surveyor) at rates not exceeding the minimum rates established by law for surveying the public lands. A copy of such notice will also be transmitted by the surveyor-general to the register and receiver of the land district in which the township to be surveyed is situated, and it shall be the duty of registers and receivers to post such notices conspicuously in their office.

16. The surveyor-general will prepare a contract with the accepted bidder, and transmit the same to this office for approval in the usual manner.

17. Triplicate certificates of deposit are receivable from the settlers making the deposits in part payment for their lands situated in the townships the surveying of which is paid for out of such deposits.

18. The triplicate certificates may be assigned by indorsement and be received in payment for lands "entered by settlers under the pre-emption and homestead laws of the United States at the land office in which the lands surveyed for which the deposit was made are subject to entry, and not elsewhere."

19. Such certificates hereafter issued will not be regarded as assignable or receivable until the township for the survey of which the deposit was made has been surveyed, and the plat thereof filed in the district land office.

20. Triplicate certificates issued *on and after* August 7, 1882, can be received in payment for lands *only in the land district* in which the surveyed township is situated.

21. Certificates issued subsequent to March 3, 1879, and prior to August 7, 1882, may, if assigned, be used in any land district, but if issued before August 7, 1882, they must be transmitted to this office for examination as to excess repayments, if any, before they can be accepted by the receiver, who will be governed by the certificates indorsed on or attached to them by this office.

22. Certificates issued before March 3, 1879, can be used only by the settlers in the purchase of lands *in the township* the surveying of which was paid for out of such deposits.

23. Where the amount of a certificate or certificates is less than the value of the lands taken the balance must be paid in cash.

24. Where the certificate is for an amount greater than the cost of the land, but is surrendered in full payment for such land, the receiver will indorse on the triplicate certificate the amount for which it is received, and will charge the United States with that amount only.

25. There is no provision of law authorizing the issue of duplicate certificates for certificates lost or destroyed.

EXCESS REPAYMENTS.

26. Where the amount of the deposit is greater than the cost of the survey, including field and office work, the excess is repayable upon an account to be stated by the surveyor-general.

27. The surveyor-general will in all cases be careful to express upon the register's township plat the amount deposited by each individual, the cost of survey in the field and office work, and the amount to be refunded in each case.

28. Before transmitting accounts for refunding excesses the surveyor-general will indorse on the back of the triplicate certificate the following, "\$—— refunded to —— ——, by account transmitted to the General Land Office with letter dated ——," and will state in the account that he has made such indorsement. Where the whole amount deposited is to be refunded the surveyor-general will require the depositor to surrender the triplicate certificate, and will transmit it to this office with the account.

29. No provision of law exists for refunding to other than the depositor, nor otherwise than as referred to in the preceding sections.

ASSIGNMENTS.

30. Certificates issued *after March 3, 1879*, "may be assigned by indorsement." The indorsement required is that the person in whose name the deposit is made shall write his name on the back of the triplicate certificate.

31. When there are several parties to, or assignees of, one certificate, the register and receiver will make the proper indorsement on the triplicate certificate, showing the satisfaction of the pro rata share of each party interested. They will make the same notes on the register's certificate of purchase and the receiver's original and duplicate receipts.

32. When the entire amount of a certificate is not satisfied at the same time, the triplicate should be retained by the receiver until satisfied. But such certificate should as far as practicable be satisfied during the current quarter.

33. Certificates are not receivable in payment for lands sold at public or private sale, nor for mineral, desert, coal, or timber lands, nor for fees and commissions on homestead entries, nor in any manner otherwise than as provided by law.

REGISTERS' AND RECEIVERS' RETURNS.

34. In their monthly cash abstracts the register and receiver will designate the entries in which certificates of deposit are used and the balance paid in cash, if any, noting on the certificates of purchase and receipt the manner of payment. The receiver in his monthly account-current will debit the United States with the amount of such certificates, and in his quarterly accounts will specify each entry with these

certificates, giving number, date, amount for which received, by whom and with whom the deposit was made, and debit the United States with the same.

35. The receiver must write across the face of each accepted certificate the date of its receipt in payment of land, the number of the entry, and description of the tracts sold.

36. Certificates received in payment for lands sold must be forwarded once a month to this office with letter of transmittal and abstract. (Form 4-543.)

37. Surveyors-general are directed to instruct their deputies that they must designate in the field-notes and plats of their surveys the location of each and every settlement within a township surveyed, whether permanent in character or not, together with the names of such settlers and their improvements, if any.

38. When no settlers are found in a township, the field-notes of survey must expressly so state, and any omission to describe the settlements and improvements, or the absence of one or both in the field-notes and plat, will be deemed a sufficient cause to infer fraud and the accounts of the deputy will be suspended until such omission shall have been supplied. A suspension of the commission of the deputy will in the mean time take place, and all the facts will be reported to this office for consideration and action.

39. In every case of a contract heretofore or hereafter approved which the surveyor-general has reason to believe was fraudulently procured, such contracts and the accounts thereunder must be immediately suspended and the facts reported to this office.

Approved.

L. Q. C. LAMAR,
Secretary.

RAILROAD GRANT

CAL. AND OREGON R. R. CO.

As the grant has expired and the matter of the enforcement of its forfeiture has become the subject of legislative consideration, selections will not be authorized pending such action as Congress may be pleased to take.

Commissioner Sparks to register and receiver, Shasta, California, June 26, 1885.

By letter of March 14, 1885, you were advised that on the 27th of Feb. 1885, the President accepted forty miles of the California and Oregon Railroad and Telegraph Line constructed in California.

Said forty miles extend from a point near the town of Redding, which, if the lands were surveyed, would be in the N.W. $\frac{1}{4}$ Sec. 36, T. 32 N. R. 5 W., northward to a point in the S.W. $\frac{1}{4}$ Sec. 22, T. 36 N. R. 5 W. M. D. M., being a part of section 8, all of section 9, and part of section 10 (each of 20 miles) of said road.

It was stated in said letter that the above information was given at the oral request of the company's resident attorney, who wished you to have official knowledge of the acceptance of that part of the road, in case the company should apply to select lands opposite the same.

I am now in receipt of your letter of April 19, 1885, in which you say that "in view of the fact that the railroad company are preparing lists to apply for lands in the above described limits, and the further fact that the grant to said railroad company had expired July 1st, 1880, said company having failed to complete their road prior to said date, we are in doubt as to the course which we are to pursue and respectfully request a special rule on the subject matter, namely, shall we receive and file said applications, or are we to refuse, subject to appeal?"

In the President's acceptance before mentioned, it was ordered that no patents for lands lying coterminous with said sections should issue until specific instructions so to do should be given by him.

On the 2d of March 1855, this restriction was withdrawn by the President, upon the recommendation of the late Secretary of the Interior, Congress having failed to pass pending bills looking to the forfeiture of the grant.

The withdrawal by the President of the express inhibition contained in his former order, leaves the matter of allowing or accepting lists of selections in the same situation as if such inhibition had not been made and withdrawn. The matter of the enforcement of the forfeiture which has been incurred having become a subject of Congressional consideration, and no positive expression of the legislative will having been reached, I do not think it a matter of official duty under my responsibilities as an executive officer of the government to authorize selections to be made pending such action as Congress may be pleased to take.

ENTRY—FEE AND COMMISSIONS.

INSTRUCTIONS.

Commissioner Sparks to register and receiver, Huron, Dakota, June 26, 1885.

In letter "C" of April 27, 1885 relating to the case of James M. Boyd, involving the S. $\frac{1}{2}$ N.W. $\frac{1}{4}$ and N. $\frac{1}{2}$ S. W. $\frac{1}{4}$ sec. 5, T. 114 R. 64 (3 L. D. 498) you were advised that all parties whose former entries had been canceled, would be allowed credit for fees and commissions previously paid, hereafter, provided they were allowed to make second entries for the same tracts.

Whilst I am satisfied that said ruling is the more practicable yet as the approved circular adopts the policy of the repayment system, you are now instructed that the former practice will be renewed in conformity with the circular of Dec. 1, 1883. Hereafter proceed in accordance therewith.

ENTRY IN EXCESS OF QUARTER SECTION.

CIRCULAR.

Commissioner Sparks to registers and receivers, June 26, 1885.

Referring to circular "C" of this office, dated September 17, 1883, you are informed that hereafter all excesses upon homestead, timber culture, and other entries, above the actual area of 160 acres, must be paid for at the rated value of the land.

The practice of not collecting amounts less than one dollar must be discontinued, and where the proper excesses, or fee and commissions, are not collected, the entries will be suspended until the amount due is paid.

Approved.

H. L. MULDROW,
Acting Secretary.

 PRACTICE—APPEAL; APPLICATION.

THOMAS HODGE.

Failure to appeal in time from the decision of the local office does not necessarily cut off the right to appeal from the Commissioner's decision.

Applicant to enter under the act of June 14, 1878, should not be required to furnish proof, beyond the statutory affidavit, that he has declared his intention to become a citizen.

Acting Secretary Muldrow to Commissioner Sparks, June 27, 1885.

I have considered the application of Thomas Hodge, received with your letter of the 18th instant, for certification under Rules 83 and 84 of Practice, of the papers connected with his application to make timber culture entry upon the SE. $\frac{1}{4}$ of Sec. 2, T. 114 N., R. 69 W., Huron District, Dakota.

This application was rejected by the register and receiver October 21, and again October 31, 1883, and no appeal was taken to your office until July 12, 1884, more than eight months subsequently, instead of within thirty days as required by the rules, and was accordingly dismissed, December 20, 1884. The recital also shows that the interests of others had intervened after the first rejection.

His appeal from the decision of your office was filed here, April 14, but it is not shown that it was within the sixty days prescribed by rule. You held April 23, 1885, that as the party failed in the first instance to appeal from the register and receiver within time he had no right of appeal from the decision of your office.

Although this is error, as the decision of your office that he was barred on account of being out of time, might be reviewed by appellate

authority, I see no reason for reviewing the same upon the case presented by the petition.

It was also error in the register and receiver to reject his original application for the cause stated on October 21, 1883, he having apparently complied with the law by filing the affidavit required by the act of June 14, 1878 (20 Stat., 113,) and proof that he had declared his intention to become a citizen was not necessary to the inception of his right to make entry. Your office had no power to add to the conditions of the statute another and burdensome requirement.

But as Hodge made no complaint, and after compliance with the condition took no appeal within the time limited after the second rejection, such delay was fatal in the presence of intervening adverse rights. I must accordingly decline to interpose an order for certification.

PRACTICE—NOTICE.

CAMPBELL *v.* MOORE—(ON REVIEW).

A decision becomes final upon notice to the party, and such notice may be secured by service upon the attorney of record as well as upon the party in person.

Acting Secretary Muldrow to Commissioner Sparks, June 30, 1885.

I transmit, with accompanying papers, an application filed May 16, 1885, by the attorney for Campbell, for a review of departmental decision of March 25th last (3 L. D. 462) in the case of Robert S. Campbell *v.* Richard T. Moore, involving commutation of homestead entry No. 339, NE. $\frac{1}{4}$ of Sec. 25, T. 12, R. 61, Huron district, Dakota.

It is objected by Moore that the motion for review is too late, not being filed within thirty days from notice of the decision. In reply, affidavit of Campbell is filed, dated June 4th, taken before a notary public of Beadle county, stating that notice was sent to him by his attorneys at Huron, as he supposes, as soon as they received the same; that he received it on or about the seventeenth or eighteenth day of April, when he at once called upon his said attorneys and made arrangements to secure a re-hearing. He had no attorney in Washington, his present resident attorney having apparently been employed pursuant to such arrangement to file the motion for review. Counsel alleges that the motion is in time, for the reason that the attorneys in Dakota had no authority to file it, and consequently notice to them of the decision was not notice to the party within the restriction of this rule.

I am unable to assent to this proposition. A decision rendered becomes final upon notice to the party. To that date all motions, petitions and communications of whatever kind refer, whether of citation or as a basis for new or further action; as to re-open, to review, to set aside, etc.

The Rules provide: 104.—“In all cases, contested or ex parte, where

the parties in interest are represented by attorneys, such attorneys will be recognized as fully controlling the cases of their respective clients."

105.—"All notices will be served upon the attorneys of record."

106.—"Notice to one attorney in a case shall constitute notice to all counsel appearing for the party represented by him; and notice to the attorney will be deemed notice to the party in interest."

These are familiar rules common to all practice, and appear to me decisive of the question. When Mr. Campbell's attorneys were served he was at that instant served. The time began to run, and his motion to be effective must be filed within it. But if it were not so, an affidavit stating that he received actual notice on or about the 17th or 18th of April is not a declaration that he did not receive it on the 16th or earlier, and does not prove the application to be within the rule.

Upon the merits there is nothing in the application bringing it within the circumstances which would call for a review or rehearing in the courts, to the rules of which in this respect the practice here is required by Rule 76 to conform. Nothing is presented, except an argument upon the correctness of the conclusion reached as to the sufficiency of the testimony offered in Moore's behalf to support his *bona fides* in making settlement upon the lands.

The motion for review is accordingly dismissed..

SWAMP LAND.

STATE OF OREGON—(ON REVIEW).

The State by its appeal from the decision of the General Land Office is estopped from denying the jurisdiction of the Department over the subject-matter.

The government is not concluded by the report of the local office upon the evidence submitted as to the character of the land.

Acting Secretary Muldrow to Commissioner Sparks, June 30, 1885.

I have considered the motion of counsel for the State of Oregon for a review of departmental decision of April 9, 1885 (3 L. D. 474), affirming the decision of your office, dated October 22, 1883, holding for rejection the claim of said State under the act of September 28, 1850 (9 Stat., 519), as extended by act of March 12, 1860 (12 Stat., 3), to certain tracts in township 41 S., R. 42 E., Lakeview land district, Oregon.

The ground of the motion is that since a hearing was duly had before the register and receiver, who rendered their joint opinion upon the testimony, from which no appeal was taken, your office had no authority to review their finding under Rule 47 of the Rules of Practice.

On the 20th instant, this Department received a communication from said counsel waiving "claim to so much of the lands involved therein as are included in the Hay Reservation of Camp McDermitt, Nevada." It is not alleged that the record was incorrectly stated in said decision,

nor is it asserted that there has been discovered any additional evidence. It is, however, insisted that the conclusions arrived at are erroneous and should be revoked.

Whatever might be said with reference to the authority of your office in the premises, there can be no question that this Department has full jurisdiction over the subject matter. The State is estopped from denying that fact by its appeal. *Griffin v. Marsh* (2 L. D., 28).

The conclusive effect of the joint report of the district land officers was pressed with great earnestness by counsel in his able argument upon the appeal, and was carefully considered in said decision. It should be remembered that the State of Oregon is the claimant under said acts, and the sole question for determination was, did the State have the right to claim the land under her grant? *Fraser et al. v. O'Connor*, (115 U. S. 102.)

The hearing was held for the purpose of ascertaining the character of said tracts at the date of said grant, and the United States is no more concluded by the report of the register and receiver in the case at bar than it would be if a hearing had been ordered to inquire into the legality of an entry, and it should appear from the testimony that the entry was illegal. It was held in said decision, that "a careful consideration of the testimony taken at the hearing fails to show that the lands in question were swamp and overflowed at the date of said grant." It does not appear that there is any error in said decision, and the motion for review and revocation must be denied.

SETTLEMENT BEFORE SURVEY.

COLLIN *v.* HOTCHKISS.

As the land in dispute was claimed before survey, in good faith, by both parties, and each filed within the statutory period, a joint entry is awarded.

Acting Secretary Muldrow to Commissioner Sparks, June 30, 1885.

The case of *Richard Collin v. Charles R. Hotchkiss* has been considered, on appeal by Hotchkiss from the decision of your office dated June 12, 1884, awarding the NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Sec. 17, T. 47, R. 8, Gunnison, Colorado, to Collin.

Hotchkiss filed declaratory statement No. 6, April 19, 1883, for the SW. $\frac{1}{4}$ of Sec. 17, alleging settlement August 1, 1882.

Collin filed declaratory statement No. 24, May 2, 1883, for the N. $\frac{1}{2}$ of SE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Sec. 17, alleging settlement September 28, 1882. Township plat filed March 22, 1883. Hotchkiss published notice of his intention to make final proof in support of his claim; whereupon Collin filed a protest, alleging his superior right to the NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Sec. 17. In pursuance of the protest, a hearing was held November 28, 1883, when both parties presented proof in support of their respective

claims to the tract in controversy. The facts as presented by the record of the case are as follows: During June, 1882, Hotchkiss selected a tract of land and planted what is termed a location stake on which was this inscription, "28th day of June, 1882, I, the undersigned, claim 160 acres of land, running south 160 rods, east 160 rods, north 160 rods, and west 160 rods to place of beginning. Charles R. Hotchkiss." During July, 1882, he placed the inscription "N. E. C. R. Hotchkiss" on a small cottonwood stump situated in the midst of a close growth of brush and timber, about 160 rods southeast of the former stake. This stump was utilized to indicate the NE. corner of his claim, which after survey was found to lie on the western part of the land in controversy. During August, 1882, he erected a house on a spot near the first stake and within the lines describing his claim, which was occupied by his family as their home.

In September, 1882, Collin selected a piece of land included in the tract in controversy, and placed six stakes, one at each of the four corners and one each at the center of the boundary lines running lengthwise; each stake contained a plainly written notice of his intention to claim the land lying within the boundary lines indicated. He then cut a number of logs for building purposes on the land. The survey in the field was completed during November, 1882, and for the first time the parties were enabled to learn where the section lines were situated. They discovered that Collin's claim as staked just about covered the land as described in his declaratory statement, while that of Hotchkiss lay off toward the northwest, so that the northwest corner of the location claim lay thirty rods northwest of the northwest corner of the southwest quarter of Sec. 17.

In December, 1882, Hotchkiss erected a cabin on the land in controversy and moved his effects therein. During January, 1883, Collin completed his house on the tract and made it his abode. Both parties appear to have acted in good faith as to their intention of claiming the land, and as they both made substantial settlement thereon prior to survey and filed their respective declaratory statements within the time prescribed by law, they will be given notice of their right to make joint cash entry of the tract in controversy, under section 2274 of the Revised Statutes within sixty days after notification to each; at the expiration of such period, if either party fail to consent, the said tract is hereby awarded to the other.

Your predecessor's decision is accordingly modified.

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