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DECISIONS

OF

THE DEPARTMENT OF THE INTERIOR

AND

GENERAL LAND OFFICE

IN

CASES RELATING TO THE PUBLIC LANDS

FROM JANUARY 1, 1889, TO JUNE 30, 1889.

VOLUME VIII.

Edited by S. V. PROUDFIT.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1889.

TABLE OF CASES REPORTED.

	Page.
Adair, Joseph M	200
Alabama and Chattanooga R. R. Co	33
Alderson, John W	517
Allen, Gerard B	140
Allen *et al.* *v.* Merrill *et al*	207
Alta Mill Site	195
Amundson, Chicago, Milwaukee and St. Paul Ry. Co. *v*	291
Anderson *et al.* *v.* Byam *et al*	388
Anderson, Smith *v*	46
Anrys, Northern Pacific R. R. Co. *v*	362
Antediluvian Lode and Mill Site	602
Arkansas, State of	387
Armstrong *v.* Taylor *et al*	598
Arnold, Dotson *et al.* *v*	439
Asher *v.* Holmes	396
Atlantic and Pacific R. R. Co	165, 307, 373
Atterbery *et al.*, United States *v*	173
Avery *et al.*, Pratt *v.* (on review)	457
Ballew, Edward C	508
Banks, Nathaniel (on review)	532
Barker *v.* Carberry	535
Barnes *et al.* Hoffman *v*	608
Bartl *v.* West	289
Beall *v.* Engle	470
Becker, Sorenson *v*	357
Bell, Harper *v*	197
Bell, Padgett *v*	630
Belliveaux *v.* Morrison	605
Bissell, Rice *v*	606
Blake, Martha	634
Bois Blanc Island	308, 560
Boles, A. H	155
Bondurant *v.* Conkling	558
Bone *v.* Dickerson's heirs	452
Bosch, Gottlieb	45
Bowman, James	408
Bradford, David Y	283
Brassfield *v.* Eshom	1
Bregard *et al.*, Napthaly *v*	144
Bright *et al.* *v.* Elkhorn Mining Co	122
Brown, Jackson C	587
Brown *v.* Central Pacific R. R Co	589
Buettner, Ernst	185
Bullen, Joseph A	301
Burdick, Anna R	230
Burch, Nellie E	651
Burns, Iddings *v*	224, 559
Byam *et al.*, Anderson *et al.* *v*	388
Caldwell *v.* Missouri, Kansas and Texas Ry. Co. *et al*	570
California, Central Pacific R. R. Co. *v*	79
California *et al.*, Wright *et al.* *v.*	24
California, State of	307
California *v.* United States	4
Campbell, Mary	331
Campbell, Samuel L	27
Campbell *v.* Kelley	75
Campbell, Payne *v*	367
Capps, L. J	406
Carberry, Barker *v*	535
Carlson *v.* Kries (on review)	186
Carter, Palmer *v*	544
Central Pacific R. R. Co	30
Central Pacific R. R. Co., Brown *v.*	589
Central Pacific R. R. Co. *v.* California	79
Central Pacific R. R. Co. *v.* Doll	355
Central Pacific R. R. Co., Odgers *v.*	520
Cleaveland, Johnson *v*	405
Chamberlin, T. L	421
Chase, Lewis S	393
Chicago, Burlington and Quincy R. R. Co	546
Chicago, Milwaukee and St. Paul Ry. Co. *v.* Amundson	291
Chitwood *v.* Hickok (on review)	448
Choate, E. L	162
Colfer, Spalding *v*	615
Conkling, Bondurant *v*	558

	Page.
Counterman *v.* Missouri, Kansas and Texas Ry. Co	237
Cowhick, Neff *v*	111
Creswell Mining Company *v.* Johnson	440, 443
Cromwell, Oscar	432
Crumpler *v.* Swett	584
Cunningham, Melissa J	433
Custer *et al.*, Smith *v*	269
Daly, Patrick	471
Dakota Central R. R. Co. *v.* Downey	115
Davis, Edward C	507
Davis *v.* Davidson	417
Dayton *v.* Dayton (on review)	248
Delaney *v.* Watts *et al*	480
Delbridge *v.* Florida Ry. and Navigation Co	410
Dement, Helen E	639
Denver and Rio Grande R. R. Co.	41
Dickerson's heirs, Bone *v*	452
Disch, John B	31
Doll, Central Pacific R. R. Co. *v*	355
Donovan, Michael	382
Doolittle, Edwin	403
Dorman, Nellie N	519
Dotson *et al.*, *v.* Arnold	439
Dow, Northern Pacific R. R Co. *v.*	389
Downey, Dakota Central R. R. Co. *v*	115
Drew, William	399
Dubuque and Sioux City R. R. Co., Mudgett *v*	243
Duhain *et al.*, Hambleton *v.*	326
Dunphy, Elijah M	102
Eaton, Benjamin H	344
Edwards, Edwin	429
Edwards, James	353
Elkhorn Mining Co., Bright *et al. v*	122
Emblen, Reeves *v*	444
Engineer Mining and Developing Company	361
Engle, Beall *v*	470
Epley *v.* Trick	110
Erskins, Willis A	514
Eshom, Brassfield *v*	1
Eveleth, Irwin	87
Everett, George B	296
Farmer *v.* Moreland *et al*	446
Flaherty, Northern Pacific R. R. Co. *v*	542
Fitzgerald, Reed *v*	159
Florida, State of	65, 369, 380
Florida Ry. and Navigation Co., Delbridge *v*	410
Forward, James A	528
Frederick, Henry A	412
Freeman *v.* Lind	163
Fuller, Zelia J	371
Fullmer, Edward	614
Gage *v.* Lemieux	139
Gainer *v.* Paazig	346
Galvin, Sparks *v*	534
Gardner, Sylvester	483
Gilbert, Philoman D	500
Gilchrist, David	48
Gilford, Jacob A	583
Gill, Richard	303
Givens, Ambrose W	462
Gjuve, Northern Pacific R. R. Co. *v*	380
Godfrey, Richard	186
Goforth, William	80
Goodman, John	428
Graham, Platt *et al. v.* (on review)	482
Ground Hog Lode *v.* Parole and Morning Star	430
Hagerman, J. J., *et al*	183
Hair, James	466
Hall, Violette	96
Hambleton *v.* Duhain *et al*	326
Hardee *v.* United States	391
Harper *v.* Bell	197
Harris, Adam S	45
Harris, E. W	77
Harrison, James A	98
Hastie, Addison W	618
Hawblits, Smalley *v*	372
Hemsworth *v.* Holland (on review)	400
Hewit, Frank W. (on review)	566
Hickok, Chitwood *v.* (on review)	448
Hoffman *v.* Barnes *et al*	608
Holland, Hemsworth *v.* (on review)	400
Holmes, Asher *v.*	396
Howard, Prestina B.	286
Huck, Scotford *v*	60
Hughes, Parsons *v*	593
Iddings *v.* Burns	224, 559
Inglet, Naphtali	491

	Page.
Jackson, Preston B	445
Jamison, William	235
Jasmer *et al.* *v.* Molka	241
Jeardoe *v.* Shannon	38
Jenks, James A	85
Jennings, Nathan T	53
Johnson *v.* Cleaveland	405
Johnson, Creswell Mining Company *v*	440, 443
Johnson *v.* Miller	477
Johnson *v.* Missouri, Kansas and Texas Ry. Co	588
Kelley, Campbell *v*	75
Kelley, Lydia	322
Keen, James C	239
Kimberland *v.* Northern Pacific R. R. Co	318
Kistler, Frederick	132
Knabe, Julius P	74
Knans, Benjamin P	96
Knight, Thomas M. *et al*	297
Kries, Carlson *v.* (on review)	186
Lachance *v.* State of Minnesota	179
Laity *v.* Northern Pacific R. R. Co	378
Lamphere, A. T	134
Lawrence, Sampson *v*	511
Lee, David	502
Lee, Mayfield *v*	461
Lehman, Charles	486
Leinen, George	233
Lemieux, Gage *v*	139
Lewis *et al.*, Sioux City and Pacific R. R. Co. *v*	292
Lind, Freeman *v*	163
Logan, A. C. *et al*	2
Lord *v.* Perrin	536
Louisiana, State of	127
Louisiana *v.* McDonogh *et al.* (on review)	134
Madigan, Thomas	188
Madison and Portage R. R. Co	428
Mahoney, Thrasher *v*	626
Mason, George W	457
Mather, Daniel (on review)	505
Matthews, Vernon B	79
Mayfield *v.* Lee	461
McCabe, John	509
McDonogh School Fund	463
McDonogh, John, and Co. *et al*	254
McDonogh *et al.*, State of Louisiana *v.* (on review)	134
McGurk *et al.*, White *v.* (on review)	155
McIntosh, Daniel R	641
McKay, John A	526
McMillan, Griffith W	478
Meiszner, Frederick	227
Memphis and Little Rock R. R. Co	427
Merrill *et al.*, Allen *et al.* *v*	207
Merryman, Eden	406
Michigan, State of	308, 560
Miller, Johnson *v*	477
Miller *v.* Silva	480
Mills *v.* Muhlstein	395
Mimbres Mining Company	457
Minnesota, Lachance *v*	179
Minnesota *v.* Spence	64
Minnesota, State of	32
Minnesota, Starr *v*	644
Missouri, Kansas and Texas Ry. Co. *et al.*, Caldwell *v*	570
Missouri, Kansas and Texas Ry. Co., Counterman *v*	237
Missouri, Kansas and Texas Ry. Co., Johnson *v*	588
Mitchell, Joseph W. (on review)	268
Molka, Jasmer *et al.* *v*	241
Montana, Territory of	55
Moore, Farmer	621
Moreland *et al.*, Farmer *v*	446
Morrison, Belliveaux *v*	605
Mudgett *v.* Dubuque and Sioux City R. R. Co	243
Muhlstein, Mills *v*	395
Napthaly *v.* Bregard *et al*	144
Neff *v.* Cowhick	111
Newman, E. S	448
New Orleans and Pacific R. R. Co	25
New Orleans and Pacific R. R. Co., Victorine *v*	377
No Man's Land	613
Northern Pacific R. R. Co	13, 359
Northern Pacific R. R. Co. *v.* Anrys	362
Northern Pacific R. R. Co. *v.* Dow	389
Northern Pacific R. R. Co. *v.* Flaherty	542
Northern Pacific R. R. Co. *v.* Gjuve	380
Northern Pacific R. R. Co., Kimberland *v*	318
Northern Pacific R. R. Co., Laity *v*	378

	Page.
Northern Pacific R. R. Co., Parker v	324
Northern Pacific R. R. Co. v. Urquhart	365
Northern Pacific R. R. Co. v. Yantis	58
Northwestern Lode and Mill Site Co	437
O'Brien v. Richtarik	192
Odgers v. Central Pacific R. R. Co	520
Oklahoma Capital City and Townsite Co	425
O'Neal, Patrick	137
Oregon, State of	72
Owen, West v	576
Paazig, Gainer v	346
Padgett v. Bell	630
Palmer v. Carter	544
Paours, Wenzel	475
Parker, Edson O	547
Parker, Willis v	623
Parker v. Northern Pacific R. R. Co	324
Parole and Morning Star, Ground Hog Lode v	430
Parsons v. Hughes	593
Paulson v. Richardson	597
Payne v. Campbell	367
Pederson, Saint Paul, Minneapolis and Manitoba Ry. Co. *et al.* v	21
Pennell, Lewis H	645
Perkins, Alfred G	282
Perrin, Lord v	536
Peterson, Lewis	121
Pierce, Jay	73
Pierpoint v. Stalder	595
Pike v. Thomas	493
Platt *et al.* v. Graham (on review)	482
Pollard v. Rethke *et al*	294
Polzin, August	84
Pratt v. Avery *et al.* (on review)	457
Quigley, T. H	551
Raff, St. John v	552
Reed v. Fitzgerald	159
Reeves v. Emblen	444
Rethke *et al.* Pollard v	294
Rhea, United States v	578
Rice v. Bissell	606
Richardson, Paulson v	597
Richtarik, O'Brien v	192
Rico Lode	223
Robbins, David H	409
Roberts, Oscar T	423
Robinson, F. C	202
Ross *et al.*, Schweitzer v	70
Sah-wah-goo-do gaw	55
Saint Paul, Minneapolis and Manitoba Ry. Co	255
Saint Paul, Minneapolis and Manitoba Ry. Co. *et al.* v. Pederson	21
Sampson v. Lawrence	511
Sargent, John	415
Satrum, Peter O	485
Schweitzer v. Ross *et al*	70
Schnabelin, John	474
Scotford v. Huck	60
Shannon, Jeardoe v	38
Shannon, Tannehill v. (on review)	38
Shineberger, Joseph	231
Short, Lovia A	512
Shumate, Warden v	330
Silva, Miller v	480
Simpson, Willis E., *et al*	306
Simrall, William F	581
Sioux City and Pacific R. R. Co. v. Lewis *et al*	292
Sloan, Uriah	411
Smith, Amos E	204
Smith v. Anderson	46
Smith v. Custer *et al*	269
Smalley v. Hawblit's	372
Sorenson v. Becker	357
Southern Minnesota R. R. Co. *et al*	472
Southern Pacific R. R. Co., Wier v.	282
Spalding v. Colfer	615
Sparks v. Galvin	534
Spence, State of Minnesota v	64
Stalder, Pierpoint v.	595
Starr v. State of Minnesota	644
State of Arkansas	387
State of California	307
State of California, Central Pacific R. R. Co v.	79
State of California *et al.*, Wright *et al.* v	24
State of California, United States v	4
State of Florida	65, 369, 380
State of Louisiana	126
State of Louisiana v. McDonogh *et al.* (on review)	134
State of Michigan	308, 560

	Page.
State of Minnesota	32
State of Minnesota, Lachance *v.*	179
State of Minnesota *v.* Spence	64
State of Minnesota, Starr *v*	644
State of Oregon	72
State of Wisconsin *v.* Wolf	555
Stearns, George F	573
St. John *v.* Raff	552
Stone, William R	524
Streib *v.* Zalondek	601
Strohl, Matilda	62
Swett, Crumpler *v*	584
Talbot, Thomas F	495
Tannehill *v.* Shannon (on review)	38
Taylor *et al.*, Armstrong *v*	598
Taylor *v.* Yates *et al*	279
Texas Pacific grant	530
Thomas, Pike *v*	493
Thompson, William	104
Thompson, Sydney F	285
Thrasher *v.* Mahoney	626
Tilton, Daniel G	368
Tingley, Henry C	205
Trick, Epley *v*	110
United States *v.* State of California	4
United States *v.* Atterbery *et al*	173
United States, Hardee *v*	391
United States *v.* Rhea	578
Union River Logging Railroad Co	374
Urquhart, Northern Pacific R. R. Co. *v*	365
Victorine *v.* New Orleans and Pacific R. R. Co	377
Waite, Fred. G	638
Wakefield, George M	189
Ward, Gilbert M	156
Warden *v.* Shumate	330
Warren, Emma J	113
Watts *et al.*, Delaney *v*	480
Weed, Thurlow	100
Weir *v.* Southern Pacific R. R. Co	282
Welo, Caroline	612
West, Bartl *v*	289
West *v.* Owen	576
White *v.* McGurk *et al.* (on review)	155
Wilds, Henry	394
Willis *v.* Parker	623
Winslow, Robert M	191
Wintamute, D. D	636
Wisconsin *v.* Wolf	555
Wolters, Charles	131
Wright *et al. v.* California *et al*	24
Wybrant, H. P., *et al*	18
Yantis, Northern Pacific R. R. Co. *v*	58
Yates *et al.*, Taylor *v*	279
Zalondek, Streib *v*	601

TABLE OF CASES CITED.

[The abbreviation "L. D." refers to this publication; "B. L. P." refers to Brainerd's Legal Precedents; "1 C. L. L.," to Copp's Public Land Laws, Ed. 1875; "2 C. L. L.," to Copp's Public Land Laws, Ed. 1882; "C. L. O.," to Copp's Land Owner; "C. M. D.," to Copp's Mining Decisions; "C. M. L.," to Copp's Mineral Lands; "Lester," to Lester's Land Laws and Decisions; "Rep.," to the Reporter; "S. M. D.," to Sickles' Mining Laws and Decisions; and "C. Cls.," to the Court of Claims.]

Case	Page.
Aiken *v.* Ferry; 6 Saw., 79	277
Alabama and Chattanooga R. R. Co.; 8 L. D., 33	592
Alabama and Chattanooga R. R. Co. *v.* Tennessee and Alabama R. R. Co.; 5 L. D., 582	33
Allen, Adelphi; 6 L. D., 420	568, 613
Allen *v.* Baird; 6 L. D., 98	98
Allen *v.* Leet; 6 L. D., 669	454
Allman *v.* Thulon; 1 C. L. L., 690	176, 419
Atherton *v.* Fowler; 96 U. S., 513	451
Atkins *v.* Disintegrating Co.; 18 Wall., 272	95
Atlantic and Pacific R. R. Co.; 6 L. D., 84 and 91	238, 356, 428
Atlantic and Pacific R. R. Co. *v.* Buckman; 3 L. D., 277	391
Atlantic and Pacific R. R. Co. *v* Forrester; 1 L. D., 475	391
Atlantic and Pacific R. R. Co. *v.* McCabe; 4 L. D., 94	373
Austin *v.* Norin; 4 L. D., 461	97, 201
Bailey, John W. *et al.*; 5 L. D., 216	500
Bailey, John W. *et al.*; 3 L. D., 386	460
Ball *v.* Graham; 6 L. D., 407	567
Baker *v.* Hurst; 7 L. D., 457	111
Baldwin *v.* Stark; 107 U. S., 463	277
Ballance *v.* Forsythe *et al.*; 21 How., 389.	214
Banks, Nathaniel; 7 L. D., 512	532
Barnard *v.* Ashley's heirs; 18 How., 46	540
Barnes, Julius A.; 6 L. D., 522	89, 410, 572
Barney *v.* Winona and St. Peter R. R. Co.; 117 U. S., 228	23, 37
Barnett *v.* Crow; 5 L. D., 372	420
Barnum, Henry E.; 5 L. D., 583	241
Bartch *v.* Kennedy; 3 L. D., 437	535
Beckner, Tobias; 6 L. D., 134	288, 449
Beecher *v.* Wetherby; 95 U. S., 517	311
Belk *v.* Meagher; 104 U. S., 282	389
Benschoter *v.* Williams; 3 L. D., 419	242
Bertrand, Madam; 6 L. D., 487	393
Bishop, Francis M.; 5 L. D., 429	107
Bishop, George S.; 1 L. D., 69	533
Bickford, Perry; 7 L. D., 374	50
Bladen *v.* Southern Pacific R. R. Co.; 9 C. L. O., 119	206
Blanc *v.* Lafayette; 11 How., 104	83
Blenkner *v.* Sloggy; 2 L. D, 267	535
Blodgett *v.* California and Oregon R. R. Co.; 6 C. L. O., 37	22
Blodgett *v.* Central Pacific R. R. Co.; 6 L. D., 309	322
Blunt, Elias; 5 L. D., 617	466
Boal, Albert D.; 7 L. D., 50	480
Bodie Tunnel and Mining Co. *v.* Bechtel Consolidated M'g Co. *et al.*; 1 L. D., 584	125
Boeing, Wilhelm; 6 L. D., 262	89
Bolster *v.* Barlow; 6 L. D., 825	554
Boones *v.* Chiles; 10 Pet., 177	278
Booth *v.* Lee (unreported)	178
Bosch, Gottlieb; 8 L. D., 45	569
Bowers *v.* Keesecker; 14 Ia., 307	419
Bradford, David Y.; 8 L. D., 283	528
Brady *v.* Southern Pacific R. R. Co.; 5 L. D., 407	391
Brake *v.* Ballou; 19 Kans., 402	176
Branagan *et al. v.* Dulaney; 2 L. D., 744	125
Branagan *et al. v.* Dulaney; 13 C. L. O., 190	362
Brassfield *v.* Eshom; 8 L. D., 1	569
Bray *v.* Colby; 2 L. D., 88	629
Bright *et al. v.* Elkhorn Mining Co.; 8 L. D., 122	440
Bright *v.* Northern Pac. R. R. Co.; 6 L. D., 613	292, 572
Brittin, James; 4 L. D., 441	567
Brown, Hannah M.; 4 L. D., 9	530
Brown, Joseph; 5 L. D., 316	104
Brown *v.* Central Pacific R. R. Co.; 6 L. D., 151	364, 523
Brown *v.* United States; 113 U. S., 568	17, 94, 281
Buena Vista Lode; 6 L. D., 646	460
Bunnell, Louis W.; 7 L. D., 231	568, 653
Burgel, Joseph	422
Butts *v.* Northern Pacific R. R. Co.; 119 U. S., 55	311
Buxton *v.* Traver; 130 U. S., 232	541
Byer *v.* Burrill; 6 L. D., 521	176
Cain, James A.; 7 L. D., 482	411
California *v.* Townsend; 2 C. L. L., 1117	540

	Page.
California and Oregon R. R. Co. *v.* California; 4 L. D., 142	78
Cameron, John; 7 L. D., 436	369
Campbell, John; 6 L. D., 317	415
Campbell *v.* Kelley; 8 L. D., 75	606
Campbell *v.* Middleton; 7 L. D., 400	139
Candido *v.* Fargo; 7 L. D., 75	400, 535
Capprise *v.* White; 4 L. D., 176	414
Capps, L. J.; 8 L. D., 406	414
Carpenter, Chauncey; 7 L. D., 236	236
Carroll *v.* Safford; 3 How., 441	278
Caste, Nancy Ann; 3 L. D., 174	300, 452, 533
Caviness *v.* Harrah; 4 L. D., 174	602
Caward, J. J.; 3 L D., 505	97
Cedar Rapids R. R. Co. *v.* Herring; 110 U. S., 27	23
Central Pacific R. R. Co. *v.* Benity; 5 Saw., 118	117
Central Pacific R. R. Co. *v.* Dyer; 1 Saw., 641	117
Central Pacific R. R. Co. *v.* Wolford; 3 L. D., 264	364, 523
Chaffin *v.* Taylor; 116 U. S., 567	264
Chicago, Milwaukee and St. Paul Ry. Co. *v.* Amundson; 8 L. D., 291	572
Choate, John R.; 7 L. D., 281	606
Chotard *v.* Pope; 12 Wheat., 588	90
Chrisinger, R. M.; 4 L. D., 347	335, 525, 653
Churchill *v.* Seeley; 4 L. D., 589	478, 596
Clark, Daniel; 1 C. L. L., 494	455
Clark, George T.; 6 L. D., 157	532, 584
Clarke, Judith M.; 7 L. D., 485	204, 411
Cleghorn *v.* Bird; 4 L. D., 478	442
Clement *v.* Heney; 6 L. D., 641	581, 596
Clements *v.* Warner; 24 How., 394	168
Cleveland *v.* Dunlevy; 4 L. D., 121	500, 600
Cole, Harlan; 6 L. D., 290	97
Coleman *v.* Winfield; 6 L. D., 826	542
Collar *v.* Collar; 4 L. D., 26	201
Colorado Coal Co. *v.* United States; 123 U. S., 314	50
Cooper *v.* Roberts; 18 How., 173	311, 565
Cornell, Lode; 6 L. D., 717	460
Cotton *v.* Struthers; 6 L. D., 288	567
Crooks *v.* Hadsell; 3 L. D., 258	161
Crosby *v.* Dall; 13 C. L. O., 210	578, 586
Cull, Frances M.; 5 L. D., 348	653
Davidson *v.* Kokojan; 7 L. D., 436	504
Dayton *v.* Dayton; 6 L. D., 164	248
Deffeback *v.* Hawke; 115 U. S., 392	541, 604
Denny *v.* Taylor's heirs; 2 L. D., 227	456
Devoe, Lizzie A.; 5 L. D., 4	107
Disch, John B.; 8 L. D., 31	32
Doe *v.* Larmore; 116 U. S., 198	36
Dole, David B.; 3 L. D., 214	108
Downey, Owen D.; 6 L. D., 23	51, 114, 432, 451
Downey, S. W.; 7 C. L. O., 26	108
Douglas *v.* County of Pike; 101 U. S., 677	93
Doyle, Edward J.; 7 L. D., 3	542
Drew, William L.; 8 L. D., 399	535
Dubuque and Sioux City R. R. Co.; 2 L. D., 542	473
Durand *v.* Martin; 120 U. S., 366	9
Durbize, John; 6 L. D., 536	108
Dungan *v.* Griffen's heirs; 1 C. L. L., 254	289
Eddy *v.* England; 6 L. D., 530	553, 581
Edwards' Lessee *v.* Darby; 12 Wheat., 206	93
Eldred *v.* Sexton; 19 Wall., 189	89, 422
Elk *v.* Wilkins; 112 U. S., 94	57
Elliott *v.* Lee; 4 L. D., 301	578, 586
Elliott *v.* Ryan; 7 L. D., 322	111
Ellis *v.* Moore; 6 L. D., 630	52
Elmer *v.* Bowen; 4 L. D., 337	419, 504
Elson, William C.; 6 L. D., 797	206
Elwell *v.* Northern Pacific R. R. Co.; 5 L. D., 566	322
Emmert, David B.; 3 L. D., 55	415
Engen *v.* Sustad; 11 C. L. O., 215	567, 613
English *v.* Noteboom; 7 L. D., 335	478
Ervine, Thomas; 4 L. D., 420	446
Esler *v.* Townsite of Cooke; 4 L. D., 212	560
Fagan *v.* Jiran; 4 L. D., 141	578
Falconer *v.* Hunt *et al.*; 6 L. D., 516	46, 194, 451, 621
Farnsworth *v.* Hudson; 5 L. D., 315	553
Farnsworth *v.* Minnesota and Pacific R. R. Co.; 92 U. S., 49	592
Featherspil, John C.; 4 L. D., 570	416
Ferguson *v.* Hoff; 4 L. D., 491	479
Filkins, Charles W.; 5 L. D., 49	466
Fitzsimmons *v.* Meder; 6 L. D., 93	600
Flint, A. E.; 6 L. D., 668	87
Foote, George B.; 2 L. D., 773	104
Forgeot, Margaret; 7 L. D., 280	436
Foster, David; 2 C. L. L., 1125	540
Foster *v.* McLean; 2 L. D., 175	176
Frank, Samuel M.; 2 L. D., 628	419, 503
Fraser *v.* Ringgold; 3 L. D., 69	52, 371
French, William (on review); 2 L. D., 238	235
Friese *v.* Hobson; 4 L. D., 580	463, 551, 596
Friend, William; 5 L. D., 38	414
Frisbie *v.* Whitney; 9 Wall., 157	275, 301
Frohne *v.* Sanborn; 6 L. D., 491	536
Frue, W. B. *et al.* (Topsy Mine); 7 C. L. O., 20	224
Fruit, Henry D.; 6 L. D., 138	510
Gage *v.* Lemieux; 8 L. D., 139	576
Gaines *v.* Thompson; 7 Wall., 347	277
Galloway *v.* Winston; 1 L. D., 142	554
Garrett, Riley; 7 L. D., 79	432
Gates *v.* Gates; 7 L. D., 35	618, 628
Geer *v.* Farrington; 4 L. D., 410	450
Gelpcke *v.* Dubuque; 1 Wall., 175	109, 263
Gilbert *v.* Spearing; 4 L. D., 463	226
Gilfillan, R. E.; 6 L. D., 353	241
Goforth, William; 8 L. D., 80	393
Going *v.* Orns; 8 Kansas, 87	504
Goist *v.* Bottum; 5 L. D., 643	99
Good, Maria; 5 L. D., 196	612
Gotthelf *v.* Swinson; 5 L. D., 657	139, 243
Good Return Placer Mine; 4 L. D., 221	505
Graves *v.* Keith; 3 L. D., 309	243
Greenwood *v.* Peters; 4 L. D., 237	54, 568, 654
Grinnell *v.* Railroad Co.; 103 U. S., 739	23
Grisar *v.* McDowell; 6 Wall., 381	414
Grove *v.* Crooks; 7 L. D., 140	529

	Page.
Habersham, F. E.; 4 L. D., 282	161
Hagland, Gustavus; 1 L. D., 593	438
Hair, James; 8 L. D., 467	535
Hardee, D. C.; 7 L. D., 1	393
Hardin County; 5 L. D., 236	556
Harkness v. Underhill; 1 Black, 316	276
Harris, Ariel C.; 6 L. D., 122	596
Harris, Adam S.; 8 L. D., 45	451
Harris, Henry H.; 6 L. D., 154	635, 646
Harrison, James A.; 8 L. D., 98	587
Hartzell, Thomas B.; 5 L. D., 124	281
Hastings and Dakota Ry. Co.; 2 L. D., 527	473
Hastings and Dakota Ry. Co.; 6 L. D., 716	473
Hatch v. Van Doren; 4 L. D., 358	504
Hatfield Smith *et al.*; 6 L. D., 561	236
Hanson v. Howe; 2 L. D., 220	243
Healey, Andrew J.; 4 L. D., 80	653
Heirs of Isham Floyd; 5 L. D., 531	281
Heitkamp v. Halverson; 3 L. D., 530	373
Hemsworth v. Holland; 7 L. D., 76	400
Herrell, Noah; 6 L. D., 573	568
Heydenfeldt v. Daney Gold Co.; 93 U. S., 634	95
Hogan v. Page; 2 Wall., 605	455
Holland, William H.; 6 L. D., 38	51, 114
Hollants v. Sullivan; 5 L. D., 115	404
Holmes, Lewis; 6 L. D., 762	480
Holmes v. Northern Pacific R. R. Co.; 5 L. D., 333	364, 385
Holston, Frank V.; 7 L. D., 218	89, 644
Holz v. Fox; 2 L. D., 162	640
Hooper, Henry; 6 L. D., 624	191, 536
Hotaling, Charles; 3 L. D., 17	202
Hotaling v. Currier; 5 L. D., 368	121, 600
Howard, Prestina B.; 8 L. D., 286	449
Howden v. Piper; 3 L. D., 162	176, 420
Howell v. Bishop; 6 L. D., 608	500
Houston v. Coyle; 2 L. D., 58	139
Hughes v. Tipton; 2 L. D., 334	160, 414
Hunt v. Lavin; 3 L. D., 499	504
Hunter v. Haynes; 7 L. D., 8	554
Hurd v. Smith; 7 L. D., 491	600
Jacobs v. Champlin; 4 L. D., 318	242
Jacobs v. Northern Pacific R. R. Co.; 6 L. D., 223	321
James *et al.* v. Nolan; 5 L. D., 526	529
Jefferson v. Winter; 5 L. D., 694	53
Jenks, James; 8 L. D., 85	551
Johansen, John; 5 L. D., 408	498
Johnson v. Towsley; 13 Wall., 72	90, 276, 348
Jones, James A.; 3 L. D., 176	452
Jones v. Campbell; 7 L. D., 404	373
Jones v. Finley; 10 C. L. O., 365	161
Kane *et al.* v. Devine; 7 L. D., 532	469
Kansas Pacific R. R. Co. v. Atchison, Topeka and Santa Fé R. R. Co.; 112 U. S., 42	23, 360
Kansas Pacific R. R. Co. v. Dunmeyer; 113 U. S., 629	293, 379
Kathan, Clark S.; 5 L. D., 94	518
Kearney, Thomas; 7 L. D., 29	530
Kelley v. Grameng; 5 L. D., 611	580
Kenosha v. Lamson; 9 Wall., 477	263
Killin v. Suydam; 6 L. D., 324	551
Keiser v. Keech; 7 L. D., 25	597
Knight v. Haucke; 2 L. D., 188	500, 626
Knippenberg, L. and B.; 4 L. D., 477	654
Kortsch v. State of Minnesota; 7 L. D., 313	182
Krichbaum v. Perry; 5 L. D., 403	97, 201
Krichbaum v. Perry; 4 L. D., 517	139
Kurtz v. Summers; 7 L. D., 46	139
Lachance v. State of Minnesota; 4 L. D., 479	180, 469, 556
Lalley, Robert *et al.*; 10 C. L. O., 55	299
Lambert v. Fairchild; 5 L. D., 675	566
Landgren, Olof; 2 B. L. P., 323	63
Larriviere v. Madegan; 1 Dillon, 455	220
Larson v. Weisbecker; 1 L. D., 409	247
Laura, the; 114 U. S., 441	94
Lea, J. C.; 11 C. L. O., 45	107, 232
Lee v. Johnson; 116 U. S., 48	276
Leinen, George; 8 L. D., 233	431
Love, James S.; 5 L. D., 642	107
Lowe, Robert; 5 L. D., 541	409
Lundy v. Hoebel; 7 L. D., 49	139
Lynch, James; 7 L. D., 580	308
ytle v. Arkansas; 22 How., 193	176
Magalia Gold Mining Co. v. Ferguson; 6 L. D., 218	490
Makinson, R. W.; 4 L. D., 165	107
Malone v. Union Pacific Ry. Co., 7 L. D., 13	294
Mann v. Huk; 3 L. D., 452	541
Manning, Patrick; 7 L. D., 144	354
Martel, Israel; 6 L. D., 566	635
Martin, William; 7 L. D., 351	568
Marquez v. Frisbie; 101 U. S., 473	277
Martin v. Marks; 97 U. S., 345	68
Martin v. Henderson; 2 L. D., 172	161
Martinson v. Rhude; 3 L. D., 500	504
Marshall, James H.; 3 L. D., 411	334
Matthiessen and Ward v. Williams; 6 L. D., 95	331, 607
Matthiessen and Ward; 6 L. D., 713	77
McConliss, Rufus; 2 L. D., 622	97
McCreery v. Haskell; 119 U. S., 327	360
McGarrahan v. New Idria Mining Co.; 3 L. D., 422	125
McCay, John J.; 2 C. L. L., 454	566
McKenzie v. State of California; 6 L. D., 680	73
McMahon v. Grey; 5 L. D., 58	600
McMicken v. United States; 97 U. S., 204	592
Merritt v. Short *et al.*; 3 L. D., 435m	161
Merryman, Eden; 8 L. D., 406	483
Meyers v. Smith; 6 L. D., 526	451
Miller, Ann E.; 5 L. D., 642	108
Miller, John W.; 1 L. D., 57	606
Miller v. Noble; 3 L. D., 9	52, 574
Miller, Wilson; 6 C. L. O., 190	236
Millican v. Northern Pacific R. R. Co.; 7 L. D., 85	294
Miner v. Mariott; 2 L. D., 709	438

	Page.
Mitchell *v.* Robinson; 3 L. D., 546	139, 243
Mitchell, Samuel M.; 1 L. D., 96	404
Mitchell, Joseph W.; 7 L. D., 455	268
Montana Mining Co.; 6 L. D., 291	438
Mooney, W. J.; 12 C. L. O., 51	510
Moore *v.* Robbins; 96 U. S., 530	277
Morgan, Evan L.; 5 L. D., 215	635
Morgan *v.* Craig; 10 C. L. O., 239	178
Morgan *v.* Doyle; 3 L. D., 5	600
Morrison *v.* Jackson; 92 U. S., 654	455
Murdock *v.* Higgason; 6 L. D., 35	505
Murphy *v.* Deshane; 6 L. D., 831	201
Murray, J. H.; 6 L. D., 124	373
Nall *v.* Pulver; 3 L. D., 398	602
Neff *v.* Cowhick; 8 L. D., 111	443
Neilson *v.* Shaw; 5 L. D., 387	333
Newcomb, Jefferson; 2 C. L. O., 162	93
New Orleans and Pacific R. R. Co.; 5 L. D., 593	26
Newport Lode; 6 L. D., 546	460
New York Lode and Mill Site Claim; 5 L. D., 513	460
Nivens *v.* State of California; 6 L. D., 439	499
Northern Pacific R. R. Co. *v.* Bowman; 7 L. D., 238	364, 379
Northern Pacific R. R. Co. *v.* Elder *et al.*; 6 L. D., 409	404
Northern Pacific R. R. Co. *v.* Evans; 7 L. D., 131	364, 379
Northern Pacific R. R. Co. *v.* Johnson; 7 L. D., 357	294
Northern Pacific R. R. Co. *v.* Schoebe; 3 L. D., 183	485
Northern Pacific R. R. Co. *v.* Sturm; 5 L. D., 295	391
Northern Pacific R. R. Co. *v.* Waldon; 7 L. D., 182	356
Northern Pacific R. R. Co. *v.* Wiley; 7 L. D., 354	294
Nyman *v.* St. Paul, Minneapolis and Manitoba Ry. Co.; 5 L. D., 396	391
Ohio Life and Trust Co. *v.* Debolt; 16 How., 127	109
Oliver *v.* Thomas *et al.*; 5 L. D., 292	237, 632
O'Neal, Patrick; 8 L. D., 137	587
Orr *v.* Breach; 7 L. D., 292	490
Osterman *v.* Baldwin; 6 Wall., 116	541
Owens *et al.* *v.* Stephens *et al.*; 2 L. D., 699	438
Parker *v.* Castle; 4 L. D., 84	559, 580
Parker *v.* Gamble; 3 L. D., 390	445
Pecard *v.* Camens; 4 L. D., 152	88, 190, 410
Pederson *v.* Jorgenson; 5 L. D., 22	243
Peninsular R. R. Co. *v.* Carlton; 2 L. D., 534	474
Perkins *v.* Robson; 6 L. D., 828	139
Peterson, Adolph *et al.*; 6 L. D., 371	466
Philbrick *v.* United States; 120 U. S., 59	94
Phillip *v.* Central Pacific R. R. Co.; 6 L. D., 378	72
Polk's Lessee *v.* Wendall; 9 Cranch, 87	93
Porter *v.* Throop; 6 L. D., 691	528
Powers, John; 1 L. D., 103	139
Prescott, Nellie O.; 6 L. D., 245	635
Pruitt *v.* Chadbourne; 3 L. D., 100	500
Putnam, S. N.; 4 C. L. O., 146	93, 282
Quinby *v.* Conlan; 104 U. S., 420	277
Rabuck *v.* Cass; 5 L. D., 398	580
Railroad Co. *v.* Baldwin; 103 U. S., 429	117
Ramsey, George; 5 L. D., 120	50, 114, 574
Rasmussen *v.* Rice; 6 L. D., 755	600
Ray, William H.; 6 L. D., 340	247
Raymond, J. B.; 2 L. D., 854	419
Redmond, Henry J.; 4 L. D., 559	485
Reed *v.* Buffington; 7 L. D., 154	111
Renner, Sarah; 2 L. D., 43	88
Rico Townsite; 1 L. D., 556	196
Rivers *v.* Burbank; 9 C. L. O., 238	107
Roberts, Oscar T.; 5 L. D., 392	568
Roberts *v.* Mahl; 6 L. D., 446	581
Roberts *v.* Cooper; 20 How., 481	264
Robertson *v.* Downey; 127 U. S., 607	94
Roe *v.* Schang; 5 L. D., 394	1
Roeschlaub *v.* Union Pacific Ry. Co.; 6 L. D., 750	345
Rogers *v.* Lukens; 6 L. D., 111	110
Root *v.* Shields; 1 Wool., 340	278
Rowan *et al.* *v.* Runnels; 5 How., 134	109
Rowe, Elias; 7 L. D., 397	482
Rowena Lode; 7 L. D., 477	460
Rowland *v.* Clemens; 2 L. D., 633	161
Ryan *v.* Central Pacific R. R. Co.; 99 U. S., 382	32
Saint Louis, Iron Mountain and Southern Ry. Co. *v.* McGee; 115 U. S., 469	36, 592
Saint Paul R. R. Co. *v.* Winona R. R. Co.; 112 U. S., 720	23, 37
Saint Paul, Minneapolis and Manitoba Ry. Co.; 4 L. D., 127	473
Saint Paul, Minneapolis and Manitoba Ry. Co. *v.* Bond; 3 L. D., 50	23
Saint Paul, Minneapolis and Manitoba Ry. Co. *v.* Northern Pacific R. R. Co.; 4 L. D., 426	23
Salter *v.* Burt; 20 Wend., 205	431
Sandberg, Goran; 7 L. D., 384	615
Sandell *v.* Davenport; 2 L. D., 157	640
Sanford, George E.; 5 L. D., 535	76
Satterlee *v.* Dibble; 2 L. D., 307	602
Sayles, Henry P.; 2 L. D., 88	206
Schick, Charles H.; 5 L. D., 151	114, 574
Schindler, Adam; 7 L. D., 253	574
Schrotberger *v.* Arnold; 6 L. D., 425	2, 451
Schulenberg *v.* Harriman; 21 Wall., 44	37, 591
Scotford *v.* Huck; 8 L. D., 60	290
Sears *v.* Almy; 6 L. D., 1	53, 371
Secretary *v.* McGarrahan; 9 Wall., 298	277
Seitz *v.* Wallace; 6 L. D., 299	402, 553
Shafer, John; 5 L. D., 283	393, 455
Shanley, James; 5 L. D., 641	63
Shaw, C. G.; 1 C. L. L., 309	206
Shenon, Philip *et al.*; 8 C. L. O., 8	231
Shepley *v.* Cowan; 91 U. S., 340	276
Showers *v.* Friend; 3 L. D., 210	161
Sieman's admr. *v.* Sellers; 123 U. S., 276	94
Simmons, W. A. *et al.*; 7 L. D., 283	604

	Page.
Simmons v. Wagner; 101 U.S., 260	277
Sioux City R. R. Co. v. Chicago Ry. Co.; 117 U.S., 406	38
Slootskey, A. J.; 6 L. D., 505	241, 430
Smith, Amos, E.; 8 L. D., 204	476
Smith v. Ewing; 23 Fed. Rep., 741	277
Smith v. Martin; 2 L. D., 333	414
Snyder v. Ellison; 5 L. D., 353	202
Southern Minnesota Ry. Co. v. Kufner; 2 L. D., 492	472
Southern Pacific R. R. Co.; 6 L. D., 618	283
Southern Pacific R. R. Co. v. Lopez; 3 L. D., 130	364, 523
Southern Pacific R. R. Co. v. Reed; 4 L. D., 256	23
Spencer, James; 6 L. D., 217	400, 535
Spithill v. Gowen; 2 L. D., 631	160
State of California; 7 L. D., 270	499
State of California v. Smith; 5 L. D., 543	127
State of Florida; 8 L. D., 65	370
State of Illinois; 6 C. L. O., 76	68
State of Kansas; 5 L. D., 243	137
State of Michigan; 7 L. D., 514	388, 556
State of Minnesota; 14 C. L. O., 118	127
State of Minnesota; 6 L. D., 37	557
State of Oregon; 3 L. D., 595	263
State of Oregon; 5 L. D., 31	556
State of Oregon; 7 L. D., 572	557
Stanton, Mary; 7 L. D., 227	605
Stark v. Starrs; 6 Wall., 402	414
Starkey, Orlando; 7 L. D., 385	138
Stayton v. Carroll; 7 L. D., 198	139, 554
Steel v. Smelting Co.; 106 U. S., 450	276
Steele, Lydia; 1 L. D., 460	436
Steinhardt, Falk; 7 L. D., 10	414
Stephens v. Ray; 5 L. D., 133	138, 201, 549
Stevens v. Owens *et al.*; 3 L. D., 401	281
Story v. Southern Pacific R. R. Co.; 4 L. D., 395	24
Strawn v. Maher; 4 L. D., 235	578, 586, 618
Stroud v. De Wolf; 4 L. D., 394	121, 560, 617, 629
Strout v. Yeager; 7 L. D., 41	139
Supervisors v. Kennicott; 94 U. S., 498	264
Sutton v. State of Minnesota; 7 L. D., 562	182
Swan and Billups v. Lindsey; 70 Ala., 521	36
Sweayze, Stephen; 5 L. D., 570	393, 465
Talkington, heirs of Isaac W.; 5 L. D., 114	104
Tannehill v. Shannon; 6 L. D., 626	40
Tarr, Jennie M; 7 L. D., 67	74
Taylor, Ida May; 6 L. D., 107	296
Texas Pacific Grant; 8 L. D., 530	584
Thomas v. St. Joseph and Denver City R. R. Co.; 3 C. L. O., 197	226
Thompson v. Lee County; 3 Wall., 327	263
Thompson, William A.; 6 L. D., 576	62, 635, 647
Thompson, Sidney F.; 8 L. D., 285	618
Thornton, Hiram S.; 3 L. D., 509	54
Toponce, Alexander; 4 L. D., 261	432
Topsy Mine (W. B. Frue *et al.*); 7 C. L. O., 20	224
Trepp v. Northern Pacific R. R. Co.; 1 L. D., 380	23
Turpen, John C.; 5 L. D., 25	93
Tyrl, John E.; 3 L. D., 49	518, 567
United States v. Atterbery *et al.*; 8 L. D., 176	503
United States v. Barbour; 6 L. D., 432	50
United States v. Burlington and Missouri R. R. Co.; 98 U. S., 341	93, 262
United States v. Clark *et al.*; 6 L. D., 770	416
United States v. Edwards; 33 Fed. Rep., 104	177
United States v. Fisher; 2 Cranch, 386	95
United States v. Flint; 4 Saw., 58, and 98 U. S., 61	172
United States v. Gilmore; 8 Wall., 330	93
United States v. Graham; 110 U. S., 219	94, 281
United States v. Hill; 120 U. S., 169	94
United States v. Johnston; 124 U. S., 236	94
United States v. Miller; 3 B. L. P., 214	16
United States v. Miner; 114 U. S., 243	277
United States v. Moore; 95 U. S., 763	262
United States v. Repentigny; 5 Wall., 211	592
United States v. Schurz; 102 U. S., 378	71, 276
United States v. Skahen; 6 L. D., 120	653
United States v. State of California; 8 L. D., 4	24
United States v Woodbury; 5 L. D., 303	177
Vance v. Burbank; 101 U. S., 514	277
Vandivoort, Samuel H.; 7 L. D., 87	568, 654
Van Gordon v. Ems; 6 L. D., 422	578, 586, 618
Van Ostrum v. Young; 6 L. D., 25	578, 618
Van Wyck v. Knevals; 106 U. S., 360	592
Veta Grande Lode; 6 L. D., 719	460
Wachter *et al.* v. Sutherland; 7 L. D., 165	237, 500
Wade v. Sweeney; 6 L. D., 234	121, 560
Wakefield v. Cutter *et al.*; 6 L. D., 451	190
Walker, John M.; 5 L. D., 504	560
Walker, John M. *et al.*; 7 L. D., 565	611
Wallace v. Boyce; 1 L. D., 26	50, 574
Wallace v. Schooley; 3 L. D., 326	559
Walsh, Joseph; 5 L. D., 319	143
Warden v. Shumate; 8 L. D., 330	607
Warner, James H.; 7 L. D., 531	234
Water and Mining Co. v. Bugbey; 96 U. S., 165	498
Waters v. Sheldon; 7 L. D., 346	554
Watson, Thomas E.; 6 L. D., 71	395, 497
Watts v. Williams; 6 L. D., 94	331, 607
Way v. Matz; 6 L. D., 257	2
Weed, Thurlow; 8 L. D., 100	138
Welch v. Molino *et al.*; 7 L. D., 210	281
West v. Owen; 4 L. D., 412	586, 617
Whitcher v. Southern Pacific R. R. Co.; 3 L. D., 459	473
Whitcomb v. Boos; 5 L. D., 448	654
Widger, Minerva A.; 6 L. D., 694	425
Willis, E. W.; 6 L. D., 732	400
Wilson, Calvin L.; 10 C. L. O., 343	567
Winans v. Miller; 4 L. D., 254	243
Winona and St. Peter R. R. Co. v. Barney; 113 U. S., 628	171
Winona and St. Peter R. R. Co. v. Barney; 117 U. S., 228	178
Winslow, Robert M.; 8 L. D., 191	536
Wirth v. Branson; 98 U. S., 118	414

	Page.
Wisconsin Central R. R. Co.; 6 L. D., 190	592
Wisconsin Central R. R. Co. *v.* Stinka; 6 L. D., 344	71, 622
Witherspoon *v.* Duncan; 4 Wall., 218	248, 278
Wolcott *v.* Des Moines Co.; 5 Wall., 681	414
Wolsey *v.* Chapman; 101 U. S., 769	415
Wolters, Charles; 8 L. D., 131	587
Wood, Levi; 5 L. D., 481	50, 114
Wood *v.* Burlington and Missouri R. R. Co.; 104 U. S., 329	374
Wright *v.* Larson; 7 L. D., 555	528
Wright *v.* Roseberry; 121 U. S., 488	310
Yosemite Valley Case; 15 Wall., 77	275, 301

TABLE OF OVERRULED AND MODIFIED CASES.

[From 1 to 8 L. D., inclusive.]

Bailey, John W. *et al.* (3 L. D., 386); modified, 5 L. D., 513.
Baker *v.* Hurst (7 L. D., 457); overruled, 8 L. D., 110.
Barlow, S. L. M. (5 L. D., 695).; modified, 6 L. D., 648.
Bartch *v.* Kennedy (3 L. D., 437); modified, 6 L. D., 217.
Bivins *v.* Shelley (2 L. D., 282); modified, 4 L. D., 583.
Blenkner *v.* Sloggy (2 L. D., 267); modified, 6 L. D., 217.
Box *v.* Ulstein (3 L. D., 143); modified, 6 L. D., 217.
Bundy *v.* Livingston (1 L. D., 152); overruled, 6 L. D., 284.
Buttery *v.* Sprout (2 L. D., 293); overruled, 5 L. D., 591.

Christofferson, Peter (3 L. D., 329); modified, 6 L. D., 284 and 624.
Cornell *v.* Chilton (1 L. D., 153); overruled, 6 L. D., 483.

Devoe, Lizzie A. (5 L. D., 4); modified, 5 L. D., 429.
Dudymott *v.* Kansas Pacific R. R. Co. (5 C. L. O., 69); overruled, 1 L. D., 345.

Elliott *v.* Ryan (7 L. D., 322); overruled, 8 L. D., 110.
Ewing *v.* Rickard (1 L. D., 146); overruled, 6 L. D., 483.

Florida Ry. and Navigation Co. *v.* Miller (3 L. D., 324); modified, 6 L. D., 716.
Freeman *v.* Texas Pacific R. R. Co. (2 L. D., 559); overruled, 7 L. D., 18.

Galliher, Maria (8 C. L. O., 57); overruled, 1 L. D., 57.
Garrett, Joshua (2 C. L. L., 1005); overruled, 5 L. D., 158.
Gates *v.* California and Oregon R. R. Co. (5 C. L. O., 150); overruled, 1 L. D., 336.
Gohrman *v.* Ford (8 C. L. O., 6); overruled, 4 L. D., 580.

Hickey, M. A. and Edward (3 L. D., 83); modified, 5 L. D., 256.
Holland, G. W. (6 L. D., 20); overruled, 6 L. D., 639.

Jones, James A (3 L. D., 176); overruled, 8 L. D., 448.

Kniskern *v.* Hastings and Dakota Ry. Co. (6 C. L. O., 50); overruled, 1 L. D., 362.

Lindberg, Anna C. (3 L. D., 95); modified, 4 L. D., 299.

Maughan, George W. (1 L. D., 25); overruled, 7 L. D., 94.
Morgan *v.* Craig (10 C. L. O., 234); overruled, 5 L. D., 303.

Nyman *v.* St. Paul, Minneapolis and Manitoba Ry. Co. (5 L. D., 396); overruled, 6 L. D., 750.

Papina *v.* Alderson (1 B. L. P., 91); modified, 5 L. D., 256.
Patterson, Charles E. (3 L. D., 260); modified, 6 L. D., 284 and 624.
Phelps, W. L. (8 C. L. O., 139); overruled, 2 L. D. 854.

Rancho Alisal (1 L. D., 173); overruled, 5 L. D., 320.
Reed *v.* Buffington (7 L. D., 154); overruled, 8 L. D., 110.
Rico Town site (1 L. D., 556); modified, 5 L. D., 256.
Rogers *v.* Atlantic and Pacific R. R. Co. (6 L. D., 565); overruled, 8 L. D, 165.
Rogers *v.* Lukens (6 L. D., 111); overruled, 8 L. D., 110.

Sayles, Henry P. (2 L. D., 88); modified, 6 L. D., 797.
Serrano *v.* Southern Pacific R. R. Co. (6 C. L. O., 93); overruled, 1 L. D., 380.
Sipchen *v.* Ross (1 L. D., 634); modified, 4 L. D., 152.
Spencer, James (6 L. D., 217); modified, 6 L. D., 772 and 8 L. D., 467.
State of California *v.* Pierce (9 C. L. O., 118); modified, 2 L. D., 854.
Sweeten *v.* Stevenson (3 L. D., 249); overruled, 3 L. D., 248.

Traugh *v.* Ernst (2 L. D., 212); overruled, 3 L. D., 248.
Tripp *v.* Stewart (7 C. L. O., 39); modified, 6 L. D., 795.
Tupper *v.* Schwarz (2 L. D., 623); overruled, 6 L. D., 623.
Turner *v.* Lang (1 C. L. O., 51); modified, 5 L. D. 256.

Watson, Thomas E. (4 L. D., 169); modified, 6 L. D., 71.
Wilkins, Benjamin C. (2 L. D., 129); modified, 6 L. D., 797.
Willingbeck, Christian P. (3 L. D., 383); modified, 5 L. D., 408.

TABLE OF CIRCULARS.

	Page.
March 24, 1887. Mining claim	505
January 2, 1889. Final proof	3
February 11, 1889. Amendment of entries and filings	187
February 13, 1889. Railroads, act of March 3, 1887	348
March 8, 1889. Homesteads, etc, act of March 2, 1889	314
April 1, 1889. Oklahoma, act of March 2, 1889	336

CIRCULARS AND INSTRUCTIONS; CITED, MODIFIED, AND REVOKED.

	Page.
May 24, 1826.—School selections; Public Lands, Laws, Instructions, and Opinions, vol. 2, p. 395	129
October 5, 1829.—School selections; Public Lands, Laws, Inst., and Ops., vol. 2, p. 420	129
August 30, 1832.—School selections; Public Lands, Laws, Inst., and Ops., vol. 2, p. 466	129
December 16, 1832.—School land; 2 Public Lands, Laws, Inst., and Ops., 472	129, 472, 562
January 1, 1836.—Private entry, restoration notice; Public Lands, Laws, Inst., and Ops., vol. 2, p. 515	282
November 21, 1850.—Swamp land; 1 Lester, 543	66
January 23, 1856.—Graduation entry; 1 Lester, 473	135
March 21, 1857.—Sioux scrip; 1 Lester, 627	216
February 22, 1864.—Sioux scrip; 1 C. L. L., 721	216
January 29, 1872.—Sioux scrip; 1 C. L. L., 723	216
March 31, 1873.—Joint entry; 1 C. L. L., 301	539
September 14, 1876.—Soldiers' homestead; 2 C. L. L., 472	549
March 12, 1877.—Desert entry; 2 C. L. L. 1375; 4 C. L. O., 22	105, 231
May 17, 1877.—Soldiers' additional homestead; 2 C. L. L., 478	236
May 28, 1878.—Sioux scrip; 2 C. L. L., 1355	217
June 25, 1878.—Desert entry; 2 C. L. L., 1377	106
April 22, 1880.—Revocation of mineral withdrawals; 7 C. L. O., 36	301
September 3, 1880.—Desert entry; 2 C. L. L., 1378; 7 C. L. O., 138	106, 231
January 26, 1881.—Desert entry; 2 C. L. L., 1379	106
October 31, 1881.—Mining; Pars., 28–34	459
Par. 84	103
December 15, 1882.—Soldiers' homestead; 1 L. D., 648	549
February 13, 1883.—Soldiers' additional homestead; 1 L. D., 654	236
April 9, 1883.—Alabama lands; 1 L.D., 655	299
May 22, 1883.—Entries on lands withdrawn for indemnity purposes; 2 L. D., 517	246
December 1, 1883.—Return of fees and commissions on allowance of second entry; 2 L. D., 660	241
September 22, 1883.—Entry on meandered stream	63
March 1, 1884.—Desert entry; Gen. Cir., p. 35	107
March 1, 1884.—Equitable adjudication; general circular, p. 76	91
December 4, 1884.—Survey of mining claim; 3 L. D., 540	361
August 4, 1885.—Railroad indemnity selections; 4 L. D., 90	373
December 15, 1885.—Final proof; 4 L. D., 297	512
December 14, 1885.—Mining claim, paragraph 5; 4 L. D., 374	516
April 30, 1886.—Restored railroad lands; 5 L. D., 165	345
July 6, 1886.—Proceedings on special agent's report; 5 L. D., 149	306
July 9, 1886.—Town sites; 5 L. D., 265	426
February 21, 1887.—Final proof; 5 L. D., 426, amended	3
March 15, 1887.—Accounts; 5 L. D., 577	296
March 24, 1887.—Mining claim; 8 L. D., 505	517
April 26, 1887.—Osage final proof; 5 L. D., 581	110, 179
June 27, 1887.—Desert land; 5 L. D., 708	96, 164, 369, 372, 408
July 12, 1887.—(June 27) Timber culture; 6 L. D., 280	20, 191
February 13, 1889.—Act of March 3, 1887; 8 L. D., 348	386

ACTS OF CONGRESS CITED AND CONSTRUED.

	Page.
March 20, 1804 (5 Stat., 596)	565
March 27, 1804 (2 Stat., 303)	127
April 21, 1806 (2 Stat., 391)	127
February 15, 1811 (2 Stat., 617)	127
March 3, 1811 (2 Stat., 662)	128, 564
April 25, 1812 (2 Stat., 713)	392
April 12, 1814 (3 Stat., 123)	82
March 3, 1819 (3 Stat., 528)	391
May 11, 1820 (3 Stat., 573)	82
May 20, 1826 (4 Stat., 179)	126, 563
June 23, 1836 (5 Stat., 59)	561
August 3, 1846 (9 Stat., 51), sec. 5	422

	Page.
September 28, 1850 (9 Stat., 519)	65, 78, 308, 369
June 10, 1852 (10 Stat., 8)	165
March 2, 1853 (10 Stat., 172)	497
March 3, 1853 (10 Stat., 244)	70, 498
sec. 7	4
March 3, 1853 (10 Stat., 258)	184
July 17, 1854 (10 Stat., 304)	207
July 22, 1854 (10 Stat., 308)	70
August 4, 1854 (10 Stat., 576)	70
March 2, 1855 (10 Stat., 634)	622
May 15, 1856 (11 Stat., 9)	546
June 3, 1856 (11 Stat., 17)	33
June 3, 1856 (11 Stat., 20)	590
June 3, 1856 (11 Stat., 21)	87, 189
February 26, 1857 (11 Stat., 166)	31
March 3, 1857 (11 Stat., 195)	255
March 3, 1857 (11 Stat., 251), swamp land	65, 370, 387
June 2, 1858 (11 Stat., 294), sec. 3	80, 391, 455, 463
February 26, 1859 (11 Stat., 385)	4, 308, 495
March 12, 1860 (12 Stat., 3)	179
May 30, 1862 (12 Stat., 410)	69
July 1, 1862 (12 Stat., 489), sec. 7	292
July 5, 1862 (12 Stat., 620), joint res	190
July 12, 1862 (12 Stat., 624), joint res	258
March 3, 1863 (12 Stat., 772)	23
July 2, 1864 (13 Stat., 365), sec. 1	17
sec. 3	13
July 2, 1864 (13 Stat., 356)	292
March 3, 1865 (13 Stat., 526)	255
June 21, 1866 (14 Stat., 66)	155, 514
July 4, 1866 (14 Stat., 87)	471
July 13, 1866 (14 Stat., 97)	259
July 23, 1866 (14 Stat., 218), sec. 1	480
secs. 4 and 5	78
sec. 6	4
sec. 7	144, 279
July 25, 1866 (14 Stat., 210)	590
July 25, 1866 (14 Stat., 239)	590
July 27, 1866 (14 Stat., 292)	165
June 25, 1868 (15 Stat., 80)	590
July 25, 1868 (15 Stat., 178)	495
February 25, 1869 (15 Stat., 440)	287
April 10, 1869 (16 Stat., 45)	34
May 31, 1870 (16 Stat., 378), joint res	13
July 15, 1870 (16 Stat., 304), sec. 1	422
July 15, 1870 (16 Stat., 362)	177
March 3, 1871 (16 Stat., 588)	259
June 8, 1872 (17 Stat., 339)	41
March 3, 1873 (17 Stat., 609)	539
June 22, 1874 (18 Stat., 194)	472
March 3, 1875 (18 Stat., 420), Indian homestead	57
March 3, 1875 (18 Stat., 482)	41, 115, 374
April 21, 1876 (19 Stat., 35), sec. 1	318
July 4, 1876 (19 Stat., 73)	156, 515
March 1, 1877 (19 Stat., 267)	4, 307, 326
March 3, 1877 (19 Stat., 377)	105, 368, 432
March 3, 1877 (19 Stat., 403), final proof	411, 510
June 3, 1878 (20 Stat., 89)	52, 159, 412
June 14, 1878 (20 Stat., 113)	20, 358
sec. 2	454, 545
March 3, 1879 (20 Stat., 472)	29, 59, 316, 389, 484
March 3, 1879 (20 Stat., 472), homestead	383, 428
January 22, 1880 (21 Stat., 61)	223
May 14, 1880 (21 Stat., 140), sec. 1	372, 605
sec. 2	52, 282, 358
sec. 3	46, 207, 286, 448, 529
May 28, 1880 ((21 Stat., 143)	111, 173
June 9, 1880 (21 Stat., 169)	411, 484, 510
June 9, 1880 (21 Stat., 171), Florida	380
June 15, 1880 (21 Stat., 237), sec. 2	75, 235, 245, 330, 403, 532, 579, 595, 606
sec. 3	87
June 16, 1880 (21 Stat., 287)	163, 322, 463, 492, 530
January 13, 1881 (21 Stat., 315)	344
February 18, 1881 (21 Stat. 326)	55
March 3, 1883 (22 Stat., 487)	74, 297, 448, 532
July 4, 1884 (23 Stat., 89)	409
July 4, 1884 (23 Stat., 96), Indian homestead	57
July 5, 1884 (23 Stat., 103)	318
January 31, 1885 (23 Stat., 296)	531
February 28, 1885 (23 Stat., 337)	530
August 4, 1886 (24 Stat., 239)	296
February 8, 1887 (24 Stat., 388), sec. 4	647
February 8, 1887 (24 Stat., 391)	25, 377
March 3, 1887 (24 Stat., 556)	27, 165, 324, 348, 382, 570, 588
sec. 3	318, 382
August 9, 1888 (25 Stat., 393)	495
October 2, 1888 (25 Stat., 525)	365, 613
March 2, 1889 (25 Stat., 854)	457
sec. 2	422
sec. 4	530, 583
sec. 5	428, 474
sec. 6	500
sec. 7	581
March 2, 1889 (25 Stat., 1004), Oklahoma	336, 425

REVISED STATUTES CITED AND CONSTRUED.

Section 441	275
Section 453	275
Section 2165	290
Section 2167	60
Section 2168	60, 289
Section 2172	60
Section 2259	433, 438, 503
Section 2260	132, 367, 502
Section 2262	272
Section 2263	271
Section 2264	347
Section 2265	347, 394, 417
Section 2267	394, 417
Section 2268	572
Section 2269	405, 455
Section 2273	274
Section 2274	536
Section 2289	289
Section 2291	45, 54, 246, 286, 551, 566
Section 2292	455
Section 2294	1, 337
Section 2301	45, 336, 566, 613
Section 2303	156, 514
Section 2304	200, 337

	Page.
Section 2305	228, 337
Section 2306	235, 337
Section 2307	337
Section 2319	197
Section 2324	388, 505
Section 2325	103, 123, 223, 459, 506
Section 2326	431
Section 2334	103
Section 2336	361
Section 2337	196
Section 2339	113
Section 2348	140
Section 2350	142
Section 2355	77
Section 2356	77
Section 2357	368
Section 2362	463, 623
Section 2367	431
Section 2369	305
Section 2370	305
Section 2387	337, 425
Section 2388	337, 425
Section 2411	254
Section 2450	91
Section 2455	421
Section 2456	183
Section 2457	91
Section 2478	91
Section 2479	78
Section 2481	52
Section 2484	387

RULES OF PRACTICE CITED AND CONSTRUED.

	Page.
Rule 3	446
Rule 11	373, 453
Rule 14	456, 458
Rule 17	478
Rule 20	199
Rule 23	199
Rule 24	199
Rule 53	121, 463
Rule 54	494
Rule 55	494
Rule 58	494
Rule 76	250, 333
Rule 77	137
Rule 78	137, 332
Rule 79	421
Rule 81	373
Rule 82	471
Rule 87	48
Rule 88	470
Rule 90	470
Rule 93	470
Rule 102	285

DECISIONS

RELATING TO

THE PUBLIC LANDS.

HOMESTEAD ENTRY—SECTION 2294, R. S.

BRASSFIELD *v.* ESHOM.

A homestead entry wherein the preliminary affidavit was executed before a clerk of court, without the pre-requisite residence on the land, is voidable only; and the intervention of a contest will not defeat the right of the entryman to cure such defect where he had, prior to said contest, established his residence on the land in good faith.

Secretary Vilas to Commissioner Stockslager, January 2, 1889.

This is a motion filed by Samuel W. Brassfield, the contestant in the above case, asking for a review of departmental decision of May 26, 1888 (6 L. D., 722), alleging error of law in said decision in holding as follows, to wit, that the homestead entry admittedly illegal and voidable for want of a proper affidavit, is cured and perfected by the establishment of residence upon the entered land, no valid affidavit having been filed as required by express statutory enactment. In this case the homestead affidavit of claimant was taken before the clerk of the district court for Washington county, under section 2294, Rev. Stat., it appearing that at the date of said affidavit neither claimant nor any member of his family was residing upon the land in question. The Department held that said defect was cured by claimant, by establishing residence on the land prior to the contest. The sole question presented in this case, therefore, is whether such defect can be cured by establishing a residence prior to contest, or whether an amended affidavit may be filed in the face of a contest, the contestant not alleging or showing settlement or improvement on said tract.

In the case of Roe *v.* Schang (5 L. D., 394), it was held that such defect might be cured by a supplemental affidavit. This case arose upon a contest initiated by Roe against the homestead entry of Schang, and although the insufficiency of said affidavit was not brought in issue by said contest or alleged in the appeal from the decision of the local office, or from the decision of the General Land Office, the Department considering the question on a motion for review, held that said entry was only voidable and might be perfected by a supplemental affidavit made

before the proper officer. While it was stated in said decision that "the insufficiency of said affidavit was not put in issue in said contest, nor was it alleged in the appeals from the local land office or your office" the ruling of the Department was not placed upon that ground but upon the ground that the entryman had acted in good faith and that there was no valid objection to allowing the entryman to make the supplemental affidavit before the proper officers curing the defect.

In the case of Way *v.* Matz (6 L. D., 257) the Department held that "An entry based on a preliminary affidavit executed before the clerk of a court not authorized to act in such matters is voidable only and the defect may be cured by a supplemental affidavit."

In this case each party had made homestead entry of the tract. Way's entry being the first allowed, but Matz' entry was based on a prior settlement. It was contended that Matz' entry was unauthorized by law not having been made before the clerk of the court for the county in which the applicant is an actual resident as required by Sec. 2294, Rev. Stat., but the Department held that this was merely an irregularity which rendered the entry voidable, but that the entryman would be allowed to file supplemental affidavit of qualification before the proper officer.

In the case of Schrotberger *v.* Arnold, (6 L. D., 425) the Department held that an affidavit made before the clerk of a court without prior residence is only voidable and may be cured in the absence of an adverse claim, but it has not been considered that a contest where the contestant does not allege a settlement or improvement on the tract, or of some other adverse right than the preference right of entry that he may acquire by a cancellation of said claim is such an adverse right as would prevent the claimant from curing the defect, by filing the supplemental affidavit, as ruled in the case of Roe *v.* Schaug, the good faith of the entryman being manifest, and the entryman having made settlement and residence on the land prior to the initiation of the contest.

You will notify the claimant that he will be required to file a supplemental affidavit taken before the proper officer, said direction having been omitted in the decision of May 26, 1888.

The motion is denied.

PRACTICE—SUPERVISORY AUTHORITY OF THE DEPARTMENT.

A. C. LOGAN ET AL.

The government has always the right to appear before the local office and submit testimony or examine the witnesses offered by the parties. It has also the right to direct the postponement or continuance of a case in order to investigate the same.

Secretary Vilas to Commissioner Stockslager, January 2, 1889.

The mineral claimants in the above case have filed through their counsel an application for certiorari alleging as follows:

That the parties to the above contest, by written stipulation, agreed to a hearing to determine the character of the land involved in the ap-

plications. That the Assistant Commissioner, acting upon advice from the Governor of Montana of an apparent attempt to obtain title to agricultural lands under said mineral applications, ordered said hearing to be postponed until an investigation could be had by the General Land Office.

From this action the applicants appealed, which your office refused to transmit, holding that said action was taken by virtue of the discretionary power vested in the Commissioner from which action no right of appeal will lie.

It is not alleged that the Commissioner has denied to said applicants the right to a hearing to determine the character of said land, but has simply directed a postponement of or continuance of said hearing to enable the government to make an investigation for the purpose of determining the character of said land if it should see proper to do so.

No matter what rights the parties to the contest may have, the government has always the right to appear before the local office and submit testimony or to examine the witnesses offered by the contestants. It has also the right to direct the postponement or continuance of said case before the local office to enable it to investigate the case and I see no abuse of the discretion of the Commissioner in postponing the case now under consideration for that purpose.

The application is denied.

FINAL PROOF—CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., January 2, 1889.

Rule VIII and Rule IX of the circular of February 19, 1887 (5 L. D. 426), approved February 21, 1887, are hereby modified to read as follows, viz:

VIII. When proof is made before the register or receiver and the final certificate does not bear the date of the proof, require of the register and receiver an explanation thereof, and if the delay was caused by a failure to tender the money or other consideration at the time of making the proof, require additional evidence to show that the claimant had not, at the date of the certificate, transferred the land, and that he still continued to reside thereon, which evidence may consist of the claimant's affidavit corroborated by the affidavits of witnesses, taken before some officer authorized to administer oaths.

IX. When proof is made before any other officer than the register or receiver, allow a reasonable time for a prompt transmission of the papers to the district land office, and if any longer interval is shown between date of proof and date of certificate (if proof is otherwise sufficient), require of the register and receiver an explanation thereof and

if such delay was caused by the fault of the claimant require the same additional evidence as prescribed under Rule VIII.

S. M. STOCKSLAGER,
Commissioner.

Approved:

WM. F. VILAS,
Secretary.

SCHOOL INDEMNITY—FRACTIONAL TOWNSHIP—ACT OF MARCH 1, 1877.

UNITED STATES *v.* STATE OF CALIFORNIA.

School indemnity selections, certified prior to the passage of the act of March 1, 1877, on the basis of losses alleged in townships made fractional, by reason of the segregation of swamp lands, will not now be disturbed.

Secretary Vilas to Commissioner Stockslager, January 3, 1889.

This case comes before the Department upon the appeal of the State of California from the decision of your office of January 4, 1888, holding that certain indemnity selections therein set forth are invalid and are subject to cancellation, under the provisions of the second section of the act of March 1, 1877 (19 Stat., 267).

Said selections were approved and certified to the State prior to the act of Congress of March 1, 1877, as lands inuring to the State under the act of February 26, 1859 (11 Stat., 385), providing for indemnity "to compensate deficiencies for school purposes, where sections sixteen and thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever."

Said townships were considered by the Department to be fractional by reason of swamp land found therein, which included in some cases the sixteenth, and in other cases both the sixteenth and thirty-sixth sections, either in whole or in part—the theory upon which the Department acted being that swamp land is a "natural cause," contemplated by the act of February 26, 1859.

You held that said selections are invalid, for the reason that they "are based upon alleged deficiencies in fractional townships, caused by said townships including sections sixteen and thirty-six (one or both, either wholly or in part) being swamp lands, which are shown by the records to have been surveyed and thereafter selected by and approved to the State as swamp lands, prior to the date of the above selections for school purposes."

The practical effect of your decision is to hold that the State is not entitled to indemnity for sections sixteen and thirty-six, under the seventh section of the act of March 3, 1853, or the sixth section of the act

of July 23, 1866, where such sections are shown to be swamp land, and that it is not entitled to said selections to compensate deficiencies under the act of February 26, 1859, because said townships are not made fractional by reason of the swamp land found therein.

Holding said selections to be invalid and not confirmed by the act of March 1, 1877, you therefore conclude that said lands should be disposed of under the second section of said act, which provides that if there be an innocent purchaser from the State for a valuable consideration, he shall be allowed to prove such facts before the proper officer and to purchase the same at one dollar and twenty-five cents per acre, not to exceed three hundred and twenty acres to any one person, and that if such person neglect or refuses after knowledge of such facts to furnish proof and make payment for said land, it shall be subject to the general land laws of the United States.

It is contended by the State that the only question that can arise in this case is, whether these townships are fractional within the meaning of the act of 1859. They insist, (1) That this question was necessarily determined by the department in certifying these lands to the State, because the selections were made upon the theory that they were fractional townships within the meaning of the law, and their approval necessarily involved a ruling that the theory was correct; that the finding was made by officers entrusted by law with the duty of passing upon that question, and as the rights of the State and her grantees have become vested under it, it is now too late to disturb or question it. (2) That if it was an open question, the ruling is correct, because said townships were made fractional by the operation of peculiar statutes, applicable to California alone, in that the acts providing for the survey of public lands in said State, and the instructions of the department made for the enforcement of said acts, authorize the surveyors in segregating large bodies of notoriously swamp and overflowed lands to close the lines of the public surveys upon them as if they were lakes or ponds. Thus, fractional townships necessarily occur in California, where the government surveys abut upon large tracts of swamp and overflowed land, in the same way as if they abutted upon a lake or ocean. (3) That if, for any reason, they are in error in the contention that said lands were properly certified under the act of 1859, the State is entitled to indemnity for the sixteenth and thirty-sixth sections of swamp land, under the acts of March 3, 1853, and July 23, 1866. (4) That the act of March 1, 1877, has no application to this case, but, if it should be held that said lands are subject to disposal under the second section of said act, they contend that there is no power in the department to set aside said certification, because by said certification the legal title has passed out of the United States, and that neither the legislative nor executive department has jurisdiction over them, but resort must be had to a court of equity in the name of the United States to cancel the legal title.

These are the several issues made by the appeal of the State.

The State of California acquired the right to indemnity for school sections under the seventh section of the act of March 3, 1853 (10 Stat., 244), and the sixth section of the act of July 23, 1866 (14 Stat., 218), which provides that said act of March 3, 1853, "shall be construed as giving to 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 the 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."

In the grant of school sections to other States, indemnity is allowed therefor where such sections have at the date of survey "been sold, *or otherwise disposed of.*"

Without stopping to discuss the exact scope and meaning of the quoted language in those grants wherein it occurs, suffice it to say, that no similar language is found in the grant of school lands to California. To this State the right of indemnity is given only for such sixteenth and thirty-sixth sections as were settled upon prior to survey, reserved for public uses, or covered by Spanish or Mexican grants or other private claims.

It is evident that this section does not give to the State indemnity for the sixteenth and thirty-sixth sections, where such sections are found to be swamp and overflowed lands, because said lands are not embraced in any of the classes provided for. They are not "private claims," nor "lands reserved for public uses," but they are lands inuring to the State under a prior grant.

This question was submitted to the Attorney General by Secretary Schurz, who, on March 4, 1878, transmitted to this Department his opinion that the words, "reserved for public uses," employed in the indemnity provision of the act of July 23, 1866, do not cover lands granted to the State by the swamp land act, but refer solely to reservations made for the purposes of the general government. In this opinion the Attorney General refers to the fact that the bill as originally drawn provided by its sixth section indemnity for such sixteenth and thirty-sixth sections, "as were settled upon prior to survey, reserved for public uses, covered by *swamp lands* or grants made under Spanish or Mexican authority," etc. On the recommendation of the Committee on Public Lands, the Senate amended the sixth section of the bill by striking out the words "swamp lands, or," and the bill was enacted as thus amended.

It is urged by counsel for the State, in their argument that this opinion of the Attorney General has been followed by this Department in a

hesitating way without any direct affirmance, and as they believe without sufficient consideration.

They insist that the action of the Senate in eliminating the words swamp lands from the act as originally drawn does not warrant the inference by the Attorney General, that it was the deliberate intention of the Senate to refuse the State indemnity for sections sixteen and thirty-six that should be found swamp and overflowed; but that the inference is just as fair and much stronger that the words were stricken out, because, in the judgment of the Committee and Senate, they were surplusage.

It seems to me clear that this act of the Senate could have signified no other purpose than that inferred by the Attorney General. But, independent of this, I am satisfied, from the language of the act of July 23, 1866, that the words "reserved for public uses," as employed in the sixth section of said act, did not embrace within its meaning lands that passed to the State under the swamp grant. The State took under the swamp grant an absolute title to all lands of that character, and such lands were not at the date of the school grant "lands reserved for public uses," but lands that had been absolutely disposed of. So that I feel obliged to hold that the State of California is not entitled, as other States are, under the language of the various acts providing for indemnity to make selections in lieu of swamp lands merely because they are swamp and overflowed.

But the State claims that under the statutes directing surveys in California, townships were made fractional by reason of the existence of swamp and overflowed lands, notoriously and obviously such, in the same manner, and with the same effect as in other States resulted from surveys being fractional by bodies of water, whether fresh or salt, of such character as to be meandered; and so likewise furnished a legal basis for indemnity selections. It is contended that this results from the act of February 26, 1859, which provides:

And other lands are also hereby appropriated to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever.

And the fourth section of the act of July 23, 1866, which provides:

The commissioner shall direct the United States surveyor-general for the State of California to 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: *Provided, That in segregating large bodies of land, notoriously and obviously swamp and overflowed, it shall not be necessary to subdivide the same, but to run the exterior lines of such body of land.* 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 general land office, representing and describing what land was swamp and overflowed under the grant, according to the best evidence he can obtain.

If under these statutes townships were made fractional by the surveys, it is claimed the same consequences must result that follow from their being fractional for any other reason. It is the fact, as I understand it, that many townships were actually so surveyed as fractional and the surveys approved; swamp and overflowed land having been meandered and the surveys closed upon the meandered lines thereof by fractional lots, in the same manner as if, instead of being partly under water, it had been wholly so. A fractional township such as is referred to in the act of 1859, must, I suppose, mean a township fractional as surveyed. It is only of government surveys that the term is so employed; one of the causes for fractional divisions is the fact that land is under water; and in the case of California, the law directs the segregation of land which is only so much under water as to be "swamp and overflowed and unfit for cultivation."

I should be less disposed, perhaps, to accept this argument, if it were an original question open to direction, and but for the fact that it has once been adopted by the Department, and the rule established accordingly upon which these certifications were made to the State for indemnities selected; since which action many years have elapsed. To now apply a different rule must necessarily unsettle titles to a serious degree, or, at least, compel purchasers from the State on the faith of a title passed from the United States to buy their lands again. It would also involve the infraction of the general principle that when a title has passed from the United States by certification, the jurisdiction of the Department terminates; unless the act of 1877 hereinafter mentioned gives a jurisdiction not otherwise existing.

Another consideration which gives a very strong equitable support to the claim of the State, is that the grant, in execution of which these indemnities are selected, was made for the purpose of aiding the State in the maintenance of public schools, a cherished object in the legislation of the United States, and, unless this interpretation be given, the State will be denied a right of selection to make good deficiencies which every other State, enjoying such a provision, has under the laws the benefit of. I think the fact mentioned in the opinion of the Attorney-General, hereinbefore referred to, in respect to the omission of the words "swamp lands" in the act of 1866, may not improbably be accounted for by supposing that the Senate understood that in that same act it was provided that swamp lands, in considerable bodies, should be treated as lands covered with water, so that a township made fractional by the existence of such land, would afford a basis for selection of indemnity lands. Under such circumstances, I do not feel authorized to affirm with such confidence as to warrant the reversal of former judgments by my predecessors in office, that their view of the law was wrong. In-

deed, I do not hold that opinion. It is, perhaps, a doubtful question, on which disagreement in judgment might well exist. It ought to be plain and undeniable that a mistake was made in order now to overturn the former judgment and action.

But if this interpretation of the acts of 1859 and 1866, so long ago adopted and so long subsisting, be thought incorrect, it could only be corrected in the exercise of a jurisdiction to be derived from the act of 1877. That act was construed by the supreme court in the case of Durand *v.* Martin (120 U. S., 366) and the language employed by the court is comprehensive enough to hold it to confirm to the State all certifications made before its passage of lands in lieu of such sixteenth and thirty-sixth sections as were regarded as wanting by reason of the townships being made fractional from such surveys.

Omitting the title and enacting clause, that act reads as follows:

That the title to the lands certified to the State of California, known as indemnity school selections, which lands were selected in lieu of sixteenth and thirty-sixth sections, lying within Mexican grants, of which grants the final survey had not been made at the date of such selection by said State, is hereby confirmed to said State in lieu of the sixteenth and thirty-sixth sections, for which the selections were made.

Sec. 2. That where indemnity school selections have been made and certified to said State, and said selection shall fail by reason of the land in lieu of which they were taken not being included within such final survey of a Mexican grant, or otherwise defective or invalid, the same are hereby confirmed, and the sixteenth or thirty-sixth section in lieu of which the selection was made shall, upon being excluded from such final survey, be disposed of as other public lands of the United States: *Provided*, That if there be no such sixteenth or thirty-sixth section, and the land certified therefor shall be held by an innocent purchaser for a valuable consideration, such purchaser shall be allowed to prove such facts before the proper land office, and shall be allowed to purchase the same at one dollar and twenty-five cents per acre, not to exceed three hundred and twenty acres for any one person: *Provided*, That if such person shall neglect or refuse, after knowledge of such facts, to furnish such proof and make payment for such land, it shall be subject to the general land-laws of the United States.

Sec. 3. That the foregoing confirmation shall not extend to the lands settled upon by any actual settler claiming the right to enter not exceeding the prescribed legal quantity under the homestead or pre-emption laws: *Provided*, That such settlement was made in good faith upon lands not occupied by the settlement or improvement of any other person, and prior to the date of certification of said lands to the State of California by the Department of the Interior: *And provided further*, That the claim of such settler shall be presented to the register and receiver of the district land-office, together with the proper proof of his settlement and residence, within twelve months after the passage of this act, under such rules and regulations as may be established by the Commissioner of the General Land Office.

Sec. 4. That this act shall not apply to any mineral lands, nor to any lands in the city and county of San Francisco, nor to any incorporated city or town, nor to any tide, swamp, or overflowed lands.

The supreme court said of this enactment:

This statute was, in our opinion, *a full and complete ratification* by Congress, according to its terms, of the lists of indemnity school selections *which had been before that time certified* to the State of California by the United States as indemnity school selections, *no matter how defective or insufficient such certificates might originally have been*, if the lands included in the lists were not of the character of any of those mentioned in section 4, and if they had not been taken up in good faith by a homestead or pre-emp-

tion settler prior to the date of the certificate. The history of the times, which is exemplified by the facts of this case, shows that such must have been the intention of Congress. . . . . . In the second section cases were provided for in which the selection failed: 1, because the school section in lieu of which indemnity was claimed and taken was not actually within the limits of a Mexican grant; and, 2, because it was 'otherwise defective or invalid.' *This language is certainly broad enough to include every defective certificate;* and, in order that the United States might be protected from loss, it was provided that if the sixteenth or thirty-sixth section, in lieu of which the selection was made, should be found outside the Mexican grant, the United States would accept that in lieu of the selected land, and confirm the selection. If, however, there was no such sixteenth or thirty-sixth section, and the land certified was held by an innocent purchaser from the State for a valuable consideration, such purchaser would be allowed to purchase the same from the United States at the rate of one dollar and twenty-five cents per acre, not exceeding three hundred and twenty acres for any one person.

The statute relates only to such selections as had been certified to the State, and, taken as a whole, it meets the requirements of all the cases of defective selection which could be so certified. These are: 1. Cases where the State was entitled to indemnity, but the selection was defective in form; 2. Cases where the original school sections were actually in place, and the State was not entitled to indemnity on their account; and 3. Cases where the State was not entitled to indemnity, because there never had been such a section sixteen or thirty-six as was represented when the selection was made and the official certificate given. As to the first of these classes, the certificate was simply confirmed because the State was entitled to its indemnity, and nothing was needed to perfect the title but a waiver by the United States of all irregularities in the time and manner of the selections. As to the second, the selection was confirmed, and the United States took in lieu of the selected land that which the State would have been entitled to but for the indemnity it claimed and got. In its effect this was an exchange of lands between the United States and the State. And as to the third, in lieu of confirmation, *bona fide* purchasers from the State were given the privilege of perfecting their titles by paying the United States for the land at a specified price. Under these circumstances, it was a matter of no moment to the United States whether the original selection was invalid for one cause or another. If the State was actually entitled to indemnity, it was got, and the United States only gave what it had agreed to give. If the State claimed and got indemnity when it ought to have taken the original school sections, the United States took the school sections and relinquished their rights to the lands which had been selected in lieu. And if the State had claimed and sold land to which it had no right, and for which it could not give school land in return, an equitable provision was made for the protection of the purchaser by which he could keep the land, and the United States would get its value in money. In this way all defective titles, under the government certificates, would be made good without loss to the United States.

The language of this act is, as the court says, broad enough to cover every defective certificate; and the court have expressly decided, so far as language can express such a decision, that it must have effect as a ratification to the full extent of the meaning of these words. It is said, on the other hand, that such a certification as is now in question must be regarded as not defective, but as void; because there was no rightful base for a selection, inasmuch as there was in fact a thirty sixth and sixteenth section in townships so made fractional by swamp lands which the State took under the swamp land grant, and in lieu of which no right of selection existed. But it is to be observed that the act does not stop with speaking of certifications merely defective, but adds also

those *invalid*, and I am unable to recognize any probable purpose in Congress to omit from its consideration and legislation any certifications which were void in legal argumentation as distinguished from and in addition to those which were invalid. And yet, it appears to me obvious that Congress in the act itself, and the court in its discussion of it, failed to take into perception such a class of cases as is now under consideration, cases in which the sixteenth and thirty-sixth section was not only wanting, but where there was no innocent purchaser to supply the other conditional fact mentioned in the first proviso of the second section of the act; cases where the State holds a certification of lands for which there was no base for selection and which that proviso seems to regard improperly certified, because it requires an innocent purchaser from the State of such lands to pay for them again to the United States, or, on his failure to do so, that the Commissioner of the General Land Office shall treat them as part of the public domain. In other words, it seems to be unjust to treat as part of the public domain lands which the State has received under a certification without a proper base and sold to an innocent purchaser, if such purchaser will not pay for the land, when it does not treat as part of the public domain lands certified to the State under similar circumstances but not sold to an innocent purchaser. But if not a word is said in respect to the latter; if there is nothing but this argument of injustice to base the claim upon of exception through this proviso; then it would seem an inevitable conclusion either that Congress intended confirmation of the certifications of such lands or such certifications failed to be considered; as they afterwards seem to have escaped the notice of the court. Notwithstanding, if such certifications are comprehended by the words of confirmation, those words cannot be denied their effect although employed possibly without full foreview of their scope. It is entirely plain that the only case actually named and defined in the proviso is the case of such sixteenth and thirty-sixth sections as did not exist in fact as a rightful base of selection and for which not only were lands selected but such lands were subsequently sold by the State to an innocent purchaser for a valuable consideration. The proviso does not speak in terms of the case of lands certified in place of a sixteenth or thirty-sixth section wanting and not sold by the State. It can only be considered, therefore, that such certifications were not confirmed because the same reason exists for their being withheld as in the case of the others mentioned in the proviso. This is, however, to incorporate something into the act which the Congress did not specify as a part of it.

And it will also be observed, that since the only basis of jurisdiction in the Land Office to deal with the case of these lands, the title to which has been passed from the government to the State by certification, must be derived from the language of this proviso, it is necessary to secure that from the inference that Congress intended the Department to re-

claim all lands certified in place of sixteenth or thirty-sixth sections which were wanting, whether the State had sold them to an innocent purchaser or not. The assertion of this jurisdiction, and the exception upon the general confirmation of certifications previously made by the act, must both, therefore, stand not upon the words of the statute, but upon the inference that a case, because equally as just as one actually mentioned, must be considered as included within the terms and force of the act. I doubt whether the Department has the right to so construe an act of Congress, or enlarge its own jurisdiction. Statutes are arbitrary, their words must receive their full meaning, if that meaning be apparent; and the idea that a mistake or an unjust distinction is made by the statute, does not afford a basis for an executive officer to raise a distinction not found in the statute itself. There must be presumed to have been a difference in reason which the legislature saw, though he cannot.

There may be, perhaps, another view taken, namely; that it was the purpose of this act to permit the State to sell, although not yet at the time of its passage already sold, all lands which had been certified in lieu of a deficient sixteenth or thirty-sixth section; and then to allow the purchaser to perfect his title by payment of the government price to the United States. This would, perhaps, be to extend this clause beyond the time to which similar enactments are usually limited; and it would seem also to be the introduction of an unusual and awkward mode for the disposition of lands which ought to be reclaimed to the public domain.

It is more probable, in my opinion, that the act was regarded as having reference only to those cases in which the trouble had arisen by reason of Mexican grants, in all of which perhaps, the State had actually parted with its title to lands selected in lieu of any such deficient sixteenth or thirty-sixth sections. It is clear from reading the act, that it was the case of Mexican grants which was chiefly in the eye of the legislature, notwithstanding the addition of the general words which comprehend all cases of certifications which "are otherwise defective or invalid." At the time when the act was passed, and for years afterward, the question does not appear to have been raised that the State was not entitled tc selections in lieu of deficient school sections in townships made fractional by the meandering of swamp and overflow lands. To seek to derive from the proviso referred to a jurisdiction to determine again that question, and to reclaim the lands certified for that reason, is doubtless to carry the purpose of the act beyond what was in the contemplation of Congress.

Upon the whole case, considering the doubt of the true construction of the act of 1859, taken together with the act of 1866; the fact that the Department some years ago determined in favor of that interpretation which the State now insists upon, and certified lands accordingly; the fact that Congress evidently intended by the act of 1877, to arbitrarily

confirm selections which were defective or wanting in base, in some cases at least, and the further fact that this view will award to the State of California in aid of her school fund, not more, but even less, lands by way of indemnity selection for those which are swamp and overflowed (taken in connection with the rule established by the Attorney-General's opinion above referred to) than other States receive for like deficiencies in school grants; I think it is the duty of the Department to refrain now from the attempt to disturb the title of the State to the lands embraced in these selections.

I feel obliged, therefore, to sustain the appeal of the State from the decision of your office, which is hereby reversed.

RAILROAD GRANT—INDEMNITY.

NORTHERN PAC. R. R. CO.

The joint resolution of May 31, 1870, created a second indemnity belt beyond and in addition to the indemnity belt created by the granting act of 1864.

Indemnity selections may be made within the first indemnity belt, irrespective of State or Territorial lines.

Secretary Vilas to Commissioner Stockslager, January 4, 1889.

In his letter of August 15, 1887, revoking the indemnity withdrawals theretofore made for the benefit of the Northern Pacific Railroad Company, my predecessor, Mr. Secretary Lamar, expressed the opinion that said company was restricted in its indemnity selections to one belt of ten miles in width within the particular State or Territory within which the loss occurred. On October 4, of the same year, your predecessor transmitted to this Department certain lists of indemnity selections, made by said company within the State of Minnesota, and outside of the ten miles but within the twenty miles limits of the indemnity belt above referred to; and suggested the concellation of the said selections in view of the opinion expressed. My predecessor, entertaining some doubt as to the correctness of the opinion theretofore expressed by him in the premises, referred the matter to the Attorney General for his opinion upon the questions involved.

The opinion of the Attorney General has been received to the effect that the joint resolution of 1870 created a second indemnity belt, beyond and in addition to the indemnity belt created by the granting act; and that indemnity selections may be made within the first indemnity belt, irrespective of State or Territorial lines. Upon this authority, from which I am unable to dissent, I must decline to cancel said selections.

Herewith I send you said opinion, and the lists spoken of, with instructions to act in accordance with the views of the Attorney General, in the adjustment of the grant to said road.

OPINION.

Attorney-General Garland to Secretary Vilas, January 17, 1888.

Your predecessor, by his letter of the 7th of December, 1887, asked my opinion on the following points:

> 1st. Did the joint resolution of May 31, 1870, create a second indemnity belt beyond and in addition to the indemnity belt created by the granting act of 1864?
>
> 2d. If you answer the first proposition in the affirmative, and find that there are two indemnity belts, can selections be made within the first belt for losses outside the particular State or Territory in which the same occurred?

The granting act referred to in your first inquiry was passed on the 2d day of July, 1864 (13 U. S. Stats., 365). Its third section granted to the Northern Pacific Railroad Company:

> Every alternate section of public land, not mineral, designated by odd numbers, to the *amount* of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever prior to said time any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the directions of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections.

This section thus provided for a limit or boundary on each side of the road, to run parallel to the course of its line, along the outside lines of the alternate sections granted, and another limit or boundary ten miles *beyond* that, to which last limit the company was granted the right to select for lands lost in the first in consequence of prior rights having attached thereto. These limits have been known as the "primary" and "secondary" or the "granted" and "indemnity" limits. Both are clearly the boundaries of rights or privileges granted by the section. On the 6th of March, 1865, the president of the company presented a map of the general route of the line to the proper officers of the Interior Department, and asked a withdrawal from sale of the public lands along its course. This map was adjudged insufficient, and withdrawal refused. The map thus filed accomplished no good purpose for the company, but afforded the public a general knowledge of probable location of the prospective road. The knowledge thus furnished inspired activity in the settlement, pre-emption, and purchase of lands along the probable line indicated by it. The 19th section of the act declared the act should be null and void unless two millions of dollars of the stock of the company should be taken, and ten per cent. thereof paid in within two years. Other provisions of the act showed the intent of Congress to impose on the company a speedy completion of the line. Before the 31st day of May, 1870, the date of the resolution referred to in

your inquiry, little had been done by the company to comply with that intent. The necessity for relief from the effect of the supineness of the company, and its inability to proceed successfully without additional powers gave rise to the resolution under consideration, which declares (16 U. S. Stat., 378):

That the Northern Pacific Railroad Company be and hereby is authorized . . . . to locate and construct under the provisions, and with the privileges, grants, and duties provided for in its act of incorporation, its main road to some point on Puget Sound, via. the Valley of the Columbia river . . . . and in the event of there not being in any State or Territory in which the said main line or branch may be located at the time of the final location thereof, *the amount* of land per mile granted by Congress to said company within the limits prescribed by its charter, then said company shall be entitled under the directions of the Secretary of the Interior to receive so many sections of land belonging to the United States and designated by odd numbers in *such State or Territory*, within ten miles on each side of said road *beyond the limits prescribed in said charter*, as will make up such deficiency on said main line or branch, except mineral or other lands as excepted in the charter of said company of 1864, to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, subsequent to the passage of the act of July 2, 1864.

The first clause in the resolution quoted expressly declares the company is authorized to construct, "under the provisions, and *with the privileges, grants and duties* provided for in its act of incorporation." This language clearly indicates an intent to confirm all the benefits, privileges and grants embraced in the original act, and rebuts any interpretation of the resolution which would diminish or curtail them. Among those privileges was the right of the company to select lieu lands for those that had been disposed of by the United States at any time prior to the date of the definite location of the road. If this indemnity grant be construed to cover the same ground embraced in the original indemnity limit, and not extend *beyond* it, it would deprive the company of the lieu lands for any lands that had been taken up by settlers or purchasers before the passage of the act of 1864. Congress could not have intended to provide for indemnity of lands lost to the company after the passage of the act of 1864, and take from it all indemnity for those which had been lost before that date, in an enactment whose clear purpose was to increase the inducements to build the road by strengthening the credit of the company. The probability that many of the most valuable lands which the company would have received had the lands been withdrawn on the 6th of March, 1865, within the original primary and secondary limits, had been appropriated by settlers and purchasers between the passage of the original act and the resolution of the 31st of March, 1870, suggested the necessity that an additional indemnity limit should be established for lands which had been lost between those dates. This probable necessity was provided for by the provisions in the resolution that:

In the event of there not being in any State or Territory in which said main line or branch may be located at the time of the final location thereof, the amount of

lands per mile granted by Congress to said company within the *limits* prescribed by its charter, then the said company shall be entitled under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such State or Territory, within ten miles on each side of said road, *beyond the limits prescribed in said charter*, as will make up such deficiency.

This clause seems to be sufficiently clear to be its own interpreter. "Beyond the limits prescribed in said charter," certainly means outside of the limits. It does not declare it is to be outside the granted or primary limits only, but beyond the limits without restriction to either primary or secondary. Interpretation does not authorize the interpolation of the words "primary," or "granted," into the statute. To add the word "granted" or "primary" after the word "limits" would diminish the right of indemnity by excluding the company from indemnity for such lands as, prior to the passage of the original act, had been disposed of by the government, and would restrict the right of selection for lands lost to the particular State or Territory in which the lands lost were located. The company would thus be deprived of a part of the "privileges and grants provided for in its act of incorporation." That the resolution should not be thus restricted is corroborated by the uniform interpretation of both the Land Bureau and the Department of the Interior in their administration of it. Commissioner Drummond, on the 26th of December, 1871, issued orders to the registers and receivers along the line of the road as follows:

DEPT. OF THE INTERIOR, GEN'L LAND OFFICE,
Washington, D. C., Dec. 26, 1871.

Register and receiver, Alexandria, Minn.

GENTLEMEN—Referring to my letter to you of the 15th of September, 1870, and map of designated line and twenty-mile limit of the land grant to the Northern Pacific Railroad Company, and directing a withdrawal of lands therefor, I now inclose you a map showing the line of the road as constructed, together with the definite twenty-mile limits of the grant and the additional ten-mile indemnity limits as granted under the original act of July 2, 1864, *and also the additional ten-mile indemnity limit granted by the joint resolution, May* 31, 1870. *These limits are respectively designated as the twenty, thirty, and forty-mile limits.* I have also designated the limits fixed in my letter of the 15th of September, 1870; and you are now directed to withhold from sale or location, pre-emption or homestead entry, all the odd-numbered sections within the limits designated on the maps herewith and not heretofore withdrawn.

* * * * * * *

Respectfully submitted,

WILLIS DRUMMOND,
Commissioner.

On the 31st of July, 1885, Commissioner Sparks, in the case of the United States *v.* Guilford Miller (3 Brainard's Precedents, 214), referring to this resolution, together with the indemnity provisions of the original act, uses the following language:

The indemnity provision is as follows: "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 land shall be se-

lected by such company in lieu thereof, under the directions of the Secretary of the Interior, in alternate sections, and designated by odd numbers not more than ten miles beyond the limits of said alternate sections." The act of May 31, 1870, (16 Stat., 276) extended these limits ten miles farther in the event that deficiencies could not be supplied within the first ten miles within the granted limits.

The interpretation thus illustrated has been the rule of administration both in the Land Bureau and in the Interior Department without exception ever since the passage of the resolution of 1870. Many property rights must doubtless have vested upon the construction adopted. Cotemporaneous and uniform interpretation is entitled to weight in the construction of the law, and in cases of doubt ought to turn the scale. (Brown *v.* United States, 113 U. S., 570.) As, therefore, the circumstances surrounding the passage of the resolution of 1870, the language of the resolution itself, and the cotemporaneous and uniform interpretation adopted by the Land Bureau and Interior Department all concur in the conclusion that the resolution of 1870 "creates a second indemnity belt beyond and in addition to the indemnity belt created by the granting act of 1864," your first inquiry is answered in the affirmative.

In reply to your second inquiry, the first section of the act of the 2d of July, 1864 (13 U. S. Stats., 366), declares:

And said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain, and enjoy *a continuous railroad and telegraph line*, with the appurtenances namely, beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin; thence westerly by the most eligible railroad route as shall be determined by said company, within the territory of the United States, on a line north of the 45th degree of latitude, to some point on Puget's sound.

By this a continuous line is provided for. No State or Territory is even named in it except as the starting point and terminus of that line, State and Territorial lines are not mentioned, nor in any way recognized as constituting divisions which break the continuity. On this unbroken line alternate sections are granted to the amount of ten per mile on each side within the States, and twenty within the Territories. Whenever lands shall have been lost to the company from the amount granted within the primary limits by previous settlement or purchase the act declares:

Other lands shall be selected by said company in lieu thereof, under the directions of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections. (13 U. S. Stats., 368.)

This clause as a whole provides for an indemnity for lands lost out of the amount granted. The conditions of this indemnity, set forth in detail, under which the right or privileges of selection rests in the company are, lands shall have been lost out of the amount granted; selections must be made by the company of other lands in lieu of them; those selections must be made under the directions of the Secretary of the Interior; selections shall only be of alternate odd-numbered sections, and they must not be more than ten miles beyond the limits of

the granted sections. These are all the limitations or conditions provided for by the act of 1864, subject to which the right to select is granted. Interpretation will not warrant the adding of another limitation that the lieu lands must be selected in the same State or Territory in which the lands were lost. To annex such an additional limitation to the words of the grant would be legislation and not construction. In the resolution of the 31st of May, 1870, (16 U. S. Stats., 379), in which Congress intended to limit the selection of the lieu lands to the same State or Territory in which the lands were lost, the language used to so limit the grant is:

Then said company shall be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, *in such State or Territory*, within ten miles on each side of said road beyond the limits prescribed in said charter.

The language "in such State or Territory," or some equivalent language, would doubtless have been found in the original act of 1864, had it been the intent of Congress to limit the selection to the State or Territory in which the lands were lost. In the absence of any such words, I do not feel authorized to interpolate them as an additional limitation to the law as enacted. I therefore answer your second inquiry also in the affirmative.

FINAL PROOF PROCEEDINGS—TRANSFEREE.

H. P. WYBRANT ET AL.

Where an irregularity in the submission of proof is not satisfactorily explained, and it appears that the entryman has disposed of the land, the transferee may be permitted, after republication, to submit supplementary proof showing the entryman's compliance with law during the period covered by his final proof, and the date and circumstances of the transfer.

Secretary Vilas to Commissioner Stockslager, January 5, 1889.

I have considered the appeal of H. P. Wybrant, transferee, from the decision of your office, dated April 1, 1887, suspending pre-emption cash entry, No. 7230, of the SE. $\frac{1}{4}$ of Sec. 28, T. 152 N., R. 60 W., made by Jennie C. R. Dowlin, on May 7, 1883, at the Grand Forks land office, in the Territory of Dakota, and requiring her to make new publication and proof showing full compliance with the requirements of the law.

The record shows that Miss Dowling filed pre-emption declaratory statement, No. 4610 for said tract February 5, 1883, alleging settlement thereon June 5, 1882. On March 21, 1883, the register gave notice of claimant's intention to make final proof before John G. Hamilton, notary public, at the house of Edith Menefee, on Sec. 30, T. 153, R. 59, on May 1. The final proof was made before the officer designated on May 2, 1883, and in accordance with the rules then in force, except that the testimony was taken on May 2d instead of the day previous, as advertised.

The testimony taken shows that claimant, a single woman, was duly qualified; that she first settled on said land in June, 1882, and established residence on said tract June 11, 1882; that her improvements consist of a house, a well, five acres of breaking, all worth $200, and that her residence has been continuous since June 12, 1882, excepting a period of six or seven weeks during the severe winter weather, when she went on a visit to Grand Forks. The final pre-emption affidavit was made before the receiver on May 7, 1883. On January 8, 1885, the local officers referring to your office letter of December 15, 1884, suspending said entry (with others) stated that your office in suspending said entry failed to state whether any explanation was given why said testimony was not taken on the day advertised; that they have never allowed a final entry where the testimony was not taken on the day advertised, unless a satisfactory reason was assigned for the failure to take the testimony as advertised, and a satisfactory reason must have been given in that case.

The local officers further state that it is frequently the case that owing to violent storms, bad roads, or absence of witnesses, it is impossible for the settler to appear on the day advertised, but when the law has been complied with as to the period of publication, the local officers have allowed the entries.

On May 21, 1886, the local officers transmitted the affidavit of one John G. Hamilton, who swears that the claimant advertised to make her final proof on May 1, 1883, that on said day she left home and started for Grand Forks by rail, that the train was due at Grand Forks at 3.30 p. m., but it did not arrive until a few minutes before 4 p. m.; that the depot was one mile from the land office; that claimant did not reach the land office until after 4 p. m., when the office was closed for the day; that on the morning of the 2d of May, final proof was made; that the affiant believes that the final proof was not made on the first day of May, solely for the reasons stated; that he went with the claimant to the United States Land Office on the evening of the first, to offer proof between the hours of four and five p. m., and found the register and receiver absent and the office closed.

If there had been no further defect than that mentioned in the decision of your office, namely, the defect in notice and insufficiency of answer as to residence and character of house, and an explanation had been made to the local officers, and the same appeared with the entry papers, I should have no hesitancy in directing that the entry be referred to the Board of Equitable Adjudication for its consideration.

The failure to insert the year in the body of the notice was the omission of the register, and besides, no one was misled by it. The final proof, in my judgment, shows compliance with the requirements of the pre-emption law as to inhabitancy and improvement. But the explanation of said Hamilton, who swears that he was the attorney of Miss Dowlin when she made her final proof, is not satisfactory. He is pre

sumably the John G. Hamilton before whom the testimony was to have been taken as advertised on May 1, and before whom the proof was taken on May 2, 1883. It is not obvious why the claimant should go to the Land Office on the night of May 1, in company with said Hamilton as he swears, when her final proof was to be made at the house of Edith Menefee, as advertised on May 1, 1883.

Besides it is not shown when the transfer of the land covered by said entry was made, or under what circumstances the sale took place. The appellant appears as transferee and the letter of the register to the claimant was returned to the local office "unclaimed."

I am of the opinion, however, that the transferee should be allowed to make new publication of notice, and furnish supplementary proof showing, so far as he may be able, that said pre emptor fully complied with the requiremants of the law during the time covered by her final proof, also the date of the sale of said land to the transferee and all the circumstances tending to show the good faith of the parties in interest. The local officers should transmit said supplementary proof together with their opinion thereon, and upon receipt of the same, your office will readjudicate the case.

The decision of your office is modified accordingly.

TIMBER CULTURE ENTRY—PRELIMINARY AFFIDAVIT.

The preliminary affidavit required of the timber culture entryman is statutory, and the Department has no authority to add thereto.

Secretary Vilas to Commissioner Stockslager, January 5, 1889.

In the timber culture circular approved July 12, 1887 (6 L. D., 280) the preliminary affidavit therein required contains a phrase which does not appear in the form prescribed by the statute. The words referred to are as follows:

That I have made personal examination of said land and from my personal knowledge of the same state.

While it is true that the statutory affidavit can not be made in good faith except on knowledge derived from a personal examination of the land, yet as the statute (20 Stat., 113) has prescribed the exact words of the oath required of the applicant, the Department has no authority to add thereto.

The said phrase should therefore be stricken out of the said affidavit. A foot-note, however, may be properly appended to the form hereafter used, calling attention to the fact that the said affidavit can only rest upon a personal knowledge of the land.

The form prescribed in said circular also requires the applicant to include in said affidavit a statement as to his post office address. This is in addition to the statutory oath and should, for the reasons given

above, be discontinued. The applicant may be properly required to state his post office address without including such statement in the preliminary affidavit.

LROAD GRANT—UNSURVEYED LAND—SETTLEMENT RIGHT.

ST. PAUL M. & M. RY. CO., ET AL. *v.* PEDERSON.

A settlement right existing at the date of indemnity withdrawal, serves to except the land covered thereby from the effect of said withdrawal.

A pre-emption filing based on settlement prior to survey, and made when the Department held that an indemnity withdrawal did not take effect upon unsurveyed land, will be held valid as against such a withdrawal.

Secretary Vilas to Commissioner Stockslager, January 5, 1889.

I have considered the several appeals of the Saint Paul, Minneapolis & Manitoba Railway Company, and the Hastings & Dakota Railroad Company, from the decision of your office, dated February 2, 1884, holding for approval homestead entry, of Lots 2 and 3, Sec. 31, T. 122, R. 43, and Lots 3 and 4, Sec. 36, T. 122, R. 44, Benson land district, in the State of Minnesota.

The record shows that the land in the odd numbered section is within the twenty mile or indemnity limits of the withdrawal of June 2, 1869, for the benefit of the St. Paul and Pacific (now the Saint Paul, Minneapolis and Manitoba Railway) Company, under the grant by act of Congress approved March 3, 1865 (13 Stat., 526). It is also within the limits of the withdrawal for indemnity purposes for the benefit of the Hastings and Dakota Railroad Company, under the grant by act of Congress approved July 4, 1866 (14 Stat., 87), notice of which was received at the local land office on May 11, 1868.

It further appears that Ingebright Pederson filed his pre-emption declaratory statement No. 5334 for said lands on June 7, 1872, alleging settlement on March 4, 1869, and on the same day transmuted said filing to homestead entry, No. 5312. On May 22, 1878, Elizabeth Pederson, widow of said Ingebright Pederson, deceased, made final proof showing that said Pederson was her husband in his lifetime; that he died on December 31, 1877; that he settled upon and occupied said land prior to June 7, 1872; that since the death of her said husband, she has continued to reside upon and cultivate said land up to the time of making said proof. The local land office accepted the proof and issued final certificate, No. 3763 thereon.

A hearing was ordered and had to determine the date of actual settlement on said land. From the evidence submitted, the register and receiver found that the subdivisional survey of said land was made in 1870, and the township plat was filed in the local office April 20, 1872, upon which is inscribed the house of E. Pederson on lot 4 of Sec. 36—

122—44, and that said Pederson settled and established his residence on the land covered by his said entry on the 4th day of March, 1869.

The record fails to show that any appeal was taken by the companies from the findings of the local office, but your office on February 2, 1884, considered the testimony taken at said hearing, concurred in the findings of the register and receiver, and held that "the Hastings and Dakota Railroad have no standing in this case, the St. Paul and Pacific, now St. Paul, Minneapolis and Manitoba Railway Company, having the prior grant, and as the tracts were settled upon and improved before the date on which the withdrawal for said last named company became effective, viz: June 2, 1869, the same were excepted from said withdrawal," and your office held said entry for approval for patent, "subject to appeal by said companies."

The St. Paul, Minneapolis and Manitoba Railway Company insists that said decision is erroneous, (1) In holding that the withdrawal for indemnity purposes did not become effective until June 2, 1869; (2) In holding that said land was settled upon by Pederson prior to the withdrawal; and (3) In holding that the land in question was excepted from said withdrawal.

The Hastings and Dakota Railway Company contends that, as the withdrawal for its benefit was prior to that for the St. Paul, Minneapolis and Manitoba Railway Company, it was error to hold that the Hastings and Dakota Company had no standing in the case; that the St. Paul, Minneapolis and Manitoba Railway Company could acquire no right to the land until selection thereof, as the tract was within the indemnity limits of its grant; citing Railroad Company *v.* Ryan, 99 U. S., 382, and Blodgett *v.* California and Oregon Railroad Company (6 C. L. O., 37).

Counsel for the St. Paul, Minneapolis and Manitoba Railway Company also state that, at the time of making final proof the claimant was not the widow of the deceased entryman, but had married Rasmus Pederson. This allegation is not sustained by the record, for that shows that the marriage did not take place until 1881, while the final proof was made in 1878.

It is quite clear that at the date when the order of withdrawal for indemnity purposes for the St. Paul, Minneapolis and Manitoba Railway Company was received at the local office, the land was settled upon and claimed by said Ingebright Pederson. The land had not then been surveyed, but after the filing of the township plat of survey the preemptor duly filed for the land, and transmuted his filing to a homestead entry. At the date of said filing, it was the ruling of the Department that the withdrawal for indemnity purposes did not take effect upon unsurveyed land, for the reason that until survey the settler could not tell whether he was upon an even or odd numbered section. (Vol. 1, Land Grant Railroads, 211) This ruling was subsequently changed, in accordance with the views of the Hon. Attorney General in his opin-

ion, dated February 4, 1871 (13 Op., 378), upon the act of Congress approved March 3, 1863 (12 Stat., 772), granting lands to the State of Kansas for railroad purposes.

It was also held by this Department that the prior grant had the prior right to lands within the common indemnity limits, and that the grant became effective upon lands within the indemnity limits and the granted limits at the same time. This ruling was changed in 1879, in the case of Blodgett *v.* the California and Oregon Railroad Company (6 C. L. O., 37) upon the authority of the decision of the supreme court of the United States in the case of Michael Ryan *v.* The Central Pacific Railroad Company (99 U. S., 382), which held that under the provisions of the act of Congress approved July 25, 1866 (14 Stat., 239), the company could have no right to "lieu" lands until it actually selected the tracts as provided by law. See also Grinnell *v.* Railroad (103 U. S., 739); Cedar Rapids R. R. Co., *v.* Herring (110 U. S., 27); Kansas Pacific R. R. Co. *v.* Atchison, Topeka and Santa Fe Co. (112 U. S., 414); St. Paul R. R. Co. *v.* Winona R. R. (112 U. S., 720); Barney *v.* Winona & St. Peter R. R. Co. (117 U. S., 228); St. Paul, Minneapolis & Manitoba Ry. Co. *v.* Bond (3 L. D., 50); Southern Pacific R. R. Co. *v.* Reed (4 L. D., 256); St. Paul, Minneapolis and Manitoba Company *v.* Northern Pacific Railroad Company (ibid., 426).

It is quite evident that under the rulings of the Department in force at the time said withdrawal for the benefit of the St. Paul and Pacific Railroad Company (of which the Manitoba road is the successor) became effective, the settlement of said Pederson served to except the land in question from the operation of said withdrawal. This ruling was uniformly followed, so far as I am advised, until the case of Serrano *v.* The Southern Pacific Railroad Company (6 L. O., 93), decided by my predecessor Secretary Schurz on July 2, 1879. The Serrano case was overruled by Secretary Kirkwood, on December 17, 1881, in the case of Trepp *v.* The Northern Pacific Railroad Company (1 L. D., 380). The claim of the Hastings and Dakota Railroad Company must be rejected for the reason, as we have seen, that when the withdrawal for its benefit was made, the construction of the Department was, that withdrawals for indemnity purposes did not take effect upon unsurveyed land. This construction of the effect of said withdrawal must be presumed to be correct, for the reason that as this was an executive withdrawal by the Department, it should be given effect only to the extent which the Department intended it should have; and, hence, the land in question having been surveyed subsequently to the withdrawal for the benefit of the Hastings and Dakota Company, was subject to settlement and entry at the date of the settlement of said Pederson.

It follows, therefore, that his settlement and entry were duly made, and that said decision of your office holding the entry for approval was correct.

It is accordingly affirmed.

SCHOOL INDEMNITY—CERTIFICATION—FRACTIONAL TOWNSHIP.

WRIGHT ET AL. *v.* STATE OF CALIFORNIA ET AL.

The certification of land is equivalent to patent therefor; and an application to enter patented land confers no right upon the applicant either in the courts or the Department to question the validity of the patent by which title passed from the government.

While the State of California is not entitled to make indemnity selections in lieu of school sections that are swamp or overflowed, yet certifications made prior to the passage of the act of March 1, 1877, for losses alleged in townships made fractional by the segregation of swamp lands, will not be disturbed.

Secretary Vilas to Commissioner Stockslager, January 5, 1889.

This case comes before the Department upon the separate appeals of Elisha Wright and other appellants from the decision of your office of November 26, 1887, rejecting their applications to enter, respectively, under the homestead and pre-emption laws, the tracts opposite their respective names, as set forth in your letter of said date, to which reference is hereby made.

You rejected said applications upon the ground that the lands applied for, having been approved and certified to the State of California, they were not subject to entry, and that the applicants could acquire no rights under their applications, as the title to said lands had passed out of the government by the approval and certification of said lands.

While this case was pending in your office, and prior to the decision of your office above referred to, James W. Shanklin, Esq., counsel for respondents, addressed you a communication, with a view to obtain from your office an authoritative expression as to the validity of the bases of certain indemnity school land selections, which embraced the land above referred to.

In response to this communication, your office by letter of October 17, 1887, held that some of the selections above referred to are valid and some must be held as invalid in whole or in part, and others are held in abeyance because it has not been decided whether the bases used were swamp land or water at the date of the swamp land act.

There was no error in your decision rejecting the applications of Elisha Wright and the other appellants to enter said lands, because the certification of said lands was equivalent to patent, and an application to enter patented land confers no right upon the applicant either in the courts or the Department to question the validity of the patent by which title passed from the government. Story *v.* Southern Pacific Railroad Company (4 L. D., 396). Your decision rejecting said application is therefore affirmed.

As to the validity of these selections, it has been decided by the Department, in the case of the United States *v.* the State of California,*

*8 L. D., 4.

that while the State of California is not entitled as other States are, under the language of the various acts providing for indemnity, to make selections for swamp lands merely because they are swamp or overflowed, yet that certifications to said State for deficient sections in townships made fractional by a survey segregating the swamp land found therein which were certified prior to the act of 1877 will not now be canceled.

The principle announced in said case controls the case now under consideration, so far as it affects the rights of the State, and your said decision, so far as it conflicts with the principles therein announced, is hereby reversed.

RAILROAD GRANT—ACT OF FEBRUARY 8, 1887.

NEW ORLEANS & PAC. R. R. CO.

The grant to the New Orleans and Pacific railroad company took effect when the Secretary of the Interior was notified that said company, through the action of a majority of its stockholders, had accepted the provisions of the act of February 8, 1887, and agreed to discharge all the obligations imposed upon the New Orleans, Baton Rouge, & Vicksburg company by the act of March 3, 1871.

After the performance of said conditions, the last named company, or its mortgagees, or bondholders, have no standing in the Department to protest against the issuance of patents, but must look to the courts for protection.

Secretary Vilas to Commissioner Stockslager, January 5, 1889.

On February 8, 1888, you submitted to the Department for approval for patent two lists of selections of lands made by the New Orleans Pacific Railroad Company, containing 77,213.27 acres, as follows:

List No. 5, 35,693.97 acres,
List No. 6, 41,519.30 acres.

While said lists were pending in the Department for consideration, a letter was received from Mr. John B. Sweat, dated March 1, 1888, stating that he had been retained to file in the Department a protest against the issue of patent for lands to the New Orleans Pacific Railroad Company until that company had complied with the provisions of section three of the act of Congress, approved February 8, 1887, and asking for certain time in which to file said protest, which was granted. The protest not having been filed within the time allowed, it was extended until the 30th day of May. Having no knowledge that any such protest had been filed, I directed that said lists be returned to your office, for the purpose of having the bases incorporated in the lists, and on July 14th last, I approved said lists and transmitted them to your office.

After said approval had been made, a letter was received from Mr. Sweat, stating that the protest had been filed, and after diligent search it was found in the office of the Assistant Attorney General, where it had been mislaid.

Said protest, which is now before me for consideration, is made in behalf of Frederick A. Babcock, who alleges that he is the holder of certain bonds made by the New Orleans, Baton Rouge and Vicksburg Railroad Company, which are secured by mortgage made by said company, covering all the property then owned or thereafter to be acquired by said company; that in the latter part of the year 1881, said New Orleans, Baton Rouge & Vicksburg Railroad Company assigned and transferred to the New Orleans Pacific Railroad Company all its rights, franchises and privileges under a grant of lands to aid in the construction of said road, made by the United States to the New Orleans, Baton Rouge & Vicksburg Railroad Company, by act of Congress of March 3, 1871, and with all the obligations imposed by said act; that the New Orleans Pacific Railroad Company took possession of the lands under said grant, and completed the construction of its road through said lands, and now claims to hold the same free and clear of said mortgage debt, upon the ground that the New Orleans, Baton Rouge & Vicksburg Railroad Company never acquired title to said lands; that the petitioner is informed that the Department is about to approve grants to the New Orleans Pacific Railroad Company, assignee of the New Orleans, Baton Rouge and Vicksburg Company, by certifying to them lands embraced in said lists, and he submits this as "a brief in opposition to the perfecting of said grants until the assignee of said grant has complied with all the requirements in relation to said grants and the protection of the New Orleans, Baton Rouge & Vicksburg Railroad Company."

The third section of the act of February 8, 1887, entitled "An act to declare a forfeiture of lands granted to the New Orleans, Baton Rouge & Vicksburg Railroad Company to confirm title to certain lands, and for other purposes," provides:

That the relinquishment of the lands and the confirmatiion of the grant provided for in the second section of this act are made and shall take effect whenever the Secretary of the Interior is notified that said New Orleans Pacific Railroad Company, through the action of a majority of its stockholders, has accepted the provisions of this act, and is satisfied that said company has accepted and agreed to discharge all the duties and obligations imposed upon the New Orleans, Baton Rouge and Vicksburg Railroad Company by act of March third, eighteen hundred and seventy-one, entitled "An act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes.

After the passage of this act, Mr. Babcock filed in the Department a petition, protesting against the certification of lands to said New Orleans Pacific Railroad Company, upon, substantially, the same grounds as are embraced in the protest now under consideration.

The Department, on April 23, 1887, acting upon this petition, declined to grant it, upon the ground that the company had filed in the Department satisfactory evidence of full compliance with the act of February 8, 1887 (5 L. D., 593). Said act of February 8, 1887, provided, that the grant to the New Orleans Pacific Railroad Company

shall take effect whenever the Secretary of the Interior is notified that said company, through the action of a majority of its stockholders, has accepted the provisions of the act, and agreed to discharge all the duties and obligations imposed upon the New Orleans, Baton Rouge & Vicksburg Railroad Company by the act of March 3, 1871.

These are the only conditions required to entitle them to the benefit of the grant, and after the performance of said conditions, the last-named company, or their mortgagees, or bondholders have no standing in the Department to protest against the issuance of patents, but must look to the courts for their protection.

In passing upon this question, the Department considered that the action of the stockholders above referred to was sufficient to constitute an acceptance of the provisions of the act of Congress of February 8, 1887, and also an acceptance of an undertaking and obligation on its part to discharge all duties and obligations imposed upon the New Orleans, Baton Rouge and Vicksburg Railroad Company by said act of Congress of March 3, 1871, and to protect all persons holding obligations or demands against said company, but the nature and extent of such obligations could not be in any manner considered by the Department, but must be determined by the courts.

You will therefore proceed to issue patents for the lands embraced in said lists.

PURCHASE UNDER THE ACT OF MARCH 3, 1887.

SAMUEL L. CAMPBELL.

Instructions given as to the method of procedure, and proof required under applications for the right of purchase as provided by section five, act of March 3, 1887.

Secretary Vilas to Commissioner Stockslager, January 8, 1889.

On January 12, 1886, by a decision of your predecessor, the timber-culture entry of George F. Robinson for the SE. ¼ of Sec. 1, T. 102 N., R. 32 W., 5th P. M., Worthington land district, Minnesota, was held for cancellation, and the applications of David M. Montgomery and Samuel L. Campbell to make homestead and timber-culture entries respectively of the same tract were rejected. From this action only Campbell appealed, and the judgment of your office became final as to applications of Robinson and Montgomery.

Pending the appeal of Campbell here, on February 28, 1888, he filed in the local office an application to purchase under section five of the act of March 3, 1887 (24 Stat., 556), the quarter-section above described and also the S. ½ of the SW. ¼ of the same section and town; which application has been transmitted to me for consideration.

As there seems to be no adverse claim to said tract involved in the appeal, action upon the latter will be suspended until the disposition of

the application to purchase, as the allowance thereof would make it unnecessary to further consider the appeal.

With his said application Campbell files the affidavit of himself and Willis Drummond, Jr., wherein certain averments are made, which, if true and properly substantiated, taken in connection with certain findings of fact in the decision of your predecessor, of January 12, 1886, would seem to bring the application within the purview of said section and act. These matters, however, it is not necessary, at this time, to recite in detail, inasmuch as the application to purchase, and the questions involved therein, should first be passed upon regularly by the register and receiver and your office.

To that end the said application and the papers in the case are herewith returned to you, so that proper steps may be taken to afford the applicant an opportunity to establish his right to make said purchase.

Section five of the act under which the purchase is sought to be made reads as follows:

That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the *bona fide* purchaser thereof from said company to make payment to the United States for said lands at the ordinary government price for like lands, and thereupon patents shall issue therefor to the said *bona fide* purchaser his heirs or assigns: *Provided*, That all lands shall be excepted from the provisions of this section which, at the date of such sales were in the bona fide occupation of adverse claimants under the pre-emption or homestead laws of the United States, and whose claims and occupation have not since been voluntarily abandoned, as to which excepted lands the said pre-emption and homestead claimants shall be permitted to perfect their proofs and entries and receive patents therefor; *Provided further*, That this section shall not apply to lands settled upon subsequent to the first day of December, 1882, by persons claiming to enter the same under the settlement laws of the United States, as to which lands the parties claiming the same as aforesaid shall be entitled to prove up and enter as in other like cases.

Therefore in order to make purchase under the provisions of that section it is apparent that the applicant must show satisfactorily to the land officers:

1. That the tract in question was of "the numbered sections prescribed in the grant;"

2. That it "was coterminous with constructed parts of said road;"

3. That it was sold by the company, to the applicant, or one under whom he claims, "as a part of its grant;"

4. That it was "excepted from the operation of the grant to said company;"

5. That at the date of said sale, it was not in the *bona fide* occupation of adverse claimants, under the pre-emption or homestead laws, "whose claims and occupation have not since been voluntarily abandoned;"

6. That it has not been "settled upon subsequent to the first day of December, 1882, by persons claiming to enter the same under the settlement laws;"

7. That the applicant is a citizen of the United States or has declared his intention to become such;

8. And that he, or one under whom he claims, was a *bona fide* purchaser of said tract from the company.

If the status of the land, its freedom from settlement claims, and the qualifications of the applicant are clearly shown in accordance with the above requirements of the act of Congress, the purchase will be allowed, otherwise it must be disallowed.

It is to be observed that the act seeks to guard jealously the rights of two classes of settlers mentioned therein—those who were in *bona fide* occupation of the land at the date of the sale, and who did not voluntarily abandon the same, and those who settled thereon since December 1, 1882, and claim to make entry under the settlement laws. In the absence of proper steps taken to ascertain if settlers of either class exist, and ample opportunity afforded them to assert their claims, purchase under said section should not be permitted. Inasmuch as the privilege conferred by the act is but a preferred right of purchase—a special pre-emption right—which would be perfected by the payment of the price of the land and the issue of cash entry certificate as in pre-emption entries, it would seem eminently proper to adopt the same mode of procedure, as far as applicable, as is used in making final proof in that class of cases. You will therefore require the applicant herein, before submitting his testimony, to give the notice, by advertisement and posting, of his intention to prove his right to make purchase of the described tract, that is prescribed by the act of March 3, 1879 (20 Stat., 472).

This would seem to be the best and most effective way of protecting the two classes of settlers described in the act, or any other adverse claimants or protestants, if there be such, who should be heard as is done in other cases, under the existing rules and practice of the land department.

As many applications to purchase lands under sections four and five of said act will probably be presented, it is advisable that you cause to be formulated, and submitted to me for approval, a circular prescribing rules in relation thereto for the guidance of the local officers in such cases.

RAILROAD GRANT—HEARING TO DETERMINE CHARACTER OF LAND.

CENTRAL PACIFIC R. R. CO.

A decision of the local officers, holding certain tracts within the granted limits non-mineral in character, after hearing ordered to determine that question, will be approved in the absence of appeal.

The failure of the company to list the said lands, will not defeat the effect of such proceedings, but such listing may be required *nunc pro tunc*.

Secretary Vilas to Commissioner Stockslager January 9, 1889.

By letter of July 11, 1885, the local officers at Sacramento, California, transmitted the record of a hearing held (May 26, 1885, before a notary public) upon the application of the Central Pacific Railroad Company to determine the non-mineral character of the fractional NE. ¼, and the N. ½ of the SE. ¼, Sec. 5, the NW. ¼ of the SE. ¼, Sec. 7, the NW. ¼ of Sec. 9, Lot 2, Sec. 25, T. 10 N., R. 7 E., and the SE. ¼ of Sec. 29, T. 11 N. R. 7 E. M., D. M.

With this record the local officers forwarded their joint opinion to the effect that all the regulations of the department had been complied with and that the "said lands are clearly non-mineral in character." No appeal was taken from this decision.

On September 30, 1886, you instructed the local office to report "as to whether application has been made to enter or select any of said lands and upon what grounds the hearing was had."

In response to the foregoing, the local office, by letter of October 29, 1886, enclosed letter dated October 11, 1886, by the "land office attorney" of said railroad, stating, in effect, that it was the company's intention to select the said lands after their non-mineral character had been established and giving record information concerning certain contests and filings, involving a portion of the land described.

By decision, dated November 16, 1886, your office dismissed the proceedings herein, for the reason that the company had "failed to file an application to select the tracts in question." From this action the company appeals.

The record before me does not disclose in what manner the tracts named had been, prior to the said application for hearing, returned as mineral. Your said decision, however, intimates that they were "*prima facie* mineral." In view, therefore, of the company's application to disprove, it would appear that their mineral character had been shown, either by the field notes of survey, or otherwise, to the satisfaction of your office.

The records of your office show the tracts mentioned to have been, at the date of its said application, within the granted limits of the appellant company.

Generally speaking, the Department will not consider a motion for a hearing to determine the character of public land, unless made with the intent to assert or acquire title thereto, which intent must be evidenced

by an accompanying application to appropriate the same. But in this case the company has already acquired title to the tracts named. The local officers after being satisfied that all the regulations of the Department were complied with have found these tracts to be non-mineral and no appeal having been taken from their finding, it is accordingly hereby approved. The character of said tracts being so determined they passed to the company by virtue of its grant. But in view of the established practice of your office you will now require the company to list the several tracts *nunc pro tunc.*

The action of your office is modified accordingly.

SCHOOL INDEMNITY—STATE OF MINNESOTA.

JOHN B. DISCH.

Where the land used as the basis of selection would have been double minimum, if it had not been reserved for school purposes, the State is entitled to select double minimum land in lieu thereof.

Secretary Vilas to Commissioner Stockslager, January 9, 1889.

I have considered the appeal of John B. Disch from your office decision of August 12, 1887, rejecting his application to make homestead entry for NW. ¼ Section 20, T. 105, R. 42, Worthington, Minnesota, land district.

Appellant's application was rejected because the land applied for was covered by school indemnity selections made August 3, 1878, per list No. 4.

List No. 4 was a selection made in behalf of the State of Minnesota by the Commissioner of the State Land Office, August 3, 1878, of NW. ¼, Sec. 20, T. 105, R. 42, in lieu of the same quantity of land in Sec. 16, T. 104, R. 8.

In your said decision you say the tract was "enhanced to the double minimum price of $2.50 per acre long prior to the said selection; but it was decided by letter to you of July 29, 1887, that the lands lost to the State by reason of pre-emption entries in Sec. 16, T. 104, R. 8, upon which loss this selection is based, had been enhanced to the double minimum price at the date of the school grant, and that the selection, is therefore, valid under existing rulings."

The grant of the sixteenth and thirty-sixth sections to the State of Minnesota for school purposes, was made by act of February 26, 1857, (11 Stat., 166) by certain propositions offered to the convention of delegates of the people of the Territory of Minnesota, which, if accepted by the convention should become obligatory upon both the United States and the State of Minnesota, the first proposition being—

That sections numbered sixteen and thirty-six in every township of public lands in said State, and where either of said sections or any part thereof, has been sold or otherwise disposed of, other lands equivalent thereto and as contiguous as may be, shall be granted to said State for the use of schools.

This convention, held August 29, 1857, adopted and accepted said proposition and by the act of May 11, 1858, Minnesota was admitted to the Union, and the said grant became effective from and after that date.

The lands in section 16, T. 104, R. 8, are within the granted limits of the Southern Minnesota Railroad, which you say in your letter of July 29, 1887, submitted with the record, was definitely located February 20, 1858.

The lands which were the basis of the selection herein described, would, if not in the reserved school section, have become by this act of definite location double minimum in price and, as under the grant above cited, the State is entitled to "other lands equivalent thereto," it may well be held that double minimum lands of the same character, selected as indemnity, are only equivalent to the lands lost to the State. Such lands are certainly like in quality and when a like quantity has in such cases been selected I can see no reason why the same should not be approved. They are besides within the fair requirement of contiguity. Whatever may be the rule in general, I think these lands selectable in this case.

It follows of course that said tract is not open to homestead entry.

Your said decision is accordingly affirmed.

SCHOOL INDEMNITY—FRACTIONAL TOWNSHIP DOUBLE MINIMUM LAND.

STATE OF MINNESOTA.

The State is entitled to select indemnity that is of the same general character and belonging to the same class as the land it would have received had there been no deficiency in the township.

Secretary Vilas to Commissioner Stockslager, January 9, 1889.

I have considered the appeal of the State of Minnesota from your office decision of July 11, 1887, holding for cancellation the selection of the S. ½ of Sec. 6, T. 129 N., R. 29 W., 5th P. M., St. Cloud, Minnesota, land district.

This land and the whole township within which it is situated were within the six mile or primary limits of the old St. Paul and Pacific Railroad (branch line), under the grant of March 3, 1857. All the even numbered sections in this township were, by the filing of the map of definite location of said road on December 5, 1857, enhanced to the double minimum price of $2.50 per acre. On March 7, 1870, the State of Minnesota applied to select the said S. ½ of Sec. 6, T. 129 N., R. 29 W., 5th P. M., in lieu of the deficiency of three hundred and twenty acres of school land in the same township, said deficiency being occasioned by that township being fractional and there being no 16th or 36th section therein. In your office it was found that the State was entitled to

three hundred and twenty acres of indemnity to make up the deficiency in said township, but that the State lost no lands in that township that had been enhanced to the double minimum price, and that she was not entitled to select double minimum lands to supply the deficiency existing there, and the selection was held for cancellation.

I can not concur with this decision. If said township had been full and regular, instead of fractional, the State would have received lands of the same class as the tract she is now asking for. It seems to me to be just and in entire accord with the letter and the spirit of the law that the State should be allowed to select as indemnity lands that are of the same general character and belonging to the same class as those she would have received if there had been no deficiency in this township.

The question as to the right of the State of Minnesota to select double minimum lands as indemnity for lands lost in place, which would had they not been in the reserved school sections, have been raised to the double minimum price, was discussed and decided in the case of John B. Disch, decided by me this date.

For the reasons herein set forth, the decision appealed from is reversed, and it is directed that said selection be approved, unless there be some reason, not appearing in the record now before me, for rejecting it.

RAILROAD GRANT—RIGHT OF INDEMNITY SELECTION.

ALABAMA & CHATTANOOGA R. R. CO.

The right to select indemnity does not extend to lands within the granted limits of another road, though such road may not have been constructed within the time fixed by the statute, but was definitely located, and the grant therefor remains unforfeited.

Secretary Vilas to Commissioner Stockslager, January 10, 1889.

I have considered the appeal of the Alabama and Chattanooga Railroad Company from the decision of your office, dated May 28, 1887, rejecting so much of its selection of lands for indemnity purposes as falls within the granted limits of the grant to the State of Alabama by act of Congress approved June 3, 1856 (11 Stat., 17) for the benefit of "either the Coosa and Chattooga, the Coosa and Tennessee, or the Selma, Rome and Dalton (formerly Alabama and Tennessee) Railroads."

Said rejection was made upon the authority of departmental decision in the case of the Alabama and Chattanooga Railroad Company *v.* Tennessee and Alabama Railroad Company (5 L. D. 582).

The contention of the appellant is, (1) That this Department had no jurisdiction to render the decision cited by your office, because the lands in controversy had been certified to the State of Alabama prior to 1860, in part satisfaction of the first one hundred and twenty sections granted to the Tennessee and Coosa Railroad Company. (2)

That "the first section of the act of Congress of June 3, 1856, in the following words: 'That there be and is hereby 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 lines of railroads, through Chattooga, Wills and Lookout Valleys,' has been uniformly construed by this Department and the courts as conferring a grant to the northern end of the railroad, which, by consolidation with the Northeast and Southwestern Railroad, under authority of the act of the Legislature of Alabama of 1868, became the Alabama and Chattanooga Railroad." (3) That it is evident that Congress never intended to make any grant to or for the Coosa and Chattooga Railroad, and the acceptance of the map of definite location filed by the Coosa and Chattooga Railroad Company was unauthorized, and should not estop this Department from declaring that there was no grant for the benefit of said Coosa and Chattooga Railroad Company.

It is further urged by the appellant company that the Selma, Rome and Dalton Railroad was never built between Jacksonville and Gadsden, and the lands that it might have received if constructed between said points were granted to the Alabama and Chattanooga Company by the act of the Legislature of Alabama, dated February 20, 1883.

It is further urged by the Alabama and Chattanooga Company that by the third section of the granting act, "all the lands granted are expressly made subject to the disposal of the Legislature of the State for the purposes disclosed in the grant:" that the Tennessee and Coosa Company having failed to construct its road within the required time, and Congress by act approved April 10, 1869 (16 Stat., 45), having renewed the grant in favor of the Alabama and Chattanooga road, and not in favor of the Tennessee and Coosa road, the State of Alabama had the right to dispose of the lands within the conflicting limits to the road which had been constructed, and that the Alabama and Chattanooga Railroad Company should be permitted to select for indemnity purposes lands falling within the granted limits of the other roads, conflicting with the indemnity limits of the Alabama and Chattanooga road.

It is a sufficient answer to the objection as to the jurisdiction of the Department to render the decision of January 29, 1887, holding that "land within the granted limits of a road not constructed within the required time, but definitely located and not forfeited by Congress, is not subject to the indemnity selection of another road," to say that the question of jurisdiction was expressly presented to the Department, and the objection was urged in support of the motion asking for a modification of said departmental decision, dated January 13, 1887, "that the lands in controversy had been certified over to the State of Alabama for the benefit of the Tennessee and Coosa road, and therefore this Department has no authority and jurisdiction to pass upon the merits of the case at all." But the motion for modification was denied, for the reason that if the additional facts had been presented, the decision might have been

based upon a somewhat different ground; but it was stated that the decision was rendered upon careful consideration of the whole matter, and it did not appear that it was "in any particular incorrect."

On December 21, 1859, your predecessor, Commissioner Smith, addressed a letter of inquiry to this Department, and asked to be advised, "(1) Whether the law of Congress authorizes the construction of two roads as construed by the authorities of Alabama, and, if so, (2) whether in our adjustment, we shall certify the lands within the limits of each road to the State for their joint benefit."

On February 6, 1860, your predecessor, Commissioner Wilson, referring to said letter of inquiry, dated December 21, 1859, which had been the subject of an oral conference with the Secretary on the same morning, reported:

> That comparing with the act the geographical features of the section of the country in the north eastern part of the State to be traversed by the Railroad contemplated by the above mentioned act; I am of the opinion that the terms of the grant can be made completely operative and effective only by giving to it such construction as that given by the authorities of the State, to wit, two roads, one through Chattooga Valley, the other through Wills and Lookout Valleys.

On February 7, 1870, Secretary Thompson advised your office (Vol. 5, L. & R., 492), that he had examined the act of Congress, approved June 3, 1856, and concurred in the manner of adjustment proposed by your office, to wit: on the basis of two roads. Secretary Thompson said:

> To the casual reader, I think it would appear that one road only was provided for; but on examination of the subject it appears that the construction of one road "through three valleys is geographically impossible; that the State had chartered two companies in 1852, one to construct a road from Gadsden through Wills and Lookout Valleys to the Tennessee line of roads; and that the State Legislature in 1858 has transferred the grant to these two roads alike. The law of Congress also has named both "the Georgia and Tennessee, and Tennessee line of Railroads," which words not inaptly designate two termini for roads connecting from Gadsden. I therefore agree with you that all the calls of the grant can only be filled by the recognition of two lines of road from Gadsden: one connecting with the Tennessee line of railroads and the other with the Georgia and Tennessee line, the former passing through Wills and Lookout Valleys, and the latter through the Chattooga Valley.

I am not advised that there has been any departmental or judicial decisions adverse to the views expressed by Secretary Thompson, and an adjudication by the head of the Department that has stood for almost thirty years, unchallenged, ought not to be overruled, unless clearly contrary to law.

I conclude, therefore, that by the third section of said act, a grant was made for the benefit of a railroad to be constructed from Gadsden through the Chattooga Valley to the Georgia and Tennessee line, and that the contention of the appellant company that no grant was ever made, "to or for the Coosa and Chattooga railroad," can not be maintained. The Coosa and Chattooga railroad company, duly organized and authorized to construct said road by the act of the Legislature of

of the State of Alabama, approved February 8, 1858, filed in your office its map of definite location on September 20, 1858. Having determined that said granting act provides for a grant for the benefit of the Coosa and Chattooga Railroad Company, it will be necessary to consider what effect must be given to the first and third sections of the granting act.

The first section of the act grants every alternate section of land, designated by odd numbers, for six sections in width on each side of certain railroads from points designated therein, and also the right to select indemnity for losses within the granted limits. It is further 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 third section of the granting act provides, "that the said lands hereby granted to the said State shall be subject to the disposal of the Legislature thereof, for the purposes aforesaid, and no other."

The suggestion that the renewing act of April 10, 1869, can affect the rights of the other roads provided for in the granting act of 1856, is without force, for it did not pretend to declare any forfeiture against the other roads which had not been completed in time.

The supreme court of the United States in the case of Doe *v.* Larmore (116 U. S., 198), held, upon the authority of the St. Louis, Iron Mountain and Southern Railway Company *v.* McGee (115 U. S., 469), that said

> Act of 1869 is to be treated as an extension of the time named in the original act for the completion of the road . . . . . The completion of the road within the time fixed by the new act perfected the title of the company under the original grant, and this title inured, at once, to the benefit of Larmore.

Again, the claim of the appellant, that by the terms of the granting act the State of Alabama has the absolute and unrestricted power of disposal of all lands within the limits of the roads provided for in the granting act, is likewise untenable.

It was expressly provided in the joint resolution of the General Assembly of Alabama, conferring the grant for one of the roads designated in said act of 1856, upon the Wills Valley Railroad Company, of which the Alabama and Chattanooga Railroad Company is the successor,—

> That nothing in these joint resolutions contained, nor the passage and approval of the same first in point of time, shall be construed to give the road to which the land is hereby appropriated, any preference where its claims to lands come in conflict with the claims of any other road provided for in said act. See Acts of Alabama (1857 & 1858) p. 430–31.

The supreme court of Alabama in the case of Swan and Billups *v.* Lindsey (70 Alabama 521), upon a careful consideration of the legislation under the provisions of said acts, held that as soon as the line or route of the railroad was definitely fixed, the grant became one of specific

sections, the title to which passed out of the United States and into the State of Alabama; that it was not an indefeasible fee out of the United States, because the right was reserved, upon condition if broken to have the lands revert to the United States, upon proper proceedings being taken to that end; that was not an absolute conveyance or grant to the State in its own right as of fee, for the State took in trust to devote the proceeds or have them devoted in aid of the construction of the specified line of railroad "for the purposes aforesaid."

The court further held, that the act of 1856 and the renewing act of 1869 did not confer the right to sell all the lands granted as soon as the line of the railroad was definitely fixed; that one hundred and twenty sections included within a coterminous length of twenty miles might be sold without the performance of any condition precedent, and, beyond this, the State itself could not go nor could it confer on the railroad company power it did not itself possess.

It was further decided that the granting act constituted the State the administrator of its bounty, with limitations, it could not transcend, which restricted the State in the execution of the trust to the purposes expressed in the act of Congress. Those purposes, as we have seen, were to aid not one road, but several distinct and separate railroads diverging from a given point and with different termini. The State could not, by any legislative act, confer upon one railroad lands appropriated by Congress to aid in the building of another and different road.

Until appropriate action shall have been taken to declare a forfeiture of the grant for the benefit of the railroads not constructed in time, the lands granted will not revert to the United States. Such was the ruling of the United States supreme court made in 1874, upon a similar grant, in the case of Schulenburg *v.* Harriman (21 Wall., 44), and it has from that time been uniformly followed by the courts and this Department.

Since there has been no forfeiture by Congress, or under its authority, of the lands granted by said act of 1856 to aid in the construction of the several roads designated therein, it follows, necessarily, that said granted lands are not subject to appropriation for any other purpose.

In the case of Barney *et al. v.* Winona and St. Peter Railroad Company (117 U. S., 228), the supreme court said:

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

The supreme court, in the case of St. Paul Railroad *v.* Winona Railroad (112 U. S., 720), construing the act of Congress approved March 3, 1857, (11 Stat., 195), granting land to the Territory of Minnesota and the State of Alabama to aid in the construction of railroads, decided

that when grants are made for different roads by the same statute, priority of location gives no priority of right; that where the limits of the primary grants, which are settled by the location, conflict, as by crossing or lapping, the parties building the roads under those grants take the sections, within the conflicting limits of primary location, in equal undivided moieties without regard to priority of location of the line of the road, or priority of construction; that the rule with reference to conflicting indemnity limits is, that neither priority of grant, nor priority of location, nor priority of construction, gives priority of right, but priority of selection.

This doctrine was re-affirmed in the case of Sioux City Railroad *v.* Chicago Railway (117 U. S., 406).

So long as the grant in aid of the railroads provided in said act shall remain unforfeited, I am satisfied, both upon principle and authority, that the appellant company cannot be allowed to select, as indemnity, lands within the granted limits of the grant in aid of the other roads.

The decision of your office must be and it is hereby affirmed.

TANNEHILL *v.* SHANNON.

Motion for review of departmental decision of April 17, 1888 (6 L. D., 626) denied by Secretary Vilas, January 10, 1889.

TIMBER CULTURE CONTEST—PRACTICE—REHEARING.

JEARDOE *v.* SHANNON.

The local officers may properly in contest cases inspect the land involved, but such action should only be taken after due notice to the parties, and before argument in the case is heard.

While a decision in a contested case should not be rendered upon the report of the register, based upon a personal inspection of the land, made without notice to the parties, and after the case was closed, such report may be properly treated as the basis for a rehearing.

Secretary Vilas to Commissioner Stockslager, January 10, 1889.

The record in this case presents a motion by James Shannon for review and reconsideration of departmental decision rendered May 18, 1888, in the case of S. N. Jeardoe *v.* said Shannon, involving the latter's timber culture entry, made September 10, 1880, for the SW. ¼ Sec. 15, T. 105 N., R. 61 W., Mitchell, Dakota. On July 29, 1882, Shannon relinquished the SE. ¼ of the quarter section named, because of conflict with a prior entry, and thereupon his entry was to that extent canceled The tract now in controversy, therefore, contains only one hundred and twenty acres.

The original record shows that, on February 6, 1885, S. N. Jeardoe instituted contest against said timber culture entry, then covering but three-fourths of a quarter section of land, charging that said Shannon "has not, during the third year after entry, nor up to the present time,

planted trees, seeds or cuttings on the first *five* acres; nor during the fourth year, or up to the present time, planted trees, seeds, or cuttings on the second *five* acres; nor cultivate *any trees* on either *five* acres up to the present time."

Upon these charges a hearing was had before the local officers, on May 11, 1885, at which both parties were present and offered testimony. A large amount of evidence, mostly conflicting in character, was submitted, and upon consideration thereof, the receiver, after an elaborate and exhaustive analysis of the same, found, substantially, that the contestant had failed to sustain his charges of contest; that claimant had broken and cultivated to crop seven and a half acres of his claim and had planted the same to seeds and cuttings, as required by law, and that he had fulfilled the requirements of the law in cultivating and caring for the same; whereupon he recommended the dismissal of the contest, and that Shannon's entry be allowed to stand.

The register, in a lengthy opinion, based not upon the testimony taken at the hearing, but upon two personal inspections of the land in question, made by him, one prior and the other subsequent to the date of the trial, found for the contestant, and declared that the entry of Shannon should be canceled.

The record, accompanied by these dissenting opinions, was thereupon transmitted to your office, and upon consideration thereof, by office decision of July 9, 1886, it was held, in substance, that the requisite amount of breaking appears to have been done by claimant; an attempt has been made to plant tree seeds and cuttings, but there has not been, at any time, what could be called cultivation of the ground; that the trees planted entirely failed to grow, and the cuttings that are alive do not appear to be in a good condition, which state of things is no doubt the result of want of proper planting and cultivation; and thereupon said entry was held for cancellation.

The departmental decision, of which a reconsideration is asked, is a formal affirmance of said decision of your office.

In the register's letter of transmittal, dated September 8, 1885, he states that:

The claimant and his attorney well know, after my visit to this claim in April, that my opinion would be against them—the land showed for itself—and they determined, if possible, to discredit my statements by a great mass of false testimony. I called this matter to the receiver's attention, as I stated in the case of Tannehill *v.* Shannon, and urged him to visit the claim so he could also report. This he did not do.

He further called the attention of your office to the affidavit of one B. F. Bynum, accompanying his letter, and to the record in said case of Tannehill *v.* Shannon, transmitted by letter of August 10, 1885.

The register, in his opinion filed in the record, after describing the condition of the land as he found it upon the occasion of his first visit of inspection, further says:

Considering the fact that I have a clear and full understanding of the condition of this tract of land, and of the kind of cultivation put on it up to May 1, 1885, the

testimony of the claimant and his witnesses, in many particulars, is simply bold and reckless effrontery. The claimant's testimony on the trial was so full and clear, especially as to the number of cuttings, and the cultivation done on claim just before the trial, and as to the condition of the land—which the testimony of the contestant was exactly opposite—that I deemed a second visit to this land but just and fair to the parties and demanded by the rights of the government. May 17th, accompanied by Mr. B. F. Bynum, the gentleman who wrote the testimony, I went to this tract and for the second time closely inspected it.

In the affidavit of Bynum, above referred to, he swears, in effect, that he wrote the testimony taken in the case at the trial; that he visited the land in company with the register and the attorneys for the parties a short time before the trial, and made a thorough examination of said claim, and found the same in a wretched condition, covered with a thick growth of weeds and grass; that he went with the register to the land the second time, on the Sunday following the date of the trial, and re-examined it; that the cultivation of the same was a miserable sham and pretense, and would not be recognized as such by any good ordinary farmer; that he examined the claim thoroughly and only found here and there scattered cuttings, and part of them dead; that he had read the opinion of the register in the case and swears that he has described the condition of the tract as accurately as it is possible to describe the same, and that the testimony of claimant and his witnesses, in its material parts, is absolutely false.

The testimony in the case is voluminous and contradictory, but when considered aside from, and independent of said affidavit of Bynum and the register's opinion, which is nothing more nor less than a report on the condition of the claim, based upon his personal examination thereof, the weight of the evidence submitted is clearly and decidedly in favor of the claimant.

It does not appear from the record that the parties were notified by the register, that an inspection would be made by him after the hearing was closed; the parties were not present, and, in fact, the inference is, that no one but the register and said Bynum knew that this second inspection was ever contemplated, until after it was made.

It will be observed from the foregoing, that this case is in all material respects similar to the case of Tannehill *v.* Shannon, referred to by the register in his opinion and letter of transmittal, which was decided on appeal to this Department, April 17, 1888 (6 L. D., 626). That case came up from the same local office as this, and in each case the action of the register in making personal inspection of the land in controversy is substantially the same. In the former case the Department held that:

In the trial of a contest case the local officers act judicially, and while in certain cases they would be fully authorized to view the claims, if they deemed such action necessary, and for that purpose could adjourn the hearing and give notice to the parties of the time when they would make such inspection, yet they should not, after the case is closed, of their own motion, and without notice to the parties, inspect the ground and base their judgment upon the result of such inspection.

It was also stated in that case that the Department having repeatedly held it improper to cancel an entry upon the report of a special agent, the same principle should apply to reports of local officers, when such reports are based upon matters not in evidence at the hearing.

After further and mature consideration, I think that the rule thus enunciated is in all respects proper, and in view thereof, this case must either be decided in favor of the claimant upon the testimony submitted, or it must be remanded for a further hearing, by reason of the matters contained in the register's opinion and letter of transmittal, and the said affidavit of Bynum. These matters are sufficient, I think to warrant the Department in directing that a further hearing be had to determine, in the regular manner, the true status of the land in question.

Notwithstanding the irregularity as to time of examination and manner of making use of the view of the premises, which has occasioned a rehearing in this case, it seems not improbable that the painstaking desire of the register to arrive at the very truth may prove of great value towards that end in this case. And occasion may be taken to commend the practice of views and to suggest that both register and receiver may, and perhaps together, in cases of conflict, usefully visit the premises when accessible, and when a present view may justly afford help to resolve the point in dispute. But this ought to be before the argument is heard and after notice to the parties.

The department decision, rendered herein on May 18, 1888, is, therefore, set aside and annulled, and you will direct that a re-hearing be had in the case, after due notice to all parties. After such hearing is had, you will thereupon re-adjudicate the case.

The decision of your office originally appealed from is modified accordingly.

RAILROAD RIGHT OF WAY—ACT OF MARCH 3, 1875.

DENVER & RIO GRANDE R. R. CO.

The right to appropriate material from the public land, as conferred by the acts of June 8, 1872, and March 3, 1875, and defined by the term "adjacent" should not be held to extend beyond the tier of sections through which the right of way passes, and an additional tier of sections on either side.

The act of March 3, 1875, authorizing railroad companies to use public timber for construction purposes applies to this company and is not inconsistent with the act of June 8, 1872.

A railroad is not authorized to take timber from lands adjacent to one part of its line for the purpose of constructing another part.

The grant of timber for construction purposes is restricted to the construction of the road bed; and depots, station houses, machine shops, etc., are not included in the term "railroad" as used therein.

Secretary Vilas to the Attorney General, January, 10, 1889.

I am in receipt of your letter of April 25, 1888, transmitting a copy of a communication from Henry W. Hobson, of April 21, with an original communication from Edward O. Wolcott, Esq., general counsel for

the Denver and Rio Grande Railroad Company, relative to the right of the road to cut timber from the public lands for the use of said road under the acts of June 8, 1872, (17 Stat., 339) and of March 3, 1875, (18 Stat., 482).

The act of June 8, 1872 granted to said road the right of way over the public domain of one hundred feet on each side of the track, with the right to take from the public lands adjacent thereto stone, timber, earth, water, and other material required for the construction and repair of its railway and telegraph line.

The act of March 3, 1875, is the general law making a similar grant to railroads of right of way upon complying with certain provisions named therein.

The 2d provision of the act of June 8, 1872, was by the act of March 3, 1877 (19 Stat 405, amended so as to read as follows:

Provided, That said company shall complete its railway as far south as Santa Fe within ten years of the passage of this act, and shall complete fifty miles additional south of said point in each year thereafter; and in default thereof the rights and privileges herein granted shall be rendered null and void so far as respects the unfinished portion of said road.

Under the said acts the company makes the following claim:

The Denver and Rio Grande Railway Company claimed, and The Denver and Rio Grande Railroad Company, as its successor, claims, under the act of June 8th, 1872, and under that act and its amendments we conceive our rights to public timber to be as follows:

1. That the Railway Company had the right to take timber for purposes of construction until June 8th, 1882, and that the Railway Company had at all times after the passage of the act and the Railroad Company still has, the right to take timber for repairs of that portion of the railway line constructed prior to June 8th, 1882.
2. That for the purpose of repairs the only limit on this right is that the timber shall be taken from public lands adjacent to the right of way of that portion of the Company's lines constructed prior to June 8th, 1882.
3. That the term "adjacent" pertains only to the relation of the lands to this railway line as a whole, and does not control the particular *place of use* on the line: e. g. if there is no timber opposite a given point on the line, as "A", the Company may go to the nearest and most accessible timber land, provided it is adjacent to some part of the line, as "B" and carry the timber on the road from "B" to "A" for use at the latter point.
4. That if the necessary timber is not found on adjacent lands between the termini of the road the Company may go a reasonable distance beyond either terminus to lands adjacent to such terminal points.
5. That the distance from the lines or terminal points to which the Company may go under the term "adjacent" is to be controlled by circumstances, and that if available timber cannot be found nearer, that thirty miles would not be an unreasonable limit of the term "adjacent" in the country where this railroad line was built.

The Company claims under the act of March 3rd, 1875, for those portions of its railway lines which have been constructed, since June 8th, 1882, and which it may yet desire to construct, and under this act the Company claims:

6. That it has a right to take timber for purposes of construction from adjacent public lands and that the same rules as to adjacency apply under this act as above claimed under the act of 1872.

7. That the purposes for which timber may be used under both acts of Congress include ties, bridges, depots, station houses, round-houses, water tanks, machine shops, and all other permanent appurtenances necessary as an operating railroad, and so far as the lines were built under the act of 1872, that this right extends to repairs as well as to construction.

Said communication was referred to the Commissioner of the General Land Office, whose report therein is herewith transmitted.

The road not having been completed to a point on the Rio Grande as far south as Santa Fe within the ten years limited by the act, the company can not claim the benefits of the act of 1872 as to any part of the road built after the expiration of that time.

The Commissioner conceded the claim of the company as set forth in the first and second propositions, but denies their claim as set forth in the third, fourth and fifth.

These involve the construction of the word "adjacent" in its application to lands from which timber may be taken for construction and repair of the road.

The decision of Judge Hallett, to which the Commissioner refers, was rendered in a suit brought by the United States against the Denver & Rio Grande Railroad Company to recover the value of timber taken from the public lands – the road claiming the right to said timber under the acts above cited.

In said decision Judge Hallett held, that the word adjacent "means extending laterally some distance from the right of way and probably within ordinary transportation by wagons".

As I understand said decision he denies the right of the road to take timber from lands adjacent to one part of its line of road for the purpose of constructing another part.

The adjective "adjacent," by which word the lateral limits of the area upon which the railroad company is authorized to take material for the construction of its road is defined, is indefinite and uncertain in signification. It is recognized that it must mean something more than "adjoining." Nothing in the term itself necessarily implies that the lines of surveys shall be resorted to to define its extent. There is, however, nothing in this indefiniteness which, it seems to me, can authorize the view that timber or other material can be taken from public land so far away as may be reached by wagon transportation in a single day, or any other given period of time. That appears to be wholly an arbitrary view, and one not in accordance with the general idea which one would derive from the use of this adjective, as applied to lands adjacent to the railroad right-of-way—a narrow line drawn across the country. It seems to me that a much more restricted limitation must have been within the intention of Congress in the use of that term. I find support to this idea in the use of the same word in another connection immediately preceding, in the act of 1872, which provides that the right-of-way shall be granted, "one hundred feet in width on each side of the track," and also, "such public lands adjacent *thereto* as may be needed for depots, shops, and other buildings for railroad purposes,

and for yard-room and side-tracks, not exceeding twenty acres at any one station." A similar use of the word is also made in the act of 1875. This use of the word "adjacent" indicates a moderate right of appropriation of the public lands, which were conveniently contiguous to the right-of-way, and immediately accessible from it. I do not believe that it was the purpose of Congress, or that this Department ought to decide that a railroad company can range the public lands to secure material for the construction of its road, when it does not happen to exist on those lands which, in the ordinary acceptance of the phrase, would be regarded as "adjacent" to the right-of-way. It is perhaps necessary, for practical construction, to define some limit; and in acknowledgment of that necessity, and with a view to a proper protection of the interests of the government, I am of the opinion that it is as far as sound discretion will warrant executive officers to go until an authoritative decision by the courts, to hold that, under this phrase, material may be taken from the tier of sections through which the right-of way extends, as immediately adjoining the right of-way, and perhaps an additional tier of sections on either side, as within the idea of "adjacency." In employing this word of flexible signification, "adjacent," to indicate the territorial limits of this privilege to the railroad company, Congress has thrown upon the Department the necessity of determining a meaning to that word and of laying down a rule thereon for the guidance of the subordinate officers and the companies; and, in view of all the facts and considerations applicable, it is believed the definition and rule given are fair and just, and legitimately to be adopted. I think it wiser and safer to pursue such a rule, subject as it is to review by the courts, than to leave the matter open to the varying notions of different officers or the necessities of the companies.

The company also claim the benefits of the act of March 3, 1875, as to that portion of its line which has been constructed since June 8, 1882, and which it may yet desire to construct. The claim of the company under this act is set forth in the 6th and 7th propositions heretofore stated.

In the decision above cited, Judge Hallett held that "the act of March 3, 1875, authorizing railroad companies to use public timber for construction purposes, applies to the Denver and Rio Grande Railroad Company, and is not inconsistent with the act of June 8, 1872, but the term adjacent, as used in said act, was construed by the court adversely to the claim now presented by the company.

The decision of Judge Hallett having been made in a suit brought by the government against this road, which involved the rights of the company under the acts of June 8, 1872, and March 3, 1875, I am disposed to adhere to the ruling of the court in said case upon all points therein decided, with the limitation above stated as to adjacent lands, and I do not see that any other understanding could be arrived at by a conference between the Department and the railroad officials as suggested by the District Attorney.

As to the claim of the company set forth in the 7th proposition, I concur in the views of the Commissioner, that the intent of this act granting timber for the construction of railroads is restricted to the construction of the road bed, and that depots, station-houses, machine-shops, etc., are not included in the term railroad, as used in said act.

Overruled, 13 L. D. 42

HOMESTEAD ENTRY—RESIDENCE—COMMUTATION.

GOTTLIEB BOSCH.*

Though the final proof, in the matter of residence, may be insufficient to warrant the issuance of patent under section 2291, R. S., it may be accepted as authorizing a purchase under section 2301, if the entryman so elect.

Secretary Vilas to Commissioner Stockslager, May 11, 1888.

I have considered the appeal of Gottlieb Bosch from your office decision of May 29, 1886, wherein you hold for cancellation his homestead entry for the SE. ¼ of Sec. 26, T. 134 N., R. 59 W., Fargo, Dakota.

The facts are sufficiently stated in your said decision, and I concur in your conclusion that the claimant has not shown such residence as entitles him to the land under section 2291 of the Revised Statutes.

I cannot, however, conclude that the facts shown by the record and before set out necessarily show fraud on the part of claimant. He may have acted in good faith, believing that his acts constituted a compliance with the law; and the record fails to convince me that he did not do so. I am, therefore, unwilling to cancel his entry on the present record. But I think the proof submitted is, by reason of claimant's apparent good faith and his continuous residence in the latter year, ample to authorize the purchase of the tract by him under section 2301 of the Revised Statutes, if he so elect. Otherwise the proof offered must be rejected, and the case be left to such further proof as the claimant may make if such proof should, however, be submitted within ninety days from notice of this decision.

Your decision is modified accordingly.

HOMESTEAD ENTRY—RESIDENCE.

ADAM S. HARRIS.

In the absence of any intervening adverse claim, a homestead entryman may receive credit for a period of residence preceding his entry, and while he held the land under the timber culture law.

First Assistant Secretary Muldrow to Commissioner Stockslager, January 11, 1889.

April 17, 1882, Adam S. Harris made timber-culture entry for the NE. ¼ of Sec. 8, T. 9 N., R. 20 W., Grand Island, Nebraska. On May

*The original entry in this case was made March 24, 1881, and proof submitted March 30, 1886.

13, 1886, Harris made homestead entry for the land and on March 10, 1887, his said timber-culture entry was canceled by relinquishment.

The claimant made final proof in support of his homestead claim before the county judge of Dawson county, on May 10, 1887. This proof was rejected by the local office for the reason that "the claimant can not claim the benefit of residence upon the land while embraced in his timber-culture entry."

This action was sustained by your office decision of June 10, 1887, from which the claimant appeals.

The proof submitted shows that on April 17, 1882, the claimant settled on the land and built a house and stable, worth $100, that his improvements, valued at $365, consisted of a house twenty-six by ten feet, a stable and other outbuildings, one hundred acres broken and mostly cultivated; and that his residence has been continuous.

The record showing the claimant to have complied with the requirements of the homestead law as to residence, cultivation, and improvement, the only question that is now before me is whether the claimant can have credit for his residence on the land while it was embraced in his timber-culture entry.

The precise question that is now presented was fully discussed and answered in the affirmative by the Department in the case of Falconer *v.* Hunt *et al.* (6 L. D., 512), to which reference is made.

In that case it was expressly ruled that under the third section of the act of May 14, 1880, credit would be allowed an entryman upon the submission of homestead proof, and in the absence of an intervening adverse claim for a period of residence preceding his homestead entry, and while the land was covered by a timber-culture entry previously made by said entryman.

In accordance with the authority cited, your decision is hereby reversed.

PRACTICE—NOTICE-APPEAL—TRANSFEREE.

SMITH *v.* ANDERSON.

A transferee who was duly served with notice of contest, and appears in pursuance thereof, will not be heard, for the purpose of protecting his own interests, to object to the sufficiency of the notice to the entryman.

A misstatement as to the date of posting will not defeat service of notice, where such error is subsequently corrected by special affidavit and the testimony of the contestant.

Ten additional days are allowed for filing appeal, when notice of the Commissioner's decision is given through the mails by the local office.

Purchasers from persons holding final certificate, buy with notice that the Land Department has no authority to issue patent if the entryman has not complied with the law.

First Assistant Secretary Muldrow to Commissioner Stockslager, January 11, 1889.

I have considered the case of Ner Smith against John Anderson, upon the appeal of Flora Gans, grantee of John Anderson, from your decision

of February 28, 1887, holding for cancellation the cash entry of said Anderson for the NW. ¼ of Sec. 3, T. 113, R. 60 W., Huron, Dakota.

The record shows that Anderson filed declaratory statement for above tract November 20, 1882, alleging settlement September 26, 1882, made proof and received final certificate April 26, 1883.

February 27, 1886, Ner Smith filed a duly corroborated affidavit, charging fraud and illegality in said entry, and on June 3, 1886, your office ordered a hearing.

It appears that subsequent to making final proof, Anderson sold his interest in the claim to Flora Gans, and shortly after left that part of the country. Anderson's residence being unknown to contestant, service was made by publication, and Flora Gans, grantee aforesaid, who was notified by personal service, appeared to defend the entry.

Hearing was set down for September 30, 1886, but, at the request of grantee's brother, the same was continued until November 9th following.

On the day first appointed for hearing, Messrs. Burt & Croffutt, attorneys for Flora Gans, "specially appeared for the purpose of objecting to the jurisdiction of the local office over the person of John Anderson, entryman, and for the purposes of this motion only." The grounds of objection were substantially as follows:

1st. Because the notice of hearing was not posted on the land until August 22, 1886.

2d. Because a registered letter containing notice of contest was not sent to claimant's last known address.

This motion was overruled, and counsel for Flora Gans excepted.

The action of the local officers in overruling the motion, upon the ground stated in the first objection, was proper, because the objection was based upon a misstatement of contestant as to the date of posting notice upon the land, which misstatement was subsequently corrected by special affidavit and by the testimony of contestant at the hearing.

Neither is the second ground of objection well taken, as Flora Gans having been properly notified, and having in pursuance thereof appeared in court, she can not, for the purpose of protecting her own interests, raise the objection that Anderson was not properly notified.

The testimony submitted at the hearing shows that Anderson began the erection of a shanty upon the tract about September 26, 1882. The neighborhood was sparsely settled, and there were but few families residing within five miles of the tract in question. The principal article of furniture in the shanty was a stove, and the shanty itself seems to have been without a floor and to have been otherwise entirely unsuited for a winter residence in that climate. Anderson occasionally visited the tract, remaining over night once every two or three weeks, but at no time establishing an actual residence upon the land. For a month previous to making proof the shanty was uninhabitable, a part of the roof being blown off, the door lying open and the floor entirely covered

with snow. About the middle of April it was blown down and never rebuilt. The final proof witnesses resided some twenty miles from the tract and knew but little of the facts to which they made affidavit. The neighbors never saw Anderson upon the land and testified that he could not have resided upon the tract without their knowledge.

The facts disclosed at the hearing show that he did not comply with the law in the matter of residence.

December 2, 1886, the local officers dismissed the contest and recommended that Flora Gans be allowed to retain the land upon the ground that she was an innocent purchaser and that Anderson "made as good a residence as the majority of single men did at that period and fully as good as was at that time expected of single men by the various local offices in Dakota."

From this action contestant duly appealed and on February 28, 1887, your predecessor rendered a decision holding the cash entry of Anderson for cancellation.

April 28, 1887, notice of said decision was given by registered letter to Flora Gans and Messrs. Burtt and Croffutt her attorneys, and no appeal was filed from said decision until July 7, 1887.

August 4, 1887, a motion to dismiss said appeal was made by contestant, upon the ground that the notice was not served as required by rule 86 of the Rules of Practice. This motion, however, must be denied, as the appeal was filed within the ten additional days allowed by rule 87 of said Rules of Practice.

After carefully examining the evidence in this case, I am of the opinion that the entryman has not complied with the provisions of the pre-emption law.

The Department has repeatedly held that purchasers of pre-emption claims before patent are not in contemplation of law purchasers in good faith, as they buy only an equity subject to the action of the Land Department, either in confirming or canceling these entries. Purchasers from persons holding final certificates purchase with notice that the Land Department has no authority to issue patents to entrymen who have not complied with the law.

Your action holding for cancellation the cash entry of John Anderson is accordingly affirmed.

DESERT LAND ENTRY—NON-IRRIGABLE LAND.

DAVID GILCHRIST.

Though it should appear, on hearing, that at the date of final proof the land was not sufficiently reclaimed, yet if reclamation was subsequently effected the entry should not be canceled, in the absence of an adverse claim, unless it is clearly shown that the final proof was false and fraudulent.

It is of no consequence to the government whether the non-irrigable land covered by the entry is situated in one or more of the smallest legal sub-divisions. The main questions to be determined in each case are: (1) Was the land desert in character, and the entry compact in form, and (2) was the entryman duly qualified, and has he complied in good faith with the requirements of the statute?

Where the final proof was accepted and certificate issued, an entry will not be canceled though it may cover considerable non-irrigable land, where the land susceptible of irrigation, was in good faith substantially reclaimed, and valuable improvements placed thereon, both before and after the allowance of the entry.

The case of William H. Holland cited and distinguished.

Secretary Vilas to Commissioner Stockslager, January 12, 1889.

I have considered the appeal of David Gilchrist from the decision of your office, dated April 23, 1887, holding for cancellation his desert-land entry, No. 36, of Sec. 14, T. 14 N., R. 69 W., Cheyenne land district, in the Territory of Wyoming.

The record shows that said Gilchrist filed his desert-land declaration, No. 48, for said section, on September 27, 1879, and on September 12, 1882, final certificate No. 36 was issued upon his final proof.

The final proof showed that the claimant was duly qualified to make entry of said land; that the ditches cover each legal subdivision of forty acres of said tract, except the SW. ¼ of the SW. ¼, which lies so high that it is not possible to conduct water thereon; that claimant has irrigated about four hundred acres of the tract so as to make it produce hay; that in the year 1882, when said final proof was made, claimant cut about thirty tons of hay on said land, but allowed the greater part of the grass to remain uncut so that the seed might increase the yield the ensuing season.

On February 10, 1886, a special agent of your office reported that said entry was fraudulently made, and your office, on June 18, 1886, held said entry for cancellation.

On July 13, 1886, the claimant applied for a hearing, which was duly ordered and had before the local land office, on November 16, 1886.

The allegations against said entry were, (1) that it was made in the interest of another; (2) that the entryman failed to comply with the requirements of the law as to reclamation; and, (3) that the final proof was false and fraudulent.

Upon the evidence submitted the local officers found that the first allegation that said entry was made for the benefit of another was not sustained; that the second and third allegations were proven, and they therefore recommended that said entry be canceled. On appeal, your office affirmed the findings of the local office and held said entry for cancellation.

The entryman appeals, and assigns nineteen grounds of error, which may be briefly grouped as error in findings of fact, and error in the conclusions of law.

* * * * * * *

In the report of the special agent upon which said entry was held for cancellation, in answer to the question "Was the fraud wilfull?" It is stated "On the part of David Gilchrist it is doubtful if he comprehended what he was doing. On the part of Andrew Gilchrist *yes*."

But the local office and your office have found that there was no fraud on the part of Andrew Gilchrist. The entry was not made for his benefit, and although he bought said land, and the improvements thereon for the sum of $4800 about six months after the issuance of final certificate, yet his right as transferee can be no greater than the entryman. But considering the whole deposition of the claimant in his final proof, it does not appear that he wilfully stated that which is false or that the final proof was false and fraudulent. In his final proof David Gilchrist swore, among other things, that he had "irrigated about four hundred acres of the land so as to produce hay," and the preponderance of the evidence clearly shows that that statement is true. But even if it be conceded that the land was not sufficiently reclaimed at the date of the final proof, yet, if it has been subsequently reclaimed, in the absence of any adverse claim, the entry ought not to be canceled unless it shall clearly appear that the final proof was false and fraudulent. The burden of the proof is upon the government. United States *v.* Barbour (6 L. D., 432); Colorado Coal Company *v.* United States (123 U. S., 314); *In re* Perry Bickford (7 L. D. 374).

In the case of George Ramsey (5 L. D., 120), my predecessor, Secretary Lamar, construed the desert land act (19 Stat., 377) commenting upon the former rulings of the Department relative thereto in Wallace *v.* Boyce (1 L. D., 26) and in Secretary Teller's letter of January 9, 1885 (3 L. D., 385) holding that the desert land proof was sufficient when it showed that the claimant was 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 crops. Secretary Lamar held:

> Under the statute, the fact of reclamation is all that need be proven. The reason is this : It is a well known fact that the soil of the desert lands that are affected by this act under consideration, has all the elements to make it productive, except water. If it has, then the fact that it has been supplied with a sufficient permanent supply of water, is all that can be required under the statute. If it has not, then it can not be reclaimed 'by conducting water on the same," and the object of the statute is defeated. As was said by Mr. Secretary Teller (3 L. D., 386) "The raising of a 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." But I will go one step further than my predecessor, and hold that the whole tract for which proof is offered (unless it be possibly some high points or uneven surfaces which are practically not susceptible of irrigation) must be actually irrigated in a manner indicative of the good faith of the claimant. In this connection, the right to the water, and the quantity of it, the manner of its distribution, and the permanency of its supply, are all to be taken into consideration.

In the case of Levi Wood (5 L. D., 481) Acting Secretary Muldrow held, that, as a general rule, the entire tract entered must be reclaimed by irrigation before final proof can be accepted, but, under the peculiar circumstances as shown in that case, the final proof should be accepted. The facts, as shown by the record in the Wood case. were that the origi-

nal entry was for two hundred and forty acres, the south half being canceled for conflict with a prior desert land entry. All of one forty-acre tract had been irrigated, from twenty to twenty-five of another, and possibly about fifteen acres of the other, making, in all, about eighty acres out of the entire tract of one hundred and twenty acres. The remaining portion of the entry was hilly and rocky and it was practically impossible to irrigate it. The Acting Secretary said:

I am of the opinion, taking all of the circumstances of this case into consideration, claimant's evident and unquestioned good faith in the premises, the fact that one half of his original entry (all of which part was susceptible of irrigation) has been canceled through no fault of his, and the fact that all but the hilly and rocky portions of the claim have been properly irrigated and reclaimed, and the major part thereof cultivated, that the final proof of Wood should be accepted.

In the case of Owen D. Downey (6 L. D., 23), the desert land entry was for 216.63 acres, and the record showed that all of the land, except about thirty acres of high land on the eastern portion of the claim had been irrigated as required by law. Acting Secretary Muldrow said:

Were it not for the fact that about thirty acres of the entry have never been irrigated at all, I would have no hesitancy in allowing the same to proceed to patent. It is not shown in the final proof that said thirty acres are not susceptible of irrigation so as to bring the case within the rule laid down in the cases of George Ramsey (5 L. D., 120) and Levi Wood (id., 481); but it is alleged in argument that such is the case. If, as a matter of fact these thirty acres are so high and rocky as to be practically not susceptible of irrigation, and thus absolutely worthless to the government or any one else, then the case becomes similar to the Levi Wood case (*supra*), and the entry should be allowed to proceed to patent, otherwise I would see no objection to claimant relinquishing the subdivision not irrigated and taking patent for that part of his entry in relation to which the law has been complied with.

In the case of William H. Holland (6 L. D., 38), it appeared from the record that Holland had not reclaimed all of the legal subdivisions covered by his desert land entry No. 537, that the subdivisions not irrigated were high, rocky bluffs, not susceptible of irrigation, and that they were originally included in the entry only to render it compact. Acting Secretary Muldrow held that:

There is no legal way by which the entryman can retain either his entry as originally made, or the parts thereof which have been irrigated. The greater part of the NE. ¼ of NE. ¼ of Sec. 30, not being susceptible of irrigation, he can not include that in his entry, and as the SE. ¼ of the NE. ¼ and the NE. ¼ of SE. ¼ of said Sec. 30 have not been irrigated at all, those tracts can not be included in his entry.

The entryman was accordingly required to elect which contiguous tracts he would enter. No reference was made to the ruling in the Downey case (*supra*), which emphasized the statement that "if, as a matter of fact, these thirty acres are so high and rocky as to be practically not susceptible of irrigation, and thus absolutely worthless to the government or any one else," the entry should be allowed to proceed to patent.

It can not be supposed that in the Holland case the Acting Secretary intended to prescribe an exact mathematical rule which should govern every case, without regard to all of the attending circumstances in each

particular case. Besides, in the Holland case it appeared that two of the legal subdivisions had not been irrigated at all, and in that respect the two cases are dissimilar.

It can be of no consequence to the government whether twenty-five acres, not capable of irrigation, covered by an entry, are situated in one, or more, smallest legal subdivisions. The main questions to be determined in each case are: (1) Was the land desert in character and the entry compact in form? and (2) Was the entryman duly qualified to make the entry, and has he complied in good faith with the requirements of the statute?

It is to be observed that the first section of the desert land act allows a duly qualified person, upon the payment of twenty-five cents per acre, to file his desert land declaration under oath, "that he intends to reclaim a tract of desert land not exceeding one section, by conducting water upon the same within three years thereafter." The second section of said act provides "that all lands exclusive of timber lands and mineral lands, which will not, without irrigation, produce some agricultural crop, shall be deemed desert land within the meaning of this act;" and the third section of the act provides, that "the determination of what may be considered desert land shall be subject to the decision and regulation of the Commissioner of the General Land Office."

It thus appears that the statute prescribes the general rule to be applied in determining whether the tract entered is desert in character, namely, that "which will not, without irrigation, produce some agricultural crop," excluding timber and mineral lands.

In the swamp land grant (U. S. Revised Statutes, Sec. 2481), the statute prescribes the rule for listing swamp and overflowed lands, namely, "legal subdivisions, the greater part whereof is wet and unfit for cultivation," and also provides that, "when the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom."

The timber land act (20 Stat., 89), provides for the sale of surveyed public land, unoffered, which is "valuable, chiefly, for timber, but unfit for cultivation."

In the construction of the last named act, the Department has applied the statutory rule of the swamp land act. Ellis *v.* Moore (6 L. D., 630).

In construing the provisions of the desert land act, the Department has frequently applied the rules applicable to the pre-emption laws. For example, in the case of Miller *v.* Noble (3 L. D., 9), it was held that, where the claimant was negligent in his reclamation, but the default was cured before contest, the entry would not be disturbed. So in the case of Fraser *v.* Ringgold (ibid., 69), it was held by the Department that a person procuring the cancellation of a desert land entry was entitled to a preference right of entry, under the provisions of section two of the act of May 14, 1880 (21 Stat. 140), although the language of said section only specified "pre-emption, homestead or timber-

culture" entries. See also Jefferson *v.* Winter (5 L. D., 694); Sears *v.* Almy (6 L. D., 1).

But it will be unnecessary to cite authority to show that the uniform construction of the United States supreme court and the Department, relative to settlement and entry under the pre-emption laws, is, that the pre-emptor must show that he is a settler in *good faith* upon public land which he seeks to purchase, and that he has substantially complied with the requirements of the pre-emption laws and the departmental regulations duly made thereunder.

The case of Holland (*supra*) will not be considered as a precedent for holding that in no case can a patent issue upon an entry, where all of the land in each smallest legal subdivision, susceptible of irrigation, has been reclaimed, although it may appear that the greater part of one of said tracts is not susceptible of reclamation.

In the case at bar, there is no question but that the land was desert in character at the date of said entry; that a large portion of the land had been thoroughly irrigated prior to the date of the final proof; that subsequently, additional ditches were placed on said land; and that the improvements are valuable. It is shown that the land, susceptible of irrigation, has been substantially reclaimed. The final proof was accepted by the local officers, and final certificate was issued. Moreover, it appears that about $250 was expended in building ditches on the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of said section, and, although there is, according to the estimate of the witness Hawkins, about one-third of the NE. $\frac{1}{4}$ not susceptible of irrigation, yet in view of the large and valuable improvements placed upon said land, both prior and subsequently to the allowance of said entry, which tend strongly to show that the parties in interest have acted in good faith, and the further fact that there is no adverse claim, I am clearly of the opinion that the evidence not only fails to show that said entry should be canceled, but, on the contrary, it should be passed to patent.

The decision of your office must be and it is hereby reversed.

HOMESTEAD ENTRY—COMMUTATION.

NATHAN T. JENNINGS.

A homesteader who, by commutation, makes final entry of a part of the land covered by his original entry, exhausts thereby his right under the general homestead law.

Secretary Vilas to Commissioner Stockslager, January 12, 1889.

Nathan T. Jennings made homestead entry—No. 8192—for the NW. $\frac{1}{4}$ of section 4, T. 94, R. 61, containing 157.46 acres, at the land office at Yankton, Dakota, June 2, 1884, and on August 4, 1885, made commutation proof on the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of the section aforesaid. The proof was satisfactory to the local officers and receipt and certificate No. 4306, were issued for the land described in the proof September 16, 1885.

March 23, 1886, you directed the local officers to inform Jennings that his cash entry embraced only the south half of the northwest quarter of said section and that action would be suspended for thirty days in order that he might explain any error, if any had been made, in not making proof for the whole tract covered by his entry.

In response Jennings forwarded an affidavit, dated May 3, 1886, and not corroborated, stating that he is now residing on the N. ½ of the said NW. ¼, and requesting that he be permitted to hold said N. ½ of the NW. ¼ as his homestead as he has had only eighty acres under the homestead law, and to make final proof on the same at the expiration of the time allowed by law.

July 2, 1886, you decided that when Jennings made proof on the S. ½ of the NW. ¼ he exhausted his homestead right, and held for cancellation his entry for the N. ½ of the said NW. ¼.

From this said decision Jennings appealed and in an affidavit, duly corroborated, states that if the decision becomes final it will deprive him and his aged wife of their only home and means of livelihood: that he has acted in entire good faith and under the advice and instructions of W. T. Williams the probate judge before whom the commutation proof was made, who told him that he could legally and without prejudice to his right, commute one half of his homestead and retain the remainder under the provisions of the homestead laws; that acting under such advice he commuted the south half of said quarter section and disposed of the same in order to obtain money enough to improve his condition and to get money to expend on improvements on the north-half of said section. For these reasons he asks that the decision of the Commissioner holding the balance of his homestead entry for cancellation may be modified so as to allow him to amend his cash entry—No. 4306—to embrace the whole of the NW. ¼ of section 4, the tract originally embraced in his homestead entry No. 8192.

Jennings' application must be denied. When he commuted his homestead entry—No. 8192—into cash entry No. 4306, the former became merged in the latter, Greenwood *v.* Peters (4 L. D., 237) and, it follows, that to permit him to make entry for the north-half of said section would be to allow him to make two entries under the homestead law. Only one entry can be perfected under the general homestead law, and the right is exhausted when once used although for a less quantity than for one hundred and sixty acres. Case of Hiram S. Thornton (3 L. D., 509).

Nor could Jennings procure any benefit if the cash entry were canceled and an opportunity given him to make new proof because as he has alienated a portion of the tract embraced in the original entry he can not take the oath required by section 2291 Revised Statutes.

I, therefore, affirm your decision holding for cancellation his entry for the north-half of the northwest quarter section 4, T. 94, R. 61, Yankton, Dakota.

UNIVERSITY GRANT OF FEBRUARY 18, 1881.

TERRITORY OF MONTANA.

The Department has control over selections made under the University grant of February 18, 1881, until they are approved, and may authorize the change of a selection which embraces a tract included within a *bona fide* settlement, made without knowledge of such selection, and when the records of the local office showed the land to be subject to settlement.

Secretary Vilas to Commissioner Stockslager, January 12, 1889.

I am in receipt of your communication of September 7, 1888, requesting instructions as to the power of the Secretary to direct the change of a selection made in favor of the Territory of Montana, under the University grant of February 18, 1881. (21 Stat., 326).

It appears that Mr. Fehlberg was informed by letter from the register of Helena, Montana, that the SE. ¼ of Sec. 8, T. 28 N., R. 20 W., was vacant land and acting upon said information he improved the tract and made it his home in good faith and has made arrangements to make entry thereof. It now appears that the tract had been selected prior thereto under the University grant aforesaid.

The act requires that said selection shall be made under the direction of the Secretary of the Interior, with the approval of the President. While this tract was selected by the officer appointed by the Secretary of the Interior it has not been approved, and I am of the opinion that this Department has control over all of said selections until approved by the President.

Besides, I find upon inquiry in the General Land Office that the local officers were not notified of the selection of this tract, and hence the register at Helena, Montana, was not at fault in giving information to Mr. Fehlberg that the tract was vacant and unappropriated land, and having acted upon such advice and made improvements thereon, you will direct that another selection be made by the Territory of Montana in lieu of said one hundred and sixty acres, and allow Mr. Fehlberg to make entry of the same, if qualified and the tract is subject to entry in all other respects.

HOMESTEAD ENTRY—ACT OF JUNE 15, 1880.

SAH-WAH-GOO-DO-GAW.

The act of June 15, 1880, does not authorize a purchase under a homestead entry made by an Indian, who is not a citizen of the United States.

Secretary Vilas to Commissioner Stockslager, January 12, 1889.

March 25, 1879, Sah-wah-goo-do-gaw made application at the land office at Reed City, Michigan, to enter the NW. fractional ¼ of section 19, T. 17 N., R. 16, under section 2289, the homestead law, and paid to

the receiver the amount of fee and compensation. In the affidavit accompanying the application, and of even date therewith, she swore:

I am a single woman over the age of 21 years, the head of a family, and a citizen of the United States.

November 19, 1882, she made cash entry—No. 22,795—under the provisions of the second section of the act of June 15, 1880 (21 Stat., 236) by purchasing the land at $1.25 per acre. The receiver gave her a receipt for $175.30, the amount she had paid, and the register issued to her a certificate of her right to a patent for the land. By letter of January 7, 1887, you held the said cash entry for cancellation because of its illegality and say:

The papers in the case show that the entry party assigned her rights under original homestead entry—No. 7540—on Feb. 25, 1880, to one Martin B. Payne. A homestead made by an Indian cannot be commuted or in any manner alienated; see act March 3, 1875, (18 Stat., 420, p. 25, Circular March 1, 1884, also act July 4, 1884, 23 Stat., 96.

From this decision Josephene S. Benedict, transferee, and Sah-wah-goo-do-gaw, the claimant unite in an appeal and deny that Sah-wah-goo-do-gaw made entry of the land as an Indian, and aver that as she entered the land as a citizen, the entry does not come within the provisions of the act of March 3, 1875.

November 29, 1883, Sah-wah-goo-do gaw conveyed by warranty deed, for a consideration of $1000, all her right and title in and to said land to Willard K. Norris, who, in turn, on November 3, 1885 conveyed it to Josephene S. Benedict, the consideration stated being $1500.

Upon the back of the receiver's receipt given to Sah-wah-goo-do-gaw March 25, 1879, is written a relinquishment made by her February 25, 1880, to the United States in favor of Martin B. Payne for the consideration of $300. It is not shown that said alleged relinquishment was ever filed at the local office. Mrs. Benedict alleges that she had no knowledge of the existence of said relinquishment until she saw a copy of your decision of January 7, 1887; she denies that it is of any force or validity, and states that she purchased the land after Commissioner McFarland had on April 5, 1883, rendered the following decision, viz:

In reply to your letter of the 28th ult., I have to state that homestead entry—No. 7540—changed to cash entry No. 22795, for the NW. fr. ¼, Sec. 19, T. 117 N., R. 16 W., Mich. was *not* made under Sec. 15 of the act of March 3, 1875, but was made by the Indian woman Sah-wah-goo-do-gaw, under the act of May 20, 1862 (Sec. 2289 R. S., U. S.), she being a citizen of the United States.

Should the case be found satisfactory when examined, and a patent subsequently issued for the land involved therein, no restrictive clause regarding the alienation of the title to the land will be put in said instrument; hence if you have purchased the land from her, as alleged, you will find that you have acquired a good title thereto, it being competent for her to sell the land at date of her completion of title to it.

The foregoing letter was written to W. I. Norris from whom Mrs. Benedict bought, and reversed the decision of the receiver of the local office who wrote, May 15, 1883, to Mr. Norris that said entry came under the provisions of the act of March, 1875, forbidding the alienation of homesteads acquired by Indians.

There is nothing in this case which establishes the status of the entrywoman, absolutely, whether as an Indian woman, or a citizen. Her name, however, indicates that she is an Indian woman, and the admission seems to be impliedly carried in the papers throughout, and by the contention that she made the entry not as an Indian woman, but as a citizen of the United States. And under the latter theory it is contended now that the entry was validated by the act of June 15, 1880, in view of the very broad construction which has been given to that act by previous decisions of the Department.

I am unable to concur with this theory of the case. The second section of the act of June 15, 1880, although it uses the very comprehensive term "persons" who had theretofore made homestead entry to designate the beneficiaries of the act, is express in limiting the right to such persons who have made previous entry of lands *properly* subject to *such* entry. It seems to me it cannot be doubted that this means something more than a reference to the mere status of the *land* itself. The land must have been properly subject to such entry; that is, the entry must have been one properly to have been made in order to acquire the land under the homestead laws. To illustrate, I think it quite safe to say that if a homestead entry had been improperly allowed by the land officers in favor of a Chinese citizen, or a member of an Indian tribe, or any other individual plainly beyond the scope of the law, the entry was not of the class confirmed by the act of 1880. The evident purpose of Congress was to confirm entries which, had subsequent action required by law been taken so as to bring the cases in conformity to its provisions in the end, would have been patentable; not to confirm entries never within the scope of the homestead law.

This leads to the inquiry whether an Indian woman was in any case, authorized to make an entry under the homestead laws, unless her status as a citizen of the United States was affirmatively and plainly established. I think this inquiry must be answered in the negative. In the case of Elk against Wilkins, (112 U. S., 94) the supreme court held that an Indian born a member of a tribe still existing and recognized as a tribe by the government, is not a citizen of the United States, even within the meaning of the fourteenth amendment, although he may have voluntarily separated himself from his tribe and taken up his residence among the white citizens of a State, but who has not been naturalized, or taxed, or recognized as a citizen either by the State or the United States. In accordance with this view, our laws have provided a privilege to Indians to obtain homesteads from the public domain, but have provided special rules and limitations not applicable to other cases. It is unnecessary to recapitulate at length these laws. Sections 15 and 16 of the act of March 3, 1875 (18 Stat., 420), and the act of July 4, 1884 (23 Stat., 96), contain specific directions in respect to the manner in which Indians may obtain homesteads, and impose certain restrictions upon the title they secure thereby. These laws were

in existence at the time when this entry-woman made her application to enter the land in question, and unless she was a citizen of the United States, they controlled the right of entry by her and excluded the right of entry as a citizen under section 2289 of the Revised Statutes.

It must follow, therefore, that if she was an Indian woman, not a citizen she acquired no right under the act of 1880 to obtain this land by a title entirely different from that which the laws provided for Indian homestead entrymen, and that statute had no application to this case, because the land was not properly subject to her entry in 1879.

But, inasmuch as her status is not definitely shown, your decision holding said cash entry for cancellation must, I think, be modified so as to afford the appellant, Mrs. Benedict, an opportunity at any time within ninety days after notice of the decision, to submit proof of the citizenship of Sah-wah-goo-do-gaw, if it be the fact that she was not an Indian woman, but a citizen within the principle of the decision of the supreme court. In case of failure to do this within the time limited, your order of cancellation should be made absolute.

Your decision is modified accordingly.

Overruled, 12 L. D. 127

RAILROAD GRANT—DOUBLE MINIMUM LAND.

NORTHERN PAC. R. R. CO. *v.* YANTIS.

The existence of homestead and settlement rights, at the date when the grant attaches, is sufficient to except the land covered thereby from the operation of the grant.

The grant to the Northern Pacific is express in limiting the increase in price to the "reserved alternate sections," and such increase, therefore, does not extend to an odd numbered section excepted from the operation of the grant.

The right to amend a homestead entry, in accordance with the original application to enter, recognized where the amount covered thereby was improperly restricted through the erroneous action of the local office.

Secretary Vilas to Commissioner Stockslager, January 12, 1889.

I have considered the appeal of the Northern Pacific Railroad Company from your office decision of November 11, 1886, holding that the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, Sec. 27, T. 15 N., R. 1 W., Olympia land district, Washington Territory, did not pass to said railroad company under its grant.

The land in question is within the withdrawal for said company, on map of general route, filed in your office August 13, 1870, and is also included in the granted limits of said road, on filing September 13, 1873, a map purporting to be a map of definite location for that part of its road from Kalama to Tacoma.

The NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of the land under consideration is included in the granted limits of the branch line, the purported map of definite location of which was filed in your office March 26, 1884.

The records of your office show that William Leach, March 2, 1869, made homestead entry—No. 811—for the land in question which entry

was canceled by your office December 2, 1870, for voluntary relinquishment.

It appears that December 14, 1885, William F. Yantis made application to enter as an additional homestead under the act of March 3, 1879, the tract in controversy. In order to determine the status of said tract at the dates of the several withdrawals, a hearing was had March 2, 1886, at which Yantis appeared in person and the railroad company was represented by John H. Mitchell, Jr., its attorney.

The testimony shows that Yantis purchased the improvements of Leach on the land in question as well as those on the S. ½ of the NW. ¼ of said section, all of which was embraced in Leach's homestead entry. This purchase was made in the fall of 1870, and Leach's entry canceled under the terms of the purchase. Yantis states in his testimony that he applied to enter the tract in question at the same time that he made homestead entry—1523—February 6, 1872, for the S. ½ of the NW. ¼ of said section but was refused being told by the local officers that he could enter but eighty acres within limits of the grant to said company. It appears that Yantis again applied March 9, 1877, to amend his homestead entry so as to embrace the tract in question, but his application was rejected.

The testimony further shows that Yantis has claimed, occupied and cultivated the tract in question since his purchase from Leach, in connection with the eighty acres lying north, on which his entry was allowed.

On the hearing, the local officers decided that the land in question was excepted from the several withdrawals for said company by reason of the homestead entry of Leach and the claim, occupation and cultivation of the same by Yantis, and that his application should be admitted.

The company appealed. November 11, 1886, you affirmed the decision of the local officers for the reasons stated by them.

I concur in your conclusion that the land in controversy was excepted from the operation of the grant and affirm your decision in that respect.

You, however, decide further that Yantis has the right to make additional homestead entry for said land under the act of March 3, 1879 (20 Stat., 472) to grant additional rights to homestead settlers on public lands within railroad limits. An examination of the language of said act shows that it relates solely to *even* sections. The land in controversy is an *odd* section, and the act does not in terms apply.

But it clearly appears the local officers were wrong in rejecting his application to enter in 1872, and in denying his application to amend in 1877. The tract in controversy was excepted from the operation of the grant and was within an odd numbered section. The price of the land was not increased because the grant to the Northern Pacific is express in limiting that increase to the "reserved alternate sections," and it had not become double minimum land as the local officers held. Although

he failed to appeal from said decision and has not applied here to have his application re-instated, in view of the injury done him by the local officers and the obvious spirit of the act of March 3, 1879, the matter being solely between the government and Yantis, I direct that the application made by him in 1872, to enter the N. ½ of the SW. ¼ and the S. ½ of the NW. ¼ of said section 27, be re-instated and if patent has already issued for a part, the remainder be now patented.

Your decision is modified accordingly.

PRE-EMPTION ENTRY—NATURALIZATION—SECTION 2168, R. S.

SCOTFORD *v.* HUCK.

Under section 2168, R. S., a declaration of intention to become a citizen, filed by the father, inures, in the event of his death prior to becoming a citizen, to the benefit of his minor son, who may avail himself thereof by taking the final oaths prescribed by law.

A pre-emption filing made by the son, prior to taking the final oaths, will not be canceled, if he subsequently takes said oaths and is admitted to citizenship.

Temporary absences from the land may be properly excused, where the good faith of the settler is fully apparent.

Secretary Vilas to Commissioner Stockslager, January 12, 1889.

Henry Huck filed declaratory statement for the SE. ¼, Sec. 30, T. 123 N., R. 70 W., Aberdeen land district, Dakota, on the 12th of December, alleging settlement May 15th, 1883.

Mary Scotford made homestead entry for the same tract April 13, 1885.

Upon the day last named Huck gave the usual notice of his intention to make final proof before the local officers at Aberdeen on May 28, 1885. On the day set for the making of proof both parties appeared, Huck in person, Scotford by counsel. Huck made his proof. Scotford filed a protest, alleging that said pre-emptor was not a qualified pre-emptor when he made settlement and filing, being a minor, and that he had failed to comply with the requirements of the law as to residence. A hearing was had; and the local officers found that the claimant was under eighteen years of age when he came to the United States with his father; that his father declared his intention to become a citizen, and died within five years before completing his naturalization. "The son," they say, "thus became a qualified pre-emptor so far as his citizenship is concerned."

There are three ways known to the laws by which an alien who came to this country a minor may become a naturalized citizen of the United States. Section 2167 provides the manner in which a minor may become a citizen *by his own act alone.* Section 2172 provides that children under twenty-one years of age at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered citizens

thereof; citizenship under this section is acquired *by the act of the parent alone.* Section 2168 provides that when any alien who has filed his declaration to become a citizen, dies before he is actually naturalized, the widow and children of such alien shall be considered as citizens of the United States and shall be entitled to all rights and privileges as such upon taking the oaths prescribed by law. Under this section citizenship is acquired *by the acts of the parent* and *child,* and the process is incomplete until *both have acted.*

Under section 2167 a declaration of intention to become a citizen is required at the date of admission to citizenship, after the applicant has attained his majority. Under section 2172 the alien born child of a naturalized citizen who was a minor at the naturalization of his parent, becomes a citizen when his father or mother becomes one. Section 2168 provides that the children of a deceased declarant shall be entitled to all the rights and privileges of citizens, upon taking the oaths prescribed by law.

In this case the pre-emptor, the son of the deceased declarant, had not, at the time of filing the declaratory statement, taken the oaths prescribed by law for the naturalization of an alien. He was therefore not then a citizen. But he possessed the same right, at that time, to become fully naturalized by taking the oaths required at the time of admission, which his father would have possessed by virture of his having declared his intention, had he remained in life for the period of five years after that time. Thus it may be said that he inherited from his father the advantage of having a declaration filed, upon condition that he availed himself thereof by taking the final oaths, since the statute makes the death of the father operate to give his minor child the benefit of a declaration filed by him. That statute in regard to pre-emptions gives the right to a citizen of the United States, or one who has "filed a declaration of intention to become such, *as required by the naturalization laws.*" By the act of the father, and his subsequent decease, Huck stood in the same attitude, as we have seen; and though perhaps not strictly within the exact letter of the statute, he is clearly within the meaning and purpose of the statute, and may perhaps be regarded as within its letters, if we allow that by the operation of law the filing of the father became, after the father's death *his* filing—since no more is "required by the naturalization laws." I am inclined, therefore, to hold that, at least if Huck shall avail himself of his rights under the naturalization laws by being admitted to citizenship, and taking the final oaths, he must be regarded as qualified to make a pre-emption declaratory statement, and will be entitled to patent in that event if he has in all other respects complied with the pre-emption law.

In reply to the other question, the following facts are shown by the testimony. Huck was still a minor when he made his settlement and began his residence on the tract. He resided there continuously until within three weeks of the date he attained his majority, when he left

temporarily. Being absent from his home on the day he became twenty-one years of age—viz: December 12, 1883, he filed his declaratory statement on that day for the tract in contest without first returning to his claim. After making his filing he left for a visit to Chicago, where he remained until June, 1884, when he again returned to his home on the tract and resumed his residence. Some time after this he commenced working for one Turner, at the town of Ipswich, and continued to work for him until December, 1884, when he again returned to his home on the tract and continued to reside thereon until the date he made final proof—viz: May 28, 1885, being absent during the latter period, only about six weeks during a visit to Chicago. During the time he worked at Ipswich he made frequent visits to the tract, remaining on two occasions as long as one week at a time, putting up a house and breaking land; on other occasions he remained on the land as long as three days.

The local officers rejected this proof because there were not sufficiently strong reasons shown for a departure from the rule requiring six months continuous residence immediately preceding the making of proof.

You hold that the claimant appears to have complied with the requirements of the law as to cultivation and improvement and to have acted in entire good faith, that he should be allowed to enter the tract upon the proof already made upon making a pre-emption affidavit covering date of entry; and that Scotford's homestead entry having been made with full knowledge of the prior settlement and improvements of Huck, should be canceled.

In view of the good faith of Huck, found both by the local officers and yourself, his cultivation and improvement being sufficient, I affirm your decision. Case of William A. Thompson, decided March 15, 1888 (6 L. D., 576).

PRE-EMPTION ENTRY—MEANDERED STREAM.

MATILDA STROHL.

An entry covering tracts of land upon the opposite sides of a meandered stream, made in accordance with the practice then recognized by the Department, will not be disturbed.

First Assistant Secretary Muldrow to Commissioner Stockslager, January 12, 1889.

On October 25, 1884, George W. Johnson filed declaratory statement, alleging settlement October 18 of the same year, upon Lot 4, Sec. 3, and Lots 1 and 2, Sec. 4, T. 21 N., R. 19 W., Neligh, Nebraska. On May 16, 1885, he made cash entry for the tracts named. By warranty deed made July 6, 1885, said Johnson conveyed the said tracts which aggregated 62.90 acres, to George W. Strohl.

On November 18, 1885, the local office reported that said entry covered land upon both sides of the North Loup river, a meandered unnavigable stream, and that it was allowed prior to notice of the ruling of the Department on October 28, 1884, in the case of Olof Landgren (2 B. L. P., 323).

Thereupon, by decision of July 8, 1886, your office held that land on both sides of a meandered stream can not be embraced in one entry. By said decision your office directed the local office to instruct "said claimant . . . that upon relinquishment of that portion of his claim lying upon one side of the river, his application for amendment of his entry to embrace any vacant land contiguous thereto aggregating . . one hundred and sixty acres will be considered."

From this decision Matilda Strohl, widow and administratrix of the said George W. Strohl transferee, appeals.

The final proof of the entryman (Johnson) made May 7, 1885, sets out that he settled on the land October 18, 1884, that he broke one acre but raised no crops; that his improvements consisted of a house, stable, corn-crib, hog-yard and pasture, valued at about $150, and that his residence on the land had been continuous.

In the case of James Shanley (5 L. D., 641), the Department held, that an entry including tracts lying upon opposite sides of a meandered stream made under existing rulings and practice, will not be disturbed. In that case Shanley made homestead entry on February 24, 1880, upon four lots in Sec. 4, T. 3 N., R. 26 W., McCook, Nebraska, and submitted proof therefor June 19, 1885. Two of these lots were north and the remaining two south of the Republican river. Your office, on November 14, 1885, held that the tracts were not contiguous and required Shanley to "elect which tracts to retain in satisfaction of his homestead right." The appeal of Shanley was disposed of by this Department upon the ruling in the Landgren case (*supra*) which involved land in the same district.

In the case last cited, the Department held that as Landgren had made settlement and improvements and filed declaratory statement for land upon opposite sides of the said Republican river prior to the receipt of your office instructions of September 22, 1883, "in the case of Benjamin Bird" his (Landgren's) proof submitted on February 11, 1884, should be accepted and his entry allowed.

In the case at bar, the entryman (Johnson) made his settlement and improvements upon the land and filed his declaratory statement prior to the decision by the Department in the Landgren case (*supra*) wherein your said office instructions of September 22, 1883, seem to be recognized.

These instructions were not in the form of a general circular, but were contained in a letter addressed by your office to the register and receiver at McCook, Nebraska.

The land involved, however, is not located in the land district to

which the said instructions of your office had been sent. It can not, therefore, be said that the settlement, improvement and filing of the entryman (Johnson) although of subsequent date to your said letter of instructions, were subject thereto.

In view of the foregoing, I am of the opinion that the entry under which the appellant claims, was not made in contravention of existing rules and practice and that under the ruling in the case of James Shanley (*supra*) said entry should remain intact.

Your decision is reversed.

PRACTICE—APPEAL—SWAMP GRANT.

STATE OF MINNESOTA *v.* SPENCE.

Though the failure to appeal from the decision of the local office upon a question of fact, will as a rule defeat the right of appeal from the decision of the Commissioner, the rule is not applicable in a case involving the right of a State claiming land under the swamp grant.

Secretary Vilas to Commissioner Stockslager, January 12, 1889.

The State of Minnesota has made application, under Rules 83 and 84 of Rules of Practice, to have the record in the above stated case certified to the Department, because of your refusal to transmit its appeal from the decision of your office of April 18, 1887, holding that the decision of the district land officers in said case was final for want of appeal by the State.

The land in controversy was returned by the survey of the township as swamp and overflowed, and therefore inuring prima facie to the State under the swamp land grant, the State of Minnesota having elected to adopt the return of the government survey as the evidence of the character of the land.

Application was made to enter said land by Margaret Spence as additional homestead, which was rejected because of the record showing the right of the State. Upon appeal to your office, she also made application to contest the claim of the State, which you allowed, by letter of September 23, 1886, and directed a hearing for this purpose.

The State protested against said hearing, for want of jurisdiction, but the hearing was had and the local officers found said tract to be dry land, and that the return of the same by survey as swamp was erroneous and fraudulent. From this decision the State failed to appeal, but filed an appeal from your decision of April 18, 1887, refusing to pass upon the protest of the State, and holding that said decision of the local officers became final for want of appeal by the State.

You declined to transmit said appeal, upon the ground that the State had lost its right by failure to appeal from the decision of the local office. While the failure to appeal from the decision of the local officers upon a question of fact will, as a general rule, deprive a party of the

right of appeal from the decision of your office, the rule does not apply in a case of this nature.

It is made the duty of the Secretary to determine what lands are of the character granted by the act, and his office is the tribunal whose decision is to control. The State has the right to invoke the judgment of that tribunal upon the question whether said land is of the character granted by the act, and is entitled to the right of appeal from the decision of your office, although it failed to appeal from the decision of the local office. You will therefore certify the record to this Department.

SWAMP GRANT—UNSURVEYED LAND—ACT OF MARCH 3, 1857.

STATE OF FLORIDA.

Under the regulations of the Department which allowed selections of unsurveyed swamp lands to be made and certified by estimated areas, where an entire body of land was swamp and overflowed, and the uniform ruling of the Department hitherto, it is held that selections so made and reported to the General Land Office, prior to the passage of the act of March 3, 1857, were confirmed by said act, and the title thereto made complete.

If the lands so selected and reported, can be designated in the patent by metes and bounds, or by any other accurate description which clearly indicates and describes the particular land selected, the want of a survey will be no objection to the issuance of patent.

The exception in said act in favor of settlement rights is not applicable to the State of Florida, as there was no law authorizing settlement upon unsurveyed lands in said State at the date of said act.

Secretary Vilas to Commissioner Stockslager, January 12, 1889.

On April 6, 1887, the State of Florida made application for the issuance of patents to lands embraced in a tract of unsurveyed swamp lands, selected by said State as inuring to it under the grant of September 28, 1850, and reported to your office by the United States surveyor general prior to the passage of the confirmatory act of March 3, 1857. Your office denied said application and refused to issue patents for said lands upon the ground that they were unsurveyed lands, and that the act of March 3, 1857 (11 Stat., 251) confirming selections of swamp lands made prior to the date of said act, does not apply to unsurveyed lands because said act required that patents should be issued in conformity with the provisions of the act of September 28, 1850, which provides for the issue of patents for legal subdivisions only.

The act of March 3, 1857, provides:

That the selection of swamp and overflowed lands granted to the several States by the act of Congress approved September twenty-eight, eighteen hundred and fifty, entitled "An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits," and the act of the second of March, eighteen hundred and forty-nine, entitled, "An act to aid the State of Louisiana in draining the swamp lands therein," heretofore made and reported to the Commissioner of the General Land Office, so far as the same shall remain vacant and unappropriated, and not interfered with by an actual settlement under any existing law of the United States,

be and the same are hereby confirmed, and shall be approved and patented to the said several States, in conformity with the provisions of the act aforesaid, as soon as may be practicable after the passage of this law: *Provided, however*, That nothing in this act contained shall interfere with the provisions of the act of Congress entitled, "An act for the relief of purchasers and locators of swamp and overflowed lands," approved March the second, eighteen hundred and fifty-five, which shall be, and is hereby continued in force, and extended to all entries and locations of lands claimed as swamp lands made since its passage.

The list of lands referred to in said application are unsurveyed lands selected by the State of Florida under the swamp grant of September 28, 1850, and reported to your office by the surveyor general prior to the passage of the act of March 3, 1857, as swamp and overflowed inuring to said State under the grant of September 28, 1850.

The question as to whether the greater part of any smallest legal subdivision is or is not swamp and overflowed, appears to be immaterial because this act confirmed all the selections then made so far as the same were then vacant and unappropriated and not interfered with by an actual settlement under any existing law of the United States, provided said selections were made in conformity with law; Therefore a material issue presented in this case is, whether said lands were confirmed by the act of March 3, 1857 by reason of having been reported to your office by the surveyor general, as swamp and overflowed—by estimated area, no subdivisional survey of said lands having been made. It is contended by the State that, the confirmation extended to all lands, heretofore made and reported to the Commissioner of the General Land Office, so far as the same shall remain vacant and unappropriated, and not interfered with by an actual settlement under any existing law of the United States "whether said lands had or had not been surveyed." Your decision holding that there is no authority for issuing patents for unsurveyed lands is based upon the ground that the act of March 3, 1857, requires that patents should be issued in conformity with the provisions of the act of September 28, 1850, which provides for the issue of patents for legal subdivisions only, and that no provision is made for listing unsurveyed lands in the instructions issued November 21, 1850 (1 Lester 543) in which it is expressly stated that quarter quarter sections are to be regarded as the legal subdivisions contemplated by law.

The circular of instructions to surveyors general of November 21, 1850, provides:

That in making out a list and plats of the lands aforesaid, all legal subdivisions, the greater part of which is "wet and unfit for cultivation," shall be included in said lists and plats; but when the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom.

And that forty acre lots or quarter quarter sections will be regarded as the legal subdivisions contemplated by law, but it further provides that—

Where satisfactory evidence is produced that the whole of a township, or of any particular or specified part of a township, or the whole of a tract of country bounded by specified surveyed or natural boundaries, is of the character embraced by the grant, you will so report it.

The grant of September 28, 1850, is not a grant of lands by legal subdivisions, but a grant of "the *whole* of those swamp and overflowed lands made unfit thereby for cultivation which shall remain unsold at the passage of this act."

It is made the duty of the Secretary of the Interior to make out an accurate list and plat of all the land described in the act, and that in making out a list and plat of the lands aforesaid "all legal subdivisions, the greater part of which is wet and unfit for cultivation shall be included in said lists and plats."

The failure to make a subdivisional survey of the township, can in no wise affect the right of the State under the grant to all of the swamp and overflowed lands, as contemplated by the grant, and the only purpose to be subserved by a subdivision of the township is to enable the Secretary to determine whether by such subdivisional survey there might be one or more legal subdivisions, the greater part of which is dry and fit for cultivation. If however, "the *whole* of a township, or any particular or specified part of a township, or the *whole* of a tract of country bounded by specified surveyed or natural boundaries, is of the character embraced by the grant," a subdivisional survey of the township would not be necessary to enable the Secretary to make out a list and plat of the swamp and overflowed lands in accordance with the provisions of the act, because if "the whole of the township" or the whole of a tract of country bounded by specified surveyed or natural boundaries is swamp and overflowed, it necessarily follows that a subdivision of the land would show that the greater part of each smallest legal subdivision is swamp and overflowed, and therefore of the character of lands described in the grant. It was evidently with this view that the instructions of November 21, 1850, were issued, and acting under such instructions the surveyors general in all cases where the whole of a township, or the whole of any particular or specified part of a township, or the whole of a tract of country bounded by specified or natural boundaries, was swamp and overflowed, reported such lands to the General Land Office as swamp and overflowed by estimated areas and not by legal subdivisions, and upon such report the Commissioner of the General Land Office acted in approving said lists and issuing patents to the State for said lands. This was the prevailing practice of the land department at the date of the act of March 3, 1857, confirming to the State selections of swamp and overflowed lands made and reported to the General Land Office, prior to the passage of said act; and if said practice was not in violation of the act of September 28, 1850, it surely must have been passed with reference to selections made under said practice; and hence confirmed all such selections where the lands were then vacant and unappropriated, and not affected by actual settlement under existing laws.

The determination of the character of the land rested with the Secretary of the Interior, and in determining whether the greater part of a

legal subdivision was swamp and overflowed, he might cause a subdivisional survey to be made, or if without such subdivision he could by satisfactory evidence determine that the township, when surveyed would show the greater part of every smallest legal subdivision to be swamp and overflowed, such lands could be listed and platted in full compliance with the act of September 28, 1850 without such subdivision.

Passing upon the question as to what lands were confirmed by the act of March 3, 1857, Secretary Thompson held that:

The questions proper to be considered, in case of conflict arising upon lists remaining on the files of the Land Office on the 3rd of March, 1857, are these: (1) Has the tract been selected in the *usual manner* by an authorized agent, and had the list containing it been reported in due course before the 3rd of March, 1857 to the Commissioner of the General Land Office, the selection not having been cancelled before that date? If the reply to this inquiry be affirmative, the next question that arises is, Was that tract vacant and unappropriated and not interfered with by an actual settlement under existing laws of the United States at the date of the passage of said act of March 3, 1857? and if the tract be found vacant and unappropriated and not interfered with by a legal settlement, it is to be approved and patented to the State according to the directions given in the act of Congress to the executive branch of the government. (1 Lester 558.)

This ruling was followed by Secretary Schurz in the case of the State of Illinois decided May 2, 1879 (6 C., L. O., 76).

The question as to the title of the State to lands reported to the General Land Office as swamp and overflowed, prior to the act of March 3, 1857, came before the supreme court in the case of Martin *v.* Marks (97 U. S. 345), which was an action in the nature of ejectment brought by Marks, who claimed title under the swamp grant, to section 7–T. 20 N., R. 14, W., North Western District La., against Martin who relied on a patent from the United States for the same land dated May 20, 1873.

Marks offered in evidence in support of his title a certified copy from a list of swamp and overflowed lands, selected as inuring to the State of Louisiana, and examined and approved by the surveyor general, May 18, 1852.

The court say:

If the paper signed by the surveyor-general dated May 18, 1852, was on file in the General Land Office at Washington, March 3, 1857, we have no doubt that the act completed and made perfect the title of the State of Louisiana to the land in controversy. If this were so, the title of the plaintiff below was superior to the patent issued subsequently to the defendant; for after the passage of that act the Land Department had no right to set aside the selections. The approval of them and the issue of patents to the State were mere ministerial acts, in regard to which that department had no discretion, unless it was found that the lands were not vacant, or had been actually settled on adversely to the swamp-land claim.

The records of your office show that this section was reported by the surveyor general in a list with other lands as unsurveyed as will be seen by the letter of Commissioner Hendricks, of Sept. 4, 1857, to James Marks in which he says:—

No action has yet been had by this office relative to Sections 5, 6, 7, 8, 18 & 19 of T. 20 N. R. 14. W., North Western District of Louisiana. Those lands were reported as

selections under the act of 2d March, 1849, but were suspended because there was no survey of them. This action was but temporary and did not invalidate the claim of the State to the lands; and by the act of 3d March last, the State is confirmed *in her claim* and the lands will be approved to her if no valid interfering rights exist, as soon as we shall have such evidence as will enable us properly to designate the tracts.

The question as to whether the lands reported as swamp and overflowed, prior to the act of March 3, 1857, were in fact of that character, was not material as the act confirmed the selections whether swamp or not.

Considering that the rules and regulations of the Department allowed selections of unsurveyed swamp lands to be made and certified by estimated areas, if an entire body was swamp and overflowed, that the selections were in fact made in a similar manner to those which were held to be confirmed by the supreme court in Martin *v.* Marks, and the uniform ruling of the Department hitherto, I feel bound to hold that selections so made and reported to the General Land Office prior to March 3, 1857, were confirmed by said act and the title of the State to said lands made complete and perfect.

The next question to be considered is whether said selections are identified and described with sufficient accuracy to designate particularly and clearly the lands claimed to have been confirmed by the act of March 3, 1857. If the lands so selected and reported to the General Land Office prior to March 3, 1857, in accordance with the established usage and practice then prevailing, can be designated in the patent by metes and bounds, or by other accurate description which clearly indicates and describes the particular tract or tracts selected, the want of a survey upon this ground would be no objection to the issuance of patents.

The remaining questions to be considered, and the principal objection urged in your letter to the issuing of patents for said lands, is that parties who have settled upon tracts which they did not consider swamp or overflowed land, either in ignorance of the swamp claim, or intending to contest said claim, and with a view to securing title to the land under the public land laws after it should be surveyed, could not place their claims of record in the local office until after survey, and by the issue of patent without survey they would be cut off without a hearing.

The act of March 3, 1857, confirmed to the States all lands selected as swamp and overflowed, and reported to the Commissioner of the General Land Office, prior to the passage of said act, "So far as the same shall remain vacant and unappropriated, and not interfered with by an *actual settlement* under any existing law of the United States." A material question therefore arises, whether these lands were, at the date of the act subject to settlement under any existing law of the United States.

Prior to the act of May 30, 1862 (12 Stat., 410), there was no law recognizing settlement rights prior to survey, except the acts of March

3, 1853, July 22, and August 4, 1854 (10 Stat., 244, 308 and 576) which permitted settlements with a view to pre-emption upon unsurveyed lands in the States of California, Minnesota, Kansas, Nebraska and New Mexico. The act of May 30, 1862, authorized settlements upon all unsurveyed lands. This was the first general act authorizing settlements upon unsurveyed lands with a view to claiming the same under the settlement laws. Therefore at the time of the passage of the act of March 3, 1857, there was no existing law authorizing settlements upon unsurveyed lands in the State of Florida, and the only lands to which the exception in the act of confirmation applied, were surveyed lands upon which there was an actual settlement made under the then existing laws.

There is not sufficient information before me to determine whether the lands embraced in the present list should be patented to the State, and no decision is hereby made as to the rights of the State upon the list as presented; but the case is remanded to your office for adjustment and action thereon, under the principles above decided. If the lands embraced in said list had been reported to the General Land Office prior to the act of March 3, 1857, in conformity with the rules and regulations then prevailing, as selections of swamp lands under the act of 1850, and said selections were still pending at the date of said act, the want of a survey would be no objection to the issuance of patent, if said selection describes the lands with sufficient accuracy to identify the particular tracts reported and selected as swamp and overflowed.

The papers are herewith returned with instructions to adjust said grant in accordance with this decision.

PATENT—JURISDICTION OF THE LAND DEPARTMENT.

SCHWEITZER *v.* ROSS ET AL.

Where patent is regularly issued and recorded, the title to the land therein described passes out of the United States, though the patent may not be delivered to the grantee.

After patent has been so issued and recorded, the Department has no further jurisdiction over the land, and will not assume such jurisdiction, where the patentee, under protest, executes a relinquishment in order to protect his rights on appeal.

Secretary Vilas to Commissioner Stockslager, January 14, 1889.

By act of July 17, 1854 (10 Stat., 305) entitled an act to amend the act approved September 17, 1850, Congress granted to the Territory of Washington certain lands to be selected by its legislature for University purposes.

List No. 2, exhibiting tracts of public lands selected under the said grant, was filed by the agents of the Territory on March 5, 1867. This list contained Lot 2, T. 25 N., R. 3 E., Olympia, Washington Territory, the land involved herein. The tract named was embraced in the home-

stead entry of Lemuel J. Holgate, made June 26, 1863. Holgate relinquished this entry February 16, 1864, but the same was not canceled of record until December 20, 1871. On December 18, 1879, John Schweitzer made soldier's homestead entry for the tract mentioned. On January 3, 1882, your office held this entry for cancellation on account of conflict with the selection mentioned. This action was revoked by letter of June 26, 1882, whereby your office held that the said selection having been made prior to the cancellation of Holgate's entry was "invalid and void *ab initio*" and re-instated the entry of Schweitzer.

Thereupon, on July 25, 1882, John Ross, transferee of the Territory, appealed to the Department.

On May 11, 1883, Schweitzer made final proof in support of his claim and patent therefor, dated August 13, 1883, was issued. This patent was transmitted to the local office but it does not appear to have passed into the actual possession of the claimant. Subsequently, *i. e.*, October 29, 1883, your office, following the decision dated June 19, 1883, of my predecessor (Secretary Teller) in the case of Fred Jansen involving land embraced in said entry of Holgate, revoked the stated action of June 26th preceding, and held the claimant's (Schweitzer) entry for cancellation. From this decision Schweitzer appeals.

By letter dated December 29, 1884, your office stated that said patent had been inadvertently issued, pending the contest herein, and instructed the local officers to call upon Schweitzer to relinquish the same.

Thereupon, in pursuance of your said office instructions Schweitzer, on February 16, 1885, filed his so-called relinquishment. In this "relinquishment" he set out that he was apprehensive his appeal would not be heard unless he executed "the relinquishment demanded," that he relinquished and abandoned (under protest) to the United States, the title conveyed by said patent, but expressly reserved all the rights which inured to him by virtue of his said entry. Although it does not appear that the patent referred to at any time passed into Schweitzer's possession still, it being on August 13, 1885, regularly issued and recorded the title to the land therein described, passed on the day named, out of the United States. United States *v.* Schurz, (102 U. S., 378).

The record, therefore, shows that the United States was without title to the land on October 29, 1883, when your office held Schweitzer's entry for cancellation. Consequently on the date mentioned, the land department had no jurisdiction in the premises. Wisconsin Central Railroad Co. *v.* Stinka (4 L. D., 344.)

This action by your office was accordingly void and of no effect, and it was therefore error to have insisted upon the surrender of his (Schweitzer's) title in the manner stated. Such surrender having been made under protest, and with a reservation of his claim under said entry, his rights in the premises should not be affected thereby. The order cancelling the homestead entry of Schweitzer is hereby revoked, and

you will return to him the patent, accompanied by a certified copy of this decision, so that the parties will be left to judicial proceedings for the determination of their conflicting rights.

This disposition of the case renders it unnecessary for me to pass upon the questions presented by this appeal.

Your decision is reversed.

INDEMNITY SCHOOL SELECTION—WITHDRAWAL.

STATE OF OREGON.

A school selection made on a valid basis, but covering in part lands excluded from selection, may be approved as to the tracts subject to selection.

A selection improperly allowed, because of a prior pending claim, may be permitted to stand on the removal of such claim from the record.

Secretary Vilas to Commissioner Stockslager, January 14, 1889.

This is an appeal by the State of Oregon from your office decision of March 10, 1887, whereby "List No. 11 of indemnity school selections" is held for cancellation.

This "list" was filed in the land office at La Grande, Oregon, by Z. F. Moody, Governor and ex-officio Land Commissioner, on December 11, 1886, and is based upon losses to the said State in sections sixteen and thirty-six, in townships 5 S., R. 27 E., 13 S., R. 45 E., 8 S., 15 S., and 18 S., R. 47 E., and 4 N., R. 49 E. Said list includes the following tracts, to wit:

* * * * * * *

It appears from your said decision that certain of the tracts so listed by the said State as indemnity, to wit: . . . . . were within the limits of the indemnity withdrawal of January 1, 1872, for the benefit of the grant to the Dalles Military Road Company, act of February 25, 1867 (14 Stat., 409).

Your office finds the selection of the last named tracts to be invalid, by reason of said withdrawal, and holds the entire list for cancellation, on the ground that "a selection defective in part is invalid as a whole."

With the foregoing, I can not concur.

The withdrawal for the benefit of the said road was revoked by departmental decision of August 15, 1887 (6 L. D., 92). So far as either the record before me, or the records of your office disclose, no listing of any of the tracts involved has been made by the road company. No objection, therefore, can now be raised to the claim by the State on account of this withdrawal. Phillips *v.* Central Pacific R. R. Co. (6 L. D., 378). But even if it could be held that the State was without right to so list as school indemnity land embraced in the withdrawal referred to, I can not concur in your conclusion that the entire listing should therefore be canceled.

The case at bar is in my opinion expressly ruled by that of McKenzie *v.* State of California (6 L. D., 680). This case holds that a school selection made on a valid basis, but covering in part lands excluded from selection, may be approved as to the tracts subject to selection, and that a selection improperly allowed, because of a prior pending claim, may be permitted to stand on the removal of such claim from the record.

The validity of the basis upon which this listing has been made has not been questioned, nor has any adverse claim intervened. Unless other reasons should prevent, said list No. 11 should be approved.

Your decision is reversed.

PRACTICE—APPEAL—INTERLOCUTORY ORDER.

JAY PIERCE.

An appeal will not lie from an order of the Commissioner requiring a claimant to furnish an additional affidavit in support of his entry, only from his final action on the refusal or failure of the entryman to comply with such order.

First Assistant Secretary Muldrow to Commissioner Stockslager, January 15, 1889.

I have considered the appeal of Jay Pierce, from the decision of your office dated February 15, 1887, requiring said Pierce to furnish supplemental evidence relative to his pre-emption entry No. 1091, for the NW. ¼, Sec. 13, T. 115 N. R. 78 W., Huron land district, Dakota Territory.

The record shows that on April 27, 1883, claimant filed declaratory statement No. 3816, for said described tract, alleging settlement thereon the 25th of the same month.

On August 16, 1884, in accordance with published notice he made final proof before the clerk of the district court, Sully county, Dakota Territory, which was approved by the register and receiver and final certificate issued thereon September 19, 1884.

When the claimant made final proof he testified that he was a native born citizen, twenty-five years of age, and a single person; that he commenced to build a house on the land April 25, 1883, and established actual residence therein May 20, 1883; his improvements consisted of a house eight by eight feet, a sod stable thirteen by twenty feet, and five acres broken. Total value one hundred dollars.

In a special affidavit made at the same time he further alleged that— * * * "his residence on said land has been continuous with the exception of eight weeks, during the months of August and September, 1883, when he was sick at the house of his father, and six weeks during the months of January and February, 1884, when he was attending school at Pierre, D. T.; that he has not been absent at any other time only when he was compelled to earn a living and secure money with which to make his improvements on the land."

In your office letter "G", of February 15, 1887, addressed to the register and receiver, they were informed that "Claimant fails to show continuous residence of six months prior to making final proof. His entry papers bear date of September 19, 1884, but there is on file with the case a second pre-emption affidavit dated December 18, 1885. The fact that claimant continued to own the land free of encumbrance for fifteen months after entry is established by said affidavit of December 18, 1885, but you will call upon him to furnish an affidavit showing whether he continued to reside upon and improve the said tract after making final proof."

On July 28, 1887, claimant appealed. Upon review of the record in this case, I am convinced that the appeal herein is not well taken, as it is very evident your said office letter merely required the claimant to furnish an additional affidavit in support of his entry, and that it did not suspend or hold for cancellation his final cash certificate.

Therefore, and as this Department has frequently held that—"an appeal will not lie from the action of the Commissioner of the General Land Office, requiring a claimant to furnish an additional affidavit in support of his entry, but only from his final action in the case upon the refusal or failure of the entryman to comply with said request," the appeal of claimant is dismissed.

See case of Jennie M. Tarr (7 L. D., 67).

ALABAMA LANDS—ACT OF MARCH 3, 1883.

JULIUS P. KNABE.

Land, offered after it was returned as valuable for coal, and prior to the passage of the act of March 3, 1883, is not subject to entry if it has not been offered at public sale since the passage of said act.

Secretary Vilas to Commissioner Stockslager, January 17, 1889.

The record in this case shows that on February 23, 1887, Julius P. Knabe made private cash entry, No. 20, 785, for the S. ½ of the NE. ¼ of Sec. 7, T. 17 S., R. 7 W., Montgomery, Alabama.

On August 20, 1887, your office held said entry for cancellation "for illegality, the land embraced therein being described in the mineral list on file in this office as 'valuable coal.'"

Claimant thereupon appealed. He alleges error generally, in holding said entry for cancellation, and specifically, in the finding of fact, that the tract in question is embraced in the mineral list on file in your office.

As to the second error assigned by appellant, it is sufficient to say, that it appears from an examination of the records of your office, that the whole of said Sec. 7, T. 17 S., R. 7 W., is embraced in the list of

Alabama mineral lands now on file in your office, and that the tract here involved was reported to your office in they ear 1879 as "valuable coal."

It also appears from the records of your office, that on February 26, 1880, the land in question was offered at public sale, at one dollar and twenty-five cents per acre, but no bid was received for the same.

By act of Congress approved March 3, 1883 (22 Stat., 487), entitled "An Act to exclude the public lands in Alabama from the operation of the laws relating to mineral lands," it is provided:—

That within the State of Alabama all public lands, whether mineral or otherwise shall be subject to disposal only as agricultural lands; *Provided however*, That all lands which have heretofore been reported to the General Land Office as containing coal and iron shall first be offered at public sale.

The only question to be determined upon appellant's first assignment of error is whether his entry can be sustained under this act.

The object of the proviso of the act referred to evidently was and is to except from or take out of the operation of the declaration in the act, that mineral lands shall thereafter be disposed of as agricultural lands, that class of lands which had been previously reported to and dealt with by the General Land Office as mineral lands, and thus prevent them from falling back into the system applicable to agricultural lands until they shall first be offered at public sale with a view that the government might receive the benefit of such enhanced value as may have attached thereto by reason of their having been classed as mineral; but it is also evident that the offering at public sale contemplated by said proviso, is a future offering. The fact that this land had been once offered at public sale, after the same was reported as valuable for its coal, but before the passage of said act, can not, therefore, affect the question here involved. The land has never been offered at public sale, since the passage of said act and for that reason, the entry of claimant can not be sustained thereunder.

Your office decision holding said entry for cancellation is therefore affirmed.

HOMESTEAD ENTRY—ACT OF JUNE 15, 1880.

CAMPBELL *v.* KELLEY.

Land entered under the homestead law prior to the passage of the act of June 15, 1880, may be purchased under the second section thereof, on the payment of the government price, if free from adverse claims.

An intervening entry, made after the passage of said act and canceled on relinquishment, is no bar to the right of purchase.

Secretary Vilas to Commissioner Stockslager, January 17, 1889.

I have considered the appeal of Helen T. Campbell (who discloses under oath that she is a party in interest as grantee of the land), from the decision of your office of October 18, 1887, holding for cancellation

the cash entry, No. 1182, of Samuel D. Samuels, on the SW. ¼ of Sec. 5, T. 3. N., R. 9 W., McCook district, Nebraska.

November 3, 1879, said Samuels made homestead entry, No. 1693 of said tract, which was canceled for abandonment July 21, 1883, and subsequently, November 20, 1883, Patrick Egan made homestead entry thereon, which was canceled on relinquishment November 11, 1884, and on the same day it was entered under the homestead law by William Fruin, whose entry was like-wise canceled on relinquishment April 18, 1885.

On the day last named, said Samuels, the first entryman, made cash entry of the land, No. 1182, under the second section of the act of June 15, 1880 (21 Stat., 237), and September 13, 1886, John E. Kelley made application to enter the land under the homestead law, which was rejected by the local officers on the ground that the land "was covered by" the said cash entry of Samuels. Kelley having appealed to your office from said action of the local officers, your office in said decision of October 18, 1887, sustained the local officers in rejecting the application of Kelley to enter the land, and also, held the cash entry of Samuels for cancellation "for the reason that the two homestead entries mentioned above (subsequent to the homestead entry of Samuels) withdrew the land from entry under the act of June 15, 1880."

The case is now before this Department on appeal by Helen T. Campbell (who claims as grantee through Samuels), from that part of said decision of your office holding the cash entry of Samuels for cancellation.

The second section of the act of June 15, 1880, under which Samuels' cash entry was made, provides

> That persons who have heretofore under any of the homestead laws, entered lands properly subject to such entry . . . . . 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.

"This language is plain and unambiguous, and annexes no conditions or pre-requisities to the purchase of lands theretofore entered under any of the homestead laws, other than the freedom of the tract in question from adverse claim, and the payment by the applicant of the proper government price." (George E. Sanford, 5 L. D., 535.)

Samuels' entry under this law was properly allowed and should be sustained, unless it comes within the operation of said proviso, by interfering with the "rights or claims" of others acquired since his original homestead entry. Egan and Fruin had relinquished their claims and the land was open to settlement and entry (act of May 14, 1880, 21 Stat., 140), and they had no right to make cash entry under the act of June 15, 1880, because their entries were subsequent to said act.

At the date of Samuels' cash entry, then, there were, (so far as the record discloses) no "rights or claims of others" with which said entry

could interfere. The application of Kelley to make homestead entry September 13, 1886, long after Samuels' cash entry, could not of course affect said cash entry.

That part of the decision of your office holding for cancellation the cash entry of Samuels, is reversed.

PRIVATE ENTRY—REPAYMENT.

E. W. HARRIS.

An applicant for public land who deposits the price thereof with the receiver, to be paid to the government if the entry is allowed, by such act makes the receiver his agent, and is not entitled to repayment from the government if his application to enter is rejected.

Secretary Vilas to Commissioner Stockslager, January 17, 1889.

May 25, 1887, the Department affirmed the decisions of your office dated October 15, and November 20, 1885, refusing to allow E. W. Harris to make private cash entry of lands in T. 4 N., R. 16 E., Detroit land office, in the state of Michigan (E. W. Harris, 5 L. D., 660).

After this decision was rendered Mr. Harris made application to have paid to him the sum of $29.24 which he states he paid to L. G. Willcox, the receiver, and for which he took receiver's receipt. This sum was the amount of the estimated price of the land and having been denied the right to enter he wants his money returned.

December 30, 1887, you denied the application on the ground that the government was in no way responsible for the money paid to the then receiver.

In your letter of February 16, 1888, it is stated the money was not reported or accounted for to the United States.

Section 2355, Revised Statutes, provides that—

Every person making application at any of the land offices of the United States, for the purchase at private sale of a tract of land shall produce to the register a memorandum in writing describing the tract which he shall enter by the proper number of the section, half-section, quarter section, half quarter section, or quarter quarter section, as the case may be, and of the township and range subscribing his name thereto, which memorandum the register shall file and preserve in his office.

Section 2356 provides that—

The purchaser at private sale shall produce to the register of the land office a receipt from the Treasurer of the United States, or from the receiver of public moneys of the district, for the amount of the purchase money on any tract, before he enters the same at the land office.

In this case there is no compliance with the requirements of the statutes, there was no entry made and the records of your office fail to show that any money was paid to the government on account of the transaction.

The Department recently decided a similar case, that of Matthiessen and Ward (6 L. D., 713), and held that a payment accepted by the receiver,

in advance of the time when the local office is ready to act upon an application and allow entry thereunder, is not in pursuance of any duty enjoined by law; and a failure to account for such money, in the event that the application is refused, is not a default as to any obligation due the government, and the sureties of the receiver would not be liable therefor. It was further held that by a payment thus made the applicant constitutes the receiver his agent to pay the money to the government, if the application is allowed, and if the application is rejected the receiver is individually liable for repayment, and not the government.

Your decision is in accordance with the ruling cited and is affirmed.

SWAMP LAND—ACT OF JULY 23, 1866.

CENTRAL PAC. R. R. CO. *v.* CALIFORNIA.

Lands segregated by the State as swamp, prior to the act of July 23, 1866, by surveys in conformity with the system adopted by the government, were confirmed to the State by the provisions of said act.

Secretary Vilas to Commissioner Stockslager, January 17, 1889.

I have considered the case of the Central Pacific Railroad Company *v.* the State of California, as presented on appeal by the former from the decision of your office, dated June 4, 1887, holding for rejection its claim to Lots 15, 17, and 18, of Sec. 3, T. 12 N., R. 3 E., M. D. M., Marysville, land district, California.

The tracts in question are claimed by said company, as successor to the California and Oregon Railroad Company, under the latter's grant of July 25, 1866 (14 Stat., 239) and lie within the primary limits of said grant.

These tracts are also claimed by the State of California as swamp lands, under the act of September 28, 1850 (Revised Statutes, Sec. 2479) and certificate and patent are now sought by the State under the provisions of sections four and five of the act of July 23, 1866 (14 Stat., 218).

It appears that these lands, along with several other tracts in said township 12 N., R. 3 E., were involved in the case of the California and Oregon Railroad Company *v.* the State of California, decided by this Department September 5, 1885 (4 L. D., 142), in which the State's sole claim, then presented, was that the land had enured to it under the provisions of section one of said act of July 23, 1866.

In that case the Department overruled the award to the State made by your office, of the several tracts therein involved, holding that the first section of said act had no application to swamp land claims, but stating that your office was at liberty to consider all claims, under the laws *applicable* to the lands, without reference to the decision in the case as then presented.

The record shows that the tracts here in question were segregated by the State as swamp lands prior to July 23, 1866, by surveys made in conformity with the system of surveys adopted by the United States. An approved amended map of said township 12, showing such segregation was returned to the General Land Office by the United States surveyor general for California, January 14, 1887, and to the extent of the tracts now in controversy was approved by your predecessor, Commissioner Sparks, May 27, 1887.

The rejection of the company's claim by your office is based upon the theory that the lands in question, having been thus segregated as swamp lands were confirmed to the State by said act of July 23, 1866.

Upon consideration of the record as here presented, I see no reason for disturbing your said office decision and the same is therefore affirmed.

PRE-EMPTION ENTRY—APPROXIMATION.

VERNON B. MATTHEWS.

Where the difference between the excess, and the deficiency that would be produced by approximation is but slight, the entry may be allowed to stand as made.

Secretary Vilas to Commissioner Stockslager, January 17, 1889.

On October 12, 1887, your office suspended the pre-emption cash entry of Vernon B. Matthews, made June 25, 1884, for the W. ½ of the SW. ¼, and lots 8 and 9, of Sec. 2, T. 151 N., R. 67 W., Devil's Lake, Dakota, embracing an area of 180.27 acres, and required him to relinquish to the United States some legal subdivision of his claim, because of the excessive acreage thereof.

From this action of your office claimant appeals.

It appears from the record that said lots 8 and 9 contain respectively, 45.89 acres, and 54.38 acres.

These lots are situated on the western line of the Devil's Lake Indian reservation, said line passing north and south through the W. ½ of the SE. ¼ of said Sec. 2, and are made up by attaching to each of the two forties which constitute the E. ½ of the SW. ¼ of said Sec. 2, the adjoining parts of that portion of said W. ½ of the SE. ¼ of Sec. 2, which falls outside of said reservation.

Claimant asserts on appeal that the 20.27 acres of land which constitute the excess of area mentioned, is principally "barren hills, covered with rocks, and valueless;" that either of the two regular forties embraced in his entry, is much more valuable than either of said lots; that there are not more than twenty-five acres of desirable land in lot 8, nor more than thirty acres in lot 9; that he has been continuously residing on his claim and improving the same, since the date of his entry, and that he can not, at this late day, relinquish to the government, either

of the legal subdivisions thereof without great loss and consequent hardship and embarrassment.

It will be observed that if one of said forty-acres subdivisions be relinquished by claimant, the deficiency in his entry will be 19.73 acres, which is only fifty-four one hundredths of an acre less than the present excess of area embraced in said entry; and if on the other hand, the smallest of said lots be relinquished, the deficiency will be 25.62 acres or 5.35 acres more than the present excess.

In view of the circumstances of this case I am constrained to hold that the entry in question should be sustained.

I do not think that the spirit of the rule of approximation, heretofore uniformly applied to entries covering excessive areas, is violated in allowing this entry, as originally made, to stand. There would seem to be no equity, or justice in so rigid an application of the rule, as to require the claimant in this case at this late day to relinquish forty acres or more of entry, and thereby suffer great hardship and loss, simply because of the difference against him, under a strict application of the rule, of only a fractional part of one acre of land.

I must, therefore, reverse your said office decision. Claimant's proof being in all respects satisfactory, the same will be approved and his entry passed to patent.

PRIVATE CLAIM—SCRIP—ACT OF JUNE 2, 1858.

WILLIAM GOFORTH.

The mistaken classification of a claim, by the register and receiver in their report thereon, as among those already confirmed by law, will not bring it within the confirmatory provisions of the act of May 11, 1820.

There is no legal authority for the issuance of scrip under section 3, act of June 2, 1858, if the private claim, on which the right of indemnity is based, had not been confirmed by act of Congress.

Secretary Vilas to Commissioner Stockslager, January 17, 1889.

I have considered the appeal filed in behalf of C. G. Boudousquie, as legal representative of William Goforth, from your office decision, dated October 22, 1887, refusing to authenticate and issue, under the provisions of section three of the act of June 2, 1858, certificates of location on account of a private land claim of said William Goforth.

Said claim, it appears, was entered as No. 462 in the report dated November 20, 1816, made by Harper and Lorrain, register and receiver for the eastern district of Louisiana. See American State Papers (Green's Edition) Vol. 3, p. 225. Said register and receiver were acting as commissioners to examine and report upon claims to lands in the eastern district of Louisiana, and their report was made for the information and action of Congress as well as of your office.

The Commissioners, Harper and Lorrain, divided the claims embraced in said report into three general classes, as follows:

First class comprehends such claims as stand confirmed by law. Second class comprehends such claims as, in the opinion of the register and receiver, ought to be confirmed. Third class comprehends such claims as, in their opinion, can not be confirmed under existing laws.

They then subdivided each class into species. The following were the subdivisions of the first class:

1st. Claims founded on complete titles, granted by the French or Spanish governments.

2nd. Claims founded on incomplete French or Spanish grants or commissions, warrants, or orders of survey, granted prior to the 20th of December, 1803.

3rd. Claims formerly rejected by the Board of Commissioners for the eastern district of Louisiana, merely because the lands claimed were not inhabited on the 20th of December, 1803.

It is not necessary here to further recite the subdivisions of the classes into species.

The register and receiver in their report placed the Goforth claim in class one, species two, and numbered it 462.

Their entry of the claim was in the following language:

William Goforth claims a tract of land situate in the county of Lafourche, containing fifty arpens front by forty arpens in depth. This claim is founded on an order of survey issued by the proper officer.

In closing their entries under this subdivision or species, they say:

We are of the opinion that all the claims included under the second species of the first class are already confirmed by the act of Congress of 12th of April, 1814. (3 Stat., 121.)

In the appendix to their report (page 233, State Papers) they say, after referring generally to the scope of the report that

In classing the claims we thought it proper to subdivide those classes into species for, although we believe that all the claims reported in the first and second classes are, or ought to be, confirmed under existing laws, yet those laws do not confirm them to the same extent, nor demand the same requisites equally in all to entitle claimants to their lands. Hence, for the sake of perspicuity, and to pursue as nearly as possible the different kinds of claims pointed out by the various acts of Congress, we have adopted the preceding arrangement as being, in our judgment, the best mode.

Then, referring to the first class, they say:

Those claims which are found under species first of the first class, being founded on complete grants of former governments, we think are good in themselves on general principles, and therefore require no confirmation by the government of the United States to give them validity.

With respect to the second species of claims in the first class, which are bottomed on incomplete titles, the law at present appears to be this: Every claim to land, supported by an order of survey granted by the proper Spanish officer prior to the first day of October, 1800, in favor of persons residing in Louisiana on that day, and who have fulfilled the conditions attached to their concessions, must be confirmed in their claims without limitation as to quantity; but when all the conditions attached to the the concession have not been fulfilled, yet, if it appears that the land has been actually located and surveyed by a proper officer before the 20th of December, 1803, it must be confirmed to the claimant, to an extent not exceeding one league square,

provided the order of survey bears date prior to the 20th of December, 1803, and provided also, that the claimant has not received in his own right a donation grant from the United States in the State of Louisiana.

These principles, we think, are deducible from the acts of Congress passed on the 2nd of March, 1805, and 12th of April, 1814. Although the last mentioned act seems to apply chiefly to claims heretofore acted upon and rejected by the Board of Commissioners, yet we think the same liberal principles in the spirit of the law were intended to apply to claims since entered under the laws extending the time for filing claims, and we have therefore reported on those claims according to this impression.

As stated in your office decision, the date of the order of survey was not given by the register and receiver in reporting this case, and there is nothing in the record to show its date. The language of the report is: "This claim is founded on an order of survey issued by the proper officer."

No date of survey is given, nor is there any further information in relation to the claim. Without here quoting from the act of April 12, 1814, (3 Stat., 123), it is sufficient to say that your office is correct in its statement that this claim is not confirmed by said act, and it may be added that appellant does not allege that it is so confirmed.

The contention on appeal is that the claim fell within the purview of the act of May 11, 1820 (3 stat., 573) and therefore that scrip should issue under the provisions of the act of June 2, 1858 (11 Stat., 294).

The first section of the act of 1820 reads as follows:

Be it enacted, etc. That the claims for lands within the eastern district of the State of Louisiana, described by the register and receiver of the said district, in their report to the Commissioner of the General Land Office, bearing date the twentieth day of November, one thousand eight hundred and sixteen, and recommended in said report for confirmation, be, and the same are hereby, confirmed against any claim on the part of the United States.

To be more explicit, the averment of apellant is that the report of the register and receiver made November 20, 1816, as found in Green's Edition, American State Papers, page 222, *et seq.*, contained in effect a recommendation that this claim be confirmed, and that because of this recommendation the first section of the act of 1820 (*supra*) took hold upon it so as to bring it within the provisions of the act of 1858.

In this connection reference may be made, by way of recital to the statement of fact contained in your office decision, that "Under date of January 31, 1879, your (the surveyor-general's) office prepared in satisfaction of this unlocated claim, certificates of location numbered 432 A to 432 F, five for three hundred and twenty acres, and one for one hundred and one acres and forty hundredths of an acre, in all 1701.40 acres, the equivalent of 2000 arpens.

On the face of said scrip the act of Congress approved May 11, 1820, entitled 'An act supplementary to the several acts for the adjustment of land claims in the State of Louisiana,' (3 Stat., 573) is given as the act confirming this claim."

After reference to the fact that the act of 1820 confirmed only such claims as were recommended by the register and receiver for confirma-

tion, your office decision holds in substance, that the report of said officers, made November 20, 1816, did not contain anything which could properly be construed as a recommendation that this claim be confirmed; that said report in so far as it affected this claim was an expression of judgment by them that it was already confirmed; that such judgment was only an expression of opinion as to the status of the claim and did not deal with its merits.

Counsel for appellant urge that your office did not properly construe the report of the register and receiver; that said report was in effect a recommendation for confirmation of this and similar claims in case it should be held that they were not confirmed by the act of 1814; that because of said recommendation as above, this claim was confirmed by the act of 1820, and that therefor appellant is entitled to scrip under the act of 1858.

If appellant is correct in his contention that the claim was confirmed by the act of 1820, then it seems clear that it comes within the purview of section three of the act of June 2, 1858 (11 Stat., 294), which provides, among other things,—

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 prior to such confirmation, or for any reason whatsoever, other than a discovery of fraud in such claim subsequent to such confirmation, it shall be the duty of the surveyor-general of the district in which such claim was situated, upon satisfactory proof that such claim has been so confirmed, and that the same, in whole or in part, remains unsatisfied, to issue to the claimant, or his legal representatives, a certificate of location for a quantity of land equal to that so confirmed and unsatisfied, etc.

The sole question in this case, then, is: Had this claim been confirmed by Congress so as to bring it within the above provision of law?

Did the register and receiver in their report of November 20, 1816, recommend the confirmation of the claim and thereby bring it within the provisions of the confirmatory act of 1820? The classification made by those officers of the claims to which their report relates has already been referred to and described herein, and the fact has been noted that the claim under consideration was by them placed under the second species of the first class, the claims in which class they say "stand confirmed by law."

Whatever doubts might arise because of certain ambiguities which appear in the report made by the register and receiver in 1816, seem to have been solved by the supreme court of the United States, in a decision rendered in 1850 in the case of Blanc *v.* Lafayette (11 How., 104). That case involved a claim embraced in the same report of the register and receiver, in which that here under consideration is found. Not only is it in the same report, but it was by the officers named placed in the same class and species, viz: class one, species two. The claim was in said report designated as number 409, and was that of Louis Liotaud (State Papers, p. 244) It was in some respects more definite and con-

tained a fuller showing than that under consideration. For example, some of its boundaries were named, and the date of the order of survey was given.

The supreme court, in deciding that case, stated explicitly that:

> The question presented is, whether or not the claim of Louis Liotaud for a tract of land situated in the eastern district of Louisiana was confirmed by the act of Congress of the 11th of May, 1820 (3 Stat., 573), against any claim to the land by the United States, so that any entry could not be made upon it in favor of Major General Lafayette.

After thus succinctly stating the question, the court noted the fact that

> the register and receiver had said in their report, that all the claims, included under the second species of the first class, were already confirmed by the act of Congress of the 12th of April, 1814,

and said that

> In this they were certainly mistaken, as they were also in placing Liotaud's claim in what was termed in their report the second species of the first class of claims.

In concluding the decision, the court used the following strong and unambiguous language:

> Liotaud's claim, having been mistakenly put where we find it, it is neither within the letter nor the intention of the act of the 11th of May, 1820, confirming titles to land described by the register and receiver.

The purport of language so plain and positive as this can not easily be mistaken, and what the court said of that claim applies with equal force to this, for the two are in the same class and species in the report made by the register and receiver in 1816. If that was not confirmed by the act of 1820, neither was this, and not having been confirmed by said act, or any other, there is no legal basis for the issuance of scrip under the act of 1858.

Your office decision refusing to issue certificates of location on the claim of William Goforth is accordingly affirmed.

HOMESTEAD ENTRY—COMMUTATION—REPAYMENT.

AUGUST POLZIN.

Repayment, with the right to thereafter submit the ordinary homestead proof, can not be accorded to a homesteader who has made commutation proof, which is found insufficient; but he may submit new commutation proof within the life of the original entry.

First Assistant Secretary Muldrow to Commissioner Stockslager, January 18, 1889.

I have considered the appeal of August Polzin from your office decision of October 12, 1887, rejecting his application for repayment of purchase money paid on commutation proof under homestead entry for the

NW. $\frac{1}{4}$, of section 30, T. 101 N., R. 67 W., Mitchell, Dakota, land district.

Polzin made homestead entry for said land April 10, 1883, and advertised to make final commutation proof thereunder on February 28, 1885, before the clerk of the District Court.

Proof was made March 4, 1885, before the officer named in the advertisement. Accompanying the proof was the affidavit of the claimant setting up that the delay in making said proof was occasioned by the sickness of his child, and that it was made as soon as possible after the day advertised; and also the affidavit of J. E. Cone, a physician dated March 4, 1885, stating "that February 23, 1885, he was called to the residence of August Polzin on Sec. 30, T. 101, R. 67, to treat professionally the child of said Polzin that he found said child dangerously sick in which condition he has remained ever since. The local officers accepted said proof and issued final certificate thereon bearing date of March 31, 1885.

By your office letter of October 29, 1885, the claimant was required to file an affidavit showing that he had not alienated any part of said land between the date of the final proof and the date of final certificate. The claimant filed his affidavit dated November 28, 1885, stating that he had not then alienated any part of said land and that he and his family had resided there continuously since making proof.

By letter of January 21, 1886, your office rejected said proof because not made on the day advertised. By letter of July 28, 1887, the register transmitted Polzin's application for repayment of the purchase money paid on his cash certificate and asking "that his original entry may be allowed to stand subject to proof by himself or his heirs in due and legal course."

I concur with your office that there is no authority in law for the repayment of the purchase money in this case and the decision refusing the application for repayment is therefore affirmed.

This rejection of his application for repayment does not in any manner affect the entryman's right to offer new proof at any time within the life of his original entry.

RESIDENCE—PUBLIC OFFICIAL.

JAMES A. JENKS.

When a *bona fide* settler has established a residence, and is afterwards called away by official duty, such absence will not work a forfeiture of his rights.

First Assistant Secretary Muldrow to Commissioner Stockslager, January 19, 1889.

On November 15, 1880, James A. Jenks made homestead entry for the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, and the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 11, T. 151 N., R. 54 W., Grand Forks, Dakota. He submitted proof at the local office in commutation of his claim, on July 31, 1885. This proof was rejected

for the reason that it failed to show six month's continuous residence next preceding its date. This action was sustained by your office decision of November 12, 1885, from which the claimant appealed.

The claimant made settlement and established his residence upon the land on April 1, 1882. His improvements, valued at $900, consist of a frame house fourteen by six, with an addition twelve by sixteen, stable, well, and one hundred and twenty-eight acres of breaking, which he has cultivated for four years.

On April 15, 1882, following, his settlement, he was appointed sheriff of Grand Forks county to serve until January 1, 1883. In November, 1882, he was elected to the same office for two years, beginning January 1, 1883, and on March 5, 1883, he was also appointed deputy United States marshal for the Territory of Dakota. He was subsequently re-elected sheriff of the said county for the term of two years, beginning January 1, 1885.

By corroborated affidavit which accompanies his proof, the claimant sets out that to discharge the duties of his office and to comply with the requirements of the territorial code, he was required to reside in Grand Forks, the county-seat, about twenty-two miles distant; that he went to Grand Forks on April 15, 1882; that his wife and family continued to live on the land until October 25, 1882, when, owing to the claimant's illness, they came to Grand Forks; that he cultivated the land during each year succeeding his entry, and in 1884, built a good and substantial house, costing $300, and a small stable, that he frequently returned to the land and supervised the improvements; that his wife being in delicate health it was not advisable for her to live upon the land and that he needed her aid in caring for the prisoners in the county jail. He submitted proof and payment for the reason that as seventeen months of his term of office remained, during which time he could not personally occupy the land he considered himself in danger of losing it.

Since the appeal herein, the claimant by his attorney asks "that the final entry be allowed under section 2291, Revised Statutes, and that the local officers be instructed to issue final homestead certificate upon the payment of the proper commissions and the taking of the proper final affidavit."

This application is based on the claimant's affidavit dated January 8, 1889, wherein he avers, "that he is now living with his family upon said tract and has continued to reside upon the same continuously for the past two years."

The claimant first established his residence upon the land in good faith. His subsequent absence although covering the greater part of the time from April, 1882, until January 1887, having been caused by his duties as a public officer, could not operate as an abandonment of such residence.

This case is clearly governed by the rule laid down in the case of A.

E. Flint (6 L. D., 668). In that case the Department held that when a bona fide settler has established a residence and is afterwards called away by official duty, which required his presence at the county-seat, such absence will not work a forfeiture of his rights.

This record, therefore, indicates that the claimant has complied with the homestead law. His application that final entry be allowed upon the papers now before me can not, however, be granted. The claimant should be permitted, within a reasonable time, to make in the regular manner, final proof showing compliance with the law.

Your decision is modified.

PRIVATE ENTRY—EQUITABLE ADJUDICATION.

IRWIN EVELETH.

Where land was once offered, then increased in price and again offered, and while in that condition reduced to the first price by act of Congress, and private entry thereof allowed without re-offering, such entry is voidable only, for the want of restoration notice, and may be confirmed by the Board of Equitable Adjudication.

Secretary Vilas to Commissioner Stockslager, January 21, 1889.

I have considered the appeal of Irwin Eveleth from the decision of your office, dated October 20, 1887, refusing to re-instate his private cash entries, Nos. 12,685 and 12,686, the former made July 12, 1882, at the East Saginaw, Michigan, land office, covering the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, and the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 20, T. 27 N., R. 2 W., and the latter made July 15, same year, at the same office, covering the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 8, and the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 20, T. 27 N., R. 2 W.

The record shows that the land covered by said entries is within the limits of the grant to the State of Michigan, by act of Congress approved June 3, 1856 (11 Stat., 21), for the benefit of the Amboy, Lansing and Traverse Bay Railroad Company (now the Jackson, Lansing and Saginaw Railroad Company). The odd numbered sections were withdrawn on May 30, 1856. The even numbered sections were offered at public sale on May 10, 1841, under proclamation, dated December 14, 1840.

The second section of said act provides "that the sections and parts of sections of land, which, by such grant, shall remain to the United States, within six miles on each side of said roads, shall not be sold for less than double the minimum price of the public lands when sold; nor shall any of said lands become subject to private entry until the same have been first offered at public sale at the increased price."

The lands in question were re-offered at double minimum price on August 20, 1860, Proclamation No. 657.

Section three of the act approved June 15, 1880, (21 Stat., 236,) pro-

vides "that the price of lands now subject to entry, which were raised to two dollars and fifty cents per acre, and put in market prior to January, eighteen hundred and sixty one, by reason of the grant of alternate sections for railroad purposes, is hereby reduced to one dollar and twenty-five cents per acre."

It does not appear that the lands in controversy were re-offered after their reduction in price, nor was there any notice given of their restoration to private entry. The local officers, however, sold said lands at private cash entry, and issued cash certificates therefor.

Your office, on December 13, 1884, canceled said entries for illegality, because the land involved had never been restored to market, after having been once withdrawn, although subsequently reduced in price by section three of the act of Congress approved June 15, 1880 (21 Stat., 239).

On November 26, 1884, the local office reported to your office that said Eveleth had been duly advised of the action of your office dated August 27, 1884, holding said entry for cancellation, and that he had taken no action thereon.

On May 9, 1887, the claimant applied for re-instatement of said entries, alleging, under oath, that he never received any "official notice whatever from the land department" of the action of your office; that he had been absent from the State of Michigan for a large part of the time since said entries were canceled, but that he supposed said entries were perfect and that patents therefor would be issued in due time.

The claimant, therefore, prays that said entries may be re-instated and referred to the Board of Equitable Adjudication for its consideration. Your office, however, on October 20, 1887, refused said application.

An examination of the records of your office shows that one Earnest Strickland made homestead entry No. 4986 of the SE. ¼ of the NE. ¼, and the NE. ¼ of the SE. ¼ of said Sec. 20, on December 10, 1887. This homestead entry was erroneously allowed, so far as the same conflicts with the private cash entries for which application for re-instatement was pending. Sarah Renner (2 L. D., 43.) If Eveleth did not in fact have any notice of the cancellation of said entries, then there would seem to be no valid reason why the entries should not be re-instated and referred to the Board of Equitable Adjudication for consideration.

The facts as shown by the record, relative to the allowance of said entries, are, in all respects, similar to those in the case of Pecard *v.* Camens (4 L. D., 152), wherein my predecessor, Secretary Lamar, held, that where land had been once offered, then increased in price, and again offered, and while in that condition it was declared by act of Congress to be subject to sale at the first price, and private entries were allowed therefor, without further offering, such entries are not void, but voidable, for the want of a restoration notice, and they may be confirmed by the Board of Equitable Adjudication.

The case of Eldred *v.* Sexton (19 Wall., 189) was cited and distinguished in the Pecard *v.* Camens' case. In the case of Julius A. Barnes (6 L. D., 522), the Department used the following language:

In support of their position, counsel refer to the decision of Pecard *v.* Camens (4 L. D., 152), to show that a re-advertisement is not necessary in restoring lands to private entry after a temporary withdrawal. In the case of Pecard *v.* Camens the land had always been offered, and had not been withdrawn from market after the increase in price; besides the entry had been allowed in that case, and, although it was held to have been improperly allowed, it was considered not to be void, but voidable only, and that the defect might be cured by a reference to the Board of Equitable Adjudication. It was upon these grounds, that the department distinguished that case from the case of Eldred *v.* Sexton.

See also Wilhelm Boeing (6 L. D., 262).

In the case of Frank V. Holston (7 L. D., 218), the Department held that where there was no adverse claim, a private cash entry for land, included within a prior swamp selection, may be submitted to the Board of Equitable Adjudication, where the selection was subsequently canceled and good faith appears. If it be conceded for the sake of argument, that the principle announced in the Eldred-Sexton case is applicable to the private entries under consideration, it should, nevertheless be observed, that the jurisdiction of the Board of Equitable Adjudication to confirm private cash entries similar to those in question, was not presented to the court, nor was it considered or mentioned in said decision. The question before the court, and that which was decided by the court was, whether the action of the Department was right in canceling Eldred's private cash entry of lands, where the same had never been offered at public auction at the price for which the land was sold, namely, $1.25 per acre. The record showed that Eldred's entries were made in 1865 and 1866; that the lands had once been offered at $2.50 per acre, by reason of being within the limits of a railroad grant, but on account of a change of the route duly authorized, the lands fell outside of the railroad limits, and by the fourth section of the joint resolution of April 25, 1862 (12 Stat., 618), it was provided that the lands (*inter alia*) "shall hereafter be sold at $1.25 per acre." Eldred's entries were subsequently canceled by your office, on the ground that the lands were not subject to a private entry at the price paid and on appeal, the decision of your office was affirmed by this Department.

Upon the cancellation of Eldred's entries, the lands in question were offered at public sale at the minimum price of $1.25 per acre, and not being sold at such sale, were subsequently purchased at private entry by Sexton to whom patents were issued in 1870. Then Eldred commenced an action in one of the courts of the State of Wisconsin, praying that Sexton be declared a trustee for him, and that Sexton should surrender the patents and convey the lands to Eldred.

The State courts rendered a decree adverse to Eldred, which was affirmed by the State supreme court, and the same was taken to the su-

preme court of the United States for a final adjudication. In the report of the case (19 Wall., 192), it is stated that

The sole question was, whether the action, as above stated of the Commissioner of the General Land Office, and of the Secretary of the Interior was correct. If correct, it was conceded that the defendant's title, obtained subsequently could not be impeached. If incorrect, the defendant was to be treated as a trustee holding the legal title for the plaintiff.

In the body of the opinion, Mr. Justice Davis, speaking for the court, said (page 195)

It is a fundamental principle underlying the land system of this country, that private entries are never permitted until after the lands have been exposed to public auction at the price for which they are afterwards subject to entry.

After referring to the manner of conducting the public sales of government lands, the learned Justice continues.

There is an obvious reason for requiring a public sale before leaving the lands open to private entry. It is to secure to all persons a fair and equal opportunity of purchasing them, and to obtain for the government the benefit of competition in case the lands should be worth more than the price fixed by Congress.

It is further observed in the decision that the system of public sales commenced very early in the history of the country and was perfected in 1820; that for a period of twenty years from the commencement of the country, the public lands were sold on a credit, at not less than $2 per acre, but the practice of selling on a credit working badly, it was abandoned in 1820 and the price of the lands was reduced to $1.25 per acre; that since 1820, the great body of the public domain has been brought into market, after proper notice, at said reduced price; that private entries have never been allowed, except by special act of Congress, unless the land applied for had been previously offered at public sale to the highest bidder at the same price; that "This has been the established practice of the Land Office, sanctioned by the law officers of the government, and recognized by this court as a leading feature in our system of land sales" citing Johnson *v.* Towsley (13 Wall., 88); Chotard *v.* Pope (12 Wheaton, 588); (2 Op., 200; 3 id., 274; 4 id., 167).

The court also held, that by said joint resolution, Congress did not intend to change its policy relative to public sales as aforesaid; that "Congress meant nothing more than to fix $1.25 as their mimimum price, and to place them in the same category with other public lands not affected by land grant legislation. When they were withdrawn from the operation of this legislation and their exceptional status terminated the general provisions of the land system attached to them, and they could not, therefore, be sold at private entry, until all persons had the opportunity of bidding for them at public auction." The court held, that the entries were invalid and rightly canceled, because they were made before the lands had been proclaimed for sale at the minimum price of $1.25 an acre. It is quite evident that the court did not have in mind the question of the jurisdiction of the Board of Equitable Adjudication to confirm an entry that might without confirmation,

very properly be declared invalid and canceled by this Department. For in the case before the court, it did not appear that Eldred ever applied to have his entries confirmed, under any of the rules prescribed by said Board for the government of the Commissioner of the General Land Office under the acts of Congress of August 3, 1846, March 3, 1853, and June 26, 1856. (See General Circular, March 1, 1884, page 76).

Rule eleven of said rules provides for the submission of "all private sales of tracts which have not previously been offered at public sale, but where the entry appears to have been permitted by the land officers under the impression that the land was liable to private entry, and there is no reason to presume fraud, or to believe that the purchase was made otherwise than in good faith." Rule thirteen is as follows: "All bona fide entries on lands which had been once offered, but afterwards temporarily withdrawn from market, and then released from reservation, where such lands are not rightfully claimed by others."

These rules were promulgated on October 3, 1846, and have never been abrogated by any subsequent Board of Equitable Adjudication.

The provision of said acts relative to the Board of Equitable Adjudication are embodied in sections 2450 to 2457, and 2478 Revised Statutes. Section 2457 which is substantially the same as said act of 1856, provides that the provisions from section 2450 to 2456:

Shall be applicable to all cases of suspended entries and locations, which have arisen in the General Land Office since the twenty-sixth day of June, 1856, as well as to all cases of a similar kind, which may hereafter occur, embracing as well locations under bounty land warrants as ordinary entries or sales, including homestead entries and pre-emption locations or cases; where the law has been substantially complied with, and the error or informality arose from ignorance, accident, or mistake, which is satisfactorily explained, and where the rights of no other claimant or pre-emptor are prejudiced, or where there is no adverse claim.

But it must be observed that during all the time from 1856 until the revision of the statutes which became effective December 1, 1873 (United States *v.* Bowen, 100 U. S., 508) said rules had been in force and furnished the criterion by which the Board would be governed in determining whether "the law had been substantially complied with" in each particular case. The jurisdiction of said Board—that is, the power to determine when the law has been not absolutely, but substantially complied with—is given by said section, and the Board having prescribed general rules and regulations which had been in force for more than a quarter of a century, and upon the validity of which might depend the title to thousands of acres of land, it is fair to conclude that said rules, if unwarranted by, or in violation of law, would have been annulled by Congress in the revision of the laws under which they were framed. But this was not done. On the contrary, Section 2478 Revised Statutes, provides that:

The Commissioner of the General Land Office under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution by appropriate regulations, every part of the provisions of this title not otherwise specially provided for.

The law did not attempt to prescribe every case in which an entry might be confirmed, but left the determination of that question to the Board in the particular case presented.

If it be urged, that, under the ruling in the Eldred-Sexton case (*supra*) no private cash entry can be allowed where the land has been reduced in price, until it has been put up at auction to the highest bidder, the answer is, that the decision will not bear that construction if the lands entered have once been offered at the price for which they were subsequently sold, although they have been temporarily withdrawn, and while so withdrawn, offered at the enhanced price. It will be remembered, that the court held, with reference to the joint resolution reducing the price of said lands, that "Congress meant nothing more than to fix $1.25 as their minimum price and to place them in the *same category with other public lands not affected* by land grant legislation. When they were withdrawn from the operation of this legislation, and their exceptional status terminated, the general provisions of the land system attached to them." Now if we can ascertain what were "the general provisions of the land system" with reference to tracts situated similarly to those in question, it can readily be determined whether the private cash entries of Eveleth were so "invalid" that they can not be confirmed.

On January 1, 1836, your office issued instructions to the local officers, requiring them to give notice by public advertisement for thirty days of the restoration to private entry of tracts once offered for sale, and improperly withheld from private entry, from any cause whatever, and that at a particular hour and day named in said notice, said officers would be prepared to receive applications to enter lands designated in said notice. It was further prescribed in said regulation, that "in no event will you allow any such lands to be entered, or located, before the expiration of the time thus prescribed." (Pub. Lands Instructions & Opinions, 514).

Said regulation was considered by Attorney General Butler on July 14, 1834 (3 Op. 275), and he held that while no power was expressly given to the Commissioner of the General Land Office to make said regulation by any act of Congress, yet the power to make it was "warranted by the nature of the case, and the general powers of the Executive under the Constitution;" that it is the duty of the Commissioner of the General Land Office, under the general supervision of the Department, to take care that the law is faithfully executed; that one of the most important points to be observed in the execution of the law is, the securing to all persons a fair and equal opportunity to become purchasers of the public lands; that where a *considerable time* has elapsed since the close of a public sale, if lands are brought into market, and are allowed to be entered by any particular individual before public notice has been given that they are subject to private entry, "would, in most cases, give to such individual a preference over the rest of the community."

This opinion was re-affirmed by the Attorney General in 3 Op., 653, and 4 Op., 167, and has been uniformly followed by the Department so far as I am advised since that time. See Jefferson Newcomb (2 C. L. O., 162); S. N. Putnam (2 C. L. L., 305); John C. Turpen (5 L. D., 25).

It should, however, be kept in mind, that neither said regulation nor the opinions of the Attorney General (*supra*) required that lands which had once been offered at public auction, and afterwards suspended for "considerable time," should be re-offered at public sale. The restoration notice published for at least thirty days was deemed sufficient to give all persons a fair opportunity to purchase the lands, which by a previous offering had been placed in the "category" of lands subject to private cash entry. It is a matter of history that millions of acres of offered lands withdrawn in anticipation of railroad grants have been restored to private entry in accordance with said regulation. (See Land Office Report, 1854, page 61).

It can not be supposed, therefore, that the supreme court in the Eldred-Sexton case (*supra*) intended to decide that entries of lands, restored to private entry in accordance with a practice so long and so uniform, were invalid, nor that entries of lands, where the land officers have failed to give the published notice, can not be confirmed by the Board of Equitable Adjudication in accordance with the rules in force when said entries were allowed. Such a ruling by the court would apparently conflict with its own decisions both prior, and subsequent to the decision in the Eldred-Sexton case.

In 1815, the United States supreme court in the case of (Polks Lessee *v.* Wendal) (9 Cranch page 87) Chief Justice Marshall delivering the opinion of the court said:

> The laws for the sale of public lands provide many guards to secure the regularity of grants, to protect the incipient rights of individuals, and also to protect the State from imposition. Officers are appointed to superintend the business; and rules are formed prescribing their duty. These rules, are in general, directory, and when all the proceedings are completed by a patent issued by the authority of the State, a compliance with these rules is pre-supposed. That every pre-requisite has been performed, is an inference properly deducible, and which every man has a right to draw from the existence of the grant itself. It would, therefore, be extremely unreasonable to avoid a grant in any court for irregularities in the conduct of those who are appointed by the government to supervise the progressive course of a title, from its commencement to its consummation in a patent.

The court further held that where the grant was void, its validity could be examined in a court of law.

In the case of Edwards Lesse *v.* Darby (12 Wheaton, 206), the court held that—

> In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect.

See also United States *v.* Gilmore (8 Wall., 330); United States *v.* Burlington & Missouri River Railroad (98 U. S., 334); Douglas *v.* County of Pike (101 U. S., 677); United States *v.* Graham (110 U. S.,

221); Brown *v.* United States (113 U. S., 568); The Laura (114 U. S., 441).

In the case of Philbrick *v.* United States (120 U. S., 59), the court said:

A cotemporaneous construction by the officers upon whom was imposed the duty of executing those statutes, is entitled to great weight, and since it is not clear that that construction was erroneous, it ought not now to be overturned.

See also United States *v.* Hill, (idem., 169); Siemans Administrator *v.* Sellers (123 U. S., 276); United States *v.* Johnston (124 U. S., 236).

In the case of Robertson *v.* Downey (127 U. S., 607), the supreme court, considering a regulation of the Treasury Department, relative to the proper construction of section fourteen of the act of June 22, 1874 (18 Stat., 189), said:

This construction of the Department has been followed for many years without any attempt of Congress to change it, and without any attempt, as far as we are advised, of any other department of the government to question its correctness, except in the present instance. The regulation of a department of the government is not, of course, to control the construction of an act of Congress when its meaning is plain. But when there has been a long acquiescence in a regulation, and by it, rights of parties for many years have been determined and adjudicated, it is not to be disregarded without the most cogent and persuasive reasons.

Citing United States *v.* Hill, United States *v.* Philbrick, and Brown *v.* United States (*supra*).

The rule of disposition unquestionably is, and should be, that lands which have once been offered, and then temporarily withdrawn, but afterwards restored to market, are not to be sold at private entry without due notice of restoration; and lands which have been reduced in price should be re-offered at the reduced price before being held for private entry. I am not able to say, however, that any provision of the statute makes such an entry void. It is voidable at the option of the government only. And the precise question here is, whether where entries have been allowed by the local officers without such notice of restoration, and without re-offering, and the purchasers have acted in good faith, such entries can be confirmed by the Board of Equitable Adjudication.

The purchaser is not put in *statu quo* by merely returning the bare purchase price, perhaps years after his payment. He may have sold the lands to a purchaser who can be charged fairly with no laches. He himself acted with the approval of the local officers. Generally speaking, the fault was more theirs than his. They should be removed for a disregard of their duty, unless excusable. But the fact that they accepted his money and issued the certificate without notice gives him an equity to ask of the government not to exercise its option and cancel the entry, but to allow it to stand.

The Attorney General (14 Op., 645) held, that under rule 11, notice was not necessary to confer jurisdiction upon said Board; said rule was still in force and that "there is nothing in the acts of 1853 and 1856 to annul it." See also 1 Lester, 483.

In the case at bar the entries were allowed more than two years after the passage of the act, by which they were "reduced to one dollar and twenty-five cents per acre," and it would seem that no one was thereby deprived of a "fair and equal opportunity of purchasing them," if during all that time, they were held subject to private entry. On the other hand, if they were not so held, but were sold by mistake, nevertheless, the tracts being public lands at the date of entry, the purchase money having been accepted, and the cash certificate issued, and long delay having ensued, it would be fair and equitable that the contract, if not fully authorized, should be ratified by the government, unless prohibited by law.

It has been well said that:

It is not the words of the law, but the internal sense of it, that makes the law; the letter of the law is the body; the sense and reason of the law is the soul. Every statute ought to be expounded, not according to the letter, but according to the meaning; *qui haeret in litera, haeret in cortice.* (Potters Dwarris, 175.)

And the United States supreme court in the case of Heydenfeldt *v.* Daney Gold Co. (93 U. S., 634) speaking of the construction of a law, said:

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

See also United States *v.* Fisher (2 Cranch, 386); Atkins *v.* Disintegrating Co. (18 Wall., 272).

Tested by the principles above set forth, and bearing in mind the object to be attained in the creation of the Board of Equitable Adjudication, the injustice that might result from excluding from its jurisdiction cases, where, through mistake, the local officers had sold the lands, without having given the restoration notice required by said regulation, I must hold that said rules prescribed by said Board have not been annulled by said section 2457, Revised Statutes, and that the entries of Eveleth may very properly be referred to said Board for its consideration: Provided, however, it be shown that he was not duly notified of said cancellation. But since the local officers have allowed two of the tracts to be entered under the homestead laws after the application of Eveleth for re-instatement, and the evidence as to notice is not entirely satisfactory, I think a hearing should be ordered, in accordance with the Rules of Practice, and Strickland should be notified to show cause why his entry should not be canceled for said conflict and Eveleth should be afforded opportunity to contest the truth of the report that

he was duly notified of the decision of your office cancelling said entries, and of any other equity in his favor requiring submission to the Board.

The decision of your office is modified accordingly.

DESERT LAND ENTRY—PRELIMINARY AFFIDAVIT.

VIOLETTE HALL.

The preliminary affidavit required of an entryman under the desert land act, must be based upon the applicant's knowledge of the land derived from a personal inspection thereof.

First Assistant Secretary Muldrow to Commissioner Stockslager, January 21, 1889.

I have considered the case arising upon the appeal of Violette Hall from your office decision of October 4, 1887, rejecting her proffered application to enter under the desert land law a certain tract in the Cheyenne land district, Wyoming.

Applicant in the affidavit accompanying her application, says:

> I became acquainted with said land through the testimony and representations of many credible and responsible persons who are well acquainted with said land.

The circular of your office, dated June 27, 1887, approved by the Department, says (see 5th paragraph, page 710, 5 L. D.):

> The required affidavit can not be made by an agent, nor upon information and belief; and you will hereafter reject all applications in which it does not appear that the entryman made the averments contained in the sworn declaration upon his own knowledge derived from a personal examination of the land.

I therefore affirm your decision rejecting said application.

HOMESTEAD—SECOND ENTRY.

BENJAMIN P. KNANS.

An entry under the homestead law cannot be lawfully made by one who is at the same time maintaining a pre-emption claim for another tract.

The right to make second entry will not be accorded, where the first was for land duly subject thereto, and failed through the fault of the entryman.

Secretary Vilas to Commissioner Stockslager, January 21, 1889.

This cause comes before me on appeal of Benjamin P. Knans, from your office decision of March 2, 1886, cancelling his homestead entry for the NE. ¼, Sec. 10, T. 2 S., R. 34 W., Garden City, Kansas land district.

On February 22, 1884, claimant filed his pre-emption declaratory statement for SW. ¼, Sec. 2, of the same township and range, and made his final proof thereon and received his certificate therefor, July 27, 1885.

On November 13, 1884, and while residing on his said pre-emption claim and before offering his final proof, he made the homestead entry above stated.

On October 29, 1885 your office received through the local officers an application made by Knaus himself, asking that his said homestead entry be canceled for illegality and that he be permitted to make a re-entry of the same tract.

Prior to making such application for cancellation he had proved up on his pre-emption claim, received his final certificate and had established a residence on the tract embraced in his homestead entry.

Claimant in an affidavit and also in a private letter filed in the case, claims, that he made his homestead entry in ignorance of the law and on the advice of land attorneys and others, who professed to know, by whom he was told that he had a right to make a homestead entry while residing upon his pre-emption claim, provided he proved up on his pre-emption and commenced his residence on his homestead within six months after entry thereof.

In your said letter of March 2, 1886, you comply with his request in so far as the cancellation of his homestead entry is concerned, but refuse to allow him to make a second entry of the same tract under the homestead law, and you say, "as he has made pre-emption entry, the purpose of the law in according the same to him, being to afford him a homestead, it is not seen that he has any occasion for another, and the law allows but one homestead privilege."

If by this language it is intended to say that the law is that the exercise of either the homestead or pre-emption right exhausts the other, or both, I cannot concur in that view as the decisions of the Department have never gone to that extent, and have indeed held to the contrary, but, however, that may be it is well settled that a claimant cannot make homestead entry while his pre-emption claim on another tract is pending, without abandoning his pre-emption claim. Rufus McConliss (2 L. D., 622) J. J. Caward (3 L. D., 505) Austin *v.* Norin (4 L. D., 461) Krichbaum *v.* Perry (5 L. D., 403) Harlan Cole (6 L. D., 290).

It is undoubtedly true that the object of the homestead law was to furnish the opportunity of obtaining homes to those who might be unable to avail themselves of the privilege of the pre-emption law, and it was not the primary object of such law to give one hundred and sixty acres more to the owners of homestead claims.

Conceding however that a pre-emption claimant after he has made final proof, may still have a homestead right which he is at liberty to then exercise upon any unappropriated public land, it does not follow, nor can I believe it to be within the letter or spirit of the law, that while holding a pre-emption claim and before making final proof therefor, he can make a homestead entry for a piece of adjoining land and thereby prevent the same from being homesteaded or pre-empted by persons duly qualified to make such entries, and thus fraudulently hold the

same for his own use and benefit until after making final proof on his pre-emption claim, and then by having such entry canceled as illegal immediately make a new entry of the same tract, and thus reap an advantage from his own wrongful act.

Although the homestead entry of Knans was invalid it was not necessarily void, as the land filed upon was open to entry and settlement, and by abandoning his pre-emption tract and giving up all claim thereto, he might have perfected his homestead.

There was nothing so far as the government was concerned or in the status of the land at the time of his entry to prevent him from perfecting his title.

In Allen *v.* Baird (6 L. D., 98) it was held that, "a pre-emptor may file but one declaratory statement, for land free to settlement and entry. This ruling has been uniformly followed and the only exception is where the pre-emptor is unable to perfect his entry on account of some prior claim and there is no fault on his part".

I know of no reason why the same rule which obtains in pre-emptions should not be applied in regard to the exercise of the homestead right.

This land was free to settlement and entry when Knans made his homestead entry, and there is no pretense of there being any prior claim.

His failure to complete by residence was not the fault of the government but his own laches, this alone prevented his claim from ripening into title. His homestead right therefore, having been once exercised upon land open to settlement and entry is now exhausted and he cannot be permitted to exercise it again.

While not concuring fully in the reasons given for said decision I have reached the same conclusion upon the grounds above stated.

Your said decision is therefore affirmed.

HOMESTEAD—SECOND ENTRY.

JAMES A. HARRISON.

The right to make second entry accorded where the first, through no fault of the entryman, was made for a tract covered by a prior *bona fide* pre-emption claim.

Secretary Vilas to Commissioner Stockslager, January 21, 1889.

I have considered the appeal of James A. Harrison from the decision of your office of September 3, 1887.

March 25, 1887, Harrison made homestead entry, No. 13,954, on Lots 3 and 4, and the E. ½ of the SW. ¼ of Sec. 6, T. 31 S., R. 38 W., Garden City district, Kansas.

It appears from the application of said Harrison now under consideration, that before making said entry, he employed Putnam and Widmer, attorneys, to prepare his entry papers, and to examine the records

of the local office, to see if said tract was vacant and subject to entry, and said tract appeared upon said records as vacant public land subject to entry, and thereupon he made said entry; but, subsequently, when he went upon said land to establish residence thereon, he found one William E. Kyes, residing there, said Kyes having settled on said land May 20, 1886, and filed pre-emption declaratory statement therefor May 26, 1886; and that the dwelling and other improvements of Kyes on the land were so near the northern boundary thereof, as naturally to cause Harrison (in view of the fact that the filing of Kyes did not appear of record), to believe that said dwelling and other improvements were upon the tract north of that covered by Harrison's entry. Harrison's statements are under oath and corroborated by said Kyes, the pre-emptor, and by the clerk in the office of the register at Garden City, and there is no doubt that he acted in good faith, and, in my opinion, he exercised due care and prudence in making said entry.

On this state of facts, Harrison prays "that said homestead entry be *amended* to embrace the NW. ¼ of the SE. ¼, the N. ½ of the SW. ¼, and the SW. ¼ of the NW. ¼ of Sec. 24, T. 30 S. R. 36 W.," in said land district. His application is accompanied by his relinquishment of said entry and also by an application in due form to enter under the homestead law the tract last named. The local officers recommended the granting of the application, but your office denied it, and Harrison appeals from this ruling of your office.

The application of Harrison is properly speaking and in legal effect, an application for leave to make second homestead entry, and should be treated as such. The conflict between the prior filing of Kyes and the entry of Harrison was the result of the negligence of the local officer in not placing the former of record, and neither Kyes nor Harrison should be prejudiced thereby. Kyes, at the date of Harrison's entry and relinquishment thereof and present application, was residing on the land, and had improved the same and filed therefor and was in all things conforming to the pre-emption law, and the time for his making payment and final proof has not yet expired. Being prior in point of time, he was also prior in the legal right to perfect his filing within the lifetime thereof by compliance with the requirements of the pre-emption law. (Goist *v.* Bottum, 5 L. D., 643).

This department, it is true, holds that a pre-emption filing does not segregate the land covered thereby, and, therefore, the land in this case was open to Harrison's entry, subject to the right of Kyes to perfect his filing by compliance with the pre-emption law. This, however, should not, under the circumstances of this case, be allowed to defeat the present application of Harrison for leave to make second homestead entry. It is stated in Harrison's application and is quite evident from the nature of the case, that he would not have entered the land if the local officer had discharged his duty and placed Kyes' filing of record and thus informed Harrison that his entry would be subject thereto.

Harrison seems to have acted promptly. He made his application (now under consideration) May 9, 1887, about a month and a half after his entry and soon after he had discovered Kyes residing on the land in full compliance with the pre-emption law, and from said date to the expiration of the life time of Kyes filing was *nearly two years.* To require Harrison to comply with the homestead law for such a period of time as to the tract covered by Kyes' prior filing, on the bare possibility of his finally securing the land by reason of Kyes' failure to comply with the law, would be unjust and unreasonable and would expose him to the risk of serious loss and injury on account of the negligence of the local officer.

I am, therefore, of the opinion that Harrison's application, considered according to its legal effect, as an application for leave to make second homestead entry for the tract named in the absence of an intervening adverse claim thereto, should, under all the facts and circumstances of the case, be allowed, and you are so instructed. The decision of your office denying said application is accordingly reversed.

HOMESTEAD—SECOND ENTRY.

THURLOW WEED.

The right to make a second entry recognized where the first was made in good faith but subsequently abandoned by the homesteader on account of conflict with the *bona fide* pre-emption claim of another.

Secretary Vilas to Commissioner Stockslager, January 21, 1889.

I have considered the appeal of Thurlow Weed from your office decision of October 26, 1887, refusing his application to make homestead entry for the NE. ¼, of Sec. 28, T. 132 N., R. 64 W., Fargo, Dakota, land district, upon the ground that he had exhausted his right under the homestead law by a former entry.

Weed made homestead entry for the SW. ¼ of Sec. 32 T. 132, N., R. 64 W., Fargo district, April 7, 1884. This entry was made upon an affidavit executed April 3, 1884, before the clerk of a court, in which Weed alleges that he was then residing on said land and that his settlement was commenced April 2, 1884.

Sarah Kellogg filed pre-emption declaratory statement for said last described tract April 2, alleging settlement March 29, 1884. Kellogg made pre-emption cash entry for said tract October 16, 1884,—Weed failing to appear and protest against the allowance thereof.

By letter of your office dated April 23, 1887, Weed's homestead entry was held for cancellation for conflict with Kellogg's pre-emption entry.

On September 29, 1887, Weed filed in the local office a relinquishment of his homestead entry, a petition for the restoration of his homestead right and an application to make homestead entry for the NE. ¼

of Sec. 28, T. 132 N., R. 64 W., which papers were transmitted by the local officers with letter of October 7, 1887.

These officers refused to approve the application because they thought Weed had not used proper care to ascertain if any settlement had been made on the land prior to his entry and because he failed to protest against Kellogg's final entry.

In the affidavit filed in support of his application Weed states in substance as follows: On or about the day he made homestead entry for said tract in section 32, he built a house thereon and moved into said house with his family, consisting of a wife and child on or about April 7, 1884. He afterwards broke six acres of ground all his improvements being worth ninety dollars. After placing all these improvements on the land he was informed that one Sarah Kellogg claimed the land under the pre-emption law and that she had established her residence on said tract on or about March 29, 1884. That although he knew nothing of Kellogg's alleged prior settlement "yet because the surface of said tract was rolling and all parts thereof could not be readily seen without extraordinary travel over the same" he might be mistaken as to the priority of his own settlement. Because of the uncertainty as to priority of settlement, of his limited financial ability to carry on a contest, of the dissuasions of his wife, of the advice of his friends and because "it was all along growing more apparent that the threatened contest was liable to engender the most bitter feelings between neighbors who ought rather to be friends" he did not protest against the allowance of Kellogg's entry, but "withdrew from the unpleasant entanglement by allowing the entry of the said Sarah Kellogg to be made unmolested, and by removing his family, together with all his effects movable, off from said tract and thereby abandoning the same." He also states that he "did not abandon the tract through collusion, for any consideration or for the hope of obtaining gain or advantage elsewhere, but only to avoid the loss of time, money, property, and friendship necessarily incurred by a contention for said tract." This affidavit is duly corroborated by three witnesses.

It clearly appears that Weed was acting in good faith in trying to secure a homestead for his family, and that he made the first entry in ignorance of the rights of the pre-emptor and of the fact of a pre-emption filing. He could maintain his entry, if at all, only by a contest, which was likely to be bitter and expensive, and which there is no reason to assert would have been successful. Upon the full condition of his chances being apparent he withdrew, and asked to be placed in the position he would have been in had he made no mistake. I think his excuse sufficient, especially in view of the only prohibition of the statute being against acquiring title to more than one quarter section.

If exceptions are to be allowed to the rule of but one homestead entry—and the exception appears to be well established doctrine, and quite as supportable as the rule itself—they should be admitted when-

ever justice clearly requires, and no bad faith or fraud is shown, and the failure to discover the obstacle to the first entry is fairly excusable. A mistake which involves no wrong, and is attributable to causes reasonably likely to produce it, ought rarely to forfeit the privilege of gaining one homestead, when honestly sought in good faith by a genuine settler with a family.

Your decision is reversed.

Overruled so far as in conflict, 36 L.D. 561

REPAYMENT—MINERAL SURVEY.

ELIJAH M. DUNPHY.

There is no authority for the repayment of money deposited to cover the cost of office work on the survey of a mineral claim, though the money so deposited remains unexpended.

In such a case the deposit may be applied on a new survey if one is desired.

Secretary Vilas to Commissioner Stockslager, January 22, 1889.

I have considered the appeal of Elijah M. Dunphy, from the decision of your office, dated March 24, 1887, holding that there was no authority of law authorizing the repayment of moneys deposited on account of the plotting of the survey of mineral lands.

August 25, 1886, Elijah M. Dunphy deposited in the Montana National Bank, at Helena, Montana, a designated depository, the sum of $30 to meet the estimated cost of completing the work, to be done after the survey, of making plats, transcripts etc., of the Walsh and Carroll lode and received, as evidence of the deposit, certificate No. 21. This money was covered into the Treasury of the United States during the third quarter of the year 1886, by warrant No. 1683, as appears from the records of the Division of Public Moneys, Treasury Department.

After getting the order and making the survey Dunphy found that a former survey had just covered his "discovery" so that, while the bulk of the work on said claim had been done within its proper boundaries, technically there was no "discovery" to accord with the notice filed and on which survey was based. Another location was made and not being allowed to transfer the deposit made for the Walsh and Carroll lode to the account of another lode, Dunphy applied to have the amount returned to him less $5, for the inconvenience occasioned the department by having to attend to it.

The surveyor general transmits a statement of account showing that of the $30 deposited $25 is unexpended; and he certifies that said sum of $25 is justly due Dunphy, the survey of said Walsh and Carroll lode claim having been abandoned.

March 24, 1887, you denied the application for repayment on the ground that there was no authority of law authorizing its allowance.

From said decision the appeal before me was taken on the grounds that it has been the custom in such cases to make repayment and that

to refuse the application is to require payment for work which has not been performed.

Section 2334 of the Revised Statutes provides that the cost of surveying a mining claim shall be paid by the claimant who shall have the right to employ any United States deputy mineral surveyor to make the required survey. After the survey is made the claimant must file in the proper land office the plat and field notes made by or under the direction of the United States surveyor general (section 2325 R. S.).

Paragraph 84 of the circular of October 31, 1881, is as follows:

With regard to the platting of the claim and other *office work* in the surveyor general's office, that officer will make an estimate of the cost thereof, which amount the claimant will deposit with any assistant United States treasurer, or designated depository, in favor of the United States Treasurer to be passed to the credit of the fund created by 'individual depositors for surveys of the public lands', and file with the surveyor general duplicate certificates of such deposit in the usual manner.

The circular of July 9, 1883, calls attention to the foregoing paragraph and says that under no circumstances must the surveyors general receive the amount estimated by them as necessary to cover the cost of a survey and expenses incident thereto, but will insist upon the deposit being made by the applicant in a designated depository in favor of the United States Treasurer.

The money deposited by Mr. Dunphy having in due course of business been turned into the Treasury, cannot be withdrawn without authority of law. In neither of the acts authorizing repayment is provision made for a case like this. The sum involved herein is in the possession of the United States without any consideration having been given therefor and the depositor is justly entitled to its return; but, in the absence of any law providing for repayment in such cases, it is not within the power of the Department to grant the relief prayed for.

The language used by Attorney General Nelson (4 Op. 229) is in point. He says:

In reference to cases of error arising out of miscalculations of the amounts to be paid, I have had more difficulty. Money thus paid is never properly in the treasury of the United States. It is paid and received by mutual mistake; and as long as it remains in the hands of the receiving officer I can perceive no good reason why, upon the discovery of the error, he should not be authorized to correct it. After it has found its way into the treasury, however, like all other money it should be withdrawn in strict fulfillment of the requirements of law, which the administrative power of the executive department of the government cannot control.

Again, Attorney General Nelson on September 29, 1843 (4 Op., 233), in the case of the application of Wilson Shannon for the repayment of certain moneys said:

Nor am I aware of any principle upon which, under any supposed general authority of the Dept. to refund, the money once being in the Treasury, the repayment can be made. . . . . It will not do to say that the Dept. may refund simply because it is just that the money should be repaid, or that it is in the hands of the government by mistake or without consideration. . . . . The case of Mr. Shannon is unquestionably a hard one, and may evince the propriety of some general legislative

provision by which the Secretary of the Treasury may be clothed with authority to grant relief in like cases, but it can afford no warrant for the disregard by the Department of a most wholesome and salutary restraint upon the due and strict observance of which the most important interests depend.

See also Heirs of Isaac W. Talkington (5 L. D., 114) Joseph Brown (id., 316); George B. Foote (2 L. D., 773)

While the money can not be returned to the depositor, it can be applied to a new survey if one be desired.

DESERT LAND ENTRY—COMPACTNESS.

WILLIAM THOMPSON.

As the desert land act does not specifically prescribe what shall be considered "compact," an entry made in accordance with existing regulations, and for which final proof was accepted as made, will not be disturbed though not within the later requirements of the Department as to compactness.

Secretary Vilas to Commissioner Stockslager, January 22, 1889.

I have considered the appeal of William Thompson from the decision of your office, dated May 31, 1887, requiring an adjustment of the boundaries of his desert land entry No. 389, final certificate No. 141, of the Lots 2 & 3, Sec. 7, T. 11 N., R. 8 E., and the E. ½ of the SE. ¼ of Sec. 12, and the NE. ¼ of the NE. ¼, the W. ½ of the NE. ¼, the W ½ of the SE. ¼, the SW. ¼ of Sec. 13, the NW. ¼ of the NE. ¼, and the N. ½ of the NW. ¼ of Sec. 24, T. 11 N., R. 7 E., Salt Lake City, Utah Territory.

The record shows that said Thompson filed his desert land declaratory statement on October 20, 1879, and made final proof and received final certificate No. 147 on October 7, 1882.

On May 31, 1887, your office examined the papers and held that said entry "being two miles long and five eighths of a mile wide," was not compact as required by law and the regulations of this Department, and that the claimant must re-adjust the boundaries of his entry so as to bring it within the rule, and also furnish supplemental proof showing the nature and extent of his water right.

The appellant has filed, with his appeal, his duly corroborated affidavit alleging that, on October 7, 1882, he made final proof on said entry, and received his final receipt No. 147; that when he made his final proof he showed that he held his water right for said land by virtue of having taken the water from Bear river, "owning the ditch to the land, and the appropriation of the water; that Bear river is one of the largest rivers in said Territory and runs about nine miles south of said land; that he has dug a canal from said river, to the land in question; that the main canal is about sixteen feet wide and three feet deep, being filled with water, and "enters very near the southwest corner of said section twenty-four and strikes the land covered by said entry on the southeast corner, from which it runs along said entry on the east side,

along sections 13 and 12, T. 11 N., R. 7 E.", and east of said Lots 2 and 3; that where the main canal enters on said section twenty-four claimant has dug a branch canal about eight feet wide and two feet deep, running northerly, and on the west side of entry, until it makes its exit on said section 12; that he has made plow furrows about one foot wide from said canals, by which he conducts water "on and all over the land, thus thoroughly irrigating the said land."

The claimant further swears that there are no adverse claims to the right of the use of the water appropriated by him from said river; that he owns and controls more than enough water to irrigate the land covered by his said entry; that he has reclaimed the whole of said land by means of said irrigation, and also, by cultivating the same, so that the land has become productive; that he has irrigated said land from year to year since making said entry, and that he has remained in the undisturbed and peaceful possession of said land, and "in the ownership of the said waters," which he duly holds by reason of his appropriation of the same, in accordance with the law of said Territory (act of February 20, 1880).

The claimant also refers to a diagram, accompanying his affidavit, showing the main and lateral ditches referred to in said affidavit. The allegations of claimant are corroborated by the affidavits of four other persons who swear that from their "personal knowledge" the statements made by the claimant are true.

In the argument of counsel on appeal, it is alleged that it is impossible for claimant to adjust the boundaries of his entry so as to make it more compact, without diminishing his statutory right of entry of six hundred and forty acres, for the reason that by reference to the tract books on file in your office, it will appear that all of the lands surrounding this entry have been entered under the different land acts by different claimants, except a portion on the east and south "which is high mountain land, and so returned, as shown by the official plats and field notes;" that these mountain lands are above water mark and can not be reclaimed or cultivated; and hence, the claimant can not make any change in his entry unless it be to reduce the acreage of the same.

In the desert land act of Congress approved March 3, 1877 (19 Stat., 377) it is provided in section one (*inter alia*) "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;" and section two of said act provides that, "the determination of what may be considered desert land, shall be subject to the decision and regulation of the Commissioner of the General Land Office."

On March 12, 1877, (2 C. L. L., 1375) your office issued instructions relative to the provisions of said act, in which the applicant was required, among other things, to file a declaration containing "a description of the land applied for, by legal subdivisions if surveyed, or, if unsurveyed, as nearly as possible without a survey, by giving with as

much clearness and precision as possible, the locality of the tract with reference to known and conspicuous land marks, or the established lines of survey, so as to admit of its being thereafter readily identified, when the lines of survey come to be extended."

On June 25, 1878 (idem., 1377), your office issued instructions particularly with reference to claims under said act of unsurveyed lands. The foregoing were the only regulations so far as I am advised, relative to compactness required under said statute, in force at the date of said entry.

On September 3, 1880 (id., 1378), your office having been advised that in many cases, desert land entries had been made along the margin of streams, issued instructions, which were approved by the Acting Secretary, that:

The requirement of compactness of form will be held to be complied with on surveyed lands when a section, or part thereof, is described by legal subdivisions compact with each other, as nearly in the form of a technical section as the situation of the land and its relation to other lands will admit of, although parts of two or more sections be taken to make up the quantity, or equivalent of one section. But entries which show, on their face, an absolute departure from all reasonable requirements of compactness, and being contiguous by the joining of ends to each other, will not be admitted. . . . . In no case will the side lines be permitted to extend one mile and a quarter, when the full quantity of six hundred and forty acres is entered. Where the entry embraces a less quantity than a whole section, or its equivalent, the limit to the side lines will be proportionately decreased. You will, in future, be strictly governed by the foregoing instructions. Entries heretofore made, whether by legal subdivisions, on surveyed lands, or of an irregular form on unsurveyed lands, running along the margin or including both sides of streams, and not being compact in any true sense, will be suspended by this office, and the parties will be called on to amend their entries so as to conform to the law; failing to do which, after proper notice, such entries will be held for cancellation.

On January 26, 1881 (id., 1379), your office addressed a letter to the register and receiver at Helena, Montana, relative to the desert land entry of Philip Shenon, and construed said instructions as to entries made prior to the promulgation thereof. Your office held that the regulation, namely, "in no case will the side lines (of the tract of land embraced in a desert entry) be permitted to exceed one mile and a quarter when the full quantity of six hundred and forty acres is entered," was intended to govern in all cases of desert entries made subsequently to the promulgation of said circular; that entries made before the promulgation of said circular, whether by legal subdivisions on surveyed lands, or of an irregular form on unsurveyed lands, "running along the margin or including both sides of streams, and not being compact in any true sense will be suspended" by your office and the parties will be called upon to amend their entries so as to conform to the law; "that said circular contained no special instructions relative to entries made prior to the date thereof, and not 'running along the margin or including both sides of streams;' that in cases where it shall appear that the irregularity resulted from the configuration of the country, or from the

contiguity of other entries, or other good cause, and it shall be shown that the entry was made in good faith, and not for the purpose of monopolizing water rights, and the land has been actually reclaimed; that where the entry can not be amended without injustice to the claimant, if made prior to September 3, 1880, it may be allowed to stand where the rights of no other party are prejudiced thereby; and that "each case of this character will be adjudged upon its merits."

The circular of September 3, 1880, so far as it relates to compactness, is substantially embraced in the Gen. Circular issued March 1, 1884 (page 35).

The decisions of the Department have not been altogether uniform in the construction of said act. In the case of Rivers *v.* Burbank (9 C. L. O., 238) my predecessor, Secretary Teller, held that the land in question was not subject to entry under the desert land act, and that the desert land entry being one and three fourths miles in length would not be allowed to stand. In the case of Mrs. Joseph Lea (11 C. L. O., 45), your office refused to allow her to make final proof upon desert land entry No. 30, made by her father in his life time, it being one fourth of a mile wide and one and three fourths miles in length, and containing two hundred and eighty acres. But on appeal, the Department held that "since it appears that the entryman was allowed to enter said tracts without objection, and that he has spent much time and money in reclaiming them, it would work hardship and injustice to enforce against him the regulation referred to." The case of Rivers *v.* Burbank (*supra*) was cited, in the case of R. W. Makinson (4 L. D., 165), holding that in the former case, it appeared that the land, at the date of Burbank's entry, was in no sense desert land, but had been reclaimed thirteen years prior to the passage of the desert land act. In the case of Lizzie A. Devoe (5 L. D., 4), the desert entry was for four hundred and eighty acres, and measured a mile and a quarter from east to west, and my predecessor, Secretary Lamar, held that the regulation of the Department as to compactness "is, by its own terms, not a rigid and inflexible one," and that in determining whether an entry is within the regulations of the Department as to compactness, its relation to adjacent lands may be properly considered. In the case of Francis M. Bishop (id., 429), the desert land entry being three fourths of a mile wide and one and one quarter miles long, the Department modified said regulation by striking out the paragraph, namely, "In no case, where the full quantity of six hundred and forty acres is entered, will the side lines on either side, be permitted to exceed one mile and a quarter, and less in proportion in case the entry embraces less than a whole section or its equivalent." In the case of James S. Love (id., 642) it appeared that the desert entry being for 173.44 acres was one mile in length. Your office held the entry for cancellation because it was not compact. But Acting Secretary Muldrow reversed the decision of your office and held

on appeal, that it appeared of record that the lands immediately adjoining the lands in question have all been entered under the desert land law by other parties, so that there was no way of rendering said entry more compact than it is, and still retains the same quantity of land; that "the case is precisely like that of Ann E. Miller, decided by this Department May 22, 1886. In that case the entry was a mile long and a quarter of a mile wide, and the adjoining lands were all appropriated by other persons," and her entry was allowed to remain intact. In the case of John Durbize (6 L. D., 536) the Department held that under the rules and regulations in regard to desert land entries in force at the time said entry was made, it was not allowable to permit an entry along the margin or including both sides of a stream, showing gross departure from all reasonable requirements of compactness.

An inspection of the records of your office shows, that the allegations of the claimant are substantially true, relative to the appropriation of tracts adjoining said land, and the position of a hill on the east and south of said entry so that he can not now adjust his boundaries without diminishing the amount of land entered by him. Besides, the width of his entry, measuring from the west line in said sections 13 and 24, to the east line of said lots in section 7, is one mile and not five eighths as stated in said decision of your office. It is true that the entry is irregular, as to that portion lying in the NE. ¼ of said Section 13, the SE. ¼ of Section 12, and the lots in Section 7. But when said desert application was filed, as we have seen, it did not conflict with the regulations of your office construing the desert land act. The local officers accepted the first payment upon said land. The entry does not lie along the margin or on both sides of any stream, and it appears, that the claimant has brought water from Bear river a distance of nine miles to his claim, and that he has complied with the requirements of the law as to reclamation. In the case of David B. Dole (3 L. D., 214), my predecessor, Secretary Teller, considering the question of assignments of desert land entries allowed under departmental regulations dated March 12, 1877, which were subsequently revoked in the case of S. W. Downey (7 C. L. O., 26), held that the ruling in the Downey case was correct, except that part which held that "there is no discretion either in this act, or by any other law, which authorizes me to treat such claims assignable, because the assignment was made under a misapprehension." And referring to that part of said ruling, Secretary Teller said:

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.

But the Secretary further held that an assignee of an entryman, prior to final entry, could not acquire under said act more than six hundred and forty acres of land.

On September 15, 1887, Acting Secretary Muldrow (6 L. D., 145) advised your office relative to the proper construction of the third section of the desert land circular of June 27, 1887 (5 L. D., 708), concerning the price to be paid by the entryman where the initial entry was made prior to the promulgation of said circular. The Acting Secretary held that the making of an entry under the desert land law is a contract between the entryman and the United States, the entryman agreeing to reclaim the tract entered from its desert condition, and to pay for the same at the government price, and the United States agreeing to give him a patent for said land upon the performance of the conditions in the contract; that this contract, like all others, is to be construed and enforced according to the sense in which the parties mutually understood it at the time it was made (1 Chitty on Contracts, 104) and that effect is to be given to it, according to the law at the time it was made, (id., 130).

The Acting Secretary further held that the construction of the Department "which had been in existence from the date of the act until the date of the present circular, had, while it existed the force and effect of *law* so far as rights acquired under it are concerned," that it was a construction of the law by the head of the Department charged with the execution of it, and the law was administered according to this construction; that it made no difference that the construction of the law has changed; that the sound and true rule is, that if the contract, when made, was valid by the law as then interpreted and administered, its validity and obligation can not be impaired by any subsequent decisions altering the construction of the law. Citing Rowan *et al. v.* Runnels (5 How., 134); Ohio Life and Trust Co. *v.* Debolt (16 id., 127); Gelpcke *et al. v.* City of Dubuque (1 Wall., 175).

Since the desert land act does not specifically prescribe what shall be considered "compact" with reference to the tract entered, and said entry was made in accordance with the rules and regulations in force at the time it was made, and since it appears that the government, not only failed to require him to amend his entry prior to the allowance of his final proof showing reclamation in good faith of the land, but also continued to dispose of the adjoining tracts for five years subsequent to final entry, I am clearly of the opinion that, both upon principle and authority, the entry should be approved and passed to patent.

The decision of your office is modified accordingly.

Overruled, 9 L. D. 360

OSAGE LAND—FINAL PROOF—ADVERSE CLAIM.

EPLEY *v.* TRICK.

In the absence of express statutory provision to that effect, it cannot be held that failure to submit final proof within six months after Osage filing renders the claim thereunder subject to the adverse right of a subsequent settler.

The case of Rogers *v.* Lukens, and other cases following the ruling therein announced, are overruled.

Secretary Vilas to Commissioner Stockslager, January 22, 1889.

I have before me the appeal of Charles Epley from your decision of September 21, 1886, holding "subject to Trick's completion of entry in due form," his (Epley's) declaratory statement No. 7299, for the NE. ¼, Sec. 27, T. 21 S., R. 20 W., "Osage Indian trust and diminished reserve" land, Larned district, Kansas.

The records show that Trick filed declaratory statement No. 6204, for said tract, on November 6, 1884, alleging settlement on November 4, 1884, and, after due notice, tendered proof on May 25, 1885, when he was met by Epley's protest, on which a hearing was ordered and held October 14, 1885.

After a careful examination of the record I concur in your findings of fact, as set forth in your said decision, and therein summed up as follows: "That Trick made settlement in good faith, and that, under the circumstances, his residence was begun at as early a date as possible, and within a reasonable time from the date of his settlement; that Epley knew of his (Trick's) claim to the tract, and although he had doubt as to Trick's intention to return, yet, he settled upon the claim at his peril. Trick is clearly shown to be an actual settler."

Upon this basis of fact you hold that Trick should be allowed to perfect his entry in due form, notwithstanding his failure to make proof and payment within six months after his filing, as required by the instructions regulating the sale of the Osage lands. This holding is inconsistent with the ruling in the case of Rogers *v.* Lukens (6 L. D., 111), to the effect that "failure to submit final proof within six months after Osage filing, as required by the regulations of the Land Department, renders the claim thereunder subject to any valid intervening right." If, accordingly, this last-named ruling is to be adhered to by the Department, the decision now under consideration cannot be sustained.

But, after a careful examination of the question, I am constrained to differ from the view adopted in Rogers *v.* Lukens, for the reasons now to be stated.

The regulation referred to is contained in instructions issued by your office under date of June 28, 1881, and reads as follows:

In entries hereafter made under section two, the general principles of the pre-emption law in respect to filing, proof of settlement, and notice of making proof, will be required to be followed, and filings must be made within three months from date of settlement, and proof, and payment of not less than one-fourth of the purchase price, within six months from date of filing, with notice by publication as required in other pre-emption entries.

This, it is apparent, does not attach to a *failure* to make proof and payment "within six months", such a penalty as forfeiture of the settler's interest in the land. The provision is so clearly a merely "directory" one, that even if Congress had made it a part of the statute itself, a failure to regard it could not properly have been held to involve, as a consequence, the destruction of the settler's right to purchase under the act. Had so severe a sanction been deemed expedient, the requirement to be thereby enforced would have been followed by an express announcement that a failure to comply with such requirement would involve a forfeiture of the claim. There being no such express provision, the requirement is not to be treated as mandatory, but as directory merely.

The text of the statute (21 Stat., 143, Par. 2), reads as follows: "That all the said Indian lands . . . . . shall be subject to disposal to actual settlers only, having the qualifications of pre-emptors on the public lands. Such settlers shall make due application to the register with proof of settlement and qualifications as aforesaid; and, upon payment of not less than one-fourth the purchase price shall be permitted to enter," etc.

There is here no provision that the proof and payment required must be made "within six months from the date of filing," and, no such condition having been imposed, with penalties, by the statute, no such consequence as forfeiture of the right to the next claimant ought to be applied.

As a merely directory provision, the regulation in question seems to me to be entirely proper and expedient, and one which might in a proper case be enforced after due *notice* to a settler that he must make proof and payment within a specified period or his entry will be canceled for disregard of the regulation.

For these reasons, the said decisions, to wit: Rogers *v.* Lukens (6 L. D., 111); Reed *v.* Buffington (7 L. D., 154); Elliott *v.* Ryan (7 L. D., 322); Baker *v.* Hurst (7 L. D., 457); are hereby overruled.

The decision appealed from is hereby affirmed.

PRACTICE—MOTIONS FOR RE-REVIEW.

NEFF *v.* COWHICK.

Motions for a second reconsideration of a decision should not be allowed, and the practice of permitting them to be filed is discontinued.

After disposition of a case on review, suggestions of fact, or points of law, not previously discussed or involved in the case, may be presented by petition for such action as may be deemed appropriate by the Department.

Secretary Vilas to Commissioner Stockslager, January 22, 1889.

On the 11th of May, 1888 (6 L. D., 660), the Department decided the appeal in this case, and on the 21st of August, 1888 (7 L. D., 245), de-

nied a motion for a re-hearing. The case is simply a contest by Neff of Cowhick's homestead entry, No. 454, of the NW ¼ of the NE ¼, the SE ¼ of the NE ½, and Lots 1 and 3, in Sec. 24, T. 14 N., R. 67 W., made December 19, 1882, at the Cheyenne land office in the Territory of Wyoming.

The contestant now files a second motion for a review. The first ground of the motion is that the opinion on the motion for re-hearing was prepared by the same law clerk or examiner who wrote the original decision. This ground of motion is not properly to be urged on the part of counsel. Decisions are made by the Secretary or one of the assistant Secretaries, by whatsoever law clerk the opinion may be written, and were there not a usage to which counsel refers it would be a reproach to thus intimate in a formal motion that the duty of examination is not discharged.

The second ground of the motion is that the decisions "fail to notice in any way the very important admission made by the defendant, Cowhick, in his affidavit of April 9, 1886." The importance of the alleged admission in its effect upon the decision of the case is a matter of opinion. Whatever its importance, notice was given to the fact, although nothing was thought necessary to be said about it in the opinion.

* * * * * * *

Motions for a re-review, or a second reconsideration of a decision, should not be allowed, and the practice of permitting them to be filed ought to be discontinued. The Department ought not to be asked to consider the same points involved in a case but twice. It is natural to litigants, and occasionally happens to counsel, to see with an exaggerated estimate of their strength the importance of the points which make in their favor and to attribute the failure of a like perception of them to the Department, or by courts, when the causes are depending in courts, to an inattention to such points. The over-burdened condition of the appellate business of the Department would be reason enough, if there were not still better ones for inhibiting the gratification of this feeling by allowing second motions for reconsideration, with the consequent labor and delay. Hereafter, let the rule be that no motion for a re-review shall be filed. If the defeated party is able to present any suggestions of fact or points of law not previously discussed or involved in the case, it may be done by petition, which shall contain all the facts and arguments. On the filing of such petition, if it appears important, the Secretary will make such order for recalling the case from the General Land Office and such direction for further hearing as may be necessary. Otherwise, no further action on the petition will be taken. It will be regarded merely as in the nature of information by which the supervisory jurisdiction of the Department can, if desirable, be set in motion. Such petition should not re-argue points already twice passed upon, but should be limited to the office indicated of suggesting new facts or considerations not before presented.

DESERT LAND ENTRY—NON-IRRIGABLE LAND—FINAL PROOF.

EMMA J. WARREN.

A desert land entry cannot be allowed to include an eighty acre tract of non-irrigable land.

When the final proof does not show that crops have been raised on the land, the entryman should be required to furnish other evidence of a satisfactory character to establish the fact of reclamation.

Secretary Vilas to Commissioner Stockslager, January 22, 1889.

On June 18, 1883, Emma J. Warren filed her declaration of intention, No. 665, to reclaim the W. ½ of NE. ¼, the NW. ¼, the SW. ¼, and the SE. ¼ of Sec. 8, T. 12 N., R. 67 W., Cheyenne Wyoming, under the provisions of the act of Congress, approved March 3, 1877 (19 Stat., 377). She submitted proof in April, 1885, and final certificate and receipt were duly issued.

The claimant stated in her final proof that she obtained water under a right conferred by law, which right is not a matter of record. Thereupon, by letter dated November 17, 1885, your office required the claimant, with a number of others, to furnish "such supplementary proof as to their title to their water right as the case admits of and requires."

In pursuance of the foregoing, the claimant averred in her affidavit filed April 13, 1886, that she took the water from Lone Creek and from Duck Creek, for the purpose of irrigating said lands, under a right conferred by section 2339 of the U. S. Revised Statutes, and chapter 65 of the compiled laws of Wyoming.

Section 2339 provides that where, "by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized by local customs, laws and the decision of the courts, the possessors and owners of such vested rights shall be maintained and protected in the same."

Chapter 65, Compiled Laws of Wyoming for 1876, p. 377, enacts that persons who own or claim land on the bank, margin or neighborhood of a stream, creek or river, shall be entitled to the use of water therefrom for the purposes of irrigation, and provides that such persons shall have the right of way through farms or tracts of land which lie above or below on such stream "for the purposes hereinbefore stated."

The claimant further averred in her final proof that she had the right and proprietorship of water sufficient and available to continue the irrigation of the land and that it was her purpose to continue its use for the purpose of reclamation and that she had irrigated every legal subdivision embraced in her entry, "excepting two forties." Thereupon on May 29, 1886, your office directed that "if the two forties have not been irrigated, and cannot be reached by artificial irrigation, they must

be surrendered," and required her to make supplemental proof, "as to irrigation of the whole of the entry," and "also as to the actual raising of crops."

Upon receipt of the claimant's appeal from the foregoing your office directed the local officers to call upon the claimant for information showing the particular land that had not been reclaimed. The affidavit of the claimant's agent was duly transmitted in pursuance of the above, and on November 8, 1886, your office again directed that the claimant relinquish the N. ½ of NW. ¼ of said Section 8, and make supplementary proof "showing the irrigation of all the balance of the entry."

From both of said decisions the claimant appeals. The claimant's agent, in his said affidavit, stated that the eighty acres (the two forties mentioned), which the claimant failed to irrigate, "is a hill which rises abruptly from the surrounding country, and is not in a range of hills, and it is therefore impossible to convey water" thereon. In the case of Levi Wood (5 L. D., 481); and of Owen D. Downey (6 L. D., 23); the Department allowed the desert land claimants to retain, in the absence of an adverse claim certain rocky and hilly portion of their entries, the claims being made in good faith and the irrigable portions thereof substantially reclaimed.

In both the cases mentioned, the high and rocky land that had not been irrigated were portions of legal subdivisions of forty acres each, the remainder of which had been reclaimed.

The case at bar is, however, similar to that of William H. Holland (6 L. D., 38). The entryman in the case cited failed to irrigate two of the forties embraced in his entry, they being high and rocky. The Department held that as these forties "have not been irrigated at all," they "can not be included in the entry."

Upon the other point appealed from, your decision is also affirmed in requiring additional proof, showing a satisfactory reclamation of the land by such means as will give reasonable promise of permanence. It must be qualified, however, so far as it insists upon an actual raising of crops as an absolute condition or evidence of reclamation. See George Ramsey (5 L. D., 120); Charles H. Schick (ibidem, 151). The raising of crop is not made by the law a necessary fact; the reclamation may be established without it; yet, as the object of reclamation is to raise crops—among which I would include crops of grasses that would not otherwise grow upon the land—it is one evidence of reclamation usually to be expected as an accompanying fact. When, therefore, the proof fails to show that any crops have been produced upon the land, it ought to be required of the entryman to give satisfactory and trustworthy testimony of other facts which will satisfy the mind that the reclamation has in fact been made.

RIGHT OF WAY—ACT OF MARCH 3, 1875.

DAKOTA CENTRAL R. R. CO. *v.* DOWNEY.

The right of way privilege conferred by the act of March 3, 1875, does not attach on the filing and acceptance of the company's articles of incorporation and proofs of organization, but when the line of road is definitely fixed, either by actual construction, or the filing of a map showing its definite location.

It is not necessary for a company which has filed its articles of incorporation and proofs of organization, and constructed a road over unsurveyed public lands to file a map of definite location in order to entitle it to the benefit of said act.

When a railroad is constructed over unsurveyed lands, and an entry is subsequently allowed for land through which the road extends, the notation of the company's right on the entry papers is not required or authorized by said act.

The patent under an entry thus allowed may properly contain a statement that it is issued subject to the right of the company under said act.

Secretary Vilas to Commissioner Stockslager, January 22, 1889.

I have considered the case of the Dakota Central Railroad Company *v.* Michael J. Downey, as presented by the appeal of said company from the decision of your office, dated September 24, 1884, refusing to have notes made upon the entry papers of said Downey, in order that the patent when issued might contain a reservation of the company's right of way, and right to the use and occupation of twenty acres for station purposes.

The record shows that said company, on January 19, 1881, filed in your office a map showing the route of its road from a point on the east line of Tp. 111 N., R. 65 W., to a point on the Missouri river, passing through Tp. 111 N., R. 77 W., said last named township not having been subdivided at that time.

Your said decision states that said map was returned to the company for correction, and it was again filed in your office on May 13, 1881; that this Department, on January 24, 1882, approved said map, under the provisions of the act of Congress, approved March 3, 1875 (18 Stat., 482), and a copy of the same was, on January 31, 1882, forwarded to the land office at Mitchell, in Dakota Territory, with instructions to mark upon the township plats and records the line of the road, where the lands had been surveyed, and thereafter to note upon all entry papers where the claims were initiated subsequent to the receipt of the copy of said approved map that the entries were allowed subject to the right of way of said road; that a copy of said map was received by the local land officers on February 5, 1882.

The company, on April 25, 1883, filed a second map of the line of its road, showing its connection with the subdivision of the townships, which had been subdivided and the plats filed in the local office since the approval of the first map filed by said company; and said second map was approved by this Department on May 28, 1883, and a copy of the same, with instructions similar to those previously given, was for-

warded to the local land office on June 23, where it was received on June 28, same year.

It further appears from said decision that said company on January 14, 1882, filed a plat showing the selection of a tract of twenty acres in township 112 N., range 77 W., for station purposes, which was approved on May 11, and on June 9 following a copy thereof was transmitted to, and received by, the local office on June 16, 1882; that the register and receiver were directed to file said plat, and await further instructions, when the township shall be subdivided; that "on May 2, 1883, the railway company filed a second plat, showing the twenty acres in question. . . . . to be located in the NW. ¼ of the NW. ¼ of Sec. 25, and the E. ½ of the NE. ¼ of Sec. 26, 111 N., 77 W.," which was approved on December 20, 1883, and a copy was sent to the local office on January 8, 1884, with instructions to the register and receiver to note the location of said land upon the proper records of said office, and that in disposing of the subdivisions, including the land selected, wherever the claim was initiated subsequent to the receipt of said approved plat of selection, the local land officers must write on the entry papers that the entry was allowed subject to the right of said company to use and occupy said land for station purposes.

It is further shown by the record that, on September 20, 1882, said Downey made timber culture entry, No. 10,260, of the NW. ¼ of Sec. 12, T. "112" N., R. "72." The description of the land "in question" in the decision of your office does not correspond with that of the land covered by Downey's said entry, the selection of the company for station purposes being given in sections "25" and "26" T. "111" N., R. "77" W. An inspection, however, of the records of your office shows that the township plat of survey of 111 N., R. 72 W., was filed in the local office on September 19, 1882; that on July 25, 1881, the company filed in your office a map of its constructed road from the east line of the northwest quarter of Sec. 24, T. 110 N., R. 51 W., 5th P. M., in said Territory, to the bank of the Missouri river in Sec. 32, T. 111 N., R. 79, 5th P. M. passing through the land in question.

On November 22, 1881, the company filed in your office plat for station grounds in T. 112 N., R. 72 W., approved Jan. 30, 1882, received at local office Feb. 13, 1882, and on October 27, 1883, filed its plat showing its selection of twenty acres for station purposes, ten acres of which are located in the SW. ¼ of the NW. ¼ of Sec. "12" T. "112" N., R. "72" W., and ten acres in the SE. ¼ of the NE. ¼ of Sec. 11, same township and range. This map having been examined and found to correspond with said map of location was approved and filed in your office.

Said company made application to your office to have the entry papers corrected, so that the patent, when issued, should contain an express reservation of the company's rights in the premises. This application was refused by your office on September 24, 1884, for the reason that under the provisions of said act, as construed by this Department, the

company "can only claim the benefits thereof after a map of its road has been approved by the Secretary of the Interior, and noted on the plats of the local office, and that the lands along the line of the road sold prior to the approval of the map can not be affected by the provisions of the act."

The company, in its appeal from said decision, insists that its right attached at the time of the filing and the acceptance of the articles of incorporation and due proofs of organization, on July 9, 1879, and that Downey's entry is subject to the company's right of way and right to the use of said land as station ground, as shown by said plat.

This case involves a consideration of the act of March 3, 1875, granting to railroads the right of way through the public lands of the United States; and the difficulty is, to determine the extent to which the fourth section of the act is to be applied as a qualification of or limitation upon the present grant contained in the first section. It is obvious that the first section is a present grant. The language used is such as has repeatedly been declared by the supreme court to operate a present grant by Congress. This interpretation has been applied to grants of lands for right-of-way of lands to aid in the construction of railroads, wagon-roads, and canals, and to the swamp land grant to the States by the acts of 1849 and 1850. The cases of Railroad Company *v.* Baldwin (103 U. S., 429), the Central Pacific Railroad Company *v.* Dyer (1 Sawyer, 641), and the Central Pacific Railroad Company *v.* Benity (5 Sawyer, 118), are illustrations of the application of this rule of interpretation to grants of rights-of-way to railroads.

But it will be noticed that there is one point of difference between the present grant of this act and those where a single grantee, as a State or a railroad company, is named. In this grant, not only is the land indefinite in location, and therefore a float—in the language sometimes employed with respect to grants of land to aid in the construction of railroads or otherwise—but the particular corporation is indefinite and uncertain. In order, then, to make this grant attach, it is necessary to provide fixity of grantee, as well as fixity of location upon the ground.

To determine what company shall be considered as a grantee or beneficiary under this act, the first section provides simply that it shall be "any railroad company organized under the laws of any State or Territory . . . . . which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same." Immediately, therefore, upon the filing of these two documents, the company stands in the attitude of being named in the act, as entitled to its benefits, so far as the grantee is concerned—I think no farther; and that thereafter its relation is the same as that of the State, or the particular railroad company, to which, by similar acts grants of lands have been made for such purpose.

There must remain afterwards the necessity, in order to define the subject granted, to give fixity of location to the *land*. The same rule ought

to determine the time when the grant becomes attached to particular land, which has been declared by the supreme court in respect to other cases of grants of floats. The act fixes this. It declares, in the first section, defining this present grant, that the company has granted to it the right-of-way, "to the extent of one hundred feet on each side of the central line of said road; also the right to take from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right-of-way for station-buildings, depots, machine-shops, side-tracks, turn-outs, and water-stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road." As to the roadway, the construction of the road fixes the boundaries of the grant, and fixes it by the exact rule of the statute. As to the grounds for station-buildings, etc., the right is absolute to the quantity named, for one station to each ten miles of the road. (Perhaps the approval of the Department is necessary to its specific definition; but that needs not to be now decided.) This must undoubtedly be the rule when the road is constructed over unsurveyed lands, because then every condition necessary to the vigor of the present grant is complied with. The fact that the railroad company may locate and construct its road upon unsurveyed lands is clearly recognized in the fourth section of the act; and the regulations of the Department have been made to apply to such cases, and authorizes such construction.

It seems to me that the fourth section of the act was written for another purpose, and for another case. It relates to the case of a railroad company which desires to secure the present grant, and give to it fixity of location, *before* its road shall be constructed; and it is designed to provide a similar privilege in respect to rights of way which acts granting lands to aid in the construction of railroads have provided—namely, the privilege of giving fixity of location to the subject of the grant *before* construction of the road. Thus it begins by stating that it relates to the case of "any railroad company desiring to secure the benefit of this act." Evidently, this language is used of a company which contemplates building a road, and it speaks of the filing of a profile of its road, as a thing to precede the construction. The proviso to this section also clearly indicates that the section was designed to relate to cases where the railroad company seeks to secure the definite location of its right-of-way before building; and it indicates a period of five years within which the company, after having secured its right-of-way, may build; but upon failing to do it the right-of-way shall be forfeited. It contemplates, first, the "location" of the line of the road—authorizing it to be done in sections of twenty miles each. This "location" must mean the determination by the corporation, through its stockholders or board of directors, of the projected line upon which it purposes to construct the road. That "location" must precede construc-

tion; and it must also precede the filing of a profile, which is only another phrase for a map of definite location—a phrase frequently used in acts granting lands in aid of the construction of railroads. Then it is provided that, if the location be upon surveyed lands of the United States, this profile must be filed with and approved by the Secretary of the Interior, as the center line of the road; and being filed in the office of the register of the land office of the district where the public land is located, it is enacted that "thereafter all such lands, over which such right-of-way shall pass, shall be disposed of subject to such right-of-way." If, however, the railroad company has located its road upon unsurveyed lands, but not constructed it, then, within twelve months after the survey by the United States, the profile of the road must be filed in like manner; and from that time the clause above quoted applies—"land over which such right-of-way shall pass, shall be disposed of subject" to it. It seems to me clear that the purpose of Congress in this 4th section was only to provide means by which railroads could define, or definitely locate, the right-of-way, of two hundred feet in width, with station grounds, etc., desired for the road which was to be thereafter constructed; and that, as in the case of other grants or "floats," the right of the grantee, in its relations to settlers on the public lands attached from the date of filing the map of definite location.

But inasmuch as it is obvious that the railroad company has a perfect right to build upon unsurveyed lands, and that the construction of its road then fixes the exact line, from which the right-of-way is to be measured, in cases where a road has been constructed in fact, through unsurveyed land, its right is as perfect to the right-of-way defined by this statute, by measurement from its center line, as it is possible for it to be. The grant is complete, and defined in fact.

It does not become necessary for a road which has secured the benefits of this act, by taking the steps which give it the attitude of being named in the first section as a grantee, and by building a road through the public lands, whereby the subject of the grant has been defined, to file a map of definite location in order to entitle it to the benefits of the right-of-way.

The fourth section is designed to provide a mode by which fixity of location can be secured to a grantee, *in anticipation* of that construction by which location is defined in the section making the grant, and which shall have the effect, before the construction of the road, which the terms of the grant limit to "the central line of said road;" which only means—without the fourth section—a *constructed* road.

This interpretation of the act seems to me to solve the difficulty that has been suggested, and to solve it in accordance with the purpose and intention of Congress. If a road has been constructed through unsurveyed lands, every person who makes entry upon any given subdivision surveyed after the construction of the railroad, does so with

notice of the fact that the railroad owns a right-of-way to the extent of one hundred feet in width on each side of the central line of said road. Any patent granted to a subdivision evolved by the survey, which should include a portion of this grant to the railroad company, must therefore be subject to that grant, because the grant is already perfect and complete. The cases in which notes are to be made on the entries of public lands are those of entries made before the construction of the road, for the purpose of excepting the grant to the railroad company, thus made upon the condition that the road shall be completed within five years, or the grant shall be forfeited.

If it were to be held that a railroad company has a right to build its road on unsurveyed land, and yet, perhaps years subsequently to the date of the completion and operation of the road, and the actual appropriation of the land (under the first section) for station-buildings, depots, machine-shops, side tracks, turn-outs, and water-stations, within the limited quantity, that its right to the continued benefit of the ground for right of way, station grounds, etc., must depend upon its filing a profile of its road, after the township plats of survey are deposited in the land office, but before any other claimant can make a timber-culture entry, or a homestead entry, or file a pre-emption declaratory statement, or other step under the laws for the acquisition of public lands, it would be simply to deny to the company the benefit of the first section of the act. It would be impossible for the company to comply with the condition of filing a profile as quickly as individual settlers could file entries upon the land. A timber-culture entry might be filed on a quarter-section which would embrace the depot-grounds of a company, including its buildings, side tracks, etc., and it would be unreasonable, in my judgment, to suppose that Congress intended in said act that a railroad company, which had constructed its road prior to the initiation of any claim or right under the laws for the disposal of the public lands, should be compelled to purchase its improvements and right of way from the subsequent claimant. But since it appears that said entry was made after the construction of said road over the land in question and before survey, it does not appear to be necessary to make any notation on the entry papers, nor is there any right in the company to insist upon it. Nor does the statute provide for any such action in such a case. But, as the disposition of the land to the timber culture entryman must be in fact subject to the rights of the railroad company, as the nature and extent of those rights depend upon proof of facts not required to be shown on the records of your office, it appears to me a case where a proper administration of the statute authorizes a statement in the patent, when it shall be issued, that the grant is subject to rights acquired by the railroad company under the act of March 3, 1875.

Your decision is modified.

HOMESTEAD ENTRY—PRACTICE.

LEWIS PETERSON.

The local office should not allow a homestead entry to be made for land involved in a prior contest, pending on appeal before the Department.

Secretary Vilas to Commissioner Stockslager, January 23, 1889.

August 29, 1887, Lewis Peterson made application at the land office at Olympia (now Seattle), Washington Territory, to enter under the provisions of the homestead law, Lots 3 and 5, the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Section 32, T. 24 N., R. 1 W., and tendered the fees required by law.

The local officers rejected the application on the same day "for the reason that the same conflicts with the cash application of William Wright, under his timber land sworn statement No. 2372, made December 30, 1885, and for the further reason that said tracts are in contest between said William Wright claiming said land or part thereof under his above timber land application, and final proof thereunder, and Hans Larson, claiming said land by virtue of his pre-emption declaratory statement No. 10,184, which contest is now pending before the Hon. Secretary of the Interior on appeal."

August 5, 1886, Wright tendered proof and payment for the land embraced in his sworn statement and Larson filed a protest against the acceptance of the same, and at the date of your decision, the case was still pending. You held that the tracts cannot be entered until the contest shall have been finally disposed of.

After the local officers have rendered a joint report and opinion in a contested case and have forwarded to the Commissioner of the General Land Office, all the papers in the case as required by rules 51 and 52 of practice, Rule 53 provides that "the local officers will thereafter take no further action affecting the disposal of the land in contest until instructed by the Commissioner." The decision appealed from was in conformity with this rule, and it is affirmed. Wade *v.* Sweeny (6 L. D., 234); Hotaling *v.* Currier, (5 L. D., 368); Stroud *v.* De Wolf, (4 L. D., 394).

Herewith are returned the papers in the case.

MINING CLAIM—PRACTICE—PROTESTANT—APPEAL.

BRIGHT ET AL. v. ELKHORN MINING CO.

A protestant against the issuance of mineral patent who stands solely in the relation of *amicus curiæ*, and who alleges no interest in the result of the application for patent, is not entitled to the right of appeal.

A mineral claimant cannot ask the Department to say that a protestant, who alleges an adverse interest, is barred by failure to properly adverse within the limited time, unless he establishes the facts which cause such time to begin to run; such a protestant therefore has a right to show that proper action was not taken to bring him within the statutory period of limitation, and to that extent only he is entitled to the right of appeal.

Secretary Vilas to Commissioner Stockslager, January 25, 1889.

This is an application for certiorari filed by A. F. Bright and T. T. Nicholson, praying that the record in the above case be certified to the Department for consideration upon their appeal from your decision of July 25, 1888, dismissing their protest.

This case arises upon a protest filed by Bright and Nicholson against the issuance of patent to The Elkhorn Mining Company for mineral entry No. 1099 of the A. M. Holter Lode, Helena, Montana, said protest alleging that:

> The location of said claim was illegal, in that the boundaries were not defined by stakes at the corners thereof, and that the claim as surveyed and entered embraced ground lawfully claimed and possessed by them as owners of the Sophia Lode.

You dismissed said protest, but, subsequently, granted a rehearing, upon the ground of newly discovered evidence, and upon the further ground that the application for rehearing alleged that notice of said company's application for patent and the official plat of its claim were not posted upon the premises during the statutory period of publication.

Upon said hearing the local officers found that the posting on the claim was duly made, and recommended that the protest be dismissed.

On July 13, 1888, your office affirmed the finding of the local officers, dismissing the protest, and closed the case. Whereupon, the protestants filed an appeal from said decision, which you declined to transmit, upon the ground that:

> A protestant who is not a party litigant and appearing merely as *amicus curiæ* has no right of appeal. I decide therefore that said protestants, Bright and Nicholson, have no right of appeal, and decline to forward the papers.

The question presented by this application is, whether in any case a protestant may be entitled to the right of appeal from the decision of the Commissioner of the General Land Office.

A person protesting against the issuance of patent upon a mineral claim, who stands solely in the relation of *amicus curiæ*, and who alleges no interest in the result of the application, can not question the judgment of the land office in passing upon said application and protest, and is not entitled to the right of appeal from such decision. And

this is so whether the mineral claimant has or has not complied with the terms of the statute, because if the protestant claims no interest in the suit, the right of the mineral claimant will be considered solely as between the claimant and the government. But where a protestant shows possession of an interest, either present or prospective, depending upon the final determination of a protest against the issuance of patent to a mineral claimant, and shows that the claimant has failed to comply with the terms of the statute, as to the posting and publication of notice of his claim and application for patent, or any other failure to comply with the terms of the statute, whereby the limitation of the statute ought not to operate against the protestant, he is entitled to the right of appeal upon said protest, although no adverse claim was filed within the period prescribed by the statute.

Section 2325 of the Revised Statutes provides that:

> Any person, association, or corporation authorized to locate a claim under this chapter, having claimed and located a piece of land for such purposes, who has, or have, complied with the terms of this chapter, may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field-notes of the claim or claims in common, made by or under the direction of the United States surveyor general, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land office, shall thereupon be entitled to a patent for the land, in the manner following . . . . At the expiration of the sixty days of publication, the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the register and receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter.

The applicants in this case allege that notice of the application for patent was not made as required by the statute; that no notice was given by posting on the claim, and that said notice was illegal, in that the boundaries of said claim were not defined by stakes, and that the claim as surveyed and entered embraced ground lawfully claimed by applicants as owners of the Sophia Lode; that they had no notice of said application, and therefore no opportunity to file an adverse claim and to proceed in the courts to assert their rights as adverse claimants under the provisions of the statute.

These protestants show by their application that they are not mere protestants without interest in the result of the suit, but are claimants who assert a present interest, and that the application for patent embraces ground lawfully claimed by them as owners of the Sophia Lode. They allege that notice of the application for patent and the official

plat of the claim were not posted upon the premises during the period of publication, and that protestants had no notice of such application. If these allegations are true, they show that protestants had no opportunity to file an adverse claim within the period of publication prescribed by the statute, and they are therefore by the very terms of the statute not barred from urging their objection to the issuance of patent, and to assert their rights as adverse claimants, no legal notice having been given. The statute in express terms provides that:

> If no adverse claim shall have been filed with the register and receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter.

If the claimant has complied with all the terms of the statute and no adverse claim is filed within the prescribed period of publication of notice of the claim and application for patent, it will bar all persons from afterwards asserting an adverse claim, and no objection from third parties to the issuance of patent can thereafter be heard, because in the absence of an adverse claim filed within the period of publication, it will be presumed that the applicant is entitled to a patent and that no adverse claim exists. This presumption is conclusive, and will bar all persons from asserting an adverse claim after the period of publication prescribed by the statute. But if the mineral claimant fails to comply with the terms of the statute as to posting, publication of the application for patent, and plat showing the boundaries of the claim, or with any other requirement of the statute affecting the rights of adverse claimants, no such presumption arises and any one having a present or prospective interest in the subject matter of the suit, which may be affected thereby, may by protest allege such failure, and also show that he has an interest in the result of said suit, and upon such protest he will be entitled to the right of appeal and to have the issues raised by such protest passed upon by the Department.

It is not pretended that the Department has jurisdiction to determine or pass upon controversies between adverse claimants as to the right of possession of a mining claim, or upon any question as to the priority of such right, but it is the only tribunal having jurisdiction to pass upon the question whether the terms of the statute have been complied with, and, therefore, if it is shown that an applicant for patent has failed to comply with the terms of the act governing the disposal of mining claims, the Department may require the claimant to make full compliance with the terms of the statute, and to make new publication of notice of claim and application for patent, so that during the period of publication made in terms of the statute an adverse claimant may file notice of his claim and commence proceedings in the courts to determine the right of possession, as provided for by section 2326 of the Revised Statutes. The mineral claimant cannot ask the Department to say that the protestant

is barred by failure to properly adverse within the limited time, unless he establishes the facts which cause the time to begin to run; and since that serious consequence results to the protestant upon proof of such facts, he has an interest and a right to show that the steps were not taken to set the statutory period of limitation in motion against him. To that extent, he is involved, and only to that extent has he the right of appeal.

This is not in conflict with the rulings of the Department but on the contrary this principle has been recognized by its rulings. It is true that in the case of McGarrahan *v.* New Idria Mining Co. (3 L. D., 422), the Department held that "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." But in this case, the protestant merely alleged that the claim in controversy conflicted with a prior claim of protestant, but did not allege any failure on the part of claimant to comply with the terms of the statute.

In the case of Bodie Tunnel and Mining Co. *v.* Bechtel Consolidated Mining Co. *et al.* (1 L. D., 584), Secretary Kirkwood said:

> I desire to say that while I am of opinion that controversies between adverse mining claimants cannot be heard and determined before this Department, I am nevertheless of the opinion that where, under the last clause of section 2325, third parties present evidence by affidavits, etc., to show that an applicant has failed to comply with the mining statutes, if the evidence is of such character as to entitle it to credit, and if the allegations are such as, if proven in regular proceedings, would show that the law has not been complied with, that patent under the law ought not to be issued, or that you have no jurisdiction to issue the patent, then it is your duty to order an investigation as between the government and the applicant, as in similar cases of agricultural entries.

The case of Branagan *et al. v.* Dulaney (2 L. D., 744) came before the Department upon the appeal of Dulaney from the action of your office holding for cancellation the entry of Dulaney to the Hidden Treasure lode claim upon the protest of Branagan and others against the issuance of patent to said claim. Dulaney, after due publication of notice and application, applied for a patent for said claim, to which Branagan and others filed protest, alleging that they were the owners of several claims with which the Hidden Treasure claim conflicted, and that Dulaney had failed to make the requisite annual expenditure thereon, and other charges of failure to comply with the law. A hearing was ordered by the Commissioner to determine these charges. The Commissioner found adversely to the mineral claimants and held said entry for cancellation. From this decision Dulaney appealed, and the Department considered upon said appeal all the issues raised by said protest, except as to the question of the possessory right of the parties to the controversy. In passing upon said case, Secretary Teller said:

> These protestants should have adversed the Hidden Treasure, but they merely protested. Having failed to file an adverse claim and institute suit as provided by the statute (section 2325-26, Revised Statutes) they must be regarded as protestants, having no rights to be considered by the Department.

It is evident that the Department did not intend by this expression to hold that the protestants in this case could not have come before the Department on appeal, if the decision of the Commissioner had been adverse to them, but merely to hold that the Department had no jurisdiction to pass upon the rights of adverse claimants as to the right of possession, because, quoting from the departmental decision in the case of The Bodie Tunnel, he says:

Numerous affidavits, hereinbefore referred to, show that no work has been performed either by Dulaney or by any one in his behalf upon the claim embraced in survey No. 204; that whatever expenditures have been made by Dulaney were upon workings upon ground lying south of the Saco claim, but not upon the premises for which patent is sought. The entry was properly canceled, because it included that portion of the lode found by the court to be the property of the Saco claimants, and because the lode is not within the original location. If Dulaney is still in possession of the lode found to be his, he can relocate the same under the provisions of the statute and renew his application, when all parties claiming adversely to him will have an opportunity to assert their claim in the proper tribunal.

The Secretary did not pass upon the adverse claims as to priority and right of possession, but by canceling the entry, he placed it in the power of any adverse claimant to assert his claim, if it should be relocated under the terms of the statute.

Therefore a protestant who alleges an interest adverse to a mining claimant, and further alleges a failure on the part of said claimant to comply with the mining laws, is not a mere friend of the court, but a protestant, acting in his own interest, and asking the judgment of the Department upon the question raised by his protest, that the mineral claimant may be required to comply with the law, and thus enable the protestant to assert his claim in the proper tribunal. A protestant of this character is entitled to the right of appeal.

You will therefore certify the record to the Department, that the issues made by said protest may be considered.

Modified, 9 L. D. 157

SCHOOL LANDS—ACT OF MAY 20, 1826.

STATE OF LOUISIANA.

Under the act of May 20, 1826, the State is not entitled to make selections on account of school sections in place, but covered by private grants.

"Radiating" sections, and other irregular surveys, however are contemplated by said act, and selections therefor, from lands legally liable thereto, may be allowed.

The State may select double minimum lands in lieu of double minimum lands lost, whether in place, or by reason of the fractional character of the township; but double minimum land may not be taken in lieu of single minimum loss.

Secretary Vilas to Commissioner Stockslager, January 25, 1889.

I have considered the appeal of the State of Louisiana from your office decision of October 13, 1887, rejecting a list of school indemnity selections made by that State under the act of May 20, 1826.

The list is large, covering 22,695.41 acres in townships 1, 2 and 3, N., R. 2 W., and in township 2 N., R. 3 W., New Orleans land district, and the selections are all based upon alleged deficiencies of school lands such as are contemplated in said act, existing in forty-four townships lying in the southeastern district of Louisiana, west of the Mississippi; the cause of deficiency alleged, except in a few instances, being that there existed in the townships named "no regular section sixteen." The exceptions above referred to are a few tracts alleged to have been regular but covered by private grant, and a few townships regular in survey but fractional to such an extent that section sixteen was wanting in whole or in part.

You reject the whole list, giving the following reasons:

The deficiencies are caused by the sixteenth section being "radiating sections," not in place according to the regular method of surveying and platting townships and numbering sections therein—or by the same being covered in whole or in part by private claims. Many of the bases of selections are within the granted limits of the New Orleans Pacific R. R., but the State has not lost double minimum lands in the townships because the sixteenth sections are either not such sections as are meant by the grant of the sixteenth section for schools, or were covered by private grants at the date of the railroad grant, and therefore, were not enhanced in price by the act making the latter. (State of California *v.* Smith, 5 L. D., 543; *ex parte* State of Minnesota, 14 C. L. O., 118).

At the time of the Louisiana purchase, April 30, 1803, the system of land surveys in that territory was not the system then and now used for subdividing the public lands, but was the French system of which the arpen containing a little more than three-fourths of an acre was the unit of measurement. Most of the lands settled upon and cultivated fronted upon rivers, bayous and other water courses.

Upon taking possession of the territory Congress enacted laws confirming to the inhabitants their titles to lands held under French or Spanish laws, and in the same act March 27, 1804 (2 Stat., 303), provided that the President might direct the remainder of the lands to be "surveyed and divided, as nearly as the nature of the country will admit, in the same manner and under the same regulations as is provided by law, in relation to the lands of the United States northwest of the river Ohio."

By reason of a large portion of the land in said State being an alluvial formation, the lands high enough for residence as being reasonably free from overflow, lie next to the water courses, and to facilitate the improvement of the "back lands", Congress by act of February 15, 1811 (2 Stat., 617), gave to the owners of river frontage a preference right to purchase an equal quantity of such "back lands" contiguous to their original claims, and authorized a system of surveys into subdivisions irregular as to size and shape, in order that an equitable division of them might be made among the owners of river fronts.

By act of April 21, 1806 (2 Stat., 391) it was provided that section "number sixteen" should be reserved in each township for the support of schools within the same.

On March 3, 1811 (2 Stat., 662), Congress enacted that in surveying and dividing such of the public lands of said Territory "as are adjacent to any river, lake, creek, bayou, or water course," the deputy surveyor "should vary the mode heretofore prescribed by law, so far as relates to the contents of the tracts, and to the angles and boundary lines, and to lay out the same in tracts as far as practicable, of fifty-eight poles in front and four hundred and sixty-five poles in depth, of such shape and bounded by such lines as the nature of the country will render practicable and most convenient.

The sections called "radiating" in your said decision, are doubtless made in accordance with the above act.

No part of these irregular and radiating surveys was reserved from sale for school purposes in the acts providing for sale of such lands, and it is evident that Congress did not consider such irregular sub-divisions as included in the reservation and grant for school purposes.

On May 20, 1826, (4 Stat., 179) an act was passed by Congress for the purpose of equalizing or equitably adjusting this; which act is as follows:—

That to make provision for the support of schools, in all townships or fractional townships, for which no land has been heretofore appropriated for that use in those States in which section number sixteen, or other land equivalent thereto, is by law directed to be reserved for the support of schools, in each township, there shall be reserved and appropriated, for the use of schools, in each entire township, or fractional township, for which no land has been heretofore appropriated or granted for that purpose, the following quantities of land, to wit: for each township or fractional township containing a greater quantity of land than three-quarters of an entire township, one section; for a fractional township containing a greater quantity of land than one-half and not more than three-quarters of a township, three-quarters of a section; for a fractional township containing a greater quantity of land than one-quarter and not more than half a township, one-half section; and for a fractional township containing a greater quantity of land than one entire section and not more than a quarter of a township, one-quarter section of land.

Section 2. *And be it further enacted*, That the aforesaid tracts of land shall be selected by the Secretary of the Treasury, out of any unappropriated public land within the land district where the township for which any tract is selected may be situated; and when so selected, shall be held by the same tenure, and upon the same terms, for the support of schools, in such township, as section number sixteen is, or may be held, in the State where such township shall be situated.

This act was an original grant and not at all an indemnity act in such a sense as to make it necessary that there should actually be any loss of section number sixteen in place, in order to give the State a right to select, and it applied equally to all the States which were prior to May 20, 1826, admitted to the Union, and in which section sixteen or land equivalent thereto had been reserved for the support of schools and there was no further legislation necessary to carry it into effect as section two of the act provided that the officers of the government should make the selection.

States which have been admitted into the Union since the passage of

said act acquire their school and indemnity school lands, by other and different statutes, such as Congress at the time deemed best, but in most of the indemnity acts reference is made to the act of May 20, 1826, and the amount of land to be selected for loss of section sixteen in fractional townships is fixed the same in quantity as provided in said act.

On account of the peculiarity of the surveys made in many parts of Louisiana and in the act of March 3, 1811, that State became entitled to more land perhaps than any other under said act of 1826.

That the original construction of the act required that the selections should be made by the government and not by the State appears from various circulars issued to carry said act into effect.

The first of these was dated May 24, 1826, and was directed to the local officers in States affected by said act, calling their attention to the said act of May 20th, and ordered them to make such selections before the public sales advertised should come off, and make report of their doings. (See Public Lands, Laws, Instructions and Opinions, Vol. 2, p. 395).

On October 5, 1826 [9], (Public Lands, id., 420) a second circular was issued to the local officers at Opelousas and other points in Louisiana; and in this they were directed to select and reserve lands under said act in lieu of section sixteen, which might be covered by a private claim grant or donation, as well as where section sixteen, had been omitted by reason of the irregular character of the surveys, and directed said officers to distinguish in their reports, 1st., The lands selected because of irregular surveys; 2nd., Those selected in townships where section sixteen, has been covered by private claims; 3rd., Those selected in those townships where sixteen, contains less than six hundred and forty acres of land.

On August 30, 1832, (2, id., 466), another circular was sent out to the local officers in States affected by the act of May 20, 1826, and in this it was said—"The Secretary of the Treasury directs that you bear in mind that no selections are contemplated to be made in those cases where section sixteen, is entirely or partially interfered with by private confirmed claims or donations," and in the same circular certain rules are promulgated for the government of the local officers in making school selections under the said act, among which are the following:—

First, Where lands have not been offered at public sale, the selections are to be made *prior to the sale.* The school committees, trustees or other authority having official cognizance over the school lands, may be permitted to recommend the selections. To enable them to do so, it may be proper that you give public notice to those authorities, that, on or prior to a certain day, which you will appoint, recommendations will be received from them of school selections for certain townships, which townships it will be necessary specially to designate in your notice. * * * If the school authorities should fail to make any recommendations, you will report your own selections.

Second, The quantity of school land selected for a township is to be located within the limits of such township, provided a sufficient quantity of good land exists therein.

. . . .

Third, Where a portion of section sixteen, exists in a township, the balance of the quantity to which the township is entitled under the act of May 20, 1826, is to be selected.

Further rules are given, and in rule six, they were directed to note, *in pencil*, on the tract books and township plat the lands recommended and that as soon as notified of the approval thereof they should make such entries in ink.

Again on December 16, 1832, the local officers in Opelousas and other points in Lousiana, were directed by circular (id., 472,) in regard to making such selections in townships surveyed in radiating sections or lots under act of March 3, 1811.

The selections in the list presented by the State are alleged in the caption to be of lands to which the State is entitled under the act of May 20, 1826. In said list I find however, a few marked as based upon section sixteen in place but covered by a private grant. In the latter cases I am of the opinion that the selections can not be allowed as it appears that from the passage of the law it has been construed that it was not contemplated in said act to permit selections on account of sections sixteen in place, but covered by private grants. Radiating sections and other irregular surveys, however, are contemplated and selections therefor should be allowed as provided in said act in all cases wherein it appears from the records in your office that the same has not heretofore been done, provided always that they be made out of lands legally liable to be selected for such purpose.

The selections made by the State in the case at bar, appear to be all within the granted limits of the New Orleans Pacific R. R., and more than half of the forty-four townships on account of which said selections are based, are also within said limits and in your decision you first conclude that the radiating sections not being in place according to the regular method of surveying and platting townships are not such sections as are meant by the grant of the sixteenth section.

In this conclusion I cannot concur. It has been the uniform practice to allow the selection of double minimum lands in lieu of double minimum lands lost, whether in place or by reason of the townships being so fractional as to leave out the school sections in whole or in part.

The selections, therefore, should be allowed in so far as they are made on account of townships also within the double minimum limits, but all of such selections made on account of townships outside of such limits must, under the rule in California *v.* Smith (5 L.D., 543), be rejected and the State must select such lands outside of the double minimum limits.

Your said decision is accordingly modified to correspond with the above.

HOMESTEAD—SECOND ENTRY.

CHARLES WOLTERS.

The right to make a second entry accorded, where the first, for equitable reasons, was relinquished in good faith on discovering that the land embraced therein was covered by the settlement right of a prior pre-emptor, who, on account of poverty, had been unable to submit his final proof within the statutory period.

Secretary Vilas to Commissioner Stockslager, January 25, 1889.

I have considered the appeal of Charles Wolters from your office decision of October 20, 1886, refusing to cancel his homestead entry—No. 5121—Spokane Falls land district, Washington Territory, without prejudice to his right to make a second homestead entry.

May 21, 1886, Wolters made homestead entry for the N. ½ of the NW. ¼, the SW. ¼ of the NW. ¼ and lot 2 of section 10, T. 25 N., R. 25 E.

It appears that Jared B. Michael filed pre-emption declaratory statement for the W. ½ of the NW. ¼, the NE. ¼ of the NW. ¼ and lot 2 section 10, T. 25 N., R 25 E., December 15 1881, alleging settlement the same day.

Soon after he made his entry Wolters learned that the tract was occupied by Michael who, because of extreme poverty had been unable to carry his filing into entry within the time allowed under the pre-emption law. On June 7, 1886, about two weeks after his entry was made, Wolters filed a relinquishment thereof accompanied by an application that he be allowed to make an entry for the S. ½ of the SE. ¼ of said section 10, The reason for the relinquishment is given by Wolters in his affidavit as follows:

> That after having made said entry he discovered that said land had long been settled upon by one Michaels who had at one time filed a pre-emption on said land, but had been, by reason of extreme poverty, unable to prove up and pay for said land; that said Wolters is unwilling to take from said Michaels the only means of sustenance of himself and family. That on this account he has this day relinquished to the United States all his right to said land: That having lost his homestead right by reason of said entry he now prays that said right may be restored to him and that entry fees for said land and the amount paid for excess by him be refunded. That he may be allowed to file on the S. ½ of the SE. ¼, Section 10, T. 25 N., R. 44 E.

In transmitting the application the register says:

> Knowing the circumstances in this case, and that Michaels is a man for whom much allowance should be made, and knowing also that Wolters has acted in good faith and with commendable justice and charity I earnestly commend the enclosed application to your favorable consideration.

October 20, 1886, you rejected Wolters' application and held that "his existing entry will be allowed to stand subject to a compliance with the homestead laws, and any right Michael may have by reason of his filing and alleged settlement."

I do not concur in your decision. Notwithstanding that the pre-emption claimant's failure to prove up within the time prescribed by

law left the land subject to filing or entry by the next settler in the order of time, yet, as repeatedly decided, the government may allow such pre-emptor to prove and pay at any later time. And notwithstanding Wolters might have intervened to abridge this opportunity if he had followed up his entry by settlement and that Michael had no valid adverse claim that would have prevented Wolters securing the land by virtue of his homestead entry, yet there is no rule of law which stands against the better rule of human kindness which Wolters followed in this case. He was not obliged in the first instance to have located his homestead entry on this tract, and would not have done so if he had learned the facts which subsequently came to his knowledge in regard to Michael's circumstances. He made application to retract from the step which would thus destroy the poor settler's chance, immediately, as he did it in face of the risk that he might forfeit his own homestead right. To impose such a rule, under such a showing, nothing less than an unbending statute should be necessary. The rule which limits to one homestead entry is based upon a view of the statute which I follow only because it has been long maintained in the Department and Land Office and has some public considerations in support of the general policy; but it has been repeatedly engrafted with exceptions where justice required exception. Indeed, if underlying principle be sought for the exceptions made, none other can be fairly stated. Nor, would one be found where justice seemed more cogently to demand exception than in this instance. There appears no doubt of the truth of the alleged occasion for relinquishment, and it would be a reproach to the government and the administration of the law if it enforced a forfeiture on this homestead seeker for a course of kindness which does him honor in the heart of every just man; the shame and the credit being of like degree and measured by adverse but equal scale. The application of Wolters to have his homestead entry canceled and to be allowed to enter another tract under the homestead law is granted, and your decision reversed.

PRE-EMPTION ENTRY—SECTION 2260, R. S.

FREDERICK KISTLER.

A pre-emptor who, prior to settlement or filing, had in good faith sold that portion of his homestead which embraced his improvements and that part of the land on which he formerly resided, is not within the second inhibition of section 2260 of the Revised Statutes.

Secretary Vilas to Commissioner Stockslager, January 25, 1889.

On June 1, 1885, Frederick Kistler made final homestead entry for the NE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, the N. $\frac{1}{2}$ of NE. $\frac{1}{4}$, Sec. 20, and NW. $\frac{1}{4}$ of NW. $\frac{1}{4}$, Sec. 21, T. 6 N., R. 26 W., McCook, Nebraska.

On June 11, 1885, he filed declaratory statement, alleging settlement the day before, upon the N. ½ of SW. ¼, N. ½ of SE. ¼, Sec. 17, in the same town and range.

The proof submitted at the local office February 11, 1887, in support of said filing, shows that the claimant's improvements, worth about four hundred dollars, consisted of a house, fifteen by twenty feet, a stable and other out-buildings, twenty acres broken, and three-quarters of a mile of wire fence; that he has raised crops one season, and that, with the exception of a few days in December, 1885, and about a month in November and December, 1886, his residence upon the land was continuous.

This proof was rejected by the local office, for the stated reason that the claimant had moved from the land embraced in his said homestead entry to the tracts for which he seeks to make pre-emption proof.

From the statement of your office, it appears that the local office ascertained this fact by questioning the claimant subsequently.

Upon appeal by the claimant, your office, by decision of March 21, 1887, sustains the action below. On September 9, 1888, the Department considered the claimant's appeal from your said decision. The record transmitted with this appeal contained the claimant's affidavit, dated August 14, 1888, setting out new matter. The case was thereupon remanded to your office for further consideration.

By decision of October 2, 1888, your office adhered to its former ruling. By letter, dated December 15, 1888, counsel for the claimant requested that the papers in the case be "returned to the Honorable Secretary for his decision."

In compliance with this request, your office, by letter of December 28, 1888, transmitted the papers, and the case has been considered.

In his supplemental affidavit, the claimant avers that upon making proof for the homestead entry mentioned, he visited his brother at Hastings, Nebraska; that prior to filing his said declaratory statement, *i. e.*, on June 8, 1885, being in need of money, he sold to his brother the larger portion of his homestead, to wit: the N. ½ of NE. ¼, NE. ¼ of NW. ¼, Sec. 20, T. 6 N., R. 26 W.; that his residence and improvements were situated upon the land so sold, and that he did not in any sense remove from land of his own to make settlement upon the tract in question. He further stated, that he supposed these matters had been presented by his attorney with his proof; that he believes his said attorney to have acted in bad faith, and that he is a German and does not understand the English language.

The county clerk and ex-officio recorder of Frontier county, in which the land is situated, certifies that the records of his office show that the claimant made warranty deed on June 8, 1885, to Jacob D. Kistler, for the N ½ of NE. ¼ and NE. ¼ of NW. ¼ of said section 20.

I can not concur with the conclusion reached by your office. The statute declares that "no person, who quits or abandons his residence

on his own land to reside on the public land in the same State or Territory," shall acquire any right of pre-emption.

This record shows that before he had made settlement, or filed his declaratory statement, the claimant had sold that part of his homestead whereon his improvements were located and where he had previously resided. His residence upon his homestead, therefore, ceased when he conveyed the legal subdivisions, which contained the house in which he had actually lived, as well as all his improvements. It therefore can not be held that, when subsequently to such sale, he settled upon and filed for the land embraced in his pre-emption, that the claimant had abandoned a residence "on his own land."

There appears nothing to impeach the *bona fides* of the sale and conveyance, nor to justify the suspicion, much less belief, that the conveyance was in fact in trust for the grantors benefit and designed only to colorably transfer title to avoid the limitation of the pre-emption law. This distinguishes this case from some others where the facts warranted such a conclusion and the statute has been held applicable.

It appearing from the record that the claimant has complied with the pre-emption law, in the matter of residence and improvements, his proof should be accepted and his entry allowed. Your decision is accordingly reversed.

STATE OF LOUISIANA *v.* McDONOGH & CO. ET AL.

Motion for review of the departmental decision rendered January 6, 1888 (6 L. D., 473), denied by Secretary Vilas, January 25, 1889.

REPAYMENT—GRADUATION ENTRY—RES JUDICATA.

A. T. LAMPHERE.

Repayment cannot be allowed to one who, as assignee under a graduation entry, made cash payment for the land in lieu of the required proof of settlement and cultivation.

A decision of the General Land Office, denying the right of repayment, unappealed from, and acquiesced in for a long term of years, will not be re-opened, in the absence of any additional or newly discovered evidence.

Secretary Vilas to Commissioner Stockslager, January 26, 1889.

On December 14, 1857, one David D. Miller, entered at Warsaw, Missouri, under the graduation act of August 4, 1854, (10 Stat., 574), the S. ½ of section 11, T. 40, R. 17, containing three hundred and twenty acres, at twenty-five cents per acre, per certificate No. 53957, November 1, 1859.

In his affidavit of November 10, 1857, required by the third section of the said act, he deposed "I enter the same (meaning the said land) for my own use for actual settlement and cultivation."

On April 13, 1860, your office according to the practice then in vogue, transmitted a patent for the said land, David D. Miller, named therein patentee, together with forty-nine other patents prepared under the same act, covering various tracts of land, to the register of the land office at Warsaw, Missouri, with the following instructions:

> Before delivering these patents you will require the purchasers within one year from the date of the reception of the patents at your office, to file proof of *bona fide* actual settlement and cultivation. You will be careful to see that the proof shows not settlement for so brief a time as would indicate nothing more than a mere formal, not substantial, compliance with the law, but such a substantive one by continued *de facto* settlement and cultivation as to meet the requirements of the law and only in such cases in which such proof shall be filed are you authorized to deliver the patents.

The proof of actual settlement and cultivation of the land by the purchaser required by the said instructions, is in conformity with the decision September 18, 1855, of my predecessor Hon. R. M'Clelland (1 Lester, 479). See also circular of January 23, 1856, (idem, 473).

The proof never having been filed by Miller, the patent was not delivered; the supposition is that the patent was destroyed by fire when the office at Warsaw was burned.

A. T. Lamphere having made application November 7, 1868, for a patent on the said entry No. 53,957, your office decided by letter dated June 18, 1868:

> That as preliminary to the transmission of patents or certified copy in this case, there must be filed in this office either proof of settlement and cultivation or there must be paid to the receiver of the Land Office at Boonville, Mo., the difference between the price paid per acre under the graduation law and the ordinary minimum of $1.25 per acre.

In response to your said office letter no proof of settlement and cultivation was furnished but on June 11, 1869, Ared Lamphere, being identical with A. T. Lamphere, paid to the receiver of public moneys at Boonville, Missouri, the sum of three hundred and twenty-dollars, being the amount required in order to perfect said entry, No. 53,957, taking receipt No. 40,671 therefor; on the receipt the receiver endorsed across its face the words "supplemental over Warsaw graduation entry No. 53,957, per Commissioner's letter of June 18, 1868."

The records do not show that Lamphere made a separate and distinct entry of the land in question. No certificate was issued; the returns all show, that the payment was made as a supplemental payment on entry No. 53,957.

The money having been paid as required by your office letter of June 18, 1868, a certified copy of the record of the patent supposed to be destroyed, as aforesaid, was sent to A. T. Lamphere, January 11, 1869, in accordance with his application of November 7, 1868.

About seven years thereafter, on December 21, 1876, A. T. Lamphere, made application to your office for the repayment of the money

paid by him. His application is in the form of an affidavit. In it he sets out:

That he is the identical person to whom Boonville, Missouri, duplicate receipt No. 40671 for the S. ½ of section 11, in T. 40, of Range 17, dated, January 11, 1869, issued. Affiant further deposes and says that he has been credibly informed and verily believes that the said land had previously been sold to one David D. Miller, per Warsaw duplicate receipt, No. 53,957, December 14, 1857. That the payment of three hundred and twenty dollars ($320) by him paid and for which said duplicate receipt—No. 40671—was issued was, as he verily believes and is credibly informed, an illegal and erroneous payment by him made, of which illegality he had no knowledge at the time the same was made. That he makes the foregoing statement with the view of applying for the refunding of the money thus erroneously paid. He further deposes and says, that he has not sold, assigned, nor in any manner encumbered the tract of land described in said duplicate receipt, No. 40671, so far as his title acquired by his purchase from the United States under said duplicate is concerned.

By your office decision of April 18, 1877, the application of Lamphere was denied. Sixty days were allowed for an appeal.

Here the matter rested for years. On July 5, 1887, one A. C. Widdecombe of Boonville, addressed a letter to your office, in which he asked a reconsideration of your said office decision of April 18, 1877, enclosing a copy of the application of Ared Lamphere to purchase the said land at one dollar per acre; application is dated January 11, 1869.

Your office having considered the matter, on July 28, 1887, rendered a decision declining to modify your said decision of April 18, 1877. From this decision A. T. Lamphere by his attorney, the said Widdecombe, appealed to this department.

It is plain, that the character of the transaction between A. T. Lamphere on the one part and the government on the other, is controlled by the determination of your office, expressed in your office letter of the date of June 18, 1868, in response to which Lamphere paid the said three hundred and twenty dollars, and for which he accepted a receipt clearly disclosing the fact, that such payment was "supplemental over Warsaw graduation entry, No. 53,757, per commissioner's letter of June 18, 1868." The government in absence of any proof of settlement and cultivation received no more than the proper purchase price for the lands, and Lamphere was aware of the facts in the case when he made his said payment. Presumably, he had acquired the interest of Miller in the lands, and the latter's payment of twenty-five cents per acre accrued to his benefit. At any rate, Lamphere's payment completed the purchase of the land, no more, and was made in response to your office letter of June 18, 1868, and in compliance with the conditions therein expressed. Repayment was properly refused.

But should it be concluded, as it is urged on the part of Lamphere, hat the patent to Miller was actually issued April 1860, and the department precluded from further jurisdiction in the matter, still your office decision should not be disturbed.

The decision rendered April 18, 1877, remained unquestioned for ten years, and now after that interval, the same issue is raised again by the

applicant, not upon newly discovered evidence or any new or additional facts, but solely on the allegation that your said decision was erroneous. Lamphere failed to appeal, he acquiesced in your office decision for ten years and will not now be permitted to open the case anew. See case State of Kansas (5 L. D., 243); also Rules 77 and 78 of Rules of Practice.

Your office decision is therefore affirmed.

HOMESTEAD—SECOND ENTRY.

PATRICK O'NEAL.

A second entry allowed where the first was made in good faith for land subsequently held not subject thereto, and accordingly canceled on relinquishment.

First Assistant Secretary Muldrow to Commissioner Stockslager, January 30, 1889.

I have considered the case of Patrick O'Neal on his appeal from your office decision of July 12, 1887, holding for cancellation his homestead entry No. 3679 for W. ½ SE. ¼ Section 5, T. 33 S., R. 63 W., Pueblo, Colorado, land district.

Your said decision which affirms that of the local officers is based upon the fact that the records of your office show that claimant made homestead entry No. 1371 (Denver series) March 18, 1870, for NE. ¼ of the same section, and that he had thereby exhausted his homestead right.

In his appeal from the decision of the local officers claimant states under oath that he made entry of the NE. ¼ of said section five in good faith but was shortly after informed by the register and receiver of the local office at Denver, that the Commissioner of the Land Office had written the said local officers that all the homestead entries and pre-emption filings made within the limits of the Vigil and St. Vrain grant were unauthorized, illegal and void, and that said Commissioner had directed the local officers not to permit settlers to make final proof on such lands, and that his said homestead entry No. 1371 was within the limits of said grant. That claimant further states that in the year 1873, he and others, being satisfied by the said statement of the local officers that they could not obtain title to the lands upon which they had settled and made entry, removed from the limits of said grant, and claimant took a pre-emption claim in section 25, T. 33, R. 61 W., not within the limits of said grant, and in April, 1877, he filed a relinquishment of his said entry No. 1371,

Claimant further states that nothing but the fact that he was led to believe his first entry void by the said statements of the local officers induced him to abandon the same and that when he made his entry

for the land now claimed, he did so in good faith believing that his right had been in no manner affected by his former void entry.

It appears from the final proof submitted that claimant has lived continuously upon the land he now claims, since 1879, has buildings worth more than $500 thereon, and has cultivated nearly the whole of said tract each year.

The record discloses the fact that in March, 1870, your office directed to the local officers at Denver, a letter stating to them the following:

Intimation having been made to this office, from a source entitled to credit, that you have allowed parties to file declaratory statements under the pre-emption and homestead laws for lands situated south of the Arkansas river, and falling within the Cornelio Vigil and Ceran St. Vrain private claims originally confirmed by Congress, June 21, 1860 and since amended February 25, 1869, vide U. S. Laws, 1868-9, pages 90 and 91—I have to inform you that if such is the fact, your action is unauthorized and without validity.

Then follows an analysis of the laws governing settlements upon the said grant made prior to February 25, 1869, and the indemnity to which the original proprietors or their grantees should be entitled on account of such settlement and there appears in said letter the following, viz:

When the foregoing claims are certified according to their respective priority, then, and not till then, the remaining public lands which have been and are now being surveyed under the special act of Congress approved February 25, 1869, will be in a condition to be disposed of according to existing laws.

It has been the ruling of the Department that the law allows but one homestead privilege, and that privilege is generally exercised when a qualified claimant makes entry under the homestead law, and if he abandons his claim or fails to meet the requirements of law relative to homestead entries, he cannot get title to the land covered by his entry, and said entry will be canceled, and although in such case he has acquired no land, his rights under the homestead law are as a general rule exhausted and he can not again make entry of that or any other land. Stephens *v.* Ray (5 L. D., 133).

But it has been held that if the first entry is canceled through no fault of the entryman his right is not exhausted thereby.

In Thurlow Weed, signed January 25, 1889 (8 L. D. 100) it is said:

If exceptions are to be allowed to the rule of but one homestead entry—and the exception appears to be well established doctrine and quite as supportable as the rule itself—they should be admitted whenever justice clearly requires, and no bad faith is shown, and the failure to discover the obstacle to the first entry is fairly excusable. A mistake which involves no wrong and is attributable to causes reasonably likely to produce it, ought rarely to forfeit the privilege of gaining one homestead when honestly sought in good faith by a genuine settler with a family.

Claimant was not bound to adhere to his first entry after discovering that it had been pronounced illegal and void by the Land Department. Orlando Starkey (7 L. D., 385).

Your said decision is accordingly reversed and his entry may be passed to patent.

CONTEST—PROCEEDINGS ON SPECIAL AGENT'S REPORT.

GAGE *v.* LEMIEUX.

It is within the discretion of the Commissioner of the General Land Office to refuse to entertain a contest, where the entry in question is under investigation by a special agent; and such action of the Commissioner is not the denial of a statutory right.

First Assistant Secretary Muldrow to Commissioner Stockslager, February 5, 1889.

I have considered the appeal of Frank W. Gage from the decision of your office, dated October 13, 1887, refusing to accept his application to contest pre-emption cash entry No. 3546 of Lots 2, 3 & 4, of Sec. 14, and Lots 3 & 4 of Sec. 13, T. 62 N., R. 14 W., made by Timothy W. Lemieux at the Duluth land office in the State of Minnesota. Your office refused said application for the reason that the special agent's report on the entry dated September 1, 1886, had been held up, awaiting the disposition of the two contests, which had been subsequently dismissed upon the application of the contestant; that, as an agent's report was in the nature of a contest, your office had the right to act upon it, in preference to a subsequent application to contest if deemed advisable.

In your office letter of transmittal, reference is made to letter dated October 13, 1887, holding said entry for cancellation, and also the cancellation of said entry upon relinquishment on November 4th same year.

Counsel for appellant insists that your office erred because,

First, At the time the application to contest was filed, no order of the Land Office touching the entry was pending, but the entry was open to and subject to contest. Second, The refusal of the application to contest is the denial of a right, to which contestant is entitled under the law and the rules of the Land Department. (Act of May 14, 1880.)

The contention of counsel can not be maintained. The contestant under the first section of said act secures the rights of a successful contestant when he has contested and "procured the cancellation of any pre-emption, homestead, or timber-culture entry," and if the cancellation of the entry is not the result of his action, he has no right to insist that he has acquired any preference right of entry. This has been the uniform ruling of this Department. John Powers (1 L.D., 103); Houston *v.* Coyle (2 L. D., 58); Mitchell *v.* Robinson (3 L. D., 546); Krichbaum *v.* Perry (4 L. D., 517); Gotthelf *v.* Swinson (5 L. D., 657); Perkins *v.* Robson (6 L. D., 828); Strout *v.* Yeager (7 L. D., 41); Kurtz *v.* Summers (id., 46); Lundy *v.* Hoebel (idem., 49); Stayton *v.* Carroll (idem., 198); Campbell *v.* Middleton (idem., 400).

The record fails to show that said Gage filed any application to enter said land, and not having procured the cancellation of said entry, he has sustained no injury by the action of your office, of which he can justly complain.

The decision of your office, must be and it is hereby affirmed.

REPAYMENT—COAL ENTRY—SECTION 2348, R. S.

GERARD B. ALLEN.

No right of repayment exists in favor of an entryman who has procured the allowance of an entry through false testimony, and a transferee under such an entry can have no better right than the entryman.

A coal entry under section 2348, R. S., voidable for illegality in that it was made for the benefit of another, and that coal had not been found on the land covered thereby, may be passed to patent for the benefit of a transferee, in consideration of the price paid for the land and the fact that repayment cannot be allowed.

Secretary Vilas to Commissioner Stockslager, January 30, 1889.

December 15, 1885, Gerard B. Allen, the appellant, filed in your office his petition, under oath, for the cancellation of certain coal land entries, made January 15, 1883, and for the repayment to him of the money paid the United States for the lands embraced therein. Said entries are as follows:

No. 23, entry of T. J. Lynch, for the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 14; No. 26, entry of Scace L. Maultby, for the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 14; No. 27, entry of John J. McClusky for the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 14; No. 28, entry of James Love for the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 11, and the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 14—all in township 14 S., range, 86 W., 6th P. M., Leadville district, Colorado.

He, in substance, sets forth in said petition, as grounds for the relief asked, that, being largely engaged in the manufacture of iron in the city of St. Louis, Missouri, and being desirous of extending his operations into the State of Colorado, he instructed his agent, John McCoy, to ascertain if suitable mines of coal and iron could be purchased in Gunnison county, Colorado; that upon the representations of said McCoy that large tracts of land in said county, containing valuable mines of coal could be procured from parties who had filed upon the same under the law providing for a preference entry of coal lands, he furnished McCoy money to make such purchases and McCoy paid to said pre-emptors (above named) the amounts (to wit, twenty dollars per acre) necessary to complete the entry and purchase from the United States of said lands (above described) together with an additional amount for the use and benefit of the said pre-emptors, taking their warranty deeds to him (petitioner) and an assignment to him of the United States receiver's receipts for the purchase moneys so paid the United States; that soon thereafter he employed, through an agent, Louis R. Fry, a large force of practical miners, at an expense of several thousand dollars, to develop said lands by opening mines and building ovens for coking coal thereon, and to examine and prospect said lands by means of shafts and tunnels, and after a thorough examination thereof, lasting through the summer of 1883, said Fry reported that there were no valuable mines of coal therein and that no mines of

coal had been opened on any of the subdivisions thereof by the said pre-emptors or any one else; that he (petitioner) was prevented by his extensive business interests at St. Louis, from visiting or making a personal examination of said lands, and, in making said purchases, relied upon the representations of his agent McCoy, who did not himself examine said lands, but relied upon the sworn declarations of said pre-emptors (filed in the local land office), that they had opened valuable mines thereon, and that said declarations of said pre emptors were false and fraudulent, and that said preference entries were made with a view to selling the rights sought to be acquired thereunder and not for the purpose of purchasing said lands or working mines thereon.

After the filing of said petition, your office, September 13, 1886, directed the surveyor-general to designate a competent deputy to examine and report on behalf of the government as to the character of said lands and "the workings and development found thereon;" and an expert surveyor, mining engineer, metallurgist and geologist having been appointed under said direction, examined said lands and reported, "that coal did not exist within the limits of said entries and that the tracts have no value for coal mining."

Your office, by letter of October 22, 1886, after examination of said report, concurred therein and canceled said entries, but held up for further consideration the question of repayment of the money paid the government for said lands. Five days thereafter, October 27, 1886, your office sent a telegram to the local officers, recalling said letter of October 22, canceling said entries, but assigning no reason therefor. By letter of July 15, 1887, your office denied the petition of the appellant "to cancel said entries and refund the purchase money paid thereon." From this decision the present appeal is taken.

There are several reasons which the United States might invoke to cancel these entries.

First, upon the supposition that the statements made in regard to their character are true, these are not coal lands, because they do not contain coal, and hence are not within the provisions of the Revised Statutes relating to coal lands.

Secondly, the several entries were all made pursuant to section 2348 of the Revised Statutes under claim by each of the several entrymen of a preference right of entry, which, however, is given by that section only to qualified persons or associations of persons who shall have "opened and improved . . . . . any coal mine or mines upon the public lands, and shall be in actual possession of the same." The declaratory statement under this statute is required to be made under oath and to affirm that the claimant has "located and opened a valuable mine of coal" on the land, and, besides, that he has expended in labor and improvements on such mine a specific sum of money, with a description of such labor and improvements. The entrymen must clearly have committed perjury in these declarations if the statements of the petition are true.

Thirdly, the regulations required each claimant at the time of actual consummation of the purchase to make a sworn statement embracing, among other things, the following:

That I am now in the actual possession of said mines, and make the entry for my own use and benefit, and not directly or indirectly for the use and benefit of any other party.

On the facts stated, these declarations were all false and fraudulent in this particular.

Fourthly, the statute provides (R. S., Sec. 2350) that, "only one entry" by the same person or association of persons is authorized. Upon the facts which this petitioner states, the case furnishes a clear violation of the spirit if not the letter of this provision, because he furnished himself the money for the payment of all the entries for his own use.

Notwithstanding, however, that these entries might be canceled, it appears to me doubtful whether the claimant should be allowed to invoke these illegalities or irregularities to secure such cancellation for his relief. The petitioner must be held to know the law and probably, also, the regulations, the provisions of which are very plain, and it clearly appears that he participated in a part at least of the infractions of law and regulations above mentioned, since he made or knew of the arrangement for the action the entrymen took before it was taken; and there is indication that he knew, or is chargeable with notice, that they did not rightfully have a preference right of entry by having opened and improved coal mines on the land, because the petition states that soon after his purchase he employed one Louis R. Fry, a miner and geologist, "to develop said lands and open mines thereon and to erect ovens for coking the coal," and that said Fry at once engaged a large force of practical miners "in examining the lands and prospecting the same by means of shafts and tunnels;" by means of which he discovered that there was no coal on the land, and the necessity for which, of course, proved to him in the beginning that no mines of coal had been opened.

To have entitled him to claim the advantage resulting from showing that he was imposed upon and cheated by the entrymen from reliance upon their affidavits that they had opened and improved a mine as is claimed, he should have been prompt to act, when he discovered that those affidavits were false. This was, of course, discovered when the necessity for examining and prospecting in order to find a mine was shown. Instead of appearing then to have been surprised by the naked aspect of the land and the utter want of a mine, he proceeded to expend a large sum of money in prospecting to discover a mine. So that the facts can not but raise some suspicion that he bought in the belief that, as these lands lay within the coal region, a mine would be found there; a belief doubtless encouraged by the entrymen, in order to secure the sale, and not shown to be false until the examination of the experts discovered that by glacial action the coal veins once existing upon the lands had been eroded, so that small and valueless pockets only remained.

These circumstances tend to impeach in some degree the equitable claim of Mr. Allen, although it would appear also to be quite certain that his agent was grossly imposed upon, unless he himself colluded with the entrymen.

But there is another reason which renders it impossible for the Department to entertain the application, as a matter of law. The entries were made in the names of the four entrymen, each taking the particular tract to which he claimed a preference right of purchase; and after their entries were made, each conveyed, by deed with covenants, to Mr. Allen, in consideration of a purchase price paid to them beforehand, which embraced the amount necessary to be paid the government. Thus, in fact, Allen did not pay any money to the government, but to the entrymen; and in law he must derive his right to claim repayment from the United States through the deeds of the several entrymen to him. He can, therefore, have no better right than they. But it is very obvious that, according to familiar principles, oftentimes decided, no right to claim repayment exists in favor of an entryman who has procured the allowance of the entry by a false affidavit on his own part, and the procurement of false affidavits in corroboration. (Joseph Walsh, 5 L. D., 319).

The statute which confers a jurisdiction on the Department to order repayment from the Treasury where entries have been erroneously allowed and can not be confirmed, does not authorize repayment in any such case, and it necessarily follows that your decision in that respect was correct. Being so, I think it also follows that you were correct in refusing to cancel the entries. Undoubtedly, the government had the option to cancel these entries, which were voidable for illegality. But, inasmuch as the price which was paid is the highest required by any law and can not be returned to the purchaser, as above decided, it is a fair obligation upon the government to leave the entries to remain and pass them to patent.

There are circumstances about this case which seem to indicate that Mr. Allen, the transferee, was much imposed upon, and was himself, perhaps, quite innocent of any wrong intent. But he must be held answerable for the knowledge and the neglect of his agent, and he does not himself think that his agent is disloyal to him. There is an appeal to the grace of the government in his favor, lying in the fact that he has paid a grossly excessive price for the land, a price based upon the supposition that it contained valuable mines of coal which has proven to be a delusive expectation. But whatever claim may rest upon this foundation is addressed entirely to Congress, the maker of the laws which limit the jurisdiction of the Deparment, and the only source from which the petitioner can rightfully obtain relief.

The decision is affirmed.

RIGHT OF PURCHASE UNDER SECTION 7, ACT OF JULY 23, 1866.

NAPTHALY *v.* BREGARD ET AL.

The right of purchase conferred by the seventh section of the act of July 23, 1866, is subject to the following conditions: (1) the claimant must have purchased the land from Mexican grantees or assigns; (2) the purchase must have been made in good faith and for a valuable consideration; (3) the claimant must have used, improved, and continued in the actual possession of the land according to the lines of original purchase; and (4) no valid adverse right or title, except that of the United States, should exist.

A purchaser in good faith is one who purchases in the sincere belief that he is acquiring a good title to the land purchased, and who is not chargeable with notice of defects in the title, which may operate to defeat it, or with knowledge that he purchases only a speculative title.

The right of purchase conferred by said section does not relate back to former claimants, but extends only to persons then holding lands which they had purchased in good faith, and for a valuable consideration before the rejection of the grant, and who had used the land so purchased, improved it and continued in the actual possession thereof within defined limits, from the time of their purchase to the date of the act.

The preferred right of purchase from the government is conferred only upon one who has purchased from Mexican grantees or assigns a definite tract of land, or such a tract as may be defined by the terms of the grant. The conveyance of an undivided interest, in the absence of evidence showing partition or actual occupation within definite limits, will not carry with it the right of purchase.

Secretary Vilas to Commissioner Stockslager, February 4, 1889.

I have before me on appeal from the decision of your office, dated March 2, 1887, the case of Joseph Naphtaly *v.* L. L. Bregard and others, involving the question of Naphtaly's right to purchase under section seven, act of July 23, 1866, some twenty-one described tracts of land in T. 1 N., and T. 1 S., R. 2 W., M. D. M., California.

The township plats of survey for said townships were filed in the local office on July 30, 1878, for township one south, and on October 5, 1878, for township one north. These plats were withdrawn October 24, 1878, restored February 24, 1882, suspended March 9, 1882, and the suspension removed April 16, 1883.

Naphtaly filed his application to purchase August 10, 1883. Mary A. Jones—one of the defendants herein—on July 16, 1883, applied to purchase under the same act, a portion of the land included in Naphtaly's application. The right to purchase is based on an alleged Mexican grant to three brothers, Innocencio, Jose, and Mariano Romero.

Naphtaly claims title under Innocencio Romero and Mrs. Jones under Jose Romero.

These applications to purchase are resisted by divers parties who assert rights under the timber-culture and settlement laws and by the Western Pacific Railroad Company.

Mary A. Jones, in addition to claiming a right to purchase under said act, claims a certain part of the land in controversy under the home-

stead laws. She alleges settlement in 1866 and continuous residence since that time on the land claimed as a homestead. Some of the other defendants allege settlement in 1875, and final certificates have been obtained in several cases of soldiers additional homestead entries. Some of the defendants are simply applicants to file or enter, while others have tendered final proof and claim compliance with the settlement laws and the right to final certificates.

The land involved is within the twenty-mile limit of the reservation of January 30, 1865, for the Western Pacific Railroad, and the greater part of sections nine and fifteen is within the Highley survey of the Moraga grant.

The local office decided that the odd sections and parts of odd sections involved herein, and not included within said survey, belonged to the railroad; and that Naphtaly was entitled to purchase under the provisions of said act, the balance of the land described in his application. The decision of your office reverses the decision of the local officers, rejects the applications to purchase, and leaves the questions as to the rights of the Western Pacific Railroad and other claimants to future adjudication.

Naphtaly, Mary A. Jones, and the heirs of John M. Jones deceased, have appealed.

The application of Mary A. Jones, widow and devisee of John M. Jones deceased, may properly be considered in this case, as she has submitted evidence herein in support of her supposed right to purchase under said act a certain portion of said tract claimed by Naphtaly. The homestead claim of said Mary A. Jones, and the various claims of the other numerous defendants herein, are considered only so far as they affect the claimed right of said applicants to purchase under the act of July 23, 1866. So far as said various claims for different portions of the land involved, conflict with each other, they have not been and will not be considered herein.

The claim of each of the applicants is based on the same alleged Mexican grant and are so alike in some of their essential features that the conclusion reached in the Naphtaly case disposes of the case of Mrs. Jones.

The seventh section of the act of July 23, 1866 (14 Stat., 218) is as follows:

That where persons in good faith and for a valuable consideration, have purchased lands from Mexican grantees or assigns, which grants have subsequently been rejected, or where the lands so purchased have been excluded from the final survey of any Mexican grant, and have used, improved, and continued in the actual possession of the same as according to the lines of their original purchase, and where no valid adverse right or title (except of the United States) exists, such purchaser may purchase the same, etc.

Said applications were rejected by your predecessor in office, on the ground, (1) That there was no grant or semblance of a grant by Governor Micheltorena to the Romeros as claimed, and consequently, that

appellants were not purchasers in good faith "from Mexican grantees or assigns." And (2) That the act only applies to parties who purchased prior to the rejection of the supposed Mexican grant, and that as Naphtaly admittedly purchased long subsequent to the final rejection of the Romero brothers alleged grant, he has not brought himself within said act.

Appellant, Naphtaly, by his counsel, insists that your office erred in so deciding and claims that he has shown by the evidence in the case, (1) Such a grant, made in 1844 by Governor Micheltorena to the Romeros, as is intended by the term grant as used in said act. (2) A parol partition of the land so granted between the three brothers, some time in 1847 or 1848, and an allotment at that time of the land in controversy to Innocencio Romero. (3) The use, improvement and continued actual possession in severalty by Innocencio Romero of the land so allotted to him from the time of said partition up to December 26, 1853.

(4) The purchase of said land—excepting such portions as had been sold prior thereto—from said Innocencio on December 26, 1853 by Domingo Pujole and Francisco Sanjurjo in good faith and for a valuable consideration.

(5) The use, improvement and continuous actual possession by said Pujole and Sanjurjo, of the land so purchased, by them, from the date of purchase, and according to the lines of their purchase, up to February 14, 1855.

(6) That on February 14, 1855, Pujole and Sanjurjo conveyed the same tract to James William Tice; that on August 18, 1855, said James William Tice conveyed the same to Andrew J. Tice; that on October 14, 1859, said Andrew J. Tice conveyed same to S. P. Millett, and that on October 17, 1860, said Millett conveyed same to the aforesaid James William Tice; and that the title remained in said James William Tice until long after the passage of said act of July 23, 1866—to wit, until April 1, 1869. And that each of said parties purchased said land in good faith and for a valuable consideration, and during the time they each held title, they each used, improved, and maintained the continuous actual possession of said tract of land according to the lines of their original purchase.

Assuming the foregoing facts to be proven, the applicant Naphtaly, claims that James William Tice had, any time between July 23, 1866, and April 1, 1869—had said tract been subject to entry—the unquestioned preference right to purchase the same and that such right is assignable.

Naphtaly further claims that the evidence shows a complete chain of title from James William Tice to himself, and that he and each of the intermediate grantees purchased in good faith and for a valuable consideration, and that each of said grantees, during the time they respectively held title to said tract of land, used, improved, and maintained a

continuous actual possession of the same, and therefore that he has the preference right to purchase said tract under the act of July 23, 1866.

The documentary evidence produced in support of the Romero claim before the Board of Land Commissioners and the courts shows: A petition by claimants, dated January 18, 1844 to Micheltorena, then governor of California for a tract of land described as the sobrante of the three ranchos of Moraga, Pacheco, and Will, situated in what is now Contra Costa county, California. A direction on the margin of said petition signed "Micheltorena" that the Secretary of State report, "having first taken such steps as he may deem necessary." A direction, signed Manuel Jimeno, to the alcalde of San Jose that he summon said Moraga, Pacheco and Will that they may be heard in the matter, and that he report; a report of the alcalde dated February 1, 1844, that the petitioners and said land owners "having been confronted, the latter said that the Senors Romero did not prejudice them in any way, but on the contrary that they desired them to be their neighbors . . . . It has also come to the knowledge of this tribunal that one Francisco Soto claimed the tract in question some six or seven years ago. But in this time he has neither used nor cultivated it in any way to gain any right thereto. Wherefore the petitioners appear to me entitled to the favor they ask." A report by the Secretary of State to the governor dated February 4, 1844 that "it would seem there is no obstacle to making the grant . . . if your excellency approves of it." A direction by the governor (February 28, 1844,) that the land be measured in the presence of the adjacent proprietors and the result certified "so that it may be granted to the petitioners." A second petition by the Romeros, dated March 21, 1844, in which it is represented that the foregoing order had not been executed "for the reason that the owners of the neighboring lands . . . . were absent and engaged," and asking that the said grant be made "either provisionally or in such a manner as your excellency shall deem fit." A recommendation by the Secretary of State (Jimeno) as follows: "I think Y. E's order should be carried into effect in regard to the measuring of the land that is claimed, and as soon as this is accomplished, with the least practicable delay, Senor Romero can present himself joined with Senor Soto, who says that he has a right to the same tract. Your Excellency's superior discernment will determine what is best." This recommendation is dated March 23, 1844, and on it appears the following: "Let everything be done agreeably to the foregoing report." "Micheltorena."

The Mexican archives do not show that any further steps were taken in the matter by the Romeros, but parol testimony was produced in the prosecution of their claim before the United States courts tending to show that in fact a grant as asked had been issued to them by governor Micheltorena.

The Romero claim was presented to said Board on February 28, 1853, and rejected on April 17, 1855. It was subsequently rejected by the

United States district and circuit courts, and finally, at the December term, 1863, by the supreme court (Romero *v.* United States, 1 Wall., 721). These decisions were all made on the ground that the supposed grant was never issued.

In order to the enjoyment of the right of purchase under the act of 1866, it is necessary that the claimants of the pre-emptive right should first have purchased the lands from Mexican grantees or assigns; secondly, that such purchase should have been made both in good faith *and* for a valuable consideration; thirdly, that they should have used, improved and *continued* in the actual possession of the same *as according to the lines of their original purchase;* and fourthly, that no valid adverse right or title (except of the United States) should exist.

The supreme court have determined that there was no Mexican grant to the Romeros, and the Commissioner, therefore, held that the Romeros were not Mexican grantees. In view, however, of the fact that this is a remedial act, designed for the protection of parties who supposed they were buying a good title from a Mexican grantee, I am not prepared to hold that, if the other conditions exist, this is such a case as would deny the right upon this ground alone. An examination of the report of the decision of the supreme court shows that a grant was claimed to exist upon the testimony of witnesses who were intelligent and skilful in the law and affirmed that they had seen such a grant in due compliance with Mexican law and usage. I am disposed rather to place the affirmance of the Commissioner's decision upon other grounds, in respect to which the fact finally decided by the supreme court is of consequence as a matter of evidence upon the question of good faith.

It seems to me impossible to hold that at the time of the passage of the act of 1866 there was any person entitled to the pre-emptive right as a purchaser in good faith who had used, improved and continued in the actual possession of specific land as according to the lines of the original purchase.

A purchaser in good faith is one who purchases in the sincere and fair belief that he is acquiring a good title to the land purchased, and who is chargeable with no notice of defects in that title which may operate to defeat it, and especially one who is not chargeable with knowledge that he purchases only a speculative title. The facts of this case, especially when taken in connection with the final decision that there was no grant at all, repel the presumption that this belief could have been entertained by the original purchasers from Innocencio Romero. No conveyance had been made at the time when the petition to the Board of Land Commissioners for confirmation of the alleged grant was presented, which was on the 28th of February, 1853. The first conveyance upon which this interest is founded was by Innocencio Romero and wife, to Domingo Pujole and Francisco Sanjurjo. The conveyance from Romero and wife to these parties was made on the 26th of December, 1853, ten months substantially, after the petition for confirmation

was presented, and it shows upon its face that the parties understood that they were purchasing a title which was *sub judice* and which was speculative. I quote from the deed the material parts, as follows:

Witnesseth, That the said parties of the first part for, and in consideration of the sum of ($5,325) five thousand three hundred and twenty five dollars, lawful money of the United States of America, to them in hand paid by the said parties of the second part, ... have granted, etc., and by these presents do grant, bargain, sell, release, remise and convey unto the said parties of the second part, and to their heirs and assigns forever, all the *undivided one-third* of the lands and ranchos in said Contra Costa county and State aforesaid, being the said lands and rancho granted to the party of the first part and his two brothers, Jose Romero and Mariano Romero by Governor Micheltorena in the year 1844, and being also the same lands and rancho the claim for which is now numbered six hundred and fifty-six on the docket of the Board of the United States Land Commissioners appointed to ascertain and settle private land claims in California, reference being had to the papers and proofs on file in said case for a more particular description of the lands and premises hereby intended to be conveyed.

And it is expressly understood and reserved by the parties of the first part and assented to and agreed to by the parties of the second part, that in the event that said lands and rancho shall hereafter be confirmed by said Board of United States Land Commissioners, then the said parties of the second part, their heirs and assigns shall pay to the parties of the first part the further consideration of ($3,000) three thousand dollars.

No covenants of warranty for the title were contained in the deed.

On the 14th of February, 1855, Pujole and Sanjurjo made a deed to James William Tice which, except that the express consideration was eight thousand dollars instead of five thousand three hundred and twenty-five dollars, is in all essential particulars the same as the foregoing, and carries upon its face the same evidence that a speculative title was the subject of the transfer.

In the technical sense of the law, the consideration was "valuable" because it was of money. But, as affecting the question of good faith it appears from the evidence that the consideration was not truly stated in the deed, and was very much smaller, so far as it was a consideration for the land at all. It does not disclose how much of the real consideration was for the landed interest, but it does appear that it was quite insignificant. Innocencio Romero says he "sold land, cattle and horses." Ignacio Sybrian says that land "together with all the cattle and horses" was sold. Manuel Sybrian says that Romero sold the "land, cattle, horses, houses, and everything there was upon the ranch." This testimony was all introduced by the applicant Naphtaly. John A. White, a witness introduced on the part of defendants, says that he and James M. Tice, who is shown by the evidence to have been the father of the said James William, were associated in business in the spring of 1855, under the firm name of Tice and White; that the firm bought of Purjole and Sanjurjo the Romero ranch, together with about one hundred head of cattle, one hundred head of horses, and sheep, and a few goats; that the consideration was placed nominally at eight thousand dollars, but did not in fact exceed three thousand five hundred

dollars; that the stock was estimated to be worth the money paid, or perhaps a little less, and that not much value was put on the land; that he occupied the land for two or three days, had some trouble with James M. Tice and told him he could have the land, and that the land was conveyed to James William Tice, who was then over twenty-one years of age. There is no impeachment of the witness or contradiction of his testimony. At the time this purchase was made the claim had been nearly two years pending before the Board of Land Commissioners, presumably the evidence had been submitted and the risk of the result must have been apparent. But three days over two months passed when, on the 17th of April, 1855, the Board refused confirmation of the grant.

Subsequent to the rejection of the grant, James William Tice conveyed to Andrew J. Tice, August 8, 1855, by a deed in substantially the same terms as that already quoted, the nominal consideration expressed being eight thousand dollars.

After that the claim was considered by the district court and the circuit court of the United States and rejected by both. With these further evidences of the invalidity of the claim, the next conveyance was made for the consideration nominally, of one thousand dollars only, by Andrew J. Tice to Solomon P. Millett on the 17th of October, 1859, with the reservation of one hundred and sixty acres described by metes and bounds on which the grantor and his family were said to reside.

On the 13th of December, 1860, Millett for the same expressed consideration conveyed the same interest back to James William Tice.

Finally, on the 6th of April, 1861, James William Tice conveyed the interest derived by his deed from Millett to Urhetta Tice, his mother, for the consideration of love and affection and her better support and maintenance. This appears to be the last conveyance before the passage of the act of 1866. So far as disclosed by the proofs, whatever right of purchase was given by the act of 1866 if any, it carried to Urhetta Tice as the then holder of this claim.

I think it a clear interpretation of the act of 1866, that it had no relation back to any former claimants, but gave the pre-emptive right only to persons then holding lands which they had purchased in good faith and for a valuable consideration, before the rejection of the grant, and when they had used the land so purchased, improved it and continued in the actual possession of it within defined limits from the time of their purchase to the date of the act.

It thus appears that Urhetta Tice had not purchased it for a valuable consideration, technically speaking, but only for a "good" consideration; that she purchased, so far as the conveyance to her can be called a purchase, after the grant had been rejected by the Board of Land Commissioners, by the district court, and by the supreme court of the United States, and while the case was depending upon appeal in the supreme court. If the conveyance to her were for a valuable con-

sideration, it could not, under these circumstances, be held to be also made in that "good faith" which the law contemplated. It had been from the beginning a merely speculative title, and every deed from the original alleged Mexican grantee had carried upon its face notice of the defect and of the contingency, and charged the purchaser with an additional payment if the contingency eventuated favorably. The consideration paid, even in the earlier purchases, was not for the land, to any sensible degree, but for stock, with the privileges of a cattle range, which the claim of the grant afforded to the holder.

Besides these defects, the case does not meet the third condition of the law. That evidently contemplated the purchase of a definite tract of land, or at least of a tract capable of definition from the terms of the grant. This was the conveyance of the undivided interest only, and from the circumstances hereafter detailed, it is evident that there was nothing like definite understanding of a tract of land as conveyed, or which the parties could possess, according to the lines of their original purchase." Accordingly, it is manifest from the testimony and history of the case that there was no such thing as a well defined tract of land which the parties could claim to have been fairly conveyed as upon a perfect title; and it appears from the various claims which have been established upon this land that there was no such thing as an exclusive possession, according to the lines of an original grant. The possession appears to have been doubtful and contested to a greater or less degree, and especially the boundaries were indefinite and uncertain.

The evidence shows that the alleged Romero grant had no known or fixed boundaries, and that the quantity of land included therein was necessarily indefinite. What the sobrante or surplus claimed might prove to be could only be determined by a survey of the ranchos named in the Romero petition, and by having their boundary lines definitely fixed, and no such survey or fixing of lines appears to have been made under Mexican authority, nor until the grants for said ranchos were finally confirmed by the United States government. Innocencio Romero claimed that the grant was for from four and a half to five leagues of land, and that from a league and a half to two leagues of the granted lands were allotted to him in severalty by his brothers at the time of the alleged partition in 1847 or 1848. This would make from about six thousand to about eight thousand acres allotted to Innocencio Romero in and by said partition. Naphtaly says he bought about three thousand acres of this alleged allotment. The deed to Domingo Pujole and Sanjurjo as we have seen, was for an undivided third interest in the lands alleged to have been granted to the Romero brothers, and Innocencio says it conveyed the same land allotted to him "except some small parcels within the exterior lines which I had sold to others before." The subsequent intervening conveyances down to and including the conveyance to Naphtaly are for an undivided one-third interest in the Romero grant, and under the theory that the deed to Pujole and San-

jurjo vested the entire title of Innocencio to lands held in severalty by him, each of the subsequent purchasers took the same quantity and by the same lines as the original purchasers. They would, therefore, to bring themselves within the statute, be required to show use, occupation, and the continued actual possession of the land so conveyed according to the lines of Pujole and Sanjurjo's purchase. This the evidence does not show. Naphtaly says he claims probably two or three thousand acres; that his purchase included three hundred and fifty-seven acres of the San Ramon, and that the houses, barns, and buildings are on the San Ramon grant. The San Ramon, it appears from the evidence, was a confirmed Mexican grant, lying on the east and northeast of the land in controversy, for which a patent issued April 7, 1866.

It appears in evidence also that the west line of the tract claimed to have been purchased by Pujole and Sanjurjo has been moved in and further east than it was at the date of said purchase. How far this line has been moved in since that time does not appear, but one of Naphtaly's witnesses says that the land claimed by him is a great deal less than the Tices (who purchased in February 1855) took possession of.

The evidence taken altogether clearly shows that possession of the land claimed to have been conveyed to Pujole and Sanjurjo, and from them through intermediate conveyances to Naphtaly, has not been continuously maintained by him and his immediate and more remote grantors, according to the lines of the Pujole and Sanjurjo purchase as such lines are claimed to have been pointed out and designated by said Innocencio at the time said conveyance was made.

No documentary evidence of any character is produced to show, or which tends to show, that this claimed grant of unknown boundaries, was ever partitioned by the Romero brothers. Nor is it pretended that at the time of the alleged partition any lines of survey were run, or any permanent monuments erected, or any artificial marks of any kind made to show the lines separating the lands of one brother from those of the other brothers. That co-tenants who did not know the boundary lines of their joint property, nor its area in leagues or acres, and who were liable to have their portions allotted in lands to which they had no title, should meet together and divide the joint property among themselves and by such division each divest himself absolutely of all title to such property, except as to the portion allotted to himself, is so contrary to our experience and observation as to how men usually act in matters of such importance to themselves as to render the alleged fact highly improbable. To gain credit, therefore the fact alleged should be clearly proven by the most satisfactory evidence, and the evidence in support of the alleged partition, after careful consideration, is found to be weak and unsatisfactory. The testimony of only two persons who profess to have been present at the time of the alleged partition is offered in evidence—to wit, Innocencio Romero and Ignacio Sybrian. Romero says that he

and his brothers made an absolute partition of the land granted to them some time in 1847 or 1848; that he took the westerly portion, Jose the easterly, and Mariano the north-easterly, and that the ridges and arroyos were selected as boundaries; that he occupied the land until he sold to Pujole and Sanjurjo in Dec. 1853, and that his brothers went to live on their own land, and sold their portions as he did his.

Sybrian testifies that he was present at the time the partition was made, that Innocencio was then in posession; that his brothers visited him occasionally and that there was no house on the land but Innocencio's and that no one else built a house on the land; that Mariano lived in Monterey, Jose in San Jose, and that neither lived on the ranch; that neither of them had a house, and that he does not believe either of them occupied any portion of the ranch after the division; heard they had sold, and that Ramon Pico lived on Mariano's part and Otoyo on Jose's, and that the division was made into three parts, without survey, by designating natural objects.

These two witnesses agree substantially on the natural objects which marked the lines of the tract alleged to have been allotted to Innocencio; and Sybrian says that the lines shown to Pujole at the time of the sale to him and Sanjurjo were the same, except that some land had been previously sold by Innocencio.

A number of witnesses testify that they heard of this partition and that it was recognized by the parties and by the neighbors. That Innocencio's right to the possession of all the land alleged to have been allotted to him was not recognized by all the neighbors is clearly shown. It will be observed too that Innocencio Romero and Sybrian contradict each other as to the important fact about Jose and Mariano taking formal possession of, and going to live on, their respective portions; and Romero is flatly contradicted by the weight of the testimony as to the location of Mariano's portion. The testimony satisfactorily shows that from 1846 to 1852 Jose lived at the mission of San Jose, and that he was what some of the witnesses called a major-domo of the mission. In an affidavit offered in evidence, Mariano swears that between 1844 and 1852 he had never seen his brother Innocencio. In addition to this, all the documentary evidence is utterly inconsistent with the theory that there was an absolute partition of the land claimed by the Romero brothers. All of the deeds to this land made by Innocencio were for an undivided interest. The deeds made by the other brothers were also for undivided interests. Innocencio and Jose Romero, Francisco Otoyo, Alvin Campbell, James Thompson, William Mitchell, John M. Jones, C. Yeager and Miguel Garcia were the parties who presented the petition for the confirmation of the alleged Romero grant to the Board of Land Commissioners and they all represented that they held undivided interests therein, Innocencio Romero claiming an undivided third interest.

The evidence satisfactorily shows that the following instrument was

executed on the day it purports to have been, that the signature thereto is the genuine signature of the said Innocencio Romero—to wit:

MARTENEZ, CONTRA COSTA CO.,
February 10, 1853.

I, Innocencio Romero agree that in the division and partition of the Sobrante grant or claim, claimed and owned by myself, Garcia, Otoyo, Thompson, Mitchell, Jones and Yeager, that the land heretofore granted by me to Robert N. Wood by deed duly of record, shall be partitioned off and allotted to me in said division first in order after my homestead of one hundred and sixty acres.

Given under my hand and seal the day and date above written.

his
INNOCENCIO X ROMERO.
mark

Witness:
EDWARD WILLIAM GRAHAM.

The deed referred to was executed October 16, 1852, and conveys to said Wood by metes and bounds, a certain portion of the alleged Romero grant, and the parties named by Innocencio as owners of said grant with him, claimed under Jose in said petition for the confirmation of the grant.

If there was ever any kind of a partition of the land claimed by the Romero brothers between them, it appears clear to my mind that it was only a temporary arrangement entered into for convenience and not intended to divest any of them of their undivided interest in the alleged grant. It certainly could not bind the parties joining in the petition for the confirmation of said grant.

When the act of 1866 was passed it would appear that some new vitality was given to the claim by virtue of the expectation that a right of purchase might be secured under that act, and on the 13th of May, 1868, there appears a deed from Urhetta Tice, James W. Tice, Andrew J. Tice, and Solomon P. Millett and wife, to David P. Smith, which, for a consideration of seven thousand dollars, purported to convey the interest of the first parties in sections 2, 3, 4, 9, 10, 11, 14, 15 and 16, Township 1, South, Range 2, West, M. D. M., describing the land by metes and bounds, and stated to be supposed to contain 1,767.86 acres; to which is added

Also, all of the lands, of which the foregoing are supposed to be all or a part, included within the boundaries of a certain claim formerly known as the Romero, supposed to have been granted in the year 1844 by Micheltorena, Governor of California, to Innocencio, Jose, and Mariano Romero, which was presented for confirmation to the United States Land Commissioners . . . . . and was afterwards rejected. There is expressly excepted from the land conveyed by this instrument as follows: One hundred and sixty acres now or formerly owned, or claimed and occupied as a homestead, by the said Andrew Jackson Tice, and supposed to be the S.W. ¼ of Sec. 3, aforesaid. Together with all and singular the tenements, rights, privileges and appurtenances thereto belonging, including the interest and rights of each and every one of said parties of the first part as pre-emptors or settlers or otherwise, and all the benefits that have been or are to be derived under any and all acts of the Congress of the United States.

On the 25th of February, 1869, David P. Smith conveyed the same lands to John R. Spring, for a stated consideration of five hundred dol-

lars. On the 24th of March in the same year, Spring conveyed to Martin Clark, for a stated consideration of four thousand five hundred dollars; and on the 15th of May, 1876, Martin Clark conveyed the same to Joseph Naphtaly, for a stated consideration of five dollars.

Meantime, the various claims of other parties to this suit had attached in different ways, all indicating that the nature of the claim of Naphtaly was uncertain, indefinite, and at least in regard to its limits, disputed.

Admitting that the right of purchase given by the act of 1866 could be transferred, it appears satisfactory from the evidence that no right of purchase of this tract was conferred on anybody by that act, and that Naphtaly acquired by the conveyances described no such right as the act contemplates.

It is not a matter furnishing any special evidence of good faith that a price was paid for the possession of the claim and such of the land as has been occupied under it. The possession of it as a mere claim appears to have been of sufficient value to warrant the payment of the consideration mentioned in any deed, or so far as disclosed in fact, of any transfer, to the extent that possession has been maintained. It is shown that Naphtaly has received in rent for so much of the premises as he held possession of, for a part of the time twenty-five hundred dollars a year, and for the remainder two thousand dollars a year. To those acquainted with the country, the value of the possession of such a claim is sufficiently well known to account for all the money that appears to have been in any case paid for it.

The same considerations which relate to Naphtaly deny the right of Mary A. Jones to her claim of purchase under the act.

Your decision rejecting the application is affirmed.

WHITE *v.* MCGURK ET AL.

Motion for review of departmental decision rendered November 3, 1887 (6 L. D., 268), overruled by First Assistant Secretary Muldrow, February 4, 1889.

ARKANSAS LANDS—PRIVATE ENTRY.

A. H. BOLES.

After the repeal of the act of June 21, 1866, which restricted the disposition of public lands in this State to homesteaders, the lands affected thereby were not subject to private entry until offered at public sale.

First Assistant Secretary Muldrow to Commissioner Stockslager, February 5, 1889.

I have considered the appeal of A. H. Boles from the decision of your office dated December 7, 1887, affirming the action of the local land of-

fice at Dardanelle, Arkansas, rejecting his application to make private cash entry of the NE. ¼ of the SE. ¼ of Sec. 34, T. 7 N., R. 32 W., for the reason that the land is "unoffered."

The appellant insists that your office erred because, if said land is vacant government land, as claimed by the said register and receiver, and has never been taken from the market or appropriated, it has certainly been included in some general advertisement, if so, it would seem to me, that another offering would not be required."

An inspection of the records of your office show that said township was offered on July 31, 1831, under proclamation of President Jackson, dated March 25, same year.

The act of Congress approved June 21, 1866 (14 Stat., 66) (Revised Statutes 2303) restricted the disposition of the public lands in said State (*inter alia*) to entrymen under the homestead laws.

This act was repealed by act of Congress approved July 4, 1876 (19 Stat., 73) which expressly provided "that the public lands affected by this act shall be offered at public sale as soon as practicable from time to time, and according to the provisions of existing law, and shall not be subject to private entry until they are so offered."

The tract in question, not having been re-offered as provided in said act, can not be entered at private cash entry.

The decision of your office must be and it is hereby affirmed.

ACCOUNTS–UNITED STATES DEPUTY SURVEYOR.

GILBERT M. WARD.

An account rendered by a deputy surveyor, and duly approved by the surveyor general, should not be rejected on the report of a special agent, without due opportunity for a hearing on the merits of the case.

Secretary Vilas to Commissioner Stockslager, February 5, 1889.

By letter of your office, dated July 16, 1887, addressed to J. Cabell Breckinridge, Esq., United States surveyor-general, at Olympia, Washington Territory, your predecessor, Commissioner Sparks, adhering to his decision of March 19, 1887, finally rejected the meanders of three several streams, known, respectively, as East Twin river, West Twin river, and Deep creek, in fractional township 31 north, range 10 west, Willamette Meridian, Washington Territory, as shown by survey of said fractional township, made by deputy surveyor Gilbert M. Ward, under his contract No. 315, dated February 27, 1885; and disallowed Ward's account to the extent of the amount charged for such meanders. From this decision Ward appeals.

The facts in the case, as far as disclosed by said decision of July 16, 1887, are found to be correctly stated therein, and reference is made thereto.

The protest of Ward, referred to in said decision, alleges substantially, that the streams in question take their rise among hills and mountains, some of which are over seven thousand feet in height, and generally covered with snow from October to June; that the discharge of water through these streams, from the melting snows on said hills and mountains, during the months of May and June, is so great as to make them large and rapid rivers, sometimes impossible, and always difficult, to cross; that the tide at the mouths of these rivers rises to the height of from nine to eighteen feet, and thus causes the water to flow inland for a considerable distance; that the settlers located near these streams all desired that they be meandered, and not closed to the public, as in the greater part of the year they serve as highways for canoe navigation, and thus save the making of roads in a rough, timbered country, where roads are very difficult to construct; that all travel in and about said township 31 is done either on foot or by canoe, and in no possible manner can a team proceed even for the shortest distance; that when said survey was made the streams were at their greatest height and their meanders were very difficult to make; that the work complained of was performed in the best of faith, protestant believing that he was doing nothing but his duty under his contract, in accordance with his understanding thereof, based in part upon information obtained from Surveyor General McMicken to the effect that a stream, two chains wide, was within meanderable limits. He further states that, if necessary, he can furnish proof of the truth of these allegations, and asks that his account be allowed and paid in full.

Examiner Martin, in answer to this protest, adheres to the opinion expressed in his former report, as touching the propriety of these meanders, and expresses the belief that further investigation will confirm its correctness. He adds, substantially, that at the time he examined the survey there were but three white settlers in said township 31, all of whom assisted him in making the examination and all freely expressed the opinion that these streams could not be made available for any public use whatever; that when not flooded the streams are small, shallow and rapid, and when swollen they are rushing torrents, upon which no man would dare to risk his life in a canoe or boat; that said fractional township 31 extends but a few miles south of the strait of Juan De Fuca, which forms its northern boundary, and that the lands south of it are unsurveyed and so rough that they never can be settled; that these streams, owing to their rapid descent, are not affected by the high tide more than for a distance of about twenty chains from the beach of the strait; that he stepped across East Twin River a few rods above its mouth at low tide; that the only reason for keeping these streams open that has even the appearance of feasibility is found in the fact that "when swollen by the June floods, saw logs, railroad ties and other timber might be floated down them into the strait and towed to mills and market." He expresses regret that Ward should be subjected

to loss, but thinks "he should have exercised better discretion and given less attention to the wishes of those who perhaps were formulating rapacious schemes with reference to the excellent timber on the public domain in that vicinity."

It appears from the records of your office that the amount of Ward's accounts, as approved by Surveyor-General McMicken, with whom his contract was made, is $892.99. The amount paid him is $624.45. The difference $268.54 is the amount now in controversy.

The only serious question presented by Ward's appeal is whether a hearing should have been granted him upon the allegations of Examiner Martin's report, before final action by your office upon his account, the same having been regularly approved by the surveyor-general of the Territory.

In addition to taking the usual oath of office, Ward, upon the completion and return of his survey of said township, took and subscribed the further oath that said survey had been faithfully and correctly executed according to law and the *instructions* given him by the surveyor-general, and the survey as made and returned by him, showing the character, and meandering of said streams, was regularly examined and approved by said Surveyor-General McMicken, before being forwarded to your office.

It can not be denied, under these circumstances, that the deputy-surveyor has made out a prima facie case in support of his account as originally presented. The rejection of a part thereof is based solely upon the report and supplemental report of Examiner Martin. In my opinion such rejection should not have been adjudged simply upon said reports, but a hearing should have been had to determine the truth of the allegations therein contained.

The material charges made by Martin, as stated in his original report, are that neither of these streams is a "navigable river," or a "well defined artery of internal communication;" that they are simply "small creeks and none of them can be ascended at any stage of water, even with a canoe, one hundred yards above its mouth"; that "to create fractional subdivisions by meandering such streams is worse than ludicrous," and that such meanders "should be rejected because entirely superfluous and detrimental alike to the interests of the settler and the government."

Upon these charges, in view of the showing made by Ward, I think a hearing should yet be allowed, and you are accordingly directed to order such hearing to be had before the United States surveyor-general for Washington Territory, in accordance with the rules of practice.

The subject of the inquiry should be whether these streams are "well defined natural arteries of internal communication," or, of such a character as that, according to the custom and practice prevailing in the Department at the time said survey was made, they could reasonably have been considered as within meanderable limits, under the rules and

instructions then in existence for the guidance of surveyors general and their deputies. It should also be shown whether they have been utilized, or, are capable of being utilized, for any purpose, and, if so, by whom and for purpose, and it may be well to inquire what was the condition of the streams at the time of said survey.

Upon the receipt of the testimony taken at such hearing, together with the report of the surveyor-general thereon you will readjudicate the case.

Your said office decision is accordingly modified.

TIMBER LAND ENTRY—PRACTICE.

REED *v.* FITZGERALD.

The fact that land might be cultivated and crops grown thereon would not except it from entry under the act of June 3, 1878, unless it is shown that such crops could be profitably raised.

A rehearing should be allowed where evidence was introduced and considered under an issue not raised on the hearing as originally ordered.

Secretary Vilas to Commissioner Stockslager, February 5, 1889.

The Department, by its decision of July 9th last, in the above stated case, affirmed the action of your office, holding for cancellation the pre-emption filing of Reed, for the SE. $\frac{1}{4}$ of Sec. 35, T. 1 N., R. 2 E., H. M., Humboldt, California, and modified your decision to the extent of allowing the timber land cash entry of Hortense E. Fitzgerald, provided she relinquishes her right to the W. $\frac{1}{2}$ of said SE. $\frac{1}{4}$ of Sec. 35, it appearing that some fifty or sixty acres thereof would be fit for cultivation, if the timber and undergrowth were cleared away.

Mrs. Fitzgerald has filed a motion for review of said decision, upon the grounds, that the evidence fails to show that said sixty acres is not "chiefly" valuable for the timber upon it, or that it is fit for "ordinary agricultural purposes." Second, that the question as to the character of the land was not involved in the trial of the case, and Fitzgerald had no notice that testimony upon that point was necessary.

The facts in the case are, substantially, as follows: Reed filed pre-emption declaratory statement on said land June 6, 1882, alleging settlement thereon May 31, same year; and Mrs. Fitzgerald's application to purchase under the timber land act was allowed May 27, 1884. It appearing that said entry had been allowed without notice to Reed, a hearing was ordered to determine the question of priority of right, and upon such hearing it clearly appeared that Reed had not made a valid settlement upon the land in question, and for this reason his filing was held for cancellation, but in the investigation of said case it appeared from the testimony of Reed, offered for the purpose of showing his good faith as a pre-emptor, that he had cultivated a part of said tract for

three years. The testimony on this point is to the effect, that he planted a bucket-full of potatoes and put the beans in to see if they would grow; that he harvested a half a bucket-full of oats the first year, and placed them in his cabin; that he did not dig all of his potatoes, but he got about a bucket-full; that he got about half a bucket-full of potatoes the third year, and only planted the potatoes, beans and oats to see if they would grow; that he did not plant them for the purpose of complying with the requirements of the pre-emption laws. On this point, another witness testified "that Reed put in a bucket-full of potatoes, and that he knows he took out enough for a meal." John Foley, another witness, testified in behalf of Reed, that in March 1883, or March 1884, he saw about a quarter of an acre planted in potatoes.

This seems to be all the testimony tending to show the value of this land for agricultural purposes.

A special agent of the land office testified, that it would cost $200 an acre to clear the land claimed by Reed to be more valuable for farming purposes than for timber, and that it was undoubtedly timber land.

The witnesses for Reed did not testify as to the value of this land for agricultural purposes, but the only testimony as to the cultivation of said land was brought out for the purpose of showing the validity of Reed's settlement. On the other hand, all the four witnesses for Fitzgerald testified that the land was valuable for the timber and for nothing else. The local officers found that Reed intended to acquire title under the pre-emption laws, knowing that the land was more valuable for timber than for farming purposes.

Upon a further consideration of this case, I am of opinion that the correctness of the decision of the Department of June 9th may be questioned. The act of June 3, 1878, allowing the purchase of timber land in certain States and Territories, provides for the sale of lands "valuable chiefly for timber, but unfit for cultivation."

I do not think that the mere fact that some part of the land might be cultivated and crops grown thereon would except such land from the operation of the act, unless it is shown that said crops might be profitably grown.

This seems clearly within the rule laid down by the Department in Hughes *v.* Tipton (2 L. D., 334), wherein (referring to the decision in the case of Spithill *v.* Gowen, 2 L. D., 631) it is said:

In ruling on Tipton's application, you have held, I observe, that entries under the act of June 3, 1878, "can only be made for land which is *wholly* unfit for cultivation, after the timber has been removed," and you base the ruling on the case last mentioned. This ruling carries that case beyond its letter and spirit, which go no further than to hold that the soil must be "unfit for *ordinary* agricultural purposes," in order to subject it to sale as timber land. Such is the correct standard, undoubtedly, and the only one which could be properly adopted in view of the law, which institutes a comparison of values by force of the descriptive terms, "valuable *chiefly* for timber, but unfit for cultivation." A similar comparison is made in the mining law between the value of agricultural and mineral land, and

its application is not at all difficult in the administration of either law. For instance, if a timber application should cover timbered land whose soil was so thin or so poor, or whose surface was so precipitous, rocky, or broken, as to unfit it for raising crops in the ordinary manner and quantity, it would be valuable chiefly for timber.

The other ground of error alleged, to wit,—that the question as to the character of the land, was not involved in the trial of the case, and Fitzgerald had no notice that testimony upon that point was necessary —is, I think, sufficient ground for ordering a rehearing in this case.

In the case of F. E. Habersham (4 L. D., 282), it was said:

When there is an adverse claim of file at the date of the application, a contest should be ordered, and the sole question then involved is the validity of such adverse claim. When there is no adverse claim of file at the date of the application, a simple protest will make an issue, and the sole question then involved is the *bona fides* of the application and the character of the land, and this issue must be made by protest filed for that purpose. Martin *v.* Henderson (2 L. D., 172); Rowland *v.* Clemens (Id., 633); Showers *v.* Friend (3 L. D., 210); Crooks *v.* Hadsell (Id., 258); Merritt *v.* Short *et al.*, (Id., 435); Jones *v.* Finley (10 C. L. O., 365).

While it is true that the question as to the character of the land might have been raised on the hearing ordered to determine the priority of Reed's settlement, yet it is clear that such issue was not raised, and Fitzgerald was not called upon to meet it, the investigation being ordered solely upon Reed's allegation of prior right to the land and of compliance with the law on his part, no question as to the character of the land being raised until the decision rendered by the Commissioner.

She now asks that she may have an opportunity to meet that issue with proof, and to show that the land is absolutely unfit for cultivation and to have the decision of the Department modified to that extent.

While this motion was pending before the Department, you forwarded to the Department the application of Thomas Reed to make homestead entry of said tract, and you ask that said application be considered in connection with this motion for review, said application having been rejected by the local officers, and an appeal filed therefrom to your office.

In view of the uncertainty of the testimony as to the character of this land, and the application of Reed to enter the same under the homestead law, I have thought proper to modify the decision of the Department of June 9th, and to order a hearing in said case, for the purpose of determining the character of said land, of which hearing all parties should be notified and full opportunity should be allowed to show the character of said land, in connection with the respective applications of the parties to enter the same under the timber cash entry and homestead laws.

REPAYMENT—COMMUTED HOMESTEAD-ENTRY.

E. L. CHOATE.

Repayment may be allowed where commutation proof, made and accepted in good faith, is found insufficient by the Department in the matter of residence, and the entryman, not being able to show further compliance with law as required, relinquishes his claim to the land.

Secretary Vilas to Commissioner Stockslager, February 7, 1889.

In the matter of the application of E. L. Choate for repayment of the purchase money paid by him on commuted cash entry, No. 10,172, for the NE. ¼ of Sec. 32, T. 110 N., R. 62 W., Huron land district, Dakota, appealed from the decision of your office (of June 23, 1887,) denying said application, the record discloses the following facts:

On August 28, 1884, appellant made final commutation proof on his homestead entry No. 8733, paid two hundred dollars for said tract, and obtained from the local officers his final certificate of entry.

On August 27, 1885, your office rejected this proof, suspended the cash entry, and required appellant to make new proof, showing "that he had for a period of six months maintained an actual, bona fide, continuous residence" on said land.

On February 27, 1887, on appeal, this decision was affirmed by the Department. On April 12 following, Choate relinquished his entry—which was then canceled by the local officers—and made application for repayment of the purchase money. In denying the application you say:

> Choate could have perfected his entry; reasonable time was given him to do so, but he would not avail himself of that privilege, alleging that it was impossible to leave his work and reside on the land. The law governing the return of purchase money does not provide for repayment in a case of this character, when parties voluntarily relinquish their entries.

It appears that appellant is a locomotive engineer, and in an affidavit accompanying his application he swears that, being a poor man, he can not show the required residence on said land without giving up his only means of living, and that in making final proof, "he made no attempt to conceal or evade anything relating to his improvements, residence, or his or his family's temporary absences from said land, and that said proof was all made in his own words and own handwriting, stating all facts in the case just as they were, believing it all to have been done in accordance with legal requirements."

To the common understanding, and in the absence of any rule or law on the subject, it would appear that justice demanded the return of appellant's money, and if the law, which does not generally favor forfeitures, does not clearly forfeit this money to the government, it should be returned to him.

There is nothing in the record showing that the applicant's final proof was false or fraudulent, or that he imposed upon or in any manner

deceived the local officers. His good faith and the good faith of the officers who received payment for the land and issued to him a final certificate of purchase stand unimpeached. Nor does there appear to have been any concealment of the facts as to the character of applicant's residence, and these facts, showing the real state of the case at the time proof was made, were regarded by the applicant and by the local officers as a substantial compliance with the settlement laws. Your office and the Department were of the opinion that the facts as to residence did not show such compliance. The entry, therefore, appears to have been erroneously allowed by the local officers. The proof was finally rejected by the Department, two and a half years after it was submitted and the final certificate issued thereon, and though the applicant was allowed a reasonable time in which to make new proof, he was then so situated as to make it impracticable to do so. He has surrendered the duplicate receipt issued to him and executed a proper relinquishment of all claims to said tract of land as required by statute, and his entry has been duly canceled and can not now be confirmed. The second section of the act of June 16, 1880 (21 Stat., 287), provides that:

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

This statute is remedial in its nature, and its language is broad and liberal. "Where from *any cause* the entry has been erroneously allowed and can not be confirmed, the Secretary of the Interior shall cause to be repaid," etc., is the language used. To restrict and limit this language so as to exclude the appellant from its benefits would defeat what seems to me to be the plain object of the statute in cases like the one under consideration. In my opinion the appellant has brought himself within the statute, and is entitled to a repayment of the purchase money for said tract.

The decision of your office is therefore reversed, and the repayment asked is hereby directed to be made.

DESERT LAND ENTRY—CHARACTER OF LAND.

FREEMAN *v.* LIND.

Land which produces native grasses in sufficient quantity to make an ordinary crop of hay in usual seasons is not subject to desert entry.

First Assistant Secretary Muldrow to Commissioner Stockslager, February 6, 1889.

I have considered the case of Horace M. Freeman *v.* John S. Lind involving the validity of the latter's entry under the desert land law of

the W. ½ of the SE. ¼ of section 31 T. 4 N., R. 18 E., in the Hailey land district, Idaho.

The entry was made May 3, 1883, and the case arose upon a contest affidavit filed by Horace M. Freeman alleging that the land was not desert land. A hearing was ordered and had and both parties appeared and offered testimony. The local officers found in favor of the contestant and held that the land was not desert in character. The decision of your office was rendered September 24, 1886, and held that the south forty of the land was not desert land and that the evidence does not show that the north forty "will produce an agricultural crop without irrigation in paying quantities"—You affirmed the finding of the local office as to the south forty and reversed it as to the north forty.

From your said decision the contestant Freeman appealed.

The eighty acres in controversy are situated on the road from Hailey to Ketchum in the valley of Wood River and directly west of the pre-emption claim of Lind. At its nearest point it is about twenty rods from the river and at its most distant eighty rods, and its altitude varies from five to forty feet above the level of the stream. Upon the south forty there are about twelve acres of standing timber and from six to ten acres that are periodically overflowed by Wood River. The north forty extends to the foot hills and is watered by a branch that flows from a spring outside the tract and spreading, is distributed in the soil. It also forms a part of the water shed of the mountainous county adjoining it and receives considerable amount of water from the melting of the snow, which accumulates to the depth of three feet and more, and is also touched by a small rivulet on its western boundary.

The testimony shows that for three years Lind has cut the native grasses and sold the hay. The estimates of hay grown per acre, without irrigation, varies from sixty pounds to twelve hundred. It is shown that the average price of hay per ton at Ketchum, the nearest town, was $25 and if the land produced five hundred pounds per acre, it was a source of profit to the entryman. One of the contestees witnesses paid him $25 a ton for hay cut upon the place; and it is also shown that the land was valuable for pasturing horses and cattle and was used for that purpose. The hay was cut upon both forties.

The second section of the act of March 3, 1877 providing for the sale of desert lands provides "that all lands exclusive of timber lands and mineral lands which will not without artificial irrigation produce some agricultural crops shall be deemed desert lands within the meaning of this act," and the third section provides that "the determination of what may be considered desert land shall be subject to the decision and regulation of the Commissioner of the General Land Office." In pursuance of the duty imposed by said act the circular of June 27, 1887 (5 L. D. 708) was issued in which it was prescribed that "Land which produces native grasses sufficient in quantity, if unfed by grazing animals, to make an ordinary crop of hay in usual seasons is not desert land."

Both of the forty acre tracts involved herein produced native grasses sufficient to make an ordinary crop of hay. Your decision holding for cancellation the entry as to the south forty embraced in his entry is affirmed and your decision sustaining the entry as to the north forty thereof is reversed. The contest of Freeman is sustained and the entry of Lind will be canceled.

RAILROAD GRANT—SUIT TO VACATE PATENT.

THE ATLANTIC & PACIFIC R. R. CO.

The odd sections within the granted limits of the act of June 10, 1852, excepted therefrom, but withdrawn under said grant, having been "offered" after the adjustment thereof, and prior to the grant of July 27, 1866, were not reserved from the operation of the latter grant.

The deduction required from the lands granted by the act of 1866, in so far as the road located thereunder was upon the same line as that provided for by the grant of 1852, should be made from the aggregate amount of the later grant.

Suit to set aside patent will not be advised where title passed under a full knowledge of the facts in the case, and has remained undisturbed for a long term of years, and the land covered thereby is now held by purchasers who bought in good faith, relying upon the title issued by the government.

The case of Rogers *v.* Atlantic & Pacific R. R. Co. overruled.

Secretary Vilas to Commissioner Stockslager, February 6, 1889.

On June 3, 1886, your immediate predecessor forwarded to this Department a list of certain lands, situated in the State of Missouri, alleged to have been erroneously patented to the Atlantic and Pacific Railroad Company, accompanied by a recommendation that suit be instituted to restore the title to said lands to the United States. On July 24, 1886, in compliance with instructions from this Department, a rule was laid upon said company to show cause before you, on a day named, why proceedings should not be instituted, in accordance with section two of the act of March 3, 1887 (24 Stat., 556), to restore said title as recommended. Return and answer to the rule were duly made; and, on consideration of the showing then made, on December 7, 1888, you recommended that proceedings be instituted to recover title to such lands, as at the date of the definite location of said road were covered by claims of record—a list of which lands, marked "C," aggregating 9,105.14 acres, was forwarded. In regard to the other lands alleged to have been improperly patented by your predecessor, you state that you "prefer to make no recommendation," and the papers are transmitted for my consideration and such action as may be directed.

It appears that, in aid of the construction of a railroad from the city of St. Louis to a point to be designated on the western boundary of the State of Missouri, Congress by act of June 10, 1852 (10 Stat., 8), granted to said State "every alternate section of land designated by even numbers, for six sections in width on each side of said road," with a provis-

ion that indemnity for losses in said limits was to be selected from other lands not further than fifteen miles from the line of the road. By section three of said act it was provided further:

That the sections and parts of sections of land, which, by such grant, shall remain to the United States within six miles on each side of said roads, shall not be sold for less than double the minimum price of the public lands, when sold: which lands shall from time to time be offered at public sale to the highest bidder, under the direction of the Secretary of the Interior, and shall not be subject to entry until they shall have been so offered at public sale.

The benefits of this grant were conferred by the State upon the Pacific Railroad Company, which made definite location of the line of its road *via* Springfield on November 25, 1853—*all* lands within the limits of the grant having been previously withdrawn by your office on June 11, 1852, the day after the passage of the granting act.

In 1854 all the vacant even numbered sections within the six miles limits, except 3,130.97 acres, were certified to the State for the use of the road, and on September 15, 1854, by proclamation No. 524 of the President, notice was given that there would be offered at public sale, on days named, the sections and parts of sections, bearing odd numbers, "which remain to the United States within six miles on each side" of said road, "subject to sale at two dollars and fifty cents per acre, as provided by the act of June 10, 1852, entitled," etc., "and specially excepted from graduation as to price by the act of 4th August, 1854."

On June 21, 1854, by order No. 517, your predecessor, Commissioner Wilson, gave notice, that inasmuch as the grant of land made by said act of 1852 had been adjusted "as far as practicable, all the vacant lands heretofore withdrawn and still withheld from sale or entry, along the route of said road, which lie *outside* of the limits of six miles on each side of the same," which have not been, or may not be selected under a congressional grant, or claimed by pre-emption, would be restored to private entry at the ordinary minimum price of one dollar and twenty-five cents per acre. Notice was also given to all settlers "within the six miles limits" of the grant "who settled upon such lands prior to their withdrawal," to come forward and establish their claims under the act of March 27, 1854; and to settlers "on the residue of the lands withdrawn from sale or entry" on June 11, 1854, to come forward and establish their claims under said act.

Subsequently, on December 28, 1870, the Governor of Missouri certified that said company had completed its road to within fourteen miles of the western boundary of that State; and thereafter, on July 13, 1871, 3,130.97 acres more of land were certified to the State for the benefit of said road, which certifications, aggregating 1,161,204.51 acres, it is stated by your predecessor, fully satisfied, if they did not exceed, the quantity of land granted by the act of June 10, 1854.

By act of July 27, 1866 (14 Stat., 292), Congress incorporated the Atlantic and Pacific Railroad Company; and, to aid in the construction of a continuous line of railroad, "Beginning at or near the town of

Springfield, in the State of Missouri, thence to the western boundary line of said State," thence by the most eligible route to the Pacific coast, granted by said act to the company every alternate section of public land, not mineral, designated by odd numbers, to the extent of ten sections per mile on each side of said road, 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 . . . . . .

Provided, that if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have heretofore been granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act.

On December 17, 1866, the Atlantic and Pacific Railroad Company located its road "upon the same general line" from Springfield to the western boundary of the State of Missouri, as had been adopted by the first company, and by December 6, 1871, one hundred miles of its road westward from Springfield had been constructed and accepted by the President. Of this one hundred miles, eighty-nine thereof lay between Springfield and the west boundary of the State. This being so, it is apparent that the certificate of the Governor of Missouri, as to the completion of said road to within fifteen miles of the western boundary, was not correct, being doubtless based upon inaccurate information.

Your office states that, subsequently all the vacant lands in odd numbered sections, falling within a limit of twenty miles on each side of the Atlantic and Pacific Railroad, were patented to the said company, including the odd numbered sections which were within the six mile limits of the grant of 1852. So that, for six miles on each side of the line of the Atlantic and Pacific Railroad, the title to both even and odd sections were passed from the government; the first under the act of 1852, and the second under the act of 1866, whilst only one line of railroad was built.

With regard to the deduction required to be made by the above quoted proviso, it is stated that the amount certified to the State under the act of 1852 was charged against the Atlantic and Pacific Railroad Company, and is to be taken into consideration in the adjustment of the entire grant to that company from Springfield to the Pacific.

Your predecessor bases his recommendation, for suit to secure the cancellation of the patents in question, upon two principal grounds, either of which in his opinion is sufficient to show the illegality of their issue.

The first is that, the odd numbered sections within the six mile limits of the grant of 1852 were "reserved" lands, and consequently excepted from the grant of 1866. The second ground is, that, within what were the common limits of the old and new road, a deduction should have been made from the odd-numbered sections of the new grant to the extent that

even numbered sections had been certified under the old. In other words, that said deduction was to be made within the special limits where the old road and the new were located upon the same general line, and not from the aggregate amount of land which the Atlantic and Pacific Company might be entitled to along its entire line from Missouri to the Pacific ocean.

Possibly there might be room for a discussion of the point whether the odd sections within the six miles limits of the first grant were "reserved," as contended by your predecessor, if the supreme court, in the case of Clements *v.* Warner (24 How., 394), had not decided that lands in the category of those herein mentioned, at the date of the definite location of the Atlantic and Pacific Railroad, were *not* of the class known as reserved lands.

The court there was construing the act of September 20, 1850 (9 Stat., 466) making a grant to the State of Illinois, to aid in the construction of the Illinois Central Railroad. These two grants are strikingly alike in language and provision; and especially so in the third section of each, where provision is made that the odd sections, which remain to the United States within the limits of the grant, shall not be sold for less than double minimum price, when sold. In the Missouri act, however, this is supplemented by an express direction, of what was implied in the other act, that said odd sections so remaining to the United States—

Shall from time to time be offered at public sale to the highest bidder, under the direction of the Secretary of the Interior, and shall not be subject to entry until they shall have been so offered at public sale.

This clause added no new force to the act, but merely declared what was already existing law, and had been such since the foundation of the land system.

The decision of the supreme court in the case referred to is then properly applicable to the one under consideration.

In that case as here, all the lands within the limits of the grant were withdrawn by the Commissioner of the General Land Office, and after the selections of the State were completed, in 1852 the President directed the sale of those sections and part of sections, along the line of the road, which remained to the United States; and such as were not sold became subject to private entry. The land in controversy was one of these so-called reserved odd-numbered sections within the granted limits, and after having thus been offered was purchased at private sale in November, 1855. In November, 1856, Clements, claiming settlement in October, 1855, was allowed to make pre-emption cash entry for the same tract, and subsequently patent was issued to him for the same. Warner claiming title by virtue of the private cash entry filed the bill to have the legal title, evinced by the patent, transferred to him. The tenth section of the pre-emption act of September 4, 1841 (5 Stat., 453) prohibited the exercise of the pre emption right upon "sections of land

reserved to the United States, alternate to other sections granted to any of the States for the construction of any canal, railroad, or other public improvement." And the question in the case was whether the lands were "reserved," because, if so, they clearly were not subject to pre-emption. The court said that "after the restoration to market of lands, embraced in the exception we have quoted from the act of 1841, and when they have become subject to entry at private sale, they lose their character as reserved lands." Now, it is to be observed that the court here held that the offering of the Illinois lands at public sale, notwithstanding that offering was at the double minimum price, and in obedience to the mandate of the statute, restored the lands to market, and that, when thus restored, though, in further pursuance of the statute, they were subject to private cash entry only at an enhanced price, yet thereby they lost "their character as reserved lands." It is true the question in the case before the court related to the attachment of a pre-emption right to the tract claimed, but it involved the character of the land, and the principle on which the court based its ruling is equally applicable to the matter now under consideration; and I must hold that the odd sections within the grant of 1852 were not, when the grant of 1866 was made, "reserved" lands and therefore excluded therefrom.

It may perhaps be true, as stated, that the result of this determination will be to permit a solid block of land, including both odd and even sections, to pass from the United States to aid in the construction of one road; a result said to be unknown in the history of congressional land grants to railroads. This last assertion is not strictly correct, because there are some grants in which indemnity lands are permitted to be selected from both odd and even sections. But the answer to both assertions, were they correctly stated, is that Congress has the power to make such a grant, if deemed advisable by that body.

The presumption is that Congress had full knowledge of, and legislated for, the existing condition of affairs in Missouri, as elsewhere, when it made the Atlantic and Pacific grant. At that time the President had by public proclamation restored to market the lands theretofore withdrawn, and the then Commissioner had announced that the grant of 1852 had been practically adjusted. These facts, it must be presumed, were well known to Congress, as well as the further fact that it was making a grant, under which the road from Springfield westward would in all probability pass over the line of a road for which a former grant was made—indeed, to do which very thing authority was then asked and granted. With a full understanding of all these matters, Congress granted to that company ten alternate odd numbered 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. Congress could just as well have excepted also sections, alternate to other sec-

tions theretofore granted for public improvement; or the lands then for sale at double minimum price. But it did not do so, and made the grant of the ten odd-numbered sections, unrestricted by any such limitations. The language employed in the grant is clear and the intention thereof is made so plain that I do not think there is any room for implication. Ten odd numbered sections were granted and these were necessarily to be taken from the unencumbered and unexcepted lands of the United States nearest to the line of the road; and no other exception is justifiable, except that made by Congress in the grant.

With regard to the second point, relating to the proper mode of making the deduction for previously granted lands, suggested by Commissioner Sparks, I have no difficulty. The granting act to the Atlantic and Pacific Company gave it ten sections per mile on each side in the States through which the road might pass, and twenty sections in the Territories, if so much land was in place. This was the *amount* of land which Congress granted, and intended the Company should have, if possible. In the clause requiring a deduction to be made, on account of previously granted lands, the language used is "the amount of land heretofore granted shall be deducted from the amount granted by this act." This problem is a simple one in arithmetic, and there should be no difficulty about it. The ten sections per mile on each side of the Atlantic and Pacific Railroad, within the overlaying limits of the two roads, is the minuend—the amount from which the sum is to be subtracted; the six sections on each side of the line of the old road, within the same limits, is the subtrahend, or the amount to be subtracted from the former; and the balance that remains is the net amount to which the Atlantic and Pacific Railroad Company is entitled. If confirmation be needed of that made so plain by the language used, it is to be observed that throughout the granting portion of the act, the land given is always described specifically as "ten" and "twenty" sections; and indemnity is to be allowed, not for "the amount" lost by taking an "amount" equal thereto, but the provision is that, when any of the granted "sections or parts of sections" may be lost, other lands in "alternate sections" are to be selected. But when Congress comes to provide for a deduction on account of lands theretofore granted for the construction of a former road along the same general line, different language is employed, which deals, not with "sections" or "parts of sections," but with the aggregate "amount." This change of language in the same section, where so much particularity had theretofore been evidenced, clearly marks a legislative intent to distinguish between the mode of ascertaining the allowance of indemnity due to the company for lost lands, and the deduction to be made in favor of the United States for lands which had passed under a previous grant. In the one case the allowance is to be made by the selection of "sections" or "parts of sections" in exact counterpart of the lost lands; and in the other case "the *amount* of land" which passed under the former grant was

to be ascertained and then "deducted from *the amount* granted by this act." The rule thus prescribed by Congress, so obviously differing from the rule prescribed by the same authority in the adjustment of the indemnity clause, must be followed. Nor do I see any injustice done to the government by so doing. As said before, it proposed to give to the Atlantic and Pacific Company so much land per mile, if possible to be obtained, throughout the entire line of its road; and if the aggregate amount which passed from the government to another company, for constructing the same road or part of it, is deducted from the aggregate amount which the present company would otherwise be entitled to in the common limits, but one donation has been made for the one road. Nor is any injustice done the company, as is shown by the following statement, which I have obtained from the adjustment section in the Railroad Division of your office, and which shows the practical result of an adjustment in accordance with the rule herein prescribed. The statement is as follows:—

Areas of grant:		
Odd sections in 6 mile limit	333,572.41	
" " " 6 to 20 mile limits	750,619.35	
Total		1,084,101.76
Deduct amount approved to the State for the old road		433,592.90
Net area of grant of 1866		650,598.86
Amount heretofore approved		503,074.11
Due as indemnity		147,524.75

This statement is based upon an old map of withdrawal, which is believed to be somewhat incorrect. An accurate measurement, it is thought, will reduce the deficit in the neighborhood of 20,000 acres. Assuming the approximate correctness of this statement, it yet shows a large deficiency due the company, under this method of adjustment.

The rule here announced differs from that proposed to be adopted by your office, as heretofore stated, in that, in pursuance of the language of the act of 1866, it applies only "as far as the routes are upon the same general line," and not to the adjustment of the entire grant of the Atlantic and Pacific Company from Springfield to the Pacific. In my opinion, under its operation, exact justice is meted out to both parties under the legislative act and contract. See Winona and St. Peter R. R. *v.* Barney (113 U. S., 628).

If a wrong has been perpetrated upon the government by passing title to land not authorized by law—a wrong to right which the aid of a court of equity should be invoked,—that wrong was not in the issue of patents to the Atlantic and Pacific Company; for, as shown, that company received patents only for the land granted it by Congress, and not to the full amount of that grant. With the first certification in 1854 the Atlantic and Pacific Company could have had nothing to do, inasmuch as it was not then in existence, and, so far as the record dis-

closes, it had nothing to do with the subsequent certification in 1871, and is in no way responsible, directly or indirectly, therefor. Besides, all the lands so certified are deducted from the grant made by the later act, and the quantity actually certified is still less than the quantity of the later grant.

But it would avail little now to inquire whether the certifications to the State were made in nice compliance with exact legal rules. All the lands in the even sections within the six miles limits, except 3,130.97 acres, were certified over to the State in 1854, and this small balance in 1871. Every presumption is that the action of the land authorities in both instances was the result of careful and deliberate consideration. To those officers, as a special tribunal, was given the authority to determine and act finally. And surely their judgment, exercised not once, but twice, in relation to the questions arising under the old grant, and again for a third time, when called upon to issue patents to the Atlantic and Pacific Company within these same limits, when the questions now raised were presented by the record, and, it is to be presumed, were passed upon, should be entitled to a degree of respect akin to that required of anything which is *res adjudicata*.

The first certification to the State was made thirty-five years ago; and the second eighteen years ago; the issue of patents to the Atlantic and Pacific Railroad Company commenced about nineteen years since and was nearly completed in three years thereafter. The land certified and patented is located in one of the older and most populous of the States of the Union, and title under the patents, it is asserted, and doubtless with truth, has long since passed through several hands into the possession of the present holders, who, justly regarding a patent of the United States as the best possible muniment of title, have expended large sums in improving what they had every reason to believe was their property indisputably.

It is true that the statute of limitations may not be pleaded against the United States, nor is it strictly chargeable with the mistakes, frauds or laches of its officers. But, when going into court, it will otherwise be treated like an ordinary litigant, and "if it be inequitable to grant the relief prayed against a citizen, such relief will be refused by a court of equity, though the United States be the suitor," said Mr. Justice Field in delivering the opinion of the court in the case of United States *v.* Flint (4 Sawyer, 58, affirmed in 98 U. S., 61). Continuing, the same learned judge said, that no laches in bringing suit may be imputed to the United States:

Yet the facility with which the truth could have been originally shown by them . . . . . the changed condition of parties and property from lapse of time; the difficulty from this cause of meeting objections which might perhaps at the time have been readily explained; and the acquisition of interests by third parties upon the faith of the decree, are elements which will always be considered by the court in determining whether it be equitable to grant the relief prayed. All the attendant circumstances will be weighed, that no wrong be done to the citizens, though the government be the suitor.

The above was said in relation to a decree in a private land claim, and applies with more force even to the case of a congressional grant on which patents have been issued.

Applying the above rulings to the case under consideration, on what just ground can the United States claim the interposition of a court of equity?

If the law of the case were otherwise than as stated, I can see no equitable grounds on which a court could interfere. All the matters of fact connected with the adjustment of the two grants, with the certifying and patenting of the lands to the State and Company respectively, were within the knowledge of the government, in the only possible way for it to have such knowledge, through its officers and records; with this record knowledge, the proper officers deliberately passed the legal title from the government, and during the long period since elapsed, in the same way, through its sworn officers, it has stood by silently whilst others, ignorant of the surrounding facts, were investing their money and labor in the improvement of the same lands, the title to which the government through its then officers said was good, but which other officers now assert to be bad.

Under such circumstances, and after the lapse of so many years, many decisions of the supreme court demonstrate that it can not be expected the patents would be set aside and thereby the property rights acquired under them and so long enjoyed without challenge, sacrificed by a different interpretation of the granting act from that which was deliberately adopted and acted upon. The only probable consequence of instituting such a litigation would be uncertainty, depreciation of values for a time and distress to a large community and numerous citizens.

Holding these views, I decline to request the institution of the suit as recommended, and herewith return the papers forwarded.

The case of Rogers *v.* Atlantic and Pacific Railroad (6 L. D., 565), so far as in conflict herewith, is overruled.

OSAGE LANDS—ACT OF MAY 28, 1880.

UNITED STATES ET AL. *v.* ATTERBERY ET AL.

An "actual settler" in the meaning of the act of May 28, 1880, is one who goes upon the land specified by said act with the intention of making it his home under the settlement laws, and does some act in execution of such intention sufficient to give notice thereof to the public.

If the settlement is not *bona fide*, but made for the benefit of another, the settler is not an "actual settler" within the meaning of said act.

If the settlement is made in good faith, a subsequent agreement to convey the land after entry will not in itself invalidate the entry.

First Assistant Secretary Muldrow to Commissioner Stockslager, February 6, 1889.

I have considered the appeal of R. J. Simpson, transferee, from the decision of your office, dated May 9, 1888, holding for final cancellation

five Osage cash entries, viz: Nos. 16,631, 16,632, 16,633, 16,988 and 16,989, made by Robert W. Atterbery, Wilbur L. Fogleman, William L. Stanley, Samuel R. Moore, and Louis H. Moore, September 20, and November 11, 1882, for lands in T. 34 S., R. 6 W., at the Wichita land office in the State of Kansas.

The record shows that said entries were canceled by your office letters, dated August 6 and 7, 1883, upon the report of a special agent, that said entries were invalid for want of the required settlement and residence, and also because made for the benefit of another.

Subsequent proceedings were had upon the application of R. J. Simpson claiming as transferee. A hearing was ordered by this Department on February 28, 1887, "to determine whether said entrymen were actual *bona fide* settlers and qualified pre-emptors at the date of their alleged entries."

The hearing was duly ordered and May 12, 1887, was set for the trial. It was postponed on account of lack of funds, until July 18, 1887, when it was held before the local land officers. The United States was represented by a special agent, and, the entrymen not being present, the transferee appeared in person and was represented by counsel. The testimony was taken in each case separately, but the local officers rendered one opinion covering all of the cases. From the evidence submitted the register and receiver found that the entrymen were qualified pre-emptors; that the facts relative to settlement and cultivation were essentially the same in each case; that residence for any length of time upon the several tracts in question was not made by any of the entrymen; that the testimony fails to show that the entrymen "ever ate a meal of victuals or slept upon the land prior to their entry of the same;" that upon each of said tracts, between the dates of alleged settlement and final proof, "a small patch of sod about fifty feet wide and sixty feet long was broken, and sod walls from two to four feet in height were laid up in the form of an enclosure about twelve feet square;" that no other work was done upon the land prior to making final proof, and the value of the labor put upon each tract was not more than from five to eight dollars; that this work was done, not by the entrymen, but by one Oscar Herron, who was employed to make the improvements by the firm of Meggs and Simpson, and the lands were sold to Simpson after the entries were made.

The register and receiver further find that the entrymen were single and for most part were engaged in the business of herding cattle; that the several filings were made out by Meggs and Simpson, and with one exception were forwarded and filed in the local office the same day; that each settlement and entry was made for the benefit of the transferee Simpson, and that said entries were fraudulent and ought not to be reinstated.

The transferee, Simpson, appealed from the decision of the local officers alleging error in the findings of fact, and error in holding that said entries should be canceled.

Your office sustained the action of the local officers and found that said entries were made for the benefit of the transferee; that said Simpson, acting as agent for the entrymen, employed one Herron to build sod houses on said claims, eight by ten feet, and five feet high, with place for door in one end, and also to do some breaking on each claim if the land was in a suitable condition; that the breaking was not done for the reason, as alleged by Herron, that he was not paid therefor; that the final proofs in each case show the improvements to consist of a sod house, breaking from eight to ten acres, with a well, all valued at $150; that said "Simpson located these claimants (who appear to have been cow boys) on their several claims; made out their final proofs besides attending to the improvements and negotiating their anticipated loans;" that Meggs, a partner of Simpson, was advertised to take final proof in the cases of Atterbery, Fogleman, and Stanley, but being absent, the proofs were made before G. W. Vickers, probate judge; that the testimony of Simpson is "weak and evasive;" that the witnesses for the defense do not appear to reside near the lands in question, and their testimony relates to what the entrymen said concerning their claims; that the witnesses for the government never heard or knew of the entrymen, except Atterbery, whom, it is claimed, entertained a fellow cow boy as a passing guest one night in one of the sod houses; that the testimony of the witnesses for the government shows that said entrymen were not known in the neighborhood at all and that they were not in any true sense actual settlers; that taking into consideration so much of the special agent's reports, as were admitted in evidence, the testimony of the surveyor, Kline, and of Burchfield, the assessor for Spring township, showing the actual condition of the lands after proof, together with the testimony of the other witnesses for the government, as to the failure of the entrymen to settle on said land, and the condition thereof before making final proof, it is shown with "reasonable certainty that this whole matter was a fraud contracted by said Simpson, after he had somewhat recklessly obtained the location of these lands by means of these entrymen."

Your office, therefore, decided that actual settlement by the entrymen being shown, under the provisions of the act of May 28, 1880, "subsequent transfers or agreements to transfer do not form an element in the case," but that in the case at bar, no actual settlements had been made, and the entries being fraudulent must be held for cancellation.

From the decision of your office two appeals have been filed. One by counsel resident in this city, date not given, but received by your office on May 17, 1888, and the other filed in the local land office on May 29, 1888.

The errors alleged in each are substantially the same, namely: (1st) Error in holding that said entrymen were not actual settlers upon said lands, and, (2nd) error in holding said entries for cancellation.

An examination of the final proof papers confirms the findings of your office relative thereto.

* * * * * * *

The foregoing lengthy summary of the testimony in Atterbery's case has been made for the reason that counsel for the transferee assert that the land officers "mistook the law and grossly perverted the facts" and characterize the decision of your office as "weak and foolish." The other four cases are no stronger, if as strong for the transferee, as Atterbery's case. That the final proofs in said cases were false is clearly shown by the testimony taken at the hearing. The value of the improvements was less than $15, while the final proof stated the value to be $150. It is clearly shown that Atterbery did not establish his residence on said tract on March 15, 1882, as alleged in his final proof, and the evidence shows that there was no "well dug" on the land. Nor am I greatly impressed with the force of the contention of counsel that because the final proofs do not allege "a well of water" it does not follow that the proofs may not be true if holes were dug for the purpose of obtaining water. In Atterbery's case, however, there was no evidence showing that any hole had ever been dug for the purpose of getting water.

It is earnestly contended by counsel for Simpson that said entrymen were actual settlers under the provisions of the act of May 28, 1880 (21 Stat., 143), and had the qualifications of pre-emptors on the public lands. The second section of said act provides:

That all the said Indian lands . . . . . shall be subject to disposal to actual settlers only, having the qualifications of pre-emptors—not exceeding one quarter section each.

It will be necessary to inquire who are actual settlers, within the meaning of said act? Evidently the same acts are required as would prove actual settlement under the pre-emption laws. The term "actual settler" is technical and has acquired a well defined meaning under the rulings of this Department and the decisions of the courts. An actual settler is one who goes upon the public land with the intention of making it his home under the settlement laws, and does some act in execution of such intention sufficient to give notice thereof to the public. (4 Op. 493); Lytle *v.* Arkansas (22 How., 193); Allman *v.* Thulon (1 C. L. L., 690).

In Howden *v.* Piper, 3 L. D., 162, this Department held that—

Pre-emption is based on acts of settlement. These consist of some substantial and visible improvement having the character of permanency, with intent to appropriate it under the law. See also same case on review (ibid., 294).

This act of settlement must be personal and can not be made by an agent. Foster *v.* McLean (2 L. D., 175); Byer *v.* Burrell (6 L. D., 521).

In the case of Brake *v.* Ballou (19 Kansas, 402), the supreme court

of that State decided that under the provisions of section 12 of the act of 1870 (16 Stat., 362) which reads as follows:

"Which lands shall be open to settlement after survey . . . . . and shall be sold to actual settlers only." The government evidently not only intended that no one but actual settlers should get any portion of said Osage diminished reserve, but also that every quarter section of such reserve should be occupied by an actual settler. There is no pretense that the plaintiff was ever an actual settler at all on the land in controversy. Therefore he had no right himself to purchase said land from the government. And to procure any other person to purchase it for him would be a fraud upon the government. If he could obtain title to lands in that way it would be to cause the government to sell its lands to others than actual settlers in violation of its own laws.

But it is urged by appellant that with relation to said lands, the government is "a mere trustee, ... and its duty is only well fulfilled when it obtains the money at the earliest possible moment." Citing United States *v.* Edwards (33 Fed. Rep., 104).

It is true that in the Edwards cases (*supra*) which were suits to set aside patents for Osage Indian trust and diminished reserve lands, the learned judge stated that,

All that is required of the applicant is, that he shall have the qualifications of a pre-emptor; that he shall be an actual settler, and that he shall make payment. As the government held these lands under a trust to convert them into cash, its primary object was, of course, to realize as soon and as much as possible, and not, as in respect to public lands generally, to have them improved; so it might properly ignore the questions of improvement or length of occupation. The trust was fulfilled when the money was obtained. The land Department has recently placed the same construction upon this matter. Citing the case of U. S. *v.* Woodbury *et al* (5 L. D., 303).

The court refused to set aside said patents, for the reason, that the government did not show by satisfactory evidence that it had been defrauded; that it appeared that the entrymen were qualified pre-emptors and actual settlers; that the purchase money was paid for the land and there was "not a scintilla of testimony to show that these entries were made through any collusion or by virtue of any agreement between Halsey and the parties entering."

For the sake of argument, it may be conceded that the government acts as trustee, but it is by no means true, that it is bound by the terms of the trust to dispose of said lands so as to obtain as much money as possible and that too, in the quickest time possible. Were this so, the government would offer the lands at public auction and allow speculators to buy without limit or restriction. But this has not been done. In the first instance by the express terms of the statute the lands can not be sold to any but actual settlers having the qualifications of pre-emptors, and to each not exceeding one hundred and sixty acres.

The decision of Judge Brewer in the case cited, by no means sustains the construction of the appellant, that when the government has sold said lands and obtained the purchase money, "its obligation and authority are at an end." If the entry was fraudulent, or the entrymen did not have the qualifications required by said act of 1880, the mere fact that

upon false and fraudulent proof, the government had, through its proper officers, received payment and issued certificates for the land, would not deprive the government of the right and authority to cancel the entry upon proper proceedings being had. In the case of the United States *v.* Woodbury (*supra*) the question presented for decision was, whether a qualified pre-emptor, after filing his declaratory statement and settling in good faith upon Osage diminished reserve lands, could make a valid agreement to convey the land to a town-site company after entry; and it was held that the statutory oath required of a pre-emptor is not applicable to an entry under said act of May 28, 1880; and that the only condition pre-requisite to an entry of said lands is, that the purchaser shall be an actual settler with the qualifications of a pre-emptor. The decision in the Woodbury case referred to the case of Morgan *v.* Craig (10 C. L. O., 239), and stated that it held "that a comparison of said act with that of May 9, 1872, and other acts relating to the disposal of these lands, shows that it was the policy of Congress to subject entries upon these lands to all the requirements and conditions of the general pre-emption laws." The correctness of this ruling was denied by the Department, and to that extent the case of Morgan *v.* Craig was overruled. In the case of Booth *v.* Lee, decided March 12, 1888 (unreported), cited by counsel as authority for the proposition that "the departmental ruling is that settlement for the benefit of another on these diminished reserved lands is valid," the following statement is made:

> This Department held in the case of United States *v.* Woodbury, that under the act of May 28, 1880 (21 Stat., 143), the only condition pre-requisite to an entry of the Osage Indian trust and diminished reserve lands in Kansas, is that the purchaser shall be an actual settler with the qualifications of a pre-emptor; this decision overruled the former decision of Morgan *v.* Craig (10 C. L. O., 234) which held that a comparison of said act with that of May 9, 1872 (17 Stat., 90) and with other acts relating to the disposal of Indian lands in Kansas, shows that it was the policy of Congress to subject private entries upon that diminished reserved land to the general principles of the pre emption laws; and that a purchaser of said land may acquire title to the same although his settlement was made with the intention of proving up for the benefit of another to whom he had agreed to convey the land after entry.

Said statement, so far as the same relates to the *bona fides* of the settlement, which was quoted from the case of Woodbury *et al.*, was not necessary to the decision in Booth *v.* Lee (*supra*) and can not be regarded as authority, for the Department rejected the claim of Booth because he was never an actual settler within the meaning of said act.

It is a well established rule that expressions of opinion not necessary to the decision of the case can not be considered as authority, or even binding upon the conscience of the court, in the same case upon a second appeal upon similar facts. Barney *et al v.* Winona and St. Peter Railroad Company (117 U. S., 228).

It is evident, therefore, that in the Woodbury case (*supra*) it was not necessary to decide and the Department did not intend to decide "that

a purchaser of said lands may acquire title to the same although his settlement was made for the benefit of another," and the statement of the Department in Booth *v.* Lee to that effect was an erroneous expression of opinion not necessary to the decision of that case. If the settlement is not *bona fide*, but is made for the benefit of another, then the settler cannot be considered an "actual settler" within the meaning of said act. If, however, the settlement is actually made in good faith, then the mere agreement to convey after entry will not of itself invalidate the entry. United States *v.* Woodbury *et al* (*supra*). But "it is essential that the settlement be shown to be actual and bona fide." See Circular approved April 26, 1887 (5 L. D., 581).

The local land officers with the witnesses before them, with an opportunity of noticing their demeanor while testifying, and after carefully weighing their testimony have found against the validity of said entries, and your office has sustained their action.

A careful consideration of the whole record leads me to the conclusion that said decision is correct, and I accordingly affirm the same.

SWAMP LAND—FIELD NOTES OF SURVEY.

LACHANCE *v.* STATE OF MINNESOTA.

Though the field notes of survey may show the land to be of the character granted, it will not pass to the State under the swamp grant if the falsity of such return is established.

Secretary Vilas to Commissioner Stockslager, February 7, 1889.

I have considered the case of Mikell Lachance *v.* The State of Minnesota, involving Lot 1, the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, and the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Section 4, T. 61 N., R. 15 W., 4th P. M., Duluth, Minnesota, on appeal by the latter from the decision of your office of October 14, 1887, holding for rejection the State's claim under the swamp land grant.

Lachance made settlement on the tract in controversy April 6, 1883, with the intention of entering the same under the homestead laws when the plat of survey should be filed in the local land office. He alleged that, between that date and the 21st of the same month, he had erected and established his residence in a substantial log house . . . . . and claimed that his improvements were worth $250.

June 11, 1833, the township plat was filed in the local office. June 20, the same year, Lachance went to the local office for the purpose of making homestead application for said tract, when he found that on the day of the filing of township plat the State had made selection of the same tract as swamp land, under the act of March 12, 1860 (12 Stat., 3). Thereupon Lachance made affidavit strongly corroborated by the affidavits of several of his neighbors, setting forth the fact of his settlement, and residence as herein stated, and the further fact that no part

of said tract is swampy, but on the contrary that all of it "is high and dry and in every way fitted for agricultural purposes;" that any survey upon which it is noted as "swamp land" is and must necessarily be "false and fraudulent"; and he asked that a date be designated for a hearing at which he may be allowed "to substantiate any and all the allegations above set forth."

October 13, 1884, your office denied Lachance's request for a hearing to determine the character of the land. On appeal your decision was reversed April 7, 1886, by my predecessor and your office was "directed to order a hearing at which Lachance will be afforded an opportunity to prove the character and condition of the tract in controversy at the date of the swamp land grant to the State of Minnesota." Lachance *v.* The State of Minnesota (4 L. D., 479).

A hearing to determine the character of the land at the date of the swamp grant was accordingly ordered. Notice was issued to the parties in interest August 5, 1886, fixing September 24, 1886, as the day for the trial at the local office. On that day the contestant appeared with his attorney T. H. Pressnell, and W. W. Billson appeared in behalf of the State.

The Commissioner of the State Land Office objected to the jurisdiction of the register and receiver, and protested against the right or power of any officer or officers of the United States to investigate, attempt to decide upon or to determine the rights of the State of Minnesota by reason of the character of said tract of land or to decide upon any of the questions mentioned in the notice of the proceedings. The grounds of objection were fully considered in the decision directing the hearing and the local officers properly overruled the said objection and proceeded with the hearing.

The local officers decided that the testimony tended to show that the greater part of Lot 1 and the SE. ¼ of the NE. ¼ are wet and overflowed lands unfit for cultivation without drainage, and that the NE. ¼ of the SE. ¼ is high agricultural land.

From the decision of the local office both parties appealed. A decision was rendered by your office October 14, 1887, holding that from the evidence "the character of the land in controversy as dry, agricultural land is clearly and fully established," and holding for rejection the claim of the State for the whole tract.

This decision is brought before me for review, by the appeal of the State.

The determination of the case rests upon the weight to be given to the testimony which is so conflicting that it will be referred to at some length.

Peter Lachance (no relation of claimant) examined the land in June, 1886, found eight acres of low land in the river bottom, which was then dry but might overflow in the spring; the land lies about twenty-five feet above the water in the stream and is timbered with birch, poplar

and pine trees; some of the birch trees were eighteen to twenty inches in diameter. Witness saw Mikell Lachance's improvements—a good house and one and one-half acres of growing potatoes—in the middle of lot 1; the land is not swamp and any return so describing it is false.

William Cass—a woodman—examined the land in May, 1885; examination took three or four hours; the land is twenty to thirty feet above the stream; found birch, poplar and pine trees; ten or twelve acres were bottom lands but were dry at the date of his examination; the land is not swamp but is agricultural land and any return designating it otherwise is false.

Thomas J. Walsh resides in the same section as the land involved; has thoroughly examined it dozens of times and has seen it at all seasons of the year; the land is fifty feet above river bank and has on it pine and birch trees; when the river is very high five to eight acres are overflowed; there is no swamp.

Joseph Roy first saw the land in 1883; Lachance has land cleared and has raised crops every year since and including 1883; knows every part of land, it is sixty feet above the river and has on it birch, poplar and pine trees; there are five to eight acres of wet land along the river but there is no swamp on the tract.

Michael Beaudoin has been all over the land; was there in July and in August, 1886; saw no swamp land; there are six or eight acres of low but dry bottom land along the river; birch and pine trees grow on it; the land was fifty feet above the stream.

Joseph Beaudoin has been on the land once a year for the past three years and three or four times this year; has thoroughly examined it; the land is sixty feet above river and the timber consists of pine, birch and poplar trees; there are from seven to eight acres of bottom lands; the tract is good farming land.

R. H. Fagan testified that he was an explorer and in 1883, and 1884, examined all the swamp lands in the township for the Wisconsin, Minneapolis and Pacific R. R.; there are three "kettle holes" or low places on the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ containing about two and one-half, three and one-half and four acres respectively; these holes may be one hundred and fifty paces apart; there is a range of hills running through the land at one point fifty feet high; in his opinion the land is not swamp; it is well timbered with birch, poplar, balsam, spruce, and pine. Witness has examined about 20,000 acres of swamp land for the railroad company; does not think this land is, or was thirty or sixty years ago, swamp land and does not think any return could truthfully report it as such. Witness has examined the land so closely that his report would cover every five acres. Fagan filed a plat made by him showing that the land is not swamp.

Mikell Lachance, the claimant, testified that he has lived on the land since 1883, and has built a house and raised crops every year; the land is not swamp.

For the State George R. Stunz testified that he had the contract for surveying the township; section four was surveyed by his assistants; he was never on the land and knows nothing of it personally; does not know which of his assistants ran the line; supposes the field notes were made by his brother; supposes that the survey was correct.

On the Wednesday before the hearing A. W. Bradley of Duluth, met at the Pioneer Hotel at Tower witnesses Mee, Steinbrunner, Nye, and Ash and walked with them about three miles to the land and made an examination of it. They left the hotel about noon, reached the land about twenty minutes of two, left it between four and five and got back to the hotel about six. (testimony of Nye). With the exception of Mr. Stunz they were the only witnesses called in behalf of the State. Concerning the circumstances of their visit Mr. Bradley testified that he had an interest in a contract for the purchase of the land from the Minneapolis and St. Cloud R. R. (claiming under the swamp land grant) and that he "employed Mr. Mee, Mr. Steinbrunner, Mr. Nye and Mr. Ash to go with me. They were to go an examine the land in question with me and also to be witnesses." Bradley and all of these witnesses testified that sixty acres or more of the land were swamp in character E. M. Mee was the principal witness; he had seen the land once before. He found sixty acres of land, in his judgment, swamp. Mee filed a plat that all his companions testified to being substantially correct showing that three fourths of the tract involved was swamp. Bradley testified that some notes were made during the progress of the examination, but witness Steinbrunner testified that none of the party kept a written memorandum of the examination and that Mee's map was made at the hotel at Tower that night.

John Collins, an explorer, was called in rebuttal and testified that he had visited the land two years and one year ago; he was "looking around for anything he could find on his own hook, mineral or timber" and saw only seven or eight acres of swamp land.

Witnesses Walsh and Roy, it was developed at the hearing, have or had similar claims in the vicinity and it was stated that Fagan also had a claim of the same nature but not in the immediate neighborhood of the land.

Giving due weight to these circumstances and taking into consideration the opportunities the witnesses had for acquiring knowledge of the matters to which they testified, I am of opinion that the falsity of the return as swamp land of the tracts involved herein is shown by a clear preponderance of the evidence and that at the date of the grant no one of said subdivisions was in greater part swamp land within the meaning of the act. Sutton *v.* State of Minnesota (7 L. D., 562) and Kortsch *v.* State of Minnesota, (7 L. D., 313).

Your decision is accordingly affirmed.

ENTRY—PATENT—EQUITABLE ADJUDICATION.*

J. J. HAGERMAN ET AL.

An application to the Board of Equitable Adjudication, for the confirmation of an entry on which patent has issued, should be accompanied by a surrender of the outstanding patent, which will be canceled after confirmation of the entry, and prior to the issuance of a new patent.

Acting Secretary Muldrow to Commissioner Stockslager, October 30, 1888.

By letter of November 3, 1887, your predecessor submitted for action by the Board of Equitable Adjudication a list of fifteen private cash entries made at the Marquette land office, in the State of Michigan, by J. J. Hagerman *et al.*, with a recommendation that they be confirmed, under the provisions of Sec. 2456 of the Revised Statutes.

It appearing that patents had issued and were outstanding on said entries, Secretary Lamar, by letter, dated November 9, 1887 (6 L. D., 314), submitted the list to the Honorable Attorney General, for his action, expressing the opinion in said letter, that so long as patents are outstanding on said entries, there is no authority of law for their reference to the Board of Equitable Adjudication for its confirmatory action; that there being no evidence that the patents in these cases have been returned and canceled, the entries should not on the record as made be confirmed.

The Honorable Attorney General, by his letter of October 22d instant, has returned the list to this Department, concurring in the views of my predecessor, that there can not be confirmation, without the *surrender* of the outstanding patents, but expressing the opinion that *cancellation* of patents in such cases may take place after action by the Board of Equitable Adjudication.

The list and entry papers are returned herewith, and with them I transmit copies of the letters, above referred to, of Secretary Lamar and of the Honorable Attorney General.

OPINION.

Attorney General Garland to the Secretary of the Interior, October 22, 1888.

I have the honor to return herewith a list of fifteen private cash entries of public lands made at the Marquette land office, in the State of Michigan, which was referred to me by the Secretary of the Interior, in a letter dated the 9th of November last, for consideration and concurrent action.

It appears that these entries are voidable, and, having been for that reason submitted to the Commissioner of the General Land Office, for

* Not reported in Vol. 7.

the action of the Board of Equitable Adjudication thereon, under the law relating to suspended land entries, are by him approved and recommended to that board for confirmation. It also appears that the same entries had all been patented previously to their submission to the Commissioner, and that the outstanding patents have not as yet been surrendered. And the Secretary in his letter expressed the opinion that, until the patents are surrendered and canceled, the entries should not be confirmed by the board, and furthermore that the Commissioner has no authority to lay them before it.

The case here presented is governed by section 2456 Rev. Stat., which reads as follows:

> Where patents have already been issued on entries which are confirmed by the officers who are constituted the board of adjudication, the Commissioner of the General Land Office, upon the canceling of the outstanding patent, is authorized to issue a new patent, on such confirmation, to the person who made the entry, his heirs or assigns.

This provision, which is taken from the second section of the act of March 3, 1853, chap. 152, does not in terms require either the cancellation or the surrender of the outstanding patent before confirmation of the entry by the board; though it plainly contemplates not only such confirmation, but the surrender and also the cancellation of such patent before the Commissioner is authorized to issue a new patent. Under the act of 1853, the outstanding patent was required to be surrendered previously to confirmation of the entry by the board. This is shown by the provision thereof giving authority to confirm, which confers it only upon those officers who constituted the board of adjudication "at the time of such surrender." But that act did not call for a cancellation of the patent prior to confirmation of the entry by the board. Such cancellation was, indeed, thereby required before the Commissioner could issue a new patent on the confirmation of the entry by the board, but the confirmation of the entry might lawfully take place prior to the cancellation of the patent.

Although the surrender of the outstanding patent in advance of the action of the board upon the entry is not in terms required by section 2456 of the revision, as was the case in the act of 1853, yet such a requirement is entirely compatible with the language of that section; in view of which it may fairly be presumed that the practice established by the act of 1853, touching such surrender, was not meant to be disturbed by the revision.

It is my opinion that, in the case of an entry of the above character upon which a patent has already issued, where the action of the board of equitable adjudication is applied for with a view to obtaining the issue of a new one by the Commissioner under section 2456, Rev. Stats., a surrender of the outstanding patent should accompany the application, or at least occur before the entry is acted upon by the board; that such patent, when surrendered, need not be canceled until after confirmation

of the entry; and that it is sufficient if the cancellation thereof be done previously to the issue of a new patent by the Commissioner.

I accordingly concur in the view expressed by the Secretary in so far as it affirms the requirement of a surrender of the outstanding patent before action on the entry by the board, and differ therefrom only as regards the cancellation of the patent—holding that this may take place after such action is had.

ACCOUNTS—DEPUTY SURVEYOR'S CONTRACT.

ERNST BUETTNER.

The insertion of a provision in a deputy surveyor's contract that the cost of the work performed thereunder shall not exceed a specified amount, operates as a limitation upon the other provisions of the contract, and restricts the adjustment of the account within the maximum specified.

Secretary Vilas to Commissioner Stockslager, February 7, 1889.

I have considered the appeal of Ernst Buettner, United States deputy surveyor, from the decision of your office, dated February 7, 1888, in the matter of his claim for $141.72, which sum had been disallowed by your office upon an adjustment made May 6, 1885, of his account for certain work done under a contract duly made.

It appears that said contract was made August 27, 1884, between Fred. Salomon, surveyor-general of the United States for Utah Territory, acting for and in behalf of the United States, of the one part, and this appellant, deputy surveyor, of the other part.

Said contract provided for certain surveys to be made by said deputy surveyor at a cost "not to exceed the amount of two thousand five hundred ($2500) dollars."

It then provided certain rates per mile for base, standard, meridian and meander lines, other rates for township lines, and still other rates for section lines. The surveys were made, and the account rendered thereon aggregated $2,641.72, or $141.72 in excess of the maximum amount named in the contract.

Your office, in adjusting the account reported for payment the sum of $2500, for the reason that it had been stipulated in the contract that the sum total for surveys to be made thereunder should not exceed $2500. This amounted to a disallowance of the $141.72 in excess of $2500.

Application was subsequently made to your office for favorable adjustment as to said balance of $141.72, which it was claimed was due the deputy surveyor for the surveys executed under the contract herein mentioned. Your office, acting on said application, held in the decision appealed from that, "the deputy surveyor having entered into specific contract with the United States limiting in express terms the sum the United States agreed to pay and the contractor to receive for the work

done by him under this contract, it does not lie within the scope of the authority of this (your) office to adjust an account in his favor for an amount exceeding that sum."

It is argued on appeal that the sum ($2500) named in the contract as a maximum was intended only as an estimate, and that this is made apparent by an examination of another part of the same contract, which provides specified rates per mile of survey.

I am unable to so construe the contract as a whole. If it was necessary, as it doubtless was, to make an estimate in order to get a basis for the bond required, I see no reason why that estimate should go into the contract merely as an estimate. Such estimate would have served its purpose when the amount of the bond was ascertained. The insertion in the body of the contract of the amount, $2500, as a maximum, clearly meant something more than a mere estimate. It meant just what the language of the contract says, viz: that the total cost of said surveys should not exceed $2500. In other words, the insertion of the amount named as a maximum operated as a limitation upon the other provisions of the contract.

The rates named per mile were to be allowed so long as the aggregate did not exceed $2500. Should they exceed that amount, as they did, they were then to be scaled down so as to come within the limitation. At any rate, the limitation was not to be exceeded in the adjustment and approval of the account.

Finding nothing which under the terms and provisions of the contract would warrant a favorable adjustment of the claim as made for $141.72, your office decision is affirmed.

CARLSON *v.* KRIES.

Motion for review of departmental decision rendered September 22, 1887 (6 L. D., 152) denied by Secretary Vilas, February 7, 1889.

HOMESTEAD ENTRY—PRIVATE CLAIM.

RICHARD GODFREY.

Land suspended from sale or entry, by order of the surveyor general, pending the final location of a private claim, is not subject to appropriation under the homestead law.

Secretary Vilas to Commissioner Stockslager, February 7, 1889.

I have considered the appeal of Richard Godfrey from your office decision of May 10, 1887, rejecting his application presented at the local office in November, 1886, to make homestead entry of the SW. ¼ of the

SE. ¼, Sec. 23, and the NW. ¼ of the NE. ¼ of Sec. 26, T. 11 S., R. 4 W., S. B. M., Los Angeles, California.

The reason assigned by said decision for the rejection of the application is "that the tracts applied for were suspended from entry and sale by surveyor general's letter of December 16, 1881, pending the final location of the Rancho Buena Vista," and said decision was an affirmance of the action of the local office.

The ground of appeal is that the land in question is entirely outside of the claimed limits of the Buena Vista grant, and was improperly suspended from entry and settlement.

Whether the lands are or are not as a matter of fact within the claimed limits of said grant, is a question which will be determined by the final adjudication of the grant.

The surveyor general evidently thought from the evidence before him that they were, or he would not have taken the action which he did.

That action placed these lands *sub judice* pending the final adjudication of the grant claim, and they were, therefore, not subject to entry under the application of this appellant.

Your office decision rejecting the application is affirmed.

APPLICATIONS FOR AMENDMENTS.

(Circular.)

Commissioner Stockslager to district land officers, January 11, 1889.

In all cases hereafter arising where an application is made to amend a filing or entry under the homestead or other laws, with a view to correcting a mistake in the original application, the amendment of which is not specifically provided for under section 2372 U. S. R. S., you will require the claimant to file with you his own affidavit, corroborated by two witnesses, or such other evidence as can be procured, showing the mistake of the description of the land intended to be entered, and that every reasonable precaution had been made to avoid the error; and in full detail all the facts and circumstances. You will transmit the application to this office with your joint report both as to the existence of the error, the diligence of the entryman, and the credibility of each person testifying thereto, and in each case you will report the status of the land which the party desires to embrace in his entry by amendment.

Approved:

WM. F. VILAS,

Secretary.

REPAYMENT--OBITER DICTUM.

THOMAS MADIGAN.

Repayment may be properly allowed where through mistake the settlement and improvements of the entryman were not on the land covered by the entry, and it was accordingly canceled.

A ruling of the Department on a question not involved in the case under consideration will be treated as mere *dictum* and not conclusive.

Secretary Vilas to Commissioner Stockslager, February 7, 1889.

By letter of September 27, 1888, your office transmitted the papers in the case of Thomas Madigan with the recommendation that the decision of the Department therein made May 5, 1881, be modified to the extent of allowing repayment.

It appears that Madigan filed declaratory statement for Lots 3 and 4, Sec. 24, T. 13 S., R. 39 W., Wa Keeney, Kansas, and on December 20, 1875, made proof and payment for the same, and cash certificate issued. The entry was approved for patent June 20, 1876, the proofs being satisfactory, but the Union Pacific railway company contested the claim, alleging that Madigan's house and improvements were not situated on said lots 3 and 4.

Under instructions from your office a hearing was then had at the local office, on November 15, 1876.

It appears that the Fort Wallace military reservation lies immediately east of said lots; that Madigan first settled within the limits of said reservation by mistake; that the military authorities in 1875, moved him therefrom beyond the line which they then recognized as the western boundary of the reservation, to the land which he now occupies; that this second location was also within the boundaries of said reservation as shown by the government survey, the improvements being about a quarter of a mile east of the actual boundary and consequently the same distance from said lots; and that Madigan believing that he occupied the land applied for, made valuable improvements and has since been allowed to remain there undisturbed.

Your office by letter of June 10, 1880, after consideration of the testimony taken at said hearing, directed the suspension of said entry and said;

> In consideration of the fact however, that Madigan had good reasons for believing his settlement to be upon said lots and his manifest good faith toward the government, ... he will be permitted to establish his residence thereon.

Madigan appealed and the Department finding the improvements were not on said lots, directed that the entry be canceled "without recourse to the United States for the purchase money."

Madigan's application for repayment is dated July 11, 1887. He asks further,

> That I may be permitted to enter or purchase the same number of acres (as are) contained in lots 3 and 4, adjoining those lots on the east of them. This is the land my improvements are on, and that I have resided on for over twelve years, with credit for the purchase money already paid the government in 1875 for lots 3 and 4.

When the case was first before the Department the only point presented by the record was the legality of the entry. There was no application for repayment, and that subject was not properly before the Department. I therefore find that the ruling of the Department on that question was mere *dictum* and not of binding force in this proceeding. The facts as now presented make a proper case for repayment under the rulings of the department. You will therefore cause to be repaid to said claimant the money paid by him on account of said entry. Said decision of May 5, 1881, is accordingly modified.

The application to be permitted to enter or purchase as many acres as are contained in said lots, is not in proper shape to be passed upon. No formal application is presented and the land desired is not specified, nor are the qualifications of the applicant shown. Furthermore, on October 19, 1888, Congress passed an act for the disposition of said military reservation, under which instructions were issued December 8, 1888.

You will notify said claimant of the contents hereof, and that he will be allowed to present a formal application for the land he desires, upon receipt of which the case will be disposed of anew in accordance with existing law and regulations.

PRIVATE ENTRY—RE-OFFERING—RESTORATION NOTICE.

GEORGE M. WAKEFIELD.

Private cash entries of even numbered sections within the granted limits of the grant of June 3, 1856, held voidable for the want of a restoration notice, may be referred to the Board of Equitable Adjudication for confirmation; but private entries of odd sections within said limits, held void for want of re-offering must be canceled.

Secretary Vilas to Commissioner Stockslager, February 9, 1889.

I have considered the case of George M. Wakefield on appeal from your office decision of July 16, 1887, holding for cancellation his private cash entry for E. ½ NE. ¼ Sec. 10, the SE. ¼, Sec. 17, and the NE. ¼ and NE. ¼, NW. ¼, Sec. 20, all in T. 42 N., R. 34 W., Marquette, Michigan, land district.

The private cash entry for the above lands was allowed by the local officers March 22, 1880, and on May 24, 1887, the entryman requested that patents issue therefor.

Upon this request your office, as above stated, held the said entry for cancellation and entryman appealed.

The said land is all within the granted limits of the grant by act of June 3, 1856 (11 Stat. 20) to the State of Michigan to aid in the construction of a road from Marquette to the Wisconsin State line, which grant was conferred upon the Marquette and State Line Railroad Company, and its rights, by changes and consolidations, were subsequently vested in the Chicago and Northwestern Railroad Company.

In section 2 of said act of June 3, 1856, it was provided that the even numbered sections within said granted limits should not be sold for less than double minimum price; "nor shall any of said lands become subject to private entry until the same have been first offered at public sale at the increased price."

By joint resolution of July 5, 1862 (12 Stat., 620) a change of route was authorized and it was provided that they should receive new lands adjacent to the new route to the same width on each side of the new line and that the State of Michigan should certify back to the United States the lands certified to it for the benefit of the said railroad under the old route.

Said resolution also provided that the even numbered sections lying within the granted limits of the old route, shall hereafter be subject to sale at one dollar and twenty-five cents per acre," and in the third section providing for the disposal of the odd numbered rections thus restored to the public domain, it was made the duty of the Commissioner of the General Land Office to "re-offer for public sale, in the usual manner, the lands embraced in the lists of surrendered lands aforesaid."

The question of private cash entries of the even sections thus restored to the public domain, was presented to this department in the case of Pecard *v.* Camens *et al.* (4 L. D., 152), and it was therein held so far as said even numbered sections were concerned, that,

Where land had been once offered, then increased in price and again offered, and while in that condition declared by Congress to be subject to sale at the first price, and private entries were allowed therefor, without further offering, such entries are not void but voidable, for the want of a restoration notice, and may be confirmed by the Board of Equitable Adjudication.

The lands in the case at bar being in the same township with part of those in controversy in Pecard *v.* Camens, are properly subject to the rule therein applied.

Therefore the application of entrymen for patents will so far as the said lands in sections ten and twenty are concerned be referred to the Board of Equitable Adjudication.

The question of the method of disposal of the odd numbered sections restored to the public domain by the change of route of said railroad and the resolution of July 5, 1862, was decided by this department in Wakefield *v.* Cutter *et al.* (6 L. D., 451).

In said case the status of such odd numbered sections was fully discussed and it was held that "as Congress had in the act providing for their restoration to the public domain, affixed as a condition to their acquisition by a purchaser, the requirement that they be re-offered at public sale, this re-offering at public auction was a condition precedent to the right of entry of such sections."

It follows then, that under the rule in Wakefield *v.* Cutter, *supra*, claimant's private cash entry for the SE. $\frac{1}{4}$ of Sec. 17, must be canceled.

Your said decision is modified accordingly.

TIMBER CULTURE ENTRY—FINAL PROOF.

ROBERT M. WINSLOW.

There is no provision in the timber culture law requiring that the trees should attain any particular height or size before certificate and patent can issue for the land.

The eight years of cultivation required by the statute, must be computed from the time the full acreage of trees, seeds, or cuttings are planted.

First Assistant Secretary Muldrow to Commissioner Stockslager, February 9, 1889.

Robert M. Winslow appeals from your office decision, dated December 6, 1887, rejecting the final proof tendered by him under his timber culture entry, No. 1395, for the NW. ¼, Sec. 26, T. 141 N., R. 64 W., Fargo land district, Dakota.

The record discloses the following facts:

Entry was made July 5, 1878. Final proof was offered June 11, 1887.

* * * * * * *

The proof was rejected by the local officers, "for the reason that we do not think the trees have reached such size as will reasonably ensure their maturity without further protection."

This action was affirmed by your office, but claimant's entry was allowed to stand subject to his making new proof when he can show that the trees "have attained a growth such as will insure their permanent existence."

I can not assent to the reasons given for the rejection of this claimant's final proof. There is no provision in the timber culture law requiring that the trees should necessarily attain any particular height or size before certificate and patent can issue for the land, and in this respect the proof in this case is not necessarily defective.

The proof submitted, however, fails to show that the trees have been cultivated and kept in a healthy growing condition for the period of eight years plainly required by the law. The eight years of cultivation required by the timber culture act must be computed from the time the full required acreage of trees, seeds, or cuttings are planted. Departmental circular, June 27, 1887 (6 L. D., 284). This interpretation is manifestly in accord with the plain and positive terms of the act, and under it the claimant's proof is clearly insufficient, inasmuch as it shows a cultivation of less than seven years, instead of eight years, since the trees were planted. The proof must, therefore, for that reason, be rejected, and your decision to that effect is affirmed. The claimant will be allowed to submit new proof within the lifetime of his entry, when he can show the full eight years cultivation required.

This case is, in many respects, similar to that of Henry Hooper (6 L. D., 624), to which reference is made.

PRACTICE—APPEAL—RELINQUISHMENT—RESIDENCE.

O'BRIEN *v.* RICHTARIK.

Failure to file specifications of error within the required time will not defeat an appeal where such failure was caused by the appellant's inability to secure a copy of the decision.

A motion to dismiss an appeal, filed by a former attorney of the appellant, will not be considered where it is apparent that said attorney, at the date of said motion, had ceased to represent the appellant.

A relinquishment to be effective must be the voluntary act of the entryman.

In the absence of an intervening adverse claim, credit may be allowed a homesteader for residence on the land while covered by his previous timber culture entry.

First Assistant Secretary Muldrow to Commissioner Stockslager, February 9, 1889.

On January 13, 1874, Joseph Schumcker made timber-culture entry for the SE. ¼ of Sec. 8, T. 5 N., R. 3 E., Beatrice, Nebraska. This entry was, on October 22, 1883, canceled upon Schumcker's relinquishment and same day Frank Richtarik made timber-culture entry for the tract named. On November 12, 1883, John O'Brien filed against the entry of Richtarik his affidavit of contest, alleging that the land was not naturally devoid of timber and on the same day he (O'Brien) applied to make homestead entry thereon.

A hearing upon said contest was had at the local office on January 8, 1884, at which time Richtarik made default. Upon the testimony submitted the local office found "that at least twenty-five acres of natural timber is growing upon said section and at least five acres upon the SE. ¼ of said section; that said SE. ¼ was not subject to entry under the timber-culture act." No appeal was taken from this finding.

By office letter of August 16, 1884, you state, "that there is also now before me for action, certain affidavits submitted . . . in support of the application of said Schumcker for the re-instatement of his said canceled timber-culture entry on the ground that its cancellation was brought about through fraud."

By the same letter, your office held that "a rehearing should be had in the case of O'Brien *v.* Richtarik and that Schumcker should be allowed to interplead therein, this with the view to arriving at all the facts bearing upon Schumcker's alleged fraudulent relinquishment of his entry and permanent right to the land so that ample justice may be done in the matter."

By letter of July 12, 1885, the local office transmitted the testimony taken at a hearing had before the local office on October 6 and 7, 1884, also the testimony taken before a justice of the peace at Wilber, Nebraska, on October 31, 1884, and before the local office in June, 1885. They also forward by the same letter, the application of Schumcker, dated October 7, 1884, whereby he asked that his timber-culture entry

be re-instated, or, in the event that it should not be deemed proper to re-instate said entry, that he be permitted to make homestead entry for the tract. Along with this application is submitted the formal affidavits made November 29, 1884, before the clerk of the district court by Schumcker and two witnesses, in support of his timber-culture entry, and which he asks in said application be accepted as proof of his compliance with the timber-culture law.

In the said letter of July 12, 1885, the local office rendered their opinion to the effect that "if possible his (Schumcker's) rights should be restored."

On June 25, 1887, your office held "as Schumcker had no opportunity to disprove the charge made by O'Brien affecting the timber character of the land," and he (Schumcker) having died since the transmission of the record to your office, that his (Schumcker's) "heirs and legal representatives should be given an opportunity to be heard on that charge, or if such charge be admitted and confessed to be true, then in order to save the valuable improvements. . . . they should be allowed to make homestead entry of the tract involved." From this decision O'Brien appealed. The attorney for Schumcker's heirs on January 5, 1888, moved to dismiss the appeal.

Notice of your decision of June 29, 1887, was sent by the local officers to the attorney for contestant by letter, dated July 9, 1887, but the letter did not contain a copy of said decision. By letter, dated September 5, and received at your office September 12, 1887, said attorney forwarded his notice of appeal. In this letter the attorney stated, that he received such notice July 12, 1887; that the attorney, who had represented Schumcker at the hearing, had withdrawn from the case, and that he did not know who was attorney of record for Schumcker.

From an endorsement upon said letter of September 5, 1887, it appears that your office, on December 9, 1887, returned said notice of appeal for correction and for service on counsel (E. C. Ford) of "opposite party."

On December 22, 1887, the contestant's appeal and specifications were received at your office, together with registry receipt of notice to the attorney named.

It appearing that notice of the appeal was filed within sixty days from notice of the decision appealed from, that the attorney for the contestant was, as contended by his letter of January 26, 1888, prevented from filing his specifications of error within such period, by his failure to obtain a copy of said decision, and that notice of such specifications of error was properly served after the said notification of December 9, 1887, by your office, this motion can not, in my opinion, be sustained.

On November 23, 1888, the attorney for appellant, O'Brien also filed a motion to dismiss the appeal. This motion is based upon the allegation that O'Brien has abandoned the land and taken up a homestead or

pre-emption claim in Kansas; that O'Brien is not the real party in interest, as contestant and his said contest was in bad faith; that O'Brien has failed to keep his agreements with his counsel and that the equities of the case are with the heirs of Schumcker.

It being apparent that the said attorney did not represent the appellant at the date of the last named motion, the same has not been considered.

The material facts are sufficiently stated in the decision appealed from, to which reference is hereby had, and I concur in your conclusion that the relinquishment of Schumcker was induced by questionable methods, and that it was not his voluntary act.

It is well settled that a relinquishment, to be effective, must be the voluntary act of the entryman. Schumcker's relinquishment was not his voluntary act. The entry made by him should, therefore, be re-instated and his heirs allowed to submit proof in support of the same.

I can not, however, concur in your conclusion that the heirs of Schumcker should at this time be permitted to acquire title to the land under the homestead law. It is true that in the absence of an intervening adverse claim, credit could be allowed for Schumcker's residence upon the land while covered by his timber-culture entry. Falconer *v.* Hunt *et al.* (6 L. D., 512).

It is also true that the evidence creates a suspicion that O'Brien's contest against Richtarik's entry was instituted for the benefit of his brother-in-law. The record, however, does not affirmatively show that such was the fact.

The attention of the Department having been called by the allegations of O'Brien in said contest to matter which goes to the validity of Schumcker's entry, the contestant, O'Brien, should, in my opinion, be accorded the right to be heard.

So far as the record discloses, no action has been taken upon the finding of the local office, that the land was not subject to entry of Richtarik. Richtarik has not appealed, and his entry will therefore be canceled.

In accordance with the view heretofore expressed, you will re-instate the timber culture entry of Schumcker, and notify his heirs that they will be allowed to submit proof in support thereof. If, however, after thirty days notice of this decision, the contestant, O'Brien, fails to appear and contest the re-instated entry of Schumcker, I can see no reason why the entry could not be canceled, and the said application to make homestead entry allowed.

Your decision is modified accordingly.

MINING CLAIM—MILL SITE—SURVEY.

ALTA MILL SITE.

The expenditure of five hundred dollars upon the mill site is not a condition precedent to obtaining a patent therefor, when the applicant is also the proprietor of a lode, and the mill site is located in connection therewith. In such case it is only required that the mill site shall be used or occupied for mining or milling purposes.

It is not necessary that the survey of the mill site should be connected with a corner of the public surveys or a mineral monument, if such survey is properly connected with the survey of the lode claimed in connection therewith.

The non-mineral character of the land claimed as a mill site must be established.

On application for patent a mining company must furnish proof that it has complied with local requirements in the matter of filing its articles of incorporation.

Secretary Vilas to Commissioner Stockslager, February 9, 1889.

I have considered the appeal of the Lester Mining Company of San Francisco, California, from your office decision of September 22, 1887, holding for cancellation mineral entry No. 138, Mohave County, Arizona, known as the Alta mill site.

It appears from the record that said mining company are the owners of a lode known as the Alta mine, which is in the neighborhood of their said mill site but the same are not contiguous.

Upon their application for patent for said mill site your office by letter of November 24, 1886, required the surveyor general of Arizona to furnish his certificate that the value of the improvements made upon said mill site claim was not less than $500, his certificate being only to the effect that the improvements on the Alta mining claim, (a different piece of property) exceeded that amount in value. You also required that the plat and survey be so amended as to connect a corner of said mill site with a corner of a public survey, if such corner can be found within two miles, otherwise, with a mineral monument within that distance.

By letter of the same date to the local officers, you also required proof that a copy of the articles of incorporation of said Lester Mining Company, had been filed in the office of the Secretary of the State of Arizona, and in the office of the recorder of the county in which said company was doing business, and that proof of the non-mineral character of said mill site claim be furnished.

On December 3, 1886, in reply to your said letter of November 24, 1886, the surveyor general said,

This office was not advised until the receipt of the departmental letter above referred to, that it was necessary to connect a mill site with other than the survey of the mine with which it was claimed, if the latter was connected with a United States mineral monument, or a corner of the public surveys; and further that it was required to certify the value of the improvements upon a mill site claimed in connection with a mine, if the required expenditure has been placed upon the mining claim.

In a letter dated January 14, 1887, the said surveyor general states that—"On November 19, 1883, application for the survey of the Alta mine was made and on December 29, following, order was issued. Before the survey was made by the deputy a letter was addressed by him to this office stating that claimants of the mine desired to have their mill site surveyed for patent and asked that all necessary papers be forwarded.

On May 26, 1884, application for the survey of the Alta mill site was made, said application stating that the mill site was claimed in connection with the Alta mine, and the deputy who executed the work was so advised. The survey of the mine was made on April 18th, and although that of the mill site was not made until July 2nd, the field notes of both were transmitted together, and the deputy in his final oath of survey of the mill site states that the same was made in connection with the Alta mine. Therefore in constructing the plats, the mine was designated, as Lot No. 39 A, and that of the mill site as Lot No. 39 B.

This office on October 4, 1884, approved both surveys, and the surveyor general in his certificate of approval of the mill site certifies that the same is claimed in connection with the Alta mine.

The field notes on file are entitled "Field notes of the survey of the Alta mill site, in connection with the Alta mining claim, claimed by the Lester Mining Company."

The deputy surveyor, also certifies that said mining company had upon said mill site a quartz stamp mill 150 by 70 feet, a building containing a foundry, blacksmith shop, and carpenter shop, a corral, a stable and a bath house, which exceeded in value the sum of $500.

Sec. 2337 of Revised Statutes, which provides for the acquirement of mill sites is, so far as concerns the case at bar, as follows:

> Where non-mineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such non-adjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes, etc.

Under said section the expenditure of $500 upon the mill site is not a condition precedent to obtaining a patent therefor when the applicant is also the proprietor of a lode, when the mill site is located in connection with the lode, it is only required that it shall be *used* or *occupied* by such proprietor for mining or milling purposes.

In the case at bar the evidence shows that the proprietor of the Alta mine was both occupying and using the said mill site for milling purposes, and while the value of the improvements greatly exceeded the sum of $500, there is no law which requires that the surveyor general should so certify, the preliminary requirements as to survey and notice applicable to veins and lodes being the only ones necessary in such mill sites.

I find no affidavit of the non-mineral character of the land with the record and I deem that essential as held in Rico Town site (1 L. D., 556).

This proof should be in accordance with rule 75 of the circular of October 31, 1881.

I find in the record a certified copy of the articles of incorporation of said mining company as filed with the Secretary of State of California, but no proof whatever that said articles had been filed in the office of the Secretary of the Territory of Arizona, and in the county in which said mill site is situated as required by Chapter 12, Title 7 of Revised Statutes of Arizona, and by section 2319 United States Revised Statutes.

In my opinion under the history of the case as given by the surveyor general and the facts certified to by the deputy who did the surveying, as shown in the field notes, this application should be considered as if application for patent for both lode and mill site had been contained in the same paper as they well might have been, and therefore no certificate of the value of improvements will be required, and as the survey shows the mill site to be properly connected with the said Alta lode no further survey is necessary.

The non-mineral affidavit, and proof of filing articles of incorporation in the office of the Secretary of the Territory, and in the office of the recorder of the county, must be furnished and in view of the evident good faith shown by the extensive improvements erected on said tract, the said company will be allowed sixty days after notice of this decision to present the same, and upon their so filing the same patent may issue.

Your decision is modified accordingly.

PRACTICE—NOTICE—CONTINUANCE.

HARPER *v.* BELL.

The transferee having actual notice of the contest proceedings, and being represented therein, will not be heard to object that the heirs of the deceased entryman were not served with due notice of the contest.

An application for continuance, for the purpose of procuring the depositions of witnesses who refuse to attend the trial, is made in time if presented on the day of trial.

Secretary Vilas to Commissioner Stockslager, February 9, 1889.

I have before me the appeal of N. V. Harlan, as "present owner" of the tract involved, from your decision of January 21, 1887, holding for cancellation Robert S. Bell's pre-emption cash entry, No. 847, made July 12, 1883, for the SW. ¼ Sec. 28, T. 16, R. 22 W., North Platte, Nebraska.

On May 21, 1886, Brock Harper filed affidavit of contest against said entry, on the ground of non-compliance with law as to residence and improvements, and that the entry was made for speculation. The con-

testant having sworn to his ignorance of the whereabouts of the entryman, and to his inability to procure personal service, service by publication was had, fixing October 27th, 1886, as the day for trial, the testimony to be taken October 21, before M. F. Young, a notary public, at Custer, Nebraska, duly commissioned for the purpose.

On the latter date the contestant, Harper, appeared in person with his witnesses. One George B. France, who is said in the testimony to be a partner of N. V. Harlan, the appellant here, appeared and filed the following notice of appearance and motion:

Sullivan and Humphrey and Geo. B. France, appear specially and not generally for N. V. Harlan, and the Brighton Ranch Company, the present owners of the land in dispute, and also appear specially and not generally for the defendant Robert S. Bell, and object to the taking of any testimony in this case, and note the following as the grounds of said objection:

1. No notice has been served or given in this cause as required by law.

2. No notice has been served on the heirs of the defendant Robert S. Bell, as required by law.

3. That no affidavit has been made as a proper basis for publication of notice to the heirs of Robert S. Bell.

4. No service has been had on the heirs of Robert S. Bell

5. That none of the parties defendant who are interested in the land in dispute have been properly served with notice.

6. That the affidavit of the contestant Brock Harper is not or was not accompanied by the affidavit of one or more witnesses in support of the allegations made.

7. No notice has been posted in the United States Land Office at North Platte, Nebraska as required by law.

8. That registered letter or letters containing notice of contest, have not been posted or mailed or sent to the heirs of Robert S. Bell the defendant as required by law.

9. That no notice of contest has been posted on the land as required by law. (signed) Sullivan and Humphrey and George B. France, Attorneys for N. V. Harlan and The Brighton Ranch Co.

After the filing of this notice or protest the witnesses for the contestant were examined, Mr. France cross-examining each of them at length. In the course of this examination he (France) several times objected to questions, on the ground that the entryman was dead; and at the close of the examination before the notary Mr. France gave notice that he would move before the register and receiver for a continuance to take depositions of absent witnesses.

On the 27th of October ("the day of trial") there was filed a formal motion for continuance, together with an affidavit by two relatives of the entryman, "that on or about the 1st. day of September A. D. 1885, the said Robert S. Bell died, having been shot to death by parties or a party unknown to these affiants."

Under date of October 30, 1886, "it appearing that Robert S. Bell the claimant is dead and was dead several months before proceedings in this contest were initiated," the local officers dismissed the proceedings and "recalled" the commissions theretofore issued to take testimony.

By the decision appealed from, you overruled the objection based

on the death of the entryman; held that the motion for a continuance to take depositions had not been "filed at the proper time" and was therefore improper and without weight; and proceeded to decide the case upon the merits, with the result already stated.

The present claimants having had actual notice of the contest proceedings, and having in fact been represented therein and cross-examined witnesses; and it being in proof as well as claimed by them, that they are the assignees of the entryman, they, the present claimants cannot be heard to object that the heirs of the entryman have not been duly served by publication: If the claim of said assignees is true, then the entryman assigned all his rights during his lifetime, and his heirs have no interest in the entry.

I am not, however, prepared to say that, everything considered, the appellant's motion for a continuance to take depositions ought not to have been granted. That motion was supported by two affidavits setting forth that certain witnesses whose names and residences are specified, and whose expected testimony was shown to be material, had "refused to attend the hearing at the local land office," though diligent effort had been made to procure their attendance. This, if in time, made a case for the granting of the motion under Rules 23 and 24; and I see no sufficient reason for holding that the motion was made too late. The facts set up would, under Rule 20, have justified a postponement "on the day of trial," in order to take on a subsequent day, the testimony of witnesses not available in the first occasion; and the circumstance that in this case such subsequent taking of testimony was to be by deposition instead of orally in the local office, can hardly make any difference as to the time when the motion must be made. There is no presumption that the service by publication notified the assignees so long in advance of the day of trial, as that they ought by that day, to have procured the issue, execution, and return of the commission to take testimony. And the cause assigned (under Rule 23) for issuing such commission at all, *i. e.*, the refusal of the witnesses to attend at the hearing—is in its very nature one which can hardly be certainly shown to exist before the expiration of the last moment during which the witnesses would have had it within their power to decide to attend. The rules do not expressly require, or obviously imply, that the motion in such a case must be made before the day of trial.

For these reasons I am of the opinion that the claimants should have been allowed an opportunity to examine the witnesses specified.

Your said decision is modified accordingly, and the claimant's motion for a commission to take depositions will be granted, in accordance with the rules.

SOLDIERS' HOMESTEAD—PRE-EMPTION.

JOSEPH M. ADAIR.

A person cannot legally acquire a claim to one tract of land as a pre-emptor, and to another as a homesteader at one and the same time.

A soldiers' declaratory statement, made while the claimant is residing upon and claiming a different tract under the pre-emption law for which proof is subsequently submitted, is illegal, and will not protect the homesteader as against the intervening *bona fide* settlement of another.

In order to make secure the right initiated by a soldiers' declaratory statement, settlement and improvement, as well as entry, must follow the filing within six months.

First Assistant Secretary Muldrow to Commissioner Stockslager February 14, 1889.

The record in this case shows that on December 20, 1886, Joseph M. Adair made homestead entry for the SE. ¼, of Sec. 4, T. 7 N., R. 44 W., Denver, Colorado, based upon soldiers' declaratory statement, No. 373, filed by him July 16, of the same year.

It also appears that on May 16, 1886, said Adair filed his pre-emption declaratory statement for the SE. ¼ of Sec. 33, T. 8 N., R. 44 W., Denver, Colorado, alleging settlement on the 8th day of the same month, and that on December 10, 1886, he made final proof under said pre-emption filing. His proof was, on the same day, duly approved, and cash entry certificate issued thereon.

His homestead entry papers were duly transmitted to your office and upon consideration thereof, your predecessor, on April 4, 1887, held that "claimant having filed under the homestead laws while he was claiming a different tract as a pre-emptor his declaratory statement (meaning his soldiers' declaratory statement) was invalid, and the entry based on it is also considered invalid," and thereupon said entry was held for cancellation. The case is now before me on appeal by Adair from this decision.

It further appears, from the record as transmitted on appeal, that on October 20, 1886, one Abraham L. Jones made homestead entry for the tract in question, and that on February 11, 1887, your office, not having as yet acted upon the entry of Adair, held Jones' entry for cancellation, by reason of conflict with the soldiers' declaratory statement upon which the former's entry was based.

On April 9, 1887, Jones filed his sworn petition, duly corroborated, and dated on the day previous, asking for a reconsideration by your office of said decision of February 11, 1887, holding his entry for cancellation, as stated, and that a hearing be ordered to enable him to show his prior right to the land, alleging as grounds therefor, substantially the same facts as hereinbefore set forth in reference to said soldiers' homestead entry and pre-emption filing made by Adair, and the further fact that at the date of said petition, Adair was still residing on his pre-emption claim.

It does not appear what action, if any, your office has taken upon said

petition, but the same with the entry papers of Jones and a copy of said decision of your office in reference thereto, are now on file as a part of the record in this case.

It appearing from the foregoing, that when claimant, Adair, made and filed his soldiers' declaratory statement upon which his homestead entry is based, he was residing on a pre-emption claim, on which he made final proof and obtained cash entry certificate nearly five months thereafter, the first question to be determined is, whether his entry was illegal in its inception (the filing of his soldiers' declaratory statement being the inception thereof) and should for that reason, in the face of the adverse claim of Jones, be canceled.

It is now well settled by departmental decisions, that a person can not legally acquire a claim to one tract of land as a pre-emptor and to another tract as a homestead entryman at one and the same time. See cases of Murphy *v.* Deshane (6 L. D., 831); Krichbaum *v.* Perry (5 L. D., 403); Collar *v.* Collar (4 L. D., 26); Austin *v.* Norin (ib., 461).

The rulings of this Department in the cases cited are predicated chiefly upon the well grounded theory that as both the pre-emption law and homestead law require *bona fide* residence on the part of the claimant thereunder, it is impossible for one person to maintain such residence under each, or, in other words, two residences at the same time.

While it does not appear from the reported decisions that the precise question here presented, has ever been directly passed upon by the Department, yet the general principles which should govern all cases of this, and a similar character, in which it is sought by a person to hold two tracts of land under the settlement laws, at one and the same time, are, I think, pretty well established.

By sections 2304 to 2309 inclusive, of the Revised Statutes, certain provisions are made granting special privileges to soldiers and sailors, their widows and minor children. Among these, is the privilege of securing the right to enter under the homestead law, a particular tract of land, by filing a declaratory statement, either in person or by an agent, describing the land and setting forth that declarant has located the same and intends to enter it. And it is further provided that such homestead settler shall be allowed six months after locating his claim and filing such declaratory statement, within which to commence his settlement and improvements.

In the case of Stephens *v.* Ray (5 L. D., 133), the question arose as to the effect of a soldiers' declaratory statement when filed, and it was held that such statement (assuming it to be in all respects legal) will hold the land described therein for a period of six months for the benefit of the declarant, and his rights, if he enter at any time within six months, relate back to the date of his filing; that, in other words, such filing is an exercise of the homestead privilege.

A soldiers' declaratory statement, duly filed and in all respects legal,

being, as thus shown, an exercise of the homestead privilege, I am unable to agree that a person, by making such filing while residing upon and claiming a different tract, upon which he afterwards makes proof and secures title under the pre-emption law, may thereby hold, during the time of his residence on such pre-emption claim, as against other and intervening *bona fide* settlers, the land covered by the filing thus made. To so construe the law would be, in effect, to allow the holding of two tracts of land, preparatory to securing title thereto, by one person at one and the same time under the provisions of two different statutes, each requiring, among other things, a *bona fide* settlement and residence on the land claimed thereunder, in order to secure and perfect such title.

I do not think that Congress, in the enactment of the statute under consideration, ever contemplated that such should be its legitimate interpretation.

I must, therefore, hold that the soldiers' declaratory statement filed by Adair was illegal, and that the entry based thereon must, in the presence of the adverse claim of Jones, be canceled.

It may also be stated that, in order to make secure the right initiated by a soldiers' declaratory statement, settlement and improvement, as well as entry, must follow the filing within six months. Charles Hotaling (3 L. D., 17); Snyder *v.* Ellison (5 L. D., 353).

From the allegations in the said petition of Jones, it would seem that Adair had not made settlement on his homestead within six months from the date of his said filing, for if said allegations be true, he was still residing on his pre-emption claim in April, 1887. But the present disposition of this case renders it unnecessary to order a hearing to determine the facts in reference thereto. Adair's entry being illegal in its inception, must, for that reason, be canceled.

The decision of your office is therefore affirmed. You will take such action as may be proper, in view of the foregoing, in reference to the entry of Jones.

FINAL PROOF PROCEEDINGS—PROTEST—EQUITABLE ADJUDICATION.

F. C. ROBINSON.

An entry allowed on proof submitted after due notice and without protest, should not be canceled because the evidence as to residence is found defective, but suspended, and supplemental proof required.

It will be presumed that no protest was filed against the submission of final proof, if such protest is not in the record.

The failure of the claimant to make his own proof on the day fixed may be cured by the action of the Board of Equitable Adjudication, where his witnesses appeared and testified on the day and before the officer as advertised.

First Assistant Secretary Muldrow to Commissioner Stockslager, February 14, 1889.

I have considered the appeal of Francis C. Robinson from the decision of your office, dated November 13, 1886, holding his final proof in-

sufficient and requiring new publication of his intention to make final proof in support of his location No. 54, "R. & R.," of the NE. ¼ of Sec. 28, T. 132 N., R. 58 W., made February 9, 1884, at the Fargo land office, in the Territory of Dakota.

The record shows that said Robinson filed his pre-emption declaratory statement, for said land on October 4, 1883, alleging settlement thereon June 1, 1883. On May 5, 1884, the register gave notice, by publication, of the claimant's intention to make final proof on June 20th, same year, and that the testimony of his witnesses would be taken before Charles D. Austin, clerk of the district court at Lisbon, Ransom county, in said Territory on June 19, 1884.

The testimony of the witnesses was taken on the day, and before the officer, as advertised, but the testimony of the claimant was taken before the register of said office on July 9, 1884, and location of said tract was made with military bought land warrant No. 26,208, on the same day.

The testimony of the claimant shows that the land was subject to entry; that he was qualified to make entry under the pre-emption laws; that he first settled on said land on June 1, 1883, and established his residence on the land on August 12, 1883; that his residence on the land has been continuous "except during four months last winter," and that his improvements are worth from $225 to $250.

The testimony of the witnesses confirm the allegations of the claimant, as to his qualifications, settlement, and improvement, but they state that the claimant first established his residence on his claim "September, 1883," and, in answer to the sixth question, namely: "Has his residence been continuous?" state, "It has except."

On November 13, 1886, your office found that "the testimony submitted does not show continuous residence on the land for six months immediately preceding date of making proof," and held said location for cancellation. The claimant was allowed sixty days within which to appeal from said decision, or show cause why his location should not be canceled.

Your office further held that, as the testimony of the claimant and final affidavit were not made on the day advertised for making final proof, he must make republication of notice, and that "the proof submitted will be considered, if no adverse claim nor protest is filed against said location on the day and before the officers advertised in the new notice, which fact should be certified by said officers." The claimant was allowed ninety days within which to make republication.

The claimant, in his appeal, alleges that it was error in your office to hold said entry "for cancellation 'for the reason the testimony does not show continuous residence on the land for six months immediately preceding date of final proof,' appellant insisting that six months' residence immediately preceding date of making proof is not necessary, and further that the testimony submitted shows a compliance as to residence with the land laws of the United States."

The action of your office, holding said location for cancellation, was irregular. If the notice had been duly given, and no protest had been filed—which will be presumed, if it is not in the record—then, supplemental proof should have been called for to supply the defective proof as to residence, and, in the mean time, the entry should have been suspended. But no notice is taken in the appeal of the order of your office, requiring new publication. If the final proof had satisfactorily shown that the claimant had complied with the requirements of the law and the departmental regulations, the failure of the claimant to make his proof on the day advertised could have been cured by the action of the Board of Equitable Adjudication, since his witnesses gave their testimony on the day and before the officer as advertised. Judith M. Clarke (7 L. D., 485). But the failure of the claimant to give any excuse for his absence for four months, renders it necessary for him to make new publication and furnish supplementary proof, satisfactorily explaining the causes of his absence from said land. If no protest be filed, or objection made, and satisfactory supplementary proof as to residence be furnished, said entry will be approved by your office and passed to patent. If, however, a protest is filed, then a hearing should be duly ordered, in accordance with the rules of practice.

The claimant should be allowed ninety days to comply with the terms of this decision.

The decision of your office is modified accordingly.

FINAL PROOF PROCEEDINGS–REPUBLICATION.

AMOS E. SMITH.

Republication of notice will be required where the name of one of the witnesses was not properly designated in the published notice; but after such republication the proof may be accepted as made, in the absence of protest.

First Assistant Secretary Muldrow to Commissioner Stockslager, February 14, 1889.

I have considered the appeal of Amos E. Smith from the decision of your office, dated February 15, 1887, requiring republication and new proof as to one witness, whose name was not properly designated in the published notice, also requiring supplemental proof as to residence in support of his pre-emption cash entry, No. 6772, of the SW. ¼ of Sec. 33, T. 126 N., R. 59 W., Watertown, Dakota Territory, land office.

The record shows that the register, on June 28, 1884, gave notice by publication of the claimant's intention to make final proof in support of his claim before the Judge of Probate at Andover, Dakota Territory, on August 19, same year, naming "J. S. Keeson," as one of his witnesses. The final proof was made on the day and before the officer as advertised, but the name of one of the witnesses is signed "J. S. Ferson."

The proof shows that the claimant was duly qualified to make entry under the pre-emption laws; that he complied with the requirements of the pre-emption laws and the departmental regulations relative to settlement and improvement of said land; that he established his actual residence on his claim May 19, 1883, and that his residence has been continuous, except when away at work in the Minnesota pineries for four months in the winter of 1883 and 1884.

The local officers accepted the final proof and issued final certificate for the land.

The error in the published notice will require a new publication, giving the correct name of the witness J. S. Ferson, and, if no protest be filed on or before the day designated in the republished notice, the proof already submitted may be accepted and the entry passed to patent. If, however, protest be filed, or any valid objection be made to said entry a hearing should be ordered to determine the facts in the premises.

The decision of your office is modified accordingly.

HOMESTEAD ENTRY—APPROXIMATION—ADVERSE CLAIMANT.

HENRY C. TINGLEY.

A homestead entry embracing tracts of land in two or more quarter sections, must approximate one hundred and sixty acres as nearly as practicable, without requiring a division of the smallest legal sub-division included therein.

Though a homestead entry allowed in violation of this rule segregates the land covered thereby, it is subject to attack, and a preference right to enter the lands finally excluded therefrom may be awarded to the adverse claimant.

First Assistant Secretary Muldrow to Commissioner Stockslager, February 14, 1889.

In the matter of the application of Henry C. Tingley to make homestead entry for lot 5 Sec. 34 T. 9 N., R. 13 W., Grand Island land district Nebraska, appealed from your decision of December 12, 1887, denying said application, the record discloses the following facts:

August 24, 1880, John Hibberd made homestead entry for E ½ and S. W. ¼ of the S. E. ¼ and lots 4 and 5 all in the above described section 34. The lands described contain 175.40 acres, seventeen and a half acres of which are in said lot 5. At the time of entry Hibberd paid $19.25 for the excess of 15.40 acres over one hundred and sixty acres. June 25, 1887, he made final homestead proof, from which it appears that he established his residence on said lands March 10, 1881, and has resided thereon continuously since that time. August 27, 1887, Tingley applied to make homestead entry for said lot 5 which being denied by the local officers he filed an appeal the same day. November 9, following, and while this appeal was still pending before your office, Hibberd paid the receiver the usual fees and obtained from the register his

final certificate of entry for all of the lands embraced in his original entry.

In sustaining the local officers in rejecting Tingley's application to enter you hold that Hibberd's entry of August 24, 1880, remaining intact, (to quote your language) "is an appropriation of the land; it segregates it from the body of the public land, and removes it from liability to any other disposition." This proposition will not be disputed but it does not dispose of Tingley's application on its merits. The question presented by this application is, whether Hibberd's entry should remain intact, and whether said lot 5, should not be restored to the body of public lands and Tingley's application to enter it be allowed. The records of your office show that the lands embraced in Hibberd's entry are all in the S. E. ¼ of said section 34 except said lot five and that it is in the N. E. ¼ of said section and contains 17.50 acres, and consequently that Hibberd's entry, exclusive of said lot, contains 157.90 acres, a quantity of land but slightly less than the usual quarter section allowed by law to homesteaders. In homestead entries which include tracts of land in two or more quarter section the rule is that the quantitity of land included in the entry must approximate one hundred and sixty acres as nearly as practicable without requiring a division of the smallest legal sub-division of the lands included in the entry. Where the excess of such an entry above one hundred and sixty acres is less than the deficiency would be should the smallest legal subdivision be excluded from the entry then it is allowed to stand,—the entryman paying for said excess as was done in this case,—but where such excess is greater, as in this case, then the entry is considered illegal as to such excess, at least, and must to that extent be canceled. This rule, which is known as the rule of approximation, has been long established in this class of entries. See C. G. Shaw (1 C. L. L., 309); and Bladen *v.* Southern Pacific R. R. Co. (9 C. L. O., 119).

The rule was extended, September 8, 1883, even to cases in which the entry included only a technical quarter section H. P. Sayles (2 L. D. 88), and as extended it seems to have been followed, till June 14, 1888 at which time the old rule prevailing in the Department prior to the decision in the Sayles case (*supra*) was restored in cases where the entry included only a technical quarter section. Wm. C. Elson (6 L. D., 797).

The decision in the Elson case, however, in no manner affects the old and long established rule prevailing in the Department in the class of cases now under consideration, nor can I find any authority in the settlement laws which warrants a more liberal rule in dealing with the settler in such cases.

Hibberd's improvements—as appears from his final proof—are worth from about twelve hundred to sixteen hundred dollars. The part of the claim on which these improvements are chiefly situated is not shown, and at all events he should be allowed to relinquish any one of the smallest legal subdivisions of his claim—provided it leave the remaining portion contiguous, which he may select.

You will please direct the local officers to give him notice of his right to so select and relinquish and allow him thirty days within which to do so. Should he file his relinquishment for any such legal subdivision his entry to that extent will be canceled, and permitted to remain intact for the other lands embraced therein. Should no relinquishment be filed in the time specified his entry so far as it affects said lot 5 will be canceled; and in either event appellant Tingley will be allowed the preference right to enter the tract restored to the public domain for thirty days after notice to him of such cancellation.

The decision of your office is modified accordingly.

SIOUX HALF BREED SCRIP—HOMESTEAD ENTRY.

ALLEN ET AL. *v.* MERRILL ET AL.

The Commissioner of the General Land Office has jurisdiction to order a hearing for the purpose of determining the validity of a scrip location, either under a protest against such location, or in the absence of any protest.

Under a hearing ordered for such a purpose the voluntary appearance of other adverse claimants confers upon the Commissioner full jurisdiction to pass upon the validity of the conflicting claims.

The adjustment of a scrip location to the lines of the public survey does not validate a location theretofore invalid; it simply serves to designate by congressional subdivisions the land covered by the location.

The Sioux half breed scrip authorized by the act of July 17, 1854, conferred upon the half breed a personal right only, and his right of location thereunder is not subject to transfer.

As the transfer of this scrip is prohibited by statute, the Department will not recognize the right of location in one claiming such right by virtue of two powers of attorney, one to locate said scrip, and the other to sell the land covered by the location.

The right of location upon unsurveyed lands, conferred upon the half breed, is limited by a requirement that he shall make improvements thereon; but improvements made for the immediate benefit of one claiming the right of location under a power of attorney, are not within the intendment of the statute.

A location authorized by the statute serves to pass the fee out of the United States, but no title is acquired under a location made by one holding the scrip in violation of law.

The statutory period within which homestead entries are protected under section 3, act of May 14, 1880, must be held to commence, in case of settlement upon unsurveyed land, from the date when the land is declared to be open to such entries in the published notice of the filing of the township plat.

A settlement right under the homestead law is not acquired by one who enters upon, and retains possession of the land, under a contract of purchase from another.

Secretary Vilas to Commissioner Stockslager, February 18, 1889.

I have considered the case of Joseph W. Allen and Thomas Kean *v.* Lewis Merrill, attorney in fact for Joseph Brown, Mary B. Young and Louis Carron, Edmund T. Winston, agent of W. W. Hale, attorney in fact of Sophia Huot, and Michael H. Brown, on appeal by Lewis Mer-

rill, Edmund T. Winston and Michael H. Brown, from your office decision of December 2, 1887, holding for cancellation Sioux half breed scrip locations for lots 5 and 9 of section 26, and the NE. ¼ Sec. 36, T. 16 N., R. 55 E., Miles City, Montana land district, also holding for cancellation Michael H. Brown's homestead entry for said lots 5 and 9.

This township was surveyed in the field from August 23, to September 14, 1881. The plat of that survey was filed in the local office June 12, 1882, and the land embraced therein was opened to entries and filings June 19, after due publication for that purpose.

The different claims to said lots 5 and 9 are as follows:

On August 7, 1880, Edmund T. Winston filed in the land office at Helena, Montana, Sioux half breed certificate or scrip No. 310 D., one hundred and sixty acres, issued to Sophia Huot November 24, 1856, under the provisions of the act of July 17, 1854, (10 Stat., 304). Accompanying this certificate or scrip was an instrument purporting to have been executed by said Sophia Huot and her husband January 31, 1871, appointing one W. W. Hale of Ramsey county, Minnesota, their attorney "to select and locate at any land office in the United States the lands to which we may be entitled by reason of my 'Sioux half breed Lake Pepin reserve script,' to wit, No. 310 D., for one hundred and sixty acres" and to ask for and receive patent therefor, also an affidavit executed August 6, 1880, by Edmund T. Winston stating "the amount of improvements placed upon the land claimed by Sophia Huot consist of one log house sixteen by eighteen feet now under the course of construction," also another affidavit of said Winston dated August 7, 1880, stating, "I am acquainted with the unsurveyed tract of land described within by personal examination of the same on the 25th day of July, 1879, and there was no person living on the same at that time nor were there any improvements on it except those of Sophia Huot nor any person claiming said tract." This affidavit is found on the back of a paper containing on its face blank forms for a certificate of the receipt by the local officers of Sioux half breed scrip, an application for location and a certificate of location. None of these forms were filled out on August 7, 1880. The blank certificates are dated at Miles City land office, December 20, 1883, and the application has no date attached although evidently filled out after survey of the land since it describes it as lots 5 and 9, Sec. 26, T. 16 N., R. 55 E.

The receiver under date of August 7, 1880, issued a receipt as follows: "Received of Sophia Huot Sioux half breed scrip No. 310 D., dated November 24, 1856, said scrip to be located upon the following described tract of land when the same has been surveyed and the plats thereof filed in this office, viz:" (here follows description by metes and bounds).

No paper in the form of an application to locate this scrip seems to have been filed therewith nor was there anything to show Winston's authority to act for the half breed nor to show who placed the improvements mentioned on the land nor that those improvements were on the

land at the date the scrip was filed in the local office. It is stated in your decision that this location was on September 29, 1882, adjusted by your office to cover said lots 5 and 9 of section 26. The blank application heretofore spoken of was at some time filled out and signed "Sophia Huot by W. W. Hale her attorney in fact." This application bears no date but the certificates of the local officers on the same sheet, that said scrip was that day received by them and "that the annexed scrip No. 310, letter D., has this day been located" etc., bear date of December 20, 1883.

On October 13, 1880, Lewis Merrill claiming to act as attorney for Joseph Brown filed in the local office at Miles City, Montana, Sioux half breed scrip No. 596, D. Accompanying this scrip was a power of attorney purporting to have been executed by Joseph Brown February 28, 1872, authorizing Lewis Merrill of Boreman Co., Dakota, "to select and locate at any land office in the United States, the lands to which I may be entitled by reason of my 'Sioux half breed Lake Pepin reserve script' to wit: No. 516 letter D, 160 acres," and on such location to ask for and receive a patent, also an affidavit of said Merrill dated October 13, 1880, stating "that the improvements placed upon the land claimed by Joseph Brown consist of one house about twelve feet by twenty feet partially completed and now in course of construction" and also another affidavit of said Merrill of same date stating "I am acquainted with the tract of land described within by personal examination of the same on the twentieth day of August, 1880, and that there was no person living on the same at that time nor was there any improvements on it except those of Joseph Brown nor any person claiming such tract." This latter affidavit appears on the back of a blank containing forms for an application to locate and for the certificates of the local officers that such application has been received and such locations made which forms do not purport to have been filled out until September 19, 1882. Said scrip was adjusted September 19, 1882, by the local officers to embrace said lots 5 and 9 and also lot 6, section 26. On the margin of the power of attorney accompanying this scrip appears the following: "September 19, 1882, I, Lewis Merrill, attorney in fact, do hereby apply to correct clerical error by which 516 was written by inadvertence and mistake instead 596." Accompanying said power of attorney is also the affidavit of Merrill dated September 20, 1882, setting up "that on the 13th day of October, 1880, in filling up the blank space for the figures describing the scrip certificate of Joseph Brown he did so in his own proper person and in his own handwriting as now appears on the face of the power of attorney of said Brown constituting said Merrill his attorney in fact. That the number of said scrip certificate was called off to him by either the register or receiver of the land office and filled up from said calling off. That it now appears that 516 was written instead of 596. Said Merrill says that said error of 516 instead of 596 was an unintentional clerical error made by

inadvertence and that his full purpose and intent in filling in said number in the power of attorney was to make the number the same as that on the scrip certificate."

On June 19, 1882, Joseph W. Allen filed in the local office his application to make homestead entry for said lots 5 and 9, section 26, alleging settlement thereon January 13, 1882, which application was marked by the receiver "allowed subject to S. H. B. S. located by Louis Merrill, attorney in fact."

On September 19, 1882, Michael H. Brown made homestead entry for said lots 5 and 9, Sec. 26, alleging settlement November 15, 1881.

The claims to the N.W. ¼ of Sec. 36, in said town and range are as follows:

On October 13, 1880, Lewis Merrill filed in the local office at Miles City, Sioux half breed scrip No. 236 C, eighty acres, issued November 24, 1856, to Mary B. Lagree, described as of about the age of five years, under the act of July 17, 1854. Accompanying this certificate was a power of attorney purporting to be executed by Mary B. Young and her husband, June 14, 1872, constituting Daniel G. Shillock, their attorney in fact "to select and locate at any land office in the United States, the lands to which I may be entitled by reason of my 'Sioux half breed Lake Pepin reserve script, to wit: No. 236, letter A, for 40 acres. No. 236, letter C, for 80 acres. No. 236, letter B, for 40 acres" and to ask for and receive patent therefor "with full power of substitution and revocation." On the back of this instrument appears the following: "I, the within named Daniel G. Shillock, do hereby sub. stitute William D. Williams, Esq., as the attorney of the within named Mary B. Young, formerly Lagree, and Benjamin T. Young, to act to the same extent as I am authorized by virtue of the within power of attorney", signed by Daniel G. Shillock and acknowledged July 15, 1873.

On the same day Merrill filed his two affidavits, one stating "that the improvements placed upon the land claimed by Mary B. Young (formerly Lagree) consist of one log house about ten or fifteen feet partially completed and now in course of construction", and the other, that, "I am acquainted with the tract of land described within, by personal examination of the same on the twentieth day of August, 1880, and that there was no person living on the same at that time nor were there any improvements on it except those of Mary B. Young, formerly Lagree, nor any person claiming said tract."

This latter affidavit appears on the back of a blank containing forms for an application to locate and for certificates to be signed by the local officers of the receipt of script and of location, all of which forms purport to have been filled out, and signed on September 19, 1882. The application thus filled out describes the N. ½ of the NW ¼ Sec. 36, T. 16 N., R. 55 E., and is signed, "Mary B. Young (formerly Lagree) by William D. Williams, her attorney in fact, Benjamin T. Young by William D. Williams, his attorney in fact." This scrip was adjusted Septem-

ber 19, 1882, by the local officers to embrace the N. ½ of the NW. ¼ of said Sec. 36.

On October 13, 1880, said Merrill filed in the local office Sioux half breed scrip 83, B, forty acres, issued to Napoleon Carron, described as of about the age of three months, dated November 24, 1856. Accompanying this certificate or scrip was a power of attorney purporting to have been executed May 23, 1872, by Louis Carron, father and sole heir-at-law of Napoleon Carron deceased, constituting Daniel G. Shillock his attorney "to select and locate at any land office in the United States the lands to which I may be entitled by reason of the 'Sioux half breed Lake Pepin reserve script' to wit: Number 83, A, B, C, D and E, for 480 acres" and to ask for and receive the patent therefor "with powers of substitution and revocation." Accompanying this scrip were two affidavits of Merrill each dated October 13, 1880, the one stating "that the amount of improvements placed upon the land claimed by Louis Carron is one foundation for a house about ten feet by twelve feet in course of construction," and the other that, "I am acquainted with the tract of land described within by personal examination of the same on the twentieth day of August, 1880, and that there was no person living on the same at that time nor were there any improvements on it except those of Louis Carron nor any person claiming said tract." The latter affidavit appears on the back of a blank containing forms for an application to locate and for certificates, to be signed by the local officers, of the receipt of scrip and of location, all of which forms purport to have been filled out, and signed on September 19, 1882. The application thus filled out describes the SW. ¼ of the NW. ¼ of section 36, T. 16 N., R. 55 E., and is signed "Louis Carron, father and sole heir-at-law of Napoleon, deceased, by Wm. D. Williams, his attorney in fact." This scrip was adjusted September 19, 1882, by the local officers to embrace the SW. ¼ of the NW. ¼ of said Sec. 36.

On June 19, 1882, Thomas Kean filed pre-emption declaratory statement for said NW. ¼ of Sec. 36, alleging settlement thereon April 19, 1881. All the land involved in this controversy was embraced within the limits of the reservation made April 12, 1870, for the Arickaree, Gros Ventre and Mandan Indians. The land in this reservation was restored by Executive order of July 13, 1880, a copy of which order was received at the local office July 20, of that year.

On January 28, 1882, Thomas Kean filed in the local office his affidavit duly corroborated alleging that he settled upon the NW. ¼ of said Sec. 36, April 19, 1881, and that he then claimed said land under the pre-emption law, that Lewis Merrill, as attorney in fact, for Mary B. Young, filed certain Sioux half breed scrip on the N. ½ of said NW. ¼ and as attorney in fact for Napoleon Carron, filed certain Sioux half breed scrip on the SW. ¼ of said NW. ¼, and denying that any of said parties "ever made legal settlement on this land as required by statute" and denying that they "ever lived in Glendive, or that they ever

settled upon such lands" and asking that title be withheld from said scrip claimants until he should have an opportunity to produce evidence in support of his pre-emption claim.

No action seems to have been had at that time on this protest. On September 4, 1882, Joseph W. Allen, and Thomas Kean filed in the local office a request as adverse claimants asking that the adjustment of scrip filed by Winston as attorney of Huot be made in accordance with the requirements of the regulations in regard to compactness, reserving, however, all questions of fact. On the same day the same parties filed a paper asking that the locations made by Merrill for Joseph Brown, Mary B. Young and Louis Carron "be rejected and no adjustment made thereof, that will interfere with their rights and title." In a paper dated September 18, 1882, Lewis Merrill as attorney for Joseph Brown, set forth his claim to the land in Sec. 26, denied that Winston or any body else had made any improvements thereon in behalf of Sophia Huot or that any reasonable adjustment of the Huot claim would include any part of section twenty-six, and offered to submit proof in support of said statements. Allen and Kean on September 22, 1882, filed in the local office what is termed by them an appeal from the action of the local officers adjusting the scrip filed by Merrill, alleging that Merrill had not submitted the corroborated testimony required by the regulations, to show that the improvements claimed were embraced in the tracts to which the location was adjusted, that the application was not accompanied by "the affidavit of the Indian or other evidence that the land contains improvements made by or under the personal supervision of said Indian, giving detailed description of said improvements and that they are for his personal use and benefit," that the power of attorney under which the location of Joseph Brown was made was invalid, that the scrip was "not adjusted in accordance with the maps and descriptions filed but was moved on the lands of these appellants without the necessary sworn notices" and that gross irregularities appear on the face of the papers, and asking that adjustments made by the register and receiver be set aside and that the locations be rejected.

On June 21, 1883, Charles and William B. King, attorneys for the scrip claimants represented by Merrill, filed a paper reciting the action had in regard to these claims, contending that there had been no allegation of such a character as to constitute an attack upon the integrity of the claims, but in conclusion saying—

> But should the Commissioner be inclined to regard the protest filed as intended to put in issue the question of the good faith of these scrippees, as well as the fact of their direct connection with the lands in question, we respectfully request, in view of the magnitude of the interest involved, that no time be lost in ordering an early hearing, to determine from the evidence to be produced at such hearing, whether or not the requirements of the act of July 17, 1854, have been met by these scrippees.

In letter of your office dated September 6, 1883, the various claims to these tracts of land are briefly stated, the allegations found in the so called appeal of Allen, and Kean are also set forth and it is said:

"In view of the foregoing and that the rights of all parties in interest may be protected, I deem it proper that a hearing be had to determine the validity of the scrip location and the same is hereby ordered." November 5, 1883, was set by the local officers for the hearing.

By letter dated September 14, 1883, E. T. Winston transmitted new plats of survey of the locations represented by him including that of Sophia Huot, and in conclusion asks "that an adjustment be made at an early date and a hearing ordered."

By letter of September 29, 1883, your office adjusted the filing made with scrip No. 310, letter D, issued to Sophia Huot, for one hundred and sixty acres to embrace lots 5 and 9, Sec. 26, subject to any prior adverse rights.

On November 23, 1883, the attorneys for Merrill filed in your office a protest against the adjustment of these lines under the Huot scrip "without notice having first been given to us and an opportunity given us of showing why such adjustment was in prejudice of our previously acquired rights." With letter of January 16, 1884, the local officers transmitted to your office certain stipulations of the parties interested in these lands. This paper sets up that E. T. Winston, attorney in fact, for Sophia Huot, has secured an adjustment on lots 5 and 9, Sec. 26, that it is desired that said Winston and all other parties of record be impleaded in the hearing now pending and for that purpose it is agreed that said cases be continued until March 18, 1884. Accompanying this is the following—"I, Edmund T. Winston, named and referred to in the foregoing stipulation do hereby consent and agree that an order may be made without further notice by the Honorable Commissioner of the General Land Office bringing in and impleading me as one of the contestants in the contest above mentioned and referred to and that such order shall have the same force and effect as though I had been made a party to said contest at the commencement thereof," dated January 7, 1884, and signed Edmund T. Winston.

Your office by telegram of March 13, 1884, directed the local officers to allow all parties in interest to intervene. At the hearing Joseph W. Allen, Thomas Kean, Michael H. Brown and E. T. Winston, each appeared in person and by attorney and Lewis Merrill appeared by attorney, and all parties submitted testimony in support of their respective claims. The local officers in their decision awarded to Sophia Huot, lot 5, Sec. 26, and recommended the cancellation of her claim as to lot 9; awarded to Joseph Brown, lot 9 and recommended the cancellation of his claim as to lot 5, recommended the cancellation of the homestead entries of Michael H. Brown and Joseph W. Allen embracing said lots 5 and 9, Sec. 26; awarded to Mary B. Young, the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 36, and recommended the cancellation of her claim to the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said section; awarded to Louis Carron, the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said Sec. 36, and recommended the cancellation of Thomas Kean's pre-emption filing as to the W. $\frac{1}{2}$ of said NW. $\frac{1}{4}$ of section 36.

From this decision Lewis Merrill, E. T. Winston, Joseph W. Allen and Thomas Kean, each appealed, in behalf of the interests represented by them, respectively. Your office decided that the evidence filed in support of the different scrip locations failed in each instance to show a compliance with the requirements in such locations in that they failed to show that the land contained improvements made by or under the personal supervision of the Indians and that they were for their personal use, and benefit, or that the Indians had any personal connection with the land, that these applications to file not being accompanied by the required proof should have been rejected by the local officers and held each of said locations for cancellation. In said decision it was also held that Michael H. Brown failed to assert his claim within three months after the filing of the township plat and that he could not assert any claim to the land as against Joseph W. Allen. Brown's homestead entry was, therefore, held for cancellation and Allen's allowed to stand. Thomas Kean's pre-emption filing for the NW. $\frac{1}{4}$, Sec. 36, was allowed to stand. From that decision Winston, Merrill and Michael H. Brown, appealed.

It is contended on the part of Merrill that the allegations against the claims contained in the protest of Allen and Kean filed January 28, 1882, were not of such a character as to constitute an attack on the validity of the claims represented by him. The allegations made in the paper filed by said Allen and Kean September 22, 1882, denominated by them an appeal but which might perhaps be more properly termed a protest are not spoken of nor is the existence of that paper as a part of the records of the case mentioned by the attorneys for Merrill in their objections. These statements are however, set out in the letter of the Commissioner ordering a hearing and it was upon them, in part at least, that the hearing was ordered. The allegations there made directly attack the validity of these scrip locations and the order for a hearing clearly sets forth that it is to be had "to determine the validity of the scrip locations." If no protest had been filed your office would still have had the authority and power to order such a hearing. The objections by Merrill to the sufficiency of the protest and the jurisdiction thereunder are overruled.

After the case reached this department on appeal, the attorney for Winston interposed an objection to the jurisdiction of the department on the following grounds:

1st. Because no question has ever been raised by any of the contestants as to the validity of the location of Huot's scrip No. 310 D, and no appeal ever taken from the adjustment of the same by the Commissioner to lands in controversy September 29, 1883. See Ballance *v.* Forsythe *et al.* (21 How., 389).

2nd. Because under the hearing ordered by the Commissioner there is nothing before the Department upon which to base any action with reference to the Huot location.

3rd. Because the moment said adjustment was made by the Commissioner, the jurisdiction of the Department then and there ceased.

This objection cannot be sustained. The decision cited in support of the objection held that in the absence of an appeal from the district court, the supreme court had no jurisdiction and that "the consent of parties cannot give jurisdiction to this court where the law does not give it," and is not decisive of the question here presented. Your office had jurisdiction over the subject matter and it needed only the consent of the parties which was given in writing to give it jurisdiction of the person. There were adverse claimants of record for the land claimed by Winston and there had been formal protest against the adjustment of his location of the Huot scrip and it was within your power, and perhaps it might be said it was your duty, to order a hearing to determine the rights of the different claimants and the validity of such location. The different claimants however, for the purpose of avoiding the trouble and expense of a second hearing agreed to and did become parties to the hearing already ordered, and thereby gave jurisdiction to the department to consider and pass upon the validity of their respective claims in the light of the facts established by that hearing. The adjustment of a location to the lines of the public survey does not validate a location which was before that time invalid, it simply serves to designate by congressional subdivisions the land covered by the location. Said objections are overruled and the case will be considered and passed upon on its merits.

The important question for decision in this case is the validity of the location made with the Sioux half-breed scrip. By the ninth article of the treaty concluded with the Sioux Indians at Prairie du Chien in 1830 (7 Stat., 328) it is provided that, "The Sioux bands in council having earnestly solicited that they might have permission to bestow upon the half-breeds of their nation," a tract about fifteen by thirty-two miles in size, lying west of Lake Pepin, the United States agree to suffer said half-breeds to occupy said tract of country; they holding by the same title, and in the same manner that other Indian titles are held. By the act of July 17th, 1854 (10th Stats., 304), the President was authorized

> to exchange with the half-breeds or mixed-bloods of the Dacotah or Sioux nation of Indians, who are entitled to an interest therein,

for the said tract of land; and for that purpose was authorized to cause to be issued

> certificates or scrip for the same amount of land to which each individual would be entitled in case of a division of the said grant or reservation *pro rata* among the claimants which said certificates or scrip may be located upon any of the lands within said reservation not now occupied by actual and bona fide settlers of the half-breeds or mixed-bloods, or such other persons as have gone into said territory by authority of law, or upon any other unoccupied lands subject to pre-emption or private sale, or upon any other unsurveyed lands, not reserved by government, upon which they have respectively made improvements: *Provided*, That said certificates or scrip shall not embrace more than six hundred and forty, nor less than forty acres each, and provided that the same shall be equally apportioned, as nearly as practicable, among those entitled to an interest in said reservation: *And provided further*, that no transfer or conveyance of any of said certificates or scrip shall be valid.

Much refinement of argument has been pressed in relation to the construction of this statute, based upon the title which the half-breeds had to the reservation they surrendered; but there appears no necessity to grope for motives on the part of Congress with a view to understand what has been declared, since the language of the provisions is plain. Obviously, Congress intended to make the scrip a purely personal right in the half-breed, and, while no restriction was put upon his power of alienation of the land when it should be located, until that time no other person should have any share or interest in this right, nor should the half-breed transfer to another the privilege which Congress had given to him to locate land. This limitation was peculiarly appropriate to the right to locate scrip upon unsurveyed land, no right to purchase which was prior to this act extended by the land laws to any other person, nor any privilege to gain a pre-emptive right ever allowed to any but the actual settler.

To give effect to this policy, the regulations of the Land Office have contained from the beginning instructions looking to the maintenance in him of the half-breed's right. The first circular in 1857 (1st Lester, 627), calling attention to the unassignability of the scrip, only directed the location to be in the name of the half-breed, and stated that the scrip could not be treated as money, but located only acre for acre. In 1864, a new circular was issued (2 Lester, 307; 1 C. L. L., 721; 1 C. L. O., 142) in which, speaking of location upon unsurveyed lands, it was said:

Where the half-breed for himself may make actual settlement, his improvements will be notice on the ground to any other settler, and in this respect he will stand on the same basis as a pre-emptor on unsurveyed land, and, of course, cannot adjust his location until after the return of the township plat to the district land-office. Hereafter, and within three months, he should repair to such land office, file his scrip with his affidavit, designating specifically, in compact legal subdivisions, the tracts embracing his improvements, and should state in his affidavit the character and extent of these improvements, and file testimony of competent witnesses corroborative of his statement.

Afterwards, in 1872, a special circular (1 C. L. L., 723) upon the subject of the location of this scrip on unsurveyed lands was issued, in which, after reciting the use which had been made of the scrip to strip the timber from unsurveyed lands by filing the scrip as a preliminary location and afterwards withdrawing it, the following directions to registers and receivers were given:

1st. That the application must be accompanied with the affidavit of the Indian, or other evidence that the land contains improvements made *by* or under the personal supervision or direction of said Indian giving a detailed description of said improvements, and that they are for his personal use and benefit; in other words, you should be satisfied that the Indian has a direct connection with the land and is claiming the same for his personal use. Unless such evidence is filed, you will reject the application.

2nd. The filing of the scrip must be considered in the character of a location, and should such filing not be followed within the time prescribed by our circular of February 22, 1864, relating to the location of this scrip, by an adjustment to the official plat of survey, you will, immediately thereafter, adjust the same yourselves, as near

as may be practicable, from the map and description filed by the party, and forward the same to this office with regular abstract and reference to your action: or, if you are unable to determine the locality of the land in the public surveys, you will report the fact, forwarding therewith all the papers in the case, for our action.

In 1878, a new circular was issued which repeated the provisions of the circulars of 1864 and 1872, above quoted (2 C. L. L., 1355; 5 C. L. O., 126).

If the regulations so laid down are to govern, there is no question but that your decision should be affirmed. The Indian had nothing to do with these locations. The facts were freely stated by the able counsel who orally argued the questions involved. They are very simple. In every instance, the half-breed sold his scrip many years before this attempted location of it and received from the purchaser the agreed price therefor; but, because of the prohibition in the act of Congress against transfers, the transaction took the form of a delivery of the scrip accompanied by two letters of attorney, in printed form, duly signed and acknowledged, but as to the name of the attorney and sometimes if not always as to all of the particulars of description, left in blank; by one of which letters the attorney was authorized to locate the scrip and do whatever might be necessary for that purpose or to obtain a patent, and by the other of which the attorney was authorized to sell and convey by any proper deed any land which the half-breed might thereafter acquire in the United States. Both letters were declared irrevocable, and contained the usual provisions in such instruments. The manner of use of these letters of attorney has been to file with the scrip in the Land Office the one authorizing the location of it not disclosing the existence of the other.

Nothing therefore, to challenge the *bona fides* of the transaction then appears on the surface, nor any reason why the Land Office should not recognize it as the fair exercise of the right to do by an attorney what one might lawfully do himself. When the location is made, if validly made, the title vests at once in the person to whom the scrip was issued; and thereupon a conveyance of the land is executed by some person who consents to the use of his name as attorney, under the authority of the other letter of attorney, the blanks of which are filled accordingly.

Thus the title passes to the party owning the scrip. And thus by circumvention, the thing is done which the statute forbids to be done; and the exercise of the privilege of doing by attorney what one may do himself is made operative to accomplish the doing by attorney of what the half-breed could not do himself. The scrip, with these blank letters of attorney pinned to it, passes into the market and is sold, and transferred by mere delivery, as freely as a government bond. The half-breed about whom this protecting limitation was thrown disappears as effectually from consideration as if he were dead until some contestant hunts him up to find a basis for a contention against the scrip. The location

is often times not made for many years after the original sale by the half-breed; in this case, the certificate of acknowledgment on each of the several letters of attorney is dated as far back as 1871 or 1872. It may well be thought that in many instances the location has been made after the half-breed's death.

It is a rule of law, so familiar as to require no authority, that when a transaction is contained in various cotemporaneous papers or documents, or when partly in parole and partly in documents, its character is not to be judged by reference to one paper alone, but all the documents, besides any parole addition, are to be taken together to ascertain what in fact the agreement was, and it will be judged according to its nature as so ascertained. Applying this rule, the transaction by which the half-breed parts with his scrip would be, if written, substantially like this:

> In consideration of dollars, to be paid by J. S., I hereby sell and transfer to him the scrip issued to me by the United States (describing it); and to circumvent the statutory prohibition, I have signed two letters of attorney in blank, the one to locate the scrip, the other to convey the land when the scrip shall be located, and I agree that by whomsoever these letters of attorney may be executed I will hereafter make no claim to the scrip or the land.

Unless the letters of attorney which should accompany such an agreement might be regarded as valid notwithstanding the agreement, they have no validity in such a case as this. They are simply parts of a prohibited transaction, and although such an attorneyship if an independent and *bona fide* transaction, would be valid, yet, it does not follow that the letter of attorney is to be respected when found constituting a part of a transaction which can not be supported in law.

The case of Gilbert *v.* Thompson (14 Minn., 544), by no means goes the length of holding such a transaction valid, while there are expressions in it indicating that the court would have been unwilling to so decide. In that case, a letter of attorney given by the half-breed to a particular person to make a deed of land to be located in a particular county, which was fully executed within two months, was upheld, being apparently considered the fair exercise of the right to appoint an attorney to do what the party could do directly. But the court said:

> A power of attorney, so far as intended to operate as a transfer, would be of no avail; the right of the half-breed in the scrip and the land would remain the same; it *could not be made irrevocable*, nor create any interest in the attorney.

And again:

> Whether the power to sell would be upheld in an instrument, upon its face a transfer, the former being only incidental, we do not decide.

Unless an agreement by the half-breed, by which, for a consideration presently paid, the other party was authorized to locate the scrip on any land he saw fit, and, secondly, the half-breed agreed immediately thereafter to convey the same to the other party, should be respected in the Land Office as no assignment or transfer of the scrip, I am un-

able to perceive upon what reason a letter of attorney, which is but a part of precisely such a transaction, can be upheld.

It is, however, unnecessary to decide what might be the effect of a location so made upon surveyed lands open to pre-emption or private sale. This case relates to unsurveyed land, and a further limitation is imposed both to mark and to restrict the personal right of the half-breed to take such land; he is required to have made improvements upon it. The theory of counsel for the scrip claimants is, that the half-breed may make improvements by an agent. This may be granted; but the difficulty with the case is that the improvements were not made for the half-breed in any sense whatever; they were made for the supposed attorney, at his expense and with no purpose to admit the half-breed to any interest or benefit in connection with them or with the land.

If such a transaction can be supported, then this half-breed's scrip, issued with such precautionary restrictions of law upon the right to use it, has, by this ingenious invention become invested with a quality specifically denied to it by Congress, the quality of negotiability whereby the holder of it without regard to his relationship to the original beneficiary is clothed with the power to purchase with it unsurveyed lands of the United States; the value of which privilege, in the presence of the rapid development of the country by the agency of railways and from multiplying population, would be very great. It seems to me too plain for question that the duty of the Executive Department, charged with the supervision of the public lands, was to provide such regulations as would limit and restrict the use of this scrip within the bounds which Congress intended, and that, although the same words were not employed with respect to the Indian which are found in the statutes concerning the settlement of citizens upon the public lands, yet it was intended, keeping in view the difference between Indians and civilized persons, to express the same general idea; and that the case in which the half-breed could locate his scrip upon unsurveyed lands was only when he had in fact made improvements for himself and for his own benefit upon the land. It is not said that he must have a dwelling there, but the requirement of improvements must have some substantial significance. It is not satisfied by doing something which is a betterment of the land, but of too slight a character to mark anything more than a pretext of compliance. Thus, ploughing is an improvement of land; but it would be no satisfaction of this statute if a fraction of an acre were to be broken by the plough, although it would be so far improving the land. It is more probable that the legislative mind contemplated such improvements as the half-breed Indian would naturally make upon land of his own, which almost inevitably includes some sort of a dwelling-place. At all events, I do not think that the regulation which requires evidence that the Indian has a direct connection with the land and is claiming the same for his personal use, is open to the

least fair criticism, but that it is one calculated to effectuate the purpose of the statute and should be supported.

The absence of any proof that the respective Indians were in any wise concerned in the location of the several pieces of scrip involved in this matter, indeed, the plain proof that none of them had anything to do with it, constituted therefore, a plain and sufficient reason why the register and receiver should have rejected the applications to locate the scrip as required to do by the circular, and they violated the instruction in not doing so. For this reason alone your decision against the validity of the scrip location was correct in my judgment.

It is contended that upon the location being made, under the circumstances stated, the title passed at once out of the United States, as effectually as the title to lands granted to aid a railroad pass upon the filing of the map of definite location, and the decision in Larriviere *v.* Madegan (1 Dillon, 455), is relied upon. That case simply held that the location of the land with the scrip, under the act of July 17, 1854, passed the fee out of the United States into the person to whom the scrip was issued. This doctrine may be accepted. But it hardly needs argument to establish that in order to such an effect, the location must be one authorized by the act of Congress, and this position is not the least antagonistic to the decision cited, for in that case there had been a valid location, the court in the recitation of facts stating that the claimant under the scrip located said scrip "upon the property in dispute fully complying with the instructions of the general land office." If a piece of the scrip were stolen and a letter of attorney forged, and thereby a location made, it is plain that on proof of the facts the Commissioner would cancel it and that the scrip should be returned to the half-breed to whom it belonged. In like manner if the scrip be actually in the hands of parties seeking to locate it for their own benefit, contrary to the statute and regulation under it, it is equally in the power of the Commissioner to reject the application and deny the attempt to so misuse the scrip, and secure public land without right thereto.

It is also contended that the adjustment of the scrip after the survey was a location upon surveyed land, and no improvements were necessary. I do not think this can fairly be maintained. The act authorizes the location of the scrip upon unsurveyed lands by the same words in which it authorizes the location upon surveyed lands, and the rule laid down in Larriviere *v.* Madegan is as applicable to the one case as to the other. The title passed out of the United States to the half-breed when the scrip was rightfully located upon unsurveyed land to the land upon which it was so located. It may be doubtful whether he could be required to change the boundaries of his location because they did not correspond with the government subdivisions of the subsequent survey. But waiving that question, the subsequent adjustment by him or with his consent must be taken as having relation to the time of the location and merely as giving description according to government survey of

land which was already his. It is but an adjustment of boundaries in perfection of a location previously made and having relation back to the time of the location; not an original location of the scrip.

I have heard full argument by able counsel of the question involved, and am entitled to presume from the character of the gentlemen employed, as well as from the obvious skill and research exhibited, that every resource of reason and the books has been exhausted to sustain the claim of this location. But continued reflection has begotten a firm conviction that it is the duty of the Department, in administering this law, to give effect to these limitations, for the existence of which there was obvious reason, and which are plainly declared in the statute. To do otherwise would be to lend the aid of the Department to defeat the law which it is established to administer and enforce. The regulation which was the basis of your decision and is so sharply criticised as unauthorized, is not an addition to the law. It is but a rule of evidence to show that the law has been in fact observed. Nor can parties justly make claim of hardship by the enforcement of this rule. It has existed since 1872, and must have been known to them; and when they attempted to locate this scrip in disregard of it, they took the risks that it would be enforced if determined to be valid. They have nothing to complain of because of the failure of an attempt which they made with such notice of its risks.

I have not considered it necessary to point out the many minor informalities apparent in these locations. For the reasons herein set forth I concur in the judgment of your office that the various scrip locations involved in this case are invalid and that part of the decision appealed from which holds said locations for cancellation, is affirmed.

There remain to be disposed of the claims under the homestead and pre-emption laws. As heretofore stated Joseph W. Allen and Michael H. Brown were each allowed to make homestead entry for lots 5 and 9 in Sec. 26, and both were parties to the case and were represented at the hearing before the local officers. As a result of that hearing the local officers recommended that both entries should be canceled. From that decision Brown failed to appeal, and it was not through diligence on his part that said decision was afterwards reversed.

Your office held that Brown did not make his entry within the time prescribed by the third section of the act of May 14, 1880 (21 Stat., 140), and for that reason awarded the priority to Allen. I cannot concur with this conclusion. The plat of that township was, it is true, received at the local office June 12, 1882, but as stated in the decision of the local officers the land was not declared open for filings and entries until June 19. The published notice of the filing of said plat stated that applications to file upon or enter land embraced in said plat would be received on June 19, 1882. The three months within which entries should be made must be held to have begun to run on the 19th instant, and Brown's entry made September 19, 1882, was in time.

It is contended, however, that Brown did not settle on this land with the intention of acquiring title thereto under the homestead laws but that he went there to take possession of a certain lot in the town of Glendive which he had purchased from Lewis Merrill. There was introduced as a part of the testimony at the hearing a contract dated November 14, 1881, by which Lewis Merrill agreed to sell to M. H. Brown, lot 3, block 20, of the town of Glendive for the sum of $100 payable as follows: $25 at date of contract; $25 March 14, 1882; $25 July 14, 1882, and $25, November 14, 1882, with interest at twelve per cent per annum and signed by Lewis Merrill and M. H. Brown. On the back of this instrument is the following endorsement:

March 14, 1882, Received on the within contract twenty six dollars, second payment on the within contract. (Signed) N. C. Lawrence, Agt.

Brown admitted that he bought said lot and signed the contract but claimed that soon afterwards he found out that the parties who sold to him had no right to the land and he then concluded to take the land as a homestead and denies that he ever paid the second installment with which he is credited on the back of the contract. He commenced to build a house on the land in dispute on November 17, 1882, but claims that he did not know whether or not it was on lot 3 of block 20, in the town of Glendive and that he never knew where said lot 3 was situated. He moved into his house about December 6, 1882, and had resided there continuously. Brown is unable to state the exact date on which he determined to repudiate his contract of purchase and to take the land under the homestead law but says it was a short time after the execution of the contract and that when he commenced to build his house he intended to take the land under the homestead law. It appears, however, that he was credited with a payment on said lot as late as March 14, 1882, that he did not take any steps to relieve the land of Merrill's claim, although he admits that Merrill was building a house on said land at the time he, Brown, went there, that he did not make entry therefor until after Allen had taken steps to procure the cancellation of the Merrill and Winston claim and finally when the local officers sustained those claims and held the homestead entries for cancellation, he, Brown, took no steps and made no effort to procure a reversal of that decision. These facts justify the conclusion that Brown went on this land by virtue of his contract of purchase and not with the fixed intention of obtaining title to lots 5 and 9, Sec. 26, under the homestead laws, and I therefore hold the claim of Allen to be superior to that of Brown, and it is directed that the latter's entry be canceled. Allen's entry will be allowed to stand subject to final proof by him within the life-time thereof, showing full compliance with the requirements of law.

The final proof heretofore, submitted by Thomas Kean, under his pre-emption filing was made at the time when the validity of his said filing was in dispute and is therefore rejected. He will, however, be allowed

ninety days from notice of this decision within which to submit new final proof in support of his claim.

The decision appealed from is modified in accordance with the views herein expressed.

MINING CLAIM APPLICATION—PROOF.

RICO LODE.

The affidavits required of an applicant for mineral patent cannot be executed by an agent or attorney, if the said applicant is a resident of, and, at the date of the application, within the land district where the claim is situated.

Secretary Vilas to Commissioner Stockslager, February 18, 1889.

I have considered the case arising upon the appeal of Charles Naegelin, William Naegelin, and George Naegelin, applicants for patent for mineral entry, No. 237 (Rico lode), Durango land district, Colorado, from your office decision of December 13, 1886, holding said entry for cancellation.

The grounds upon which your office held said entry for cancellation are, that the proof that plat and notice remained posted on the claim during period of publication is by affidavit of one O. U. Taylor (a stranger to the record), and that the other affidavits (excepting those of citizenship) are made by one Joseph Wilkinson, the attorney in fact of the claimants.

The Revised Statutes (Sec. 2325) provide, among other things, that "any person, association, or corporation . . . . . who has complied with the terms of this chapter, may file in the proper land office an application for a patent, under oath, showing such compliance." This language indicates that such oath must be made, in the case of individual claimants, at least, by the claimants themselves. Again: "The *claimant* shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim," during a period of sixty days. This view is rendered more clear, as well as the stringency of this rule somewhat relaxed, by the first section of the amendatory act of January 22, 1880 (21 Stat., 61):

Where the claimant for a patent *is not a resident of or within* the land district where the vein, lode, ledge, or deposit sought to be patented is located, the application for patent, and the affidavits required to be made in this section by the claimant for such patent, may be made by his, her, or its authorized agent, where such agent is conversant with the facts sought to be established by said affidavits.

The claimants state, under oath, that Durango, where the land office is located, is "at least forty-five miles from the mine by the nearest traveled route;" said route leading "over two mountain ridges," and being difficult at any time, during a large portion of the year hazardous, and often entirely impassable;" that said Wilkinson, attorney in fact, "made the affidavits required in said proceedings, because the facts

were known to him, and were wholly unknown to either of the said applicants, who could not therefore make the said affidavits;" and for the same reason Taylor made the affidavit as to posting of notice.

Counsel for applicants contends that the decision of Mr. Secretary Schurz, in the case of W. B. Frue *et al.* (Topsy mine, 7 C. L. O., 20), should be applied to the case at bar. In the case cited, it was suggested that the act of January 22, 1880, was an enlarging or beneficial act, and should therefore be liberally construed; and it was held to apply for the benefit of an entryman who at the time of making the requisite affidavit was temporarily absent from—*i. e.*, not "within"—the land district in which the mine was located. It is urged that as it is much more difficult to reach the land office at Durango from the Rico mine, than it would be to reach it from many places outside of the land district, the decision of your office is inconsistent, in that it "discriminates in favor of non-residents and against residents."

The ruling in the case of the Topsy mine can not apply to the case at bar; for here the applicants were residents of the Durango land district, and, at the date of the execution of the affidavits in question, were "within" said district. In my opinion the act of January 22, 1880, can not, by the utmost liberality of construction allowable, be construed to include any person not either a non-resident of the district, or at the time of making the affidavits required by law temporarily at least beyond its limits. The hardship of the rule lies in the statute, which the Department can but follow. *Ita lex scripta est.* I therefore affirm your decision.

PRE-EMPTION FILING—HOMESTEAD ENTRY.

IDDINGS *v.* BURNS.

A homestead entry may be allowed for land covered by a pre-emption filing, subject to the rights of the pre-emptor.

The filing of a homestead application and preliminary affidavit, unaccompanied by the requisite fees, is not sufficient to work an appropriation of the land under the homestead law.

Secretary Vilas to Commissioner Stockslager, February 18, 1889.

I have considered the appeal of William T. Iddings from your office decision of July 2, 1886, dismissing his application to make homestead entry for the SW. $\frac{1}{4}$, Sec. 29, T. 25 S., R. 17 W., Larned land district, Kansas.

The records show that Patrick Sweeney filed declaratory statement for this land February 23, alleging settlement February 22, 1884. On December 21, 1885, he published notice of his intention to make proof February 17, 1886.

January 26, 1886, William T. Iddings filed an affidavit protesting against the acceptance of any proof to be made by Sweeney for the rea-

son that Sweeney was not a qualified pre-emptor, having moved from land of his own in Kansas to the land covered by his pre-emption filing.

On the same day Iddings made the usual homestead application to enter said land, and accompanied the same with the usual homestead affidavit.

Upon the back of the application is the following endorsement:

U. S. LAND OFFICE,
Larned, Kansas Jan. 26, 1886.

This application and affidavit was this day presented for record and is held in abeyance pending the final proof advertised by Patrick Sweeney to be made at this office Feb. 17, 1886, based on his D. S. 4177 for same tract. The within applicant has also filed in the case his supplemental affidavit and protest hereto attached. This endorsement is made at the request of the atty. for this applicant, no money being tendered with the papers.

W. R. BROWNLEE,
Register.

Sweeney did not make proof February 17, the day named in his notice, and Iddings again presented his homestead application upon which I find the following endorsement.

This paper to enter the within described tract as a homestead was presented to be made of record and rejected this 17th day of Febr'y 1886, for the reason of existing homestead entry No. 9882 made Feb. 13, '86 by Mary Burns for said tract—30 days allowed for appeal.

H. W. BICKEL,
Receiver.

Iddings appealed from said decision and deposed:

The rejected application and protest referred to were filed in the land office with the understanding on the part of the appellant that no further action would be taken until Feb. 17, 1886, at which time he was present in person and with witnesses to prove the allegations set up in his protest referred to; to cross examine the witnesses of Sweeney and to resist an illegal entry on his part for said tract of land and to again apply to have appellant's homestead entry made of record.

Appellant then learned for the first time, namely Feb. 17, 1886, that one Mary Burns had made homestead entry for said tract—No. 9882—Feb. 13, 1886, or four days prior to the time advertised by Sweeney to make final proof, at which time appellant again applied to have his homestead entry made of record which was refused.

Three grounds of error were alleged by the appellant, viz:

1. It was his protest that first gave notice to the government of Sweeney's "meditated and attempted" fraud, and his homestead application and affidavit being then on file in the land office pending the proof of Sweeney no adverse claim could attach as against appellant between the time he made application to enter, January 26, 1886, and February 17, 1886.

2. His application held in abeyance till Feb. 17, 1886, pending the final proof advertised to be made by Sweeney on that date appropriated this land as against Mary Burns and all other persons except Sweeney.

3. The entry of Mary Burns is void as against the prior application of appellant.

July 2, 1886, you affirm the decision of the local officers and say:

The application of Iddings without tender of fee and commissions, could not have been allowed; therefore it could not have operated to withdraw the land embraced therein from disposition. February 13, 1886, the entry of Burns was made. On the date, therefore, of the formal presentation of Iddings' application, viz: on February 17, the land was appropriated and you properly rejected it for that reason.

From this decision the appeal now before me was taken.

I concur in so much of your decision as holds that the notice given by Sweeney of his intention to make proof was not an appropriation of the land operating to prevent the allowance of Burn's homestead entry. A pre-emption filing does not appropriate the land covered by it so as to preclude a homestead entry for the same tract, subject of course to any rights which the pre-emptor may have in the premises; and the fact that notice of intention to make proof has been given does not alter the fact that it is still a filing and not an entry. When proof has been accepted upon a pre-emption claim and cash entry has been made, then as in the case of a homestead entry, the land is appropriated and another entry for the same tract cannot be made. Hence there was no reason why the application made by Iddings January 26th should not have been accepted, or after its rejection that of Burns. Therefore the question to be determined is whether Iddings or Burns has the prior homestead entry of the land. You hold that Iddings made no entry for the reason that he did not pay the fees and commissions. In the case of Gilbert *v.* Spearing (4 L. D., 463) the definition of the essential parts of a homestead entry given in the case of Thomas *v.* St. Joseph and Denver City R. R. Company (3 C. L. O., 197) is quoted with approval, viz:

Each of the three elements of which this transaction is composed forms an essential part thereof, the application, the affidavit and the payment of money; and when the application is presented, the affidavit made and the money paid, and entry is made, a right is vested.

In this case Iddings complied with two of the three requirements by making application to enter this land under the homestead law, and by filing the homestead affidavit. As to the failure to pay the fees and commissions he swears that when on January 26, 1886, he presented his application and affidavit he was

then and there present ready to pay the entry for said land; that he presented said entry papers to A. H. Ainsworth, chief clerk of said land office who informed affiant that the land was not subject to entry by reason of the fact that Patrick Sweeney, who had pre-emption filing thereon had filed in the land office notice of his intention to make final proof thereon on the 17th day of February, 1886, and that the filing of such notice was a part of the final proof and appropriated the land and withdrew it from entry for the time being and until February 17, 1886 when if Sweeney did not offer proof affiant could make entry of the land.

It, therefore, appears that Iddings did not comply with the third requirement, viz: the payment of the legal fees. Not only were the fees not paid but, as the endorsement made on the application by the register states, no money was tendered. Iddings should have paid the

fees when he made his application; and if, as he alleges, he failed to do so because he was advised at the local office that he would not be permitted to make entry pending the notice of Sweeney of his intention to make proof, yet the mistake was partly his. I hold, therefore, that Iddings made no homestead entry for this tract and that the entry of Burns was properly allowed.

Your decision is, accordingly, affirmed.

HOMESTEAD ENTRY—MILITARY SERVICE—RESIDENCE.

FREDERICK MEISZNER.

In the acceptance of military service in lieu of residence, an entryman is not entitled to credit twice for a period covered by two enlistments.

A settlement upon land covered by the entry of another confers no right as against the entryman who complies with the law, but if such settler subsequently procures the cancellation of the entry he may be allowed credit for residence from the time it actually began.

Secretary Vilas to Commissioner Stockslager, February 18, 1889.

I have considered the appeal of Frederick Meiszner, from your office decision of April 7, 1887, holding for cancellation Samuel Durham's homestead entry for the NW. ¼ of Sec. 26, T. 15 N., R. 4 E., Lincoln land district, Nebraska.

Samuel Durham made homestead entry for this land May 2, 1876, and on May 19, 1877, offered final proof thereunder claiming residence from July 6, 1875, and also claiming credit for military service for a longer period than necessary to make up a five years residence. Said proof was approved by the local officers and final certificate issued bearing date of June 8, 1877. Upon examination in your office said entry was suspended, it being held that the proof was prematurely made, the claimant being entitled to credit for military service of three years, five months and four days, which, when added to the actual residence shown, amounted only to four years, six months and four days, and the entryman was required "to furnish supplemental proof at the expiration of the time required by law."

The entryman did not respond to this requirement and no further steps seem to have been taken in the case until December 29, 1886, when the attorney for Frederick Meiszner transmitted to your office an affidavit of said Meiszner, setting up that he (Meiszner) bought the south half of this tract of land February 14, 1882, paying therefor the sum of $460; that he afterwards moved upon said land with his family and had continued to reside there to the date of said affidavit, improving and cultivating the same, and "that affiant has been informed since the purchase of said land and within the last six months that the said tract of land was entered by one Samuel Durham June 8, 1877; and that no patent has ever been issued therefor and that said entry was

and is now suspended for some defect in the compliance with the requirements of the law by the said Samuel Durham;" and that he had no knowledge of the whereabouts of said Durham or his present place of residence, and asked that said entry might be passed to patent.

The statement contained in this affidavit is corroborated by the affidavit of R. E. Moore, the party from whom Meiszner bought. In the letter of the attorney, transmitting these affidavits, it is said:

In the light of these affidavits it becomes at once apparent that the supplemental proof of Samuel Durham allowed by your office letter of September 14, 1877, to register and receiver at Lincoln, can not be made. It is plain, therefore, that the entry must stand or fall upon the final determination of the length of military service to be credited said Durham under section 2305 Revised Statutes of the United States, unless, in your judgment, the case is one for the Board of Equitable Adjudication as it seems to me it ought to be in view of said Durham having actually resided on and cultivated said land from July 6, 1875, nearly ten months longer than you allow him credit for and he believing that his residence and military service taken together much more than fulfilled the requirements of the law. I respectfully request that you will take final action in the case in order that I may appeal to the Honorable Secretary of the Interior and obtain a final ruling as to the proper construction of Section 2305, Revised Statutes of the United States, in its application to this case.

Your office, on April 7, 1887, held the entry for cancellation.

From that decision Meiszner appealed, alleging error in holding that the entryman "did not reside upon the land fully five years including his time served in the United States Army;" and in computing the time to be allowed the entryman for his military service, and in holding that the entryman should not be allowed credit for residence from the date of his settlement.

The final proof in this case shows that Durham was a qualified homesteader; that he, with his family, consisting of a wife and six children, moved on to this land July 6, 1875, and resided there continuously to date of final proof, May 19, 1877; that his improvements on the land consisted of a wood and sod house fourteen by twenty-six feet, containing two rooms, two doors and two windows; a stable, a granary, about one thousand forest trees planted and about one hundred acres under cultivation.

It appears from the proofs that Durham was, on August 12, 1862, enrolled in the 125th regiment of Illinois Volunteers to serve three years or during the war, and was, on July 16, 1863, discharged for disability. On February 2, 1865, he re-inlisted for the term of one year, and was mustered out January 16, 1866, by reason of special order No. 171, military division of Tennessee. Your office gave him credit for service during the three years of his first enlistment and for that period of actual service under his second enlistment occurring after the expiration of the period of his first enlistment, being from August 12, 1865 to January 16, 1866, making a total service of three years, five months and four days. It is contended, however, that the entryman was entitled to credit for the full term of his first enlistment of three years and also for the full term of service under his second enlistment, mak-

ing a total of three years eleven months and fourteen days. To allow this claim would be to give him credit twice for the period from the date of his second enlistment to the date when the term of his first enlistment expired amounting to six months and ten days, and this is not contemplated by the law.

At the time Durham settled upon this land and established a residence there, it was covered by a former homestead entry which was canceled for voluntary relinquishment April 22, 1876. Your office held that he was not entitled to credit for residence on the land prior to the cancellation of the former entry, which holding is assigned as error by the appellant here.

This former entry was made November 7, 1872, by one Stephen Brothers, and was canceled April 22, 1876, upon relinquishment dated March 22, 1876, which instrument was witnessed by Samuel Durham. An examination of the records of your office fails to disclose any of the circumstances that led to the execution of this relinquishment. The fact, however, that the name of Durham who was then an adverse claimant by reason of his settlement for the land, appears as a witness to said instrument would indicate that he was instrumental in procuring its execution.

Durham's entry was made, final proof thereunder submitted and the decision of your office of September 14, 1877, rejecting the same rendered prior to the passage of the law of May 14, 1880, and the action then taken was proper.

It seems, however, that the entryman did not receive notice of this decision until it had been modified by the later decision allowing him credit for residence from the date of the cancellation of the prior entry, but refusing to allow such credit for the period from date of settlement to such cancellation from which decision the appeal now under consideration was taken. While one who makes a settlement upon land covered by the entry of another can by that settlement acquire no rights as against the former entryman, who complies with the requirements of law and perfects his title to the land, yet if the subsequent settler procure the release of the land from that prior claim either by means of a relinquishment or through a contest, I can see no good reason either in law or equity for refusing to allow him credit for residence from the time it actually began. He took the risk of the former entryman failing to perfect his claim. In this case the period of his actual residence from date of settlement to date of final proof when added to the period of military service for which he is entitled to credit, makes more than the period required by law. It is also shown that the entryman complied in good faith with the other requirements of law, and the final proof should therefore be approved.

The decision appealed from is, therefore, reversed and it is directed that said entry be passed to patent.

REPAYMENT—DESERT LAND ENTRY.

ANNA R. BURDICK.

Repayment may be allowed where, through no fault of the entryman, a desert land entry was made for non-irrigable land, and subsequently relinquished on discovery of the mistake.

Secretary Vilas to Commissioner Stockslager, February 18, 1889.

I have considered the appeal of Anna R. Burdick from your office decision of November 1, 1889, denying her application for the re-payment of the purchase money paid on desert land entry No. 189, Hailey land district, Idaho.

Mrs. Burdick entered lots 3 and 4, and the SE. ¼, of the SW. ¼ of Sec. 18 and lot 1 of Sec. 19, T. 2 N., R. 18 E. Hailey, Idaho, under the act of March 3, 1877 providing for the sale of desert lands, May 9, 1886, and paid to the receiver $43.10 being at the rate of twenty-five cents an acre for the land above described.

September 25, 1886, Mrs. Burdick relinquished her said entry to the United States and upon the same day made application for the return of the purchase money paid on said entry.

By letter of November 1, 1886, you denied said application.

It appears from the affidavit of Mrs. Burdick that misled by the advice of a man named Turner, her entry was not for the land she had visited and thought she was entering (which she afterwards found was covered by the pre-emption claim of V. Lamb) but lay to the north of it and higher. There was no source from which to get water and it will be impossible, she says, to reclaim the land.

It would appear that if the land Mrs. Burdick designed to enter had not been pre-empted, she would have been entitled to amend her entry according to her intention. Her mistake in the proper description probably occasioned her failure to discover that the tract she sought had been filed on. Her entry ought, therefore, equitably and fairly to be treated as if made according to her true intention and as for the land for which it would be amendable to designate; and in that case it would be found in conflict with a prior entry, and be canceled and the money would be returnable. I cannot think the United States may refuse to return the money paid in consequence of an excusable mistake when if the mistake were not made it would be returnable.

For the reasons I have given I think the money paid by Mrs. Burdick should be returned to her. Therefore, I reverse your decision and direct the repayment of the $43.10 paid by her when she made said entry.

Overruled, 9 L. D. 202

DESERT LAND ENTRY—COMPACTNESS.

JOSEPH SHINEBERGER.

A desert land entry allowed in conformity with existing regulations as to compactness, should not be canceled under later regulations imposing a different and more rigid rule with respect to boundaries.

Secretary Vilas to Commissioner Stockslager, February 18, 1889.

I have considered the case arising upon the appeal of Joseph Shineberger from your office decision of May 13, 1887, requiring him to readjust the boundaries of his desert land entry, No. 182, Helena land district, Montana.

Said entry was made April 8, 1879; final proof, made November 14, 1881, was accepted, the remainder of the purchase money paid, and final certificate issued. Said final proof shows a full compliance with the requirements of the law by the construction of ditches and the irrigation of the land.

It is admitted that the entry does not conform to the requirements of the law as construed by the regulations of the Department at present in force. The question at issue is whether an entry which under former instructions and rulings of the Department was at least permitted, and upon which in consequence of such permission the entryman had made heavy expenditures for the purpose of irrigation and other improvements, shall be rejected under rulings and instructions which are thus given a retroactive effect.

The first instructions issued to local officers relative to desert land entries (March 12, 1877–4 C. L. O., 22,) contained no directions or intimations as to the shape of the entry. It seemed to be generally understood, not only by persons applying to make desert-land entries, but by the officers of the land department, that the requirement as to compactness was satisfied when the legal sub-divisions were contiguous, as required by the pre-emption, homestead, and other land laws, and not in separate parcels.

No instruction defining the term "compact" or in any way restricting the form of desert-land entries, was promulgated until September 3, 1880 (7 C. L. O., 138), when the rule now in force was adopted. It will be seen that in conclusion said circular directs, "You will *in future* be strictly governed by the foregoing instructions."

The question of the applicability of this ruling to entries made prior thereto came up squarely in the cases of Philip Shenon and E. Grasten, in which your office said (January 26, 1881—8 C. L. O., 8):

It is claimed that the entries in question were made in good faith, under instructions in force prior to the issue of said circular, that the parties have complied strictly with the instructions in force at date of entry, that in many cases the entire tract entered has been reclaimed by bringing water thereon, and valuable improvements put upon the same, and that if such entries must be made to conform to the strict letter

of said circular as to the length of the side lines of the tracts embraced therein, and amended by relinquishing a part thereof to the United States, the parties who made the entries will, without any fault of their own, be thereby made to suffer very great pecuniary losses.

It is provided in said circular that, 'In no case will the side lines' (of the tracts of land embraced in a desert entry), 'be permitted to exceed one mile and a quarter when the full quantity of 640 acres is entered.' Where the entry embraces a less quantity than a whole section or its equivalent, the limits of the side lines will be proportionately decreased.

It was intended that the foregoing should govern in all cases of desert entry *made subsequently to the* promulgation of the circular.

The circular of September 3, 1880, and the letter of January 26, 1881, both make an exception of entries made along the margin or including both sides of streams which were ordered to be suspended; but no reasoning is offered to show why regulations should have been adopted in such case, any more than in any other, whereby "the parties who made the entries would without any fault of their own, be made to suffer very great pecuniary loss."

In fact, your office would seem to have come to the conclusion that there was no ground for making such exception. In this very entry, which lies on both sides of a stream, the register's final certificate bears the endorsements: "O. K. G. B. C."; "Approved, February 2, 1885—A. M. H., Ex." (Examiner). And many entries in form as non-compact as this have been patented, notwithstanding they included both sides of a stream.

As late as March 10, 1883, the entry of J. H. Rourke, in sections 10, 11, and 12 of T. 10 S., R. 11 W., (the township adjoining that in which the land here in question is located), was patented, though two miles long, and for a mile and a half of that distance but a quarter of a mile wide, and crossed by three streams.

In the case at bar, six years after the acceptance of proof and of the purchase price of the land, the entry was suspended, and the claimant called upon to meet a requirement which, as now understood and interpreted by your office, had no existence at the inception of his right—a requirement which he can not now comply with except by relinquishing lands which, according to the affidavits accompanying his appeal, he has improved at heavy expense. His case is similar to that of J. C. Lea, whose entry, embracing two hundred and eighty acres, was a mile and three-quarters in length and one-quarter of a mile in width. In that case the Department decided (April 7, 1884—11 C. L. O., 45):

Since it appears that the entryman was allowed to enter said tracts without objection, and that he has spent much time and money in reclaiming them, it would work hardship and injustice to enforce against him the regulation referred to:

and reversed the decision of your office demanding a re-adjustment of the boundaries of the entry.

The location of the tract here in question tends to suggest that very careful inquiry should be made whether it was desert or not, originally. Were it not for the fact that the original entry was allowed at a

time when the rules and practice of the land department were far less stringent in reference to the requirement of compactness than at present, no question could be entertained that it should be substantially and materially reformed, or canceled. In view of that fact, however, your decision is affirmed, with the modification that upon further proofs showing satisfactorily the orignal desert character of the land, its actual reclamation from desert-land to agricultural, and such information in respect to compactness as may most fairly meet the law and the necessities of the case, the allowance of the entry may be reconsidered to the extent that justice shall by the facts as presented demand. The entryman should be required to make this showing within ninety days after notice of the decision; and it would be prudent to direct a special agent to make a careful examination of the facts and circumstances.

FINAL PROOF—LEGAL HOLIDAY.

GEORGE LEINEN.

Where by mistake Sunday is designated as the day for the submission of final proof, it is sufficient if the proof is made on the following day.

First Assistant Secretary Muldrow to Commissioner Stockslager, February 18, 1889.

I have considered the appeal of the Travelers Insurance Company, transferee of George Leinen, from the decision of your office dated November 10, 1887, requiring new proof in support of the pre-emption cash entry No. 5,577 of the NE. ¼ of the SE. ¼ and Lot 7 of Sec. 5, and the NE. ¼ of the NE. ¼ and Lot 1 of Sec. 8, Tp. 130 N., R. 52 W., made by said Leinen on December 13, 1882, at the Fargo land office in the Territory of Dakota.

Your office decision states that, by a former decision of your office, dated September 13, 1884, the claimant was required to furnish record proof of his declaration of intention to become a citizen of the United States and also his non-mineral affidavit as to the character of the land; that the local officers by letter dated August 3, 1887, reported that the attorney for the claimant had been duly notified of said requirements and had failed to respond thereto; that the claimant and present occupant of the land, in addition to the former requirements of your office, must make new publication and furnish new proof for the reason that the final proof appears by the certificate of the officer before whom it was taken to have been made on the 11th day of December, 1882, because the 10th of said month, the day advertised was Sunday.

The appellant insists that your office erred in requiring new proof for the reason that the error was the fault of the local officers, and that it would be an unnecessary hardship to require the claimant or his trans-

feree to make new proof. It appears that the claimant filed with his final proof, his affidavit that he "made oath" of his intention to become a citizen of the United States before the clerk of the district court of Scott County, Minnesota, on or about the 13th day of March, 1879; that he had given the certified copy of the record of said declaration to the land officers at Fargo in said territory in his final proof in support of his homestead entry of the NE. ¼ of Sec. 4, Tp. 131, R. 50; that he did not have time to secure another copy of said record to file with said proof, and he asked that said affidavit might be taken as sufficient evidence of citizenship.

The local officers accepted the proof and issued certificate for the land. An examination of the records of your office will confirm or refute the allegations in said affidavit as to said record. If the proper evidence is in the final proof of said homestead entry it will be unnecessary to require another certified copy of the record. Nor will it be necessary to require republication because the final proof was not made on the day advertised, the same being Sunday.

By Sec. 2115 of the Civil Code of Dakota it is provided that every Sunday is a holiday, and by Sec. 2118 (idem) it is provided that "whenever any act of a secular nature other than a work of necessity or mercy, is appointed by law or contract to be performed upon a particular day, which day falls upon a holiday, such act may be performed upon the next business day, as if it had been performed upon the day appointed." In the case of Salter *v.* Burt (20 Wendell 205) the Supreme Court of New York held that "when the day of performance of contracts other than instruments upon which days of grace are allowed falls on Sunday, that day is not counted, and compliance with the stipulations of the contract on the next day (Monday) is deemed in law a performance." In the case of James H. Warner (7 L. D. 531) the Department held that where the notice designated, by mistake, Sunday, as the day on which final proof would be submitted, and the final proof was made on Saturday, the day previous, in the absence of any protest, the entry may be submitted to the Board of Equitable Adjudication for consideration. It will be observed, however, that in the case of Warner (*supra*) the final proof was submitted on the day prior to the day designated, and, hence, did not come within the provisions of said sections of the Dakota Code, the provisions of which all persons living in said territory are presumed to have notice of.

The claimant or his transferee will be required to furnish a non-mineral affidavit within thirty days from due notice hereof, and in case the same is furnished said entry will be passed to patent. If the affidavit is not filed as herein required, the entry will be held for cancellation.

The decision of your office is modified accordingly.

SOLDIERS' ADDITIONAL HOMESTEAD—ACT OF JUNE 15, 1880.

WILLIAM JAMISON.

The right to make soldiers' additional homestead entry does not extend to members of the Missouri Home Guard.

A purchase under the act of June 15, 1880, made in accordance with existing rulings, and under the express direction of the Commissioner, by a transferee holding under an entry made on a certificate of additional right issued to a member of said organization, will not be disturbed.

Secretary Vilas to Commissioner Stockslager, February 19, 1889.

I have considered the appeal of William Jamison from your office decision of April 13, 1887, holding for cancellation his cash entry for lot No. 4, Sec. 24, T. 35 N., R. 5 E., Olympia land district, Washington Territory.

The record shows that one Whitley Collyer formerly of the Missouri Home Guards, on the 17th day of July, 1878, procured from the then Commissioner of the General Land Office a certificate stating that he was entitled to a soldiers additional homestead not exceeding eighty acres, whereupon he, by an attorney in fact, entered the land in controversy November 25, 1878, and on December 1, 1878, the said Collyer and wife by the same attorney in fact, conveyed the said lot 4 to said Jamison, by warranty deed, for a valuable consideration.

On November 8, 1883, your predecessor by letter to the local officers, held that said Whitley Collyer who made such additional entry was not entitled to the benefit of Sec. 2306 of the Revised Statutes for the reason, that his military service had been performed in the Missouri Home Guards, and directed notice to be given to the parties in interest that sixty days would be allowed them to appear and show cause why such entry should not be cancelled, or, in the alternative, to file application to purchase the said land under the act of June 15, 1880.

On January 27, 1885, the said Jamison made cash entry for said land under act of June 15, 1880, pursuant to the above requirement of the General Land Office and paid the government price therefor, receiving certificate. His cash entry being No. 9179.

Your office by its said letter of April 15, 1887, held for cancellation said cash entry No. 9179 for the reason that the soldiers additional homestead entry on which the same was based, was fraudulent or illegal.

The letter written by your predecessor dated November 8, 1883, permitting Jamison to make cash entry under act of June 15, 1880, was written but a few days after the decision in case (on review) of Wm. French (2 L. D., 238), and was doubtless based upon that decision.

In the said French case, the entryman's military service had been performed as a member of the Missouri Home Guards, and it was held that the "additional homestead entry made by him was illegal at its inception, because the service upon which the right to make such entry

was based was not in the army of the United States," and yet it was also held that the transferee of French's right by a *bona fide* instrument in writing was entitled to the benefit of the act of June 15, 1880 (21 Stat., 257) and might purchase said land from the government.

The provisions of said act relating to matters of this character are as follows:

> That persons who have heretofore under any of the homestead laws entered lands properly subject to such entry, or persons to whom the right of those having so entered for homesteads may have been attempted to be transferred by bona fide instrument in writing, may entitle themselves to said lands by paying the government price therefor, and in no case less than one dollar and twenty-five cents per acre, and the amount heretofore paid the government upon said lands shall be taken as part payment of said price.

This act was doubtless intended for the relief of persons who had made homestead entries and had failed to comply fully with the law in regard to residence and cultivation, and those to whom homesteaders had attempted to convey their rights in such homestead entries.

The decision in the French case, *supra*, that persons whose military service was performed in the Missouri Home Guards are not entitled to the benefits of Section 2306, R. S., has been continuously followed; Wilson Miller (6 L. O., 190); Smith Hatfield, *et al* (6 L. D., 561); Chauncey Carpenter (7 L. D., 236). And while this is the case the claimant in the case at bar, Jamison, occupies the position of the transferee in the French case, *supra*. In the Chauncey Carpenter case, *supra* the facts, as stated, do not show that the transferee purchased from the entryman prior to the passage of the act of June 15, 1880, and the construction of said act does not appear to have been involved in the case while in the case at bar it is the sole question for decision.

The soldiers' additional homestead entry in controversy was made by an attorney in fact, but it was made November 25, 1878, under the practice prescribed by circular of this Department of May 17, 1877, which in subdivision three thereof provided:

> To allow entries to be made by the agents or attorneys of the party originally entitled to the entry, but only after the claim has been presented to you and certified as valid and that the party is entitled to the amount of land claimed, under such circumstances and regulations as you may prescribe.

No change of practice was made, or different construction given the law until the circular of February 13, 1883 (1 L. D., 654), was issued, which abolished entries by attorney in fact and required the party entitled to make entry to appear in person at the local office as in other homestead entries, but in this circular it was provided that, "these rules shall not apply to cases where the additional right has heretofore been certified by this office, nor to cases now pending, or which may be filed in this office prior to March 16, 1883."

The case at bar is clearly within the above proviso and must be decided under the circular of May 17, 1877, and the law as construed in the case of French (on review).

The entry of Jamison for the land in question having been made and allowed under the rulings at the time in force, and under the express direction of the Commissioner of the General Land Office and before any change in the rulings, and not being in conflict with the law as then interpreted, should under the rule in Oliver *v.* Thomas *et al.* (5 L. D., 292), and Wachter *et al v.* Sutherland (7 L. D., 165) be allowed to stand.

Your said office decision is therefore reversed and patent will issue on claimant's cash entry.

RAILROAD GRANT—REVOCATION OF INDEMNITY WITHDRAWAL.

COUNTERMAN *v.* MISSOURI, KANSAS & TEXAS RY. CO.

Under the procedure provided in the order revoking the indemnity withdrawal, made for the benefit of this company, it is incumbent upon the General Land Office, in cases of unapproved selections for lands covered by applications to file or enter, to pass upon "the right of the company to make selection."

Secretary Vilas to Commissioner Stockslager, February 19, 1889.

By letter of March 9, 1888, your office submitted for re-adjudication the case of Gilbert J. Counterman *v.* Missouri, Kansas & Texas railway company, involving the W. ½ SW. ¼, Sec. 28, and E. ½ SE. ¼, Sec. 29, T. 25 S., R. 14 E., Independence, Kansas.

The tracts are within the indemnity limits of the grant for said company the withdrawal for which became effective April 6, 1867. The company selected the tracts September 25, 1882, which selection has not yet been approved.

November 27, 1882, Counterman applied to enter the tracts under the homestead law. His application was rejected by the local office on account of said selection. On appeal he alleged that the land was excepted from said withdrawal by reason of the claim of one Marion Kingston, under declaratory statement filed March 24, 1866, alleging settlement the same day. Your office thereupon by letter of January 3, 1883, ordered a hearing in the premises. There was also of record on the tract the declaratory statement of Mahlon C. Putnam filed April 2, 1878, alleging settlement the first of the same month and of Albert Anderson filed April 30, 1879, alleging settlement the 18th of that month.

Notice of the hearing was published specially citing all of said pre-emption claimants.

At the hearing held March 13, 1883, the pre-emption claimants failed to appear, and there were present Counterman and a representative of the company. The testimony showed that Kingston had established residence on the tract in the summer of 1866, and remained there cultivating the land until about July, 1867, after the withdrawal, when he left.

The local officers rejected the application of Counterman. Your office

by letter of February 29, 1884, affirmed that decision and awarded the tracts to the company.

On appeal that decision was affirmed by this Department on August 19, 1886.

In said latter decision it was said:

But the land in this case being offered land and at the time of the hearing nearly four years having elapsed since the filing of the latest declaratory statement, and your office having found that the parties were duly cited, and had made default, I affirm the conclusion that they had abandoned the land prior to the date of selection by the railroad company and that Counterman's subsequent application was rightfully rejected.

On August 17, 1887, the withdrawal for said indemnity limits was revoked, and October 15, 1887, was fixed in the notice as the date when the lands thereby affected would be thrown open to entry.

On that day Counterman again applied to enter said land, the company was notified and February 13, 1888, set for hearing at which time both parties appeared. Counterman submitted homestead proof and the company filed protest and cross examined the witnesses.

The proof showed that in March, 1884, claimant built a house on the tract and in 1885 broke five acres; that in the spring of 1886, he took up his residence there with his family and has since lived there; and that his improvements are valued at $620.

The local officers decided that the entry should be allowed on the ground that "the railroad selections had been forfeited." The company appealed.

On this appeal your office submitted the case as stated. Your said office letter states:

As to the jurisdiction of this office in the premises the case is *res adjudicata*, but since all the lands in the indemnity limits of the company, not included in an approved selection come within the terms of the withdrawal revocation dated August 17, 1887, it is respectfully submitted for re-adjudication.

The method of procedure to be followed in this class of cases is set out in said order of revocation of August 17, 1887*, as follows:

As to the lands covered by unapproved selections, application to make filings and entries thereon may be received, noted, and held subject to the claim of the company, of which claim the applicant must be distinctly informed, and memoranda thereof entered upon his papers. Whenever such application to file or enter is presented, alleging upon sufficient *prima facie* showing that the land is from any cause not subject to the company's right of selection, notice thereof will be given to the proper representative of the company, which will be allowed thirty days after service of said notice within which to present objections to the allowance of such filing or entry. Should the company fail to respond or show cause before the local officers why the application should not be allowed, said application for filing or entry will be admitted and the selection held for cancellation; but should the company appear and show cause, an investigation will be ordered under the rules of practice to determine whether said land is subject to the right of the company to make selection of the same, which shall be determined by the register and receiver, subject to the right of appeal in either party.

* See Atlantic and Pacific R. R. Co., 6 L. D., 91.

When appeals are taken from the decision of the register and receiver to your office in the class of cases herein provided for, you will dispose of them without delay; and if the decision of your office shall be in favor of the company, and no appeal be taken, the land shall be approved or certified for patent, without requiring further action on the part of the company except the payment of fees and dues. If the decision of your office should be adverse to the company, and no appeal taken, the selection will be canceled, and the filing or entry allowed, subject to compliance with the law.

In this case your office has not followed the course prescribed by said instructions, in that the validity of the company's selection was not passed upon. The local officers held that "the railroad selections had been forfeited."

Said instructions, however, do not justify this conclusion. Your office has made no judgment on "the right of the company to make selection." This question should have been decided by your office.

The case is therefore returned for such disposition of said selection as may be proper in the light of the application of Counterman.

SECOND TIMBER CULTURE ENTRY—REPAYMENT.

JAMES C. KEEN.

A second timber culture entry may be allowed where the first, through no fault of the entryman, did not cover the land intended to be entered, and amendment is barred by the adverse claim of another.

Credit on the second entry, for fees and commissions paid on the first, can not be allowed, but repayment of such fees and commissions will be considered on application therefor.

First Assistant Secretary Muldrow to Commissioner Stockslager, February 21, 1889.

The record in this case shows that on July 6, 1886, James C. Keen made timber culture entry for the NW. ¼ of Sec. 22, T. 12 N., R. 32 W., North Platte land district, Nebraska.

On or about July 1, 1887, Keen filed in the local office an application, accompanied by his affidavit, duly corroborated, in effect asking that his said entry be canceled without prejudice to his right to make another timber culture entry for a different tract of land. He filed at the same time his written relinquishment of his original entry, and along with it, a formal application to make timber culture entry for the E. ½ of the NW. ¼ and the W. ½ of the NE. ¼ of Sec. 24, T. 15 N., R. 30 W., of the same series.

The facts stated by Keen in support of his application are, substantially, that on July 4, 1886, desiring to select a tract of land suitable for timber culture entry, he employed one Frank Gapen, who then had an office in North Platte, and represented himself to be a competent surveyor and locator, to show him a desirable tract for the purpose named. That Gapen took him to a tract of land, which at the time was devoid of improvements, and affiant being pleased therewith, and being

informed by said Gapen that the same was the NW. $\frac{1}{4}$ of Sec. 22, T. 12 N. R. 32, W., he made his application therefor, and upon this application his said original entry was allowed; that subsequently, about the 15th of September, 1886, affiant again went to the tract for the purpose of showing the same to his family and determining what portion thereof he would plow for the planting of trees, and found a settler thereon by the name of John Spies, who informed affiant that the tract in question was not the tract embraced in his said timber culture entry. He afterwards ascertained that the land he had thus selected and supposed he had entered, was the SE. $\frac{1}{4}$ of Sec. 26, T. 13 N., R. 32 W., and that the tract he had actually entered, as aforesaid, was entirely worthless, being situated on the sand hills, and for that reason utterly unfit for cultivation; that affiant, when he made the selection aforesaid, was entirely ignorant of the government surveys, but believed said Gapen to be a competent surveyor and locator, and relied upon him as such and as a man of honesty and fair dealing, incapable of deception in the matter of locating him on the tract in question. Affiant further states that he agreed to take the claim, in good faith believing it to have been properly described to him by Gapen, and that when he made his application to enter, he honestly believed he was applying for the identical tract he had thus examined; that he has caused the records of the land office at North Platte to be examined and finds that the SE. $\frac{1}{4}$ of Sec. 26, T. 13 N., R. 32 W., the tract on which he had been located, as the NW. $\frac{1}{4}$ of Sec. 22, T. 12 N., R. 32 W., as aforesaid, is embraced in the homestead entry of said John Spies, made March 22, 1886, several months prior to affiant's selection thereof. The affidavit of one A. J. Slootskey, dated May 12, 1887, is filed in the papers, in which Slootskey states, among other things, that he had recently had a conversation with Gapen, in which the latter admitted that at the time he located Mr. Keen on the tract above mentioned, he knew the same had been previously covered by the homestead entry of Spies.

Upon the showing thus made, your office treated the application of Keen as an application to amend his original entry, and, on October 4, 1887, rejected the same, for the reason that the land now sought to be entered was not intended to have been embraced in the applicant's original entry.

The papers are now before me on Keen's appeal from your said decision.

This is not, as construed by your office, an application to amend an existing entry, but is an application by Keen to be allowed to make a timber culture entry, for another and different tract from that he originally intended to enter, on the ground of mistake in making his first entry, caused by the deception practiced upon him by the surveyor whom he employed to assist him in locating his claim, and upon whom he relied; it being shown that the tract he originally intended to enter was at the date of his examination and selection thereof covered by the homestead entry of another party.

Upon the showing made by Keen, I think his application should be allowed. Second timber culture entries have been allowed when, through no fault of the entryman, the first entry is incapable of being carried to patent. R. E. Gilfillan (6 L. D., 353). It has also been held that the same principle governs the allowance of a second timber culture entry as obtains in the case of a second homestead entry (A. J. Slootskey 6 L. D., 506, and cases there cited); and it has been substantially ruled that when entry is made for a tract of land not intended to be entered, and due care has been exercised by the entryman, an entry will be allowed for another and different tract. Henry E. Barnum (5 L. D., 583).

The applicant in the case at bar could not have carried his original entry to patent, for the good and sufficient reason that the land covered thereby is shown to be utterly unfit for purposes of cultivation, and he could not therefore have grown and cultivated thereon the trees required by the timber culture law. He could not have amended so as embrace the tract he originally intended to enter, for the reason that the same was covered by a prior adverse claim. So that, if his present application be disallowed, he will be virtually denied the privilege, through no fault or inexcusable negligence on his part, of the one entry allowed by the timber culture law. He appears to have acted, in all respects, in the best of faith, and the mistake which led to his original entry is, in my judgment, such a one as is liable to be made by a man exercising all reasonable care and prudence. There is no adverse claim to the tract he now seeks to enter and the matter is one solely between him and the government. You will, therefore, cancel his first entry on the relinquishment filed, and allow him to make new entry covering the tract applied for.

Your said office decision is accordingly reversed.

Keen, also, asks, that he be allowed credit in his new entry for fees and commissions heretofore paid by him. Such credit can not be so allowed. If he desires the repayment of fees and commissions paid on his first entry, he will be required to make separate application therefor, in accordance with the provisions of Department circular of December 1, 1883, (2 L. D , 660) when the matter will be duly considered.

CONTEST—SIMULTANEOUS APPLICATION—PRACTICE.

JASMER ET AL. v. MOLKA.

Where a few seconds intervene between two applications to contest an entry, the right of precedence is properly awarded to the one first actually received.

The defendant is the only person entitled to complain of irregularity in an application to contest which has been accepted.

First Assistant Secretary Muldrow to Commissioner Stockslager, February 21, 1889.

On June 8, 1885, Edward Molka made timber culture entry for the SE. ¼ of Sec. 4, T. 125 N., R. 64 W., Aberdeen, Dakota. On July

12, 1887, William Molka and Carl Jasmer each applied to contest the said entry. Both applications were based upon alleged failure by the entryman to comply with the law. The register accepted the contest of Molka. Upon appeal by Jasmer, your office, on October 4, 1887, sustained the action below. Jasmer appeals from this decision.

With the appeal the appellant submits the affidavits of himself, his attorney and one Heller, the witness of his affidavit of contest.

The facts in the case are set out in said affidavits and in the register's letter of August 19, 1887, transmitting the appeal from the action of the local office.

It appears from the foregoing that upon the opening of the local office on the morning of the said July 12, 1887, the said respective contests were presented within a few seconds of each other. The register states that there was a rush for the opening behind which he stood and that the contest of William Molka was first placed in his hands. Thereupon, the register, about ten minutes after the appellant's contest had been presented, accepted the contest of Molka (who applied to make homestead entry), "and allowed him to perfect his papers by taking the necessary oaths."

The appellant's affidavit of contest, with his application to make timber culture entry for the land, and accompanying affidavit, had been executed on said date, July 12, 1887, before a notary, prior to being presented at the local office.

The register further states that he reserved his decision from 9 A. M. until 1:30 P. M., "in order that he might see if his determination in the premises was in accordance with the observation of the employes in the office, and they were unanimous that precedence should be given to Molka."

On the said date, to wit: July 12, 1887, the register returned the appellant's contest papers, in compliance with his (appellant's) attorney's request not to enter said contest, unless it could be placed on the records of the local office prior "to any other contest."

The appellant submits four specifications of error, which set out substantially that your office erred in not suspending further proceedings in the matter of the contest of William Molka, in not holding said contests to be simultaneous, and in holding that the register could permit said Molka to "perfect his papers" after the presentation of the appellant's application to contest.

In the case of Benschoter *v.* Williams (3 L. D., 419), it was held that where a few seconds intervened between two applications to contest an entry, the right of precedence was properly awarded to the one first actually received. This ruling was followed in the case of Jacobs *v.* Champlin (4 L. D., 318), and is now fully settled. The application of Molka in this case was first presented and accepted by the register.

The application having been accepted, the only person competent to complain of irregularity in the same was the contestee. This ruling is

maintained by a long line of decisions. In the case of Hanson *v.* Howe (2 L. D., 220), where a stranger intervened and moved the dismissal of contest on account of want of particularity in the affidavit, it was held: "The only person entitled to complain of a want of particularity in the affidavit was Howe, but he made default." In Mitchell *v.* Robinson (3 L. D., 546), it was held that the validity of an affidavit accompanying an application to enter can not be considered on the motion of a stranger to the record. In Graves *v.* Keith (3 L. D., 309), it was held that where a contest had proceeded to hearing merely on verbal allegations, objection thereafter could not be heard. Winans *v.* Miller (4 L. D., 254). In Pederson *v.* Jorgenson (5 L. D., 12), it was held that the omission of the venue from the affidavit of contest could not be taken advantage of by a stranger to the record. In Gotthelf *v.* Swinson (Ibid., 657), it was held that, if an affidavit is defective, it can only be excepted to at the hearing. "Contests have been allowed where no affidavit has been filed at all, where the information upon which the local officers acted was merely verbal, or where it was reduced to writing, but not verified by the oath of contestant. The rule requiring an affidavit to be filed by contestant when initiating his contest was only to assure the government of his good faith in the premises." (Ibid.)

In this case the appellant Jasmer was a stranger to the contest filed by William Molka.

The decision of your office is accordingly affirmed.

The record in the case of William Molka *v.* Edward Molka, forwarded by your office letter of March 19, 1888, wherein the local officers gave their joint opinion, dated February 25, 1888, in favor of contestant (contestee in default), is returned for appropriate action by your office.

RAILROAD GRANT—INDEMNITY WITHDRAWAL—ENTRY—JUDGMENT.

MUDGETT *v.* DUBUQUE AND SIOUX CITY R. R. CO.

A homestead entry, allowed in accordance with an existing and recognized practice, for land embraced within an indemnity withdrawal, is not illegal, though subject to the rights of the railroad company.

An entry thus allowed is *prima facie* valid, and on the revocation of the withdrawal, is relieved from conflict with the railroad grant, if no selection of the land has been made thereunder.

A homesteader whose good faith is apparent may mortgage his claim, before final certificate, to secure money with which to improve his land, or for any other purpose not in itself tending to impeach his *bona fides*.

Land covered by an existing homestead entry, on which final certificate has issued, is not subject to the settlement and filing of a pre-emptor.

The effect of suspending a departmental decision, is to hold the questions involved within the control and jurisdiction of the Department, pending final action on the case.

Secretary Vilas to Commissioner Stockslager, February 23, 1889.

On October 15, 1870, Edgar D. Mudgett made homestead entry for the N. ½ of the SE. ¼ and NE. ¼ SW. ¼ Sec. 3, T. 91 N., R. 17 W., Des

Moines, Iowa. On December 16, 1874, he submitted his final proof, and it appearing therefrom that by reason of service in the United States army during the late war, he was entitled to credit for the period of about two years, against the five years continuous residence required under the homestead law, said proof was duly approved by the local officers and final certificate was issued thereunder.

The land covered by this entry lay within the fifteen miles, or indemnity limits of the grant to the Dubuque and Sioux City, or Dubuque and Pacific Railroad Company, under act of May 15, 1856 (11 Stat., 9). The company's road was definitely located opposite this land June 11, 1856, and it appears that on October 13, 1856, the local officers were notified of the filing of a map of such definite location, and instructed not to allow further entries of land within the limits of said grant.

On April 18, 1877, your office held the entry in question for cancellation, because it was made after the definite location of said company's road, and after notice of the withdrawal from entry, as stated, of the land embraced therein.

On appeal by claimant from this decision, the same was, on May 16, 1878, affirmed by my predecessor, Secretary Schurz, who held that said entry was for the reason stated "illegal, and should be canceled."

This latter decision has, however, never been promulgated. Shortly after its rendition, the attention of the Department having been called to the supposed fact that said railroad company had received more indemnity lands than it was entitled to under its grant, the Assistant Attorney General of the Department directed that the promulgation of said decision be suspended until further orders.

In answer to an inquiry made by your office, in reference to said decision, it was, by letter of March 24, 1879, further directed, by Secretary Schurz, that the promulgation of the same be suspended until the grant to said railroad company could be adjusted, and it could be determined whether the company was entitled to any further indemnity lands.

By departmental letters of December 15, and 22, 1887 (6 L. D., 419 and 456), my predecessor, Secretary Lamar, among other things, directed that all the lands theretofore withdrawn and held for indemnity purposes under the grant to said road, be restored to the public domain and offered to settlement under the general land laws.

On April 26, 1888, I received your office letter, dated the 23d of the same month, in which, after setting forth the facts in reference to the rendition and suspension of said decision of May 16, 1878, and the restoration to the public domain of the lands within the indemnity limits of the grant to said company, substantially as hereinbefore mentioned, and further stating that said grant has been examined and a considerable deficiency in the indemnity due thereunder has been found, but that the tract embraced in Mudgett's entry has never been selected by the company under said grant, you express the opinion that by reason of the restoration aforesaid, Mudgett's entry is relieved from conflict

with the railroad grant, and you therefore recommend that said departmental decision of May 16, 1878, be vacated, to the end that said entry may be examined, touching claimant's compliance with the homestead law, with a view to its final disposition.

By letter of June 13, 1888, I transmitted to you for the information of your office, and for such further recommendation as you might see fit to make in the premises, a communication from the Hon. D. B. Henderson, M. C., together with the petition of one Charles Thompson and certain affidavits and other papers accompanying said communication, relative to the alleged settlement of Thompson on the land in question, under the pre-emption law, and protesting against the issuance of patent therefor to Mudgett under and by virtue of his said entry.

Thompson claims to have settled on the land in March, 1888, after notice of the restoration thereof as aforesaid, and to have filed his declaratory statement therefor, on the 31st of the same month.

I am now in receipt of your letter of June 20, 1888, in which you recall the recommendation contained in your letter of April 23, 1888, in reference to said departmental decision of May 16, 1878, and recommend that one S. M. Baldwin, a transferee of Mudgett, be allowed to purchase the land in question under the second section of the act of June 15, 1880 (21 Stat., 237).

Preliminary to this latter recommendation, and as furnishing a basis therefor, you state that "it appears from the papers submitted (meaning the papers transmitted with my letter of June 13, 1888), that prior to making final proof, to wit, on January 1, 1874, Mudgett executed a warranty deed, conveying the land to S. M. Baldwin," and you thereupon hold that, "this was in direct violation of the homestead law and by that act he (Mudgett) forfeited any right he may have had thereunder. He is not, therefore, entitled to the land."

You further state: "It will be observed, however, that the entry of Mudgett still remains intact upon the records, and while it so remains the land is not subject to settlement and entry. The settlement and filing of Thompson were therefore illegal, and as the evidence submitted shows a purchase by Baldwin from Mudgett for a consideration of $200," you make the recommendation aforesaid that Baldwin be allowed to purchase the land under said act of June 15, 1880.

It is proper to note in this connection that the conveyance made by Mudgett on January 1, 1874, to said Baldwin, is not a warranty deed, as stated by you, but simply a mortgage given on the land to secure the payment of the sum of $200, due from Mudgett to Baldwin, and to be paid on January 1, 1878, as evidenced by the former's promissory note, of even date with said mortgage.

This mortgage was admitted to record on March 13, 1874, in the county in which the land is situated. Mudgett made his final proof and obtained final certificate, as stated, December 16, 1874, and no question as to the effect of this mortgage upon his entry seems to have

been raised at that time although the existence of the same was a matter of public record.

It further appears from the papers now before me that on December 21, 1874, Mudgett sold and conveyed the land in question to said Baldwin, for the stated consideration of $1,500, and that Baldwin subsequently conveyed the same to one D. T. Morris, who, it seems, is at present in possession of and claiming the land under and by virtue of the entry of Mudgett and the several conveyances aforesaid.

Thompson bases his protest against the issuance of patent to Mudgett, upon his claim to the land by virtue of his settlement and filing thereon, after its restoration to the public domain, as stated, alleging that the entry of Mudgett was illegal in its inception and therefore void, because made for land at the time in a state of reservation and, for that reason, not subject to entry.

Now, while it is true that the entry in question was made after the land embraced therein had been withdrawn from settlement and entry as stated, yet the same appears to have been made in accordance with the then existing practice, which had previously grown up under decisions of your office and this Department, of allowing such entries for land in sections withdrawn for indemnity purposes under grants to railroads, the same to remain of record until the adjustment of the grant, when, if the land was not needed in satisfaction thereof, the entries thus made could be carried to perfect title. The continuance of this practice was not prohibited, until, by departmental circular of May 22, 1883 (2 L. D., 517), which refers to the existence thereof, it was directed that thereafter, applications to enter lands thus withdrawn, except when the applicant alleges settlement prior to the date of the receipt of the order of withdrawal, at the local office, should be refused.

The entry of Mudgett having been allowed under a practice at the time recognized and approved, and for land at the time under the jurisdiction and control of the Department, which possessed the power to limit the operation of said withdrawal, after having made it, or to revoke the same in whole or in part, it can not be held that said entry was illegal in its inception, or that the making of the same was, in any sense, a void act. Having been thus allowed it was properly placed of record, subject, however, to the rights of said railroad company.

The mortgage given by Mudgett on the land in question, as stated, was not, in my opinion, such a conveyance thereof as is contemplated by the requirement of Sec. 2291 of the Revised Statutes, that the entryman, before obtaining his final certificate, shall make affidavit that no part of his land has been alienated, nor do I think the same was of itself, in any sense a violation of the provisions of the homestead law. The alienation prohibited by the statute is an absolute alienation of the land or a part thereof, whereas the mortgage given by Mudgett was simply a pledge for the security of a debt, to be avoided on payment of the debt.

It has been held by this Department that a pre-emptor, whose good faith is manifest, is not prohibited from mortgaging his claim to procure money to pay for his land, and that such act is not a violation of the pre-emption law, which in its provisions against allowing the making of contracts of conveyance, or agreements to convey, before final entry is quite as comprehensive as are the similar provisions of the homestead law. See cases of Larson *v.* Weisbecker (1 L. D., 409), and William H. Ray (6 L. D., 340).

Following the principle thus enunciated, I see no good reason why a homestead entryman, whose good faith is otherwise apparent, may not mortgage his claim, before final certificate, to procure money with which to improve his land, or for any other purpose, not in itself tending to impeach his *bona fides*.

I am constrained to hold, therefore, that Mudgett's entry was not forfeited by reason of the mortgage given by him, as aforesaid, and that upon the record here presented, his claim can not be prejudiced thereby.

I come next to consider said departmental decision of May 16, 1878. This decision never became final, but has remained since its date, continuously, in a state of suspension. The suspension was ordered for the express purpose of allowing time to procure such information as would enable the Department to properly adjust the matters in controversy between Mudgett and the Dubuque & Sioux City Railroad Company. The effect of such suspension was to hold said decision, for the purposes stated, within the jurisdiction and control of this Department, and the case, as between the original parties thereto, will, therefore, be considered as now before me for consideration and final determination, in the light of information furnished by the present record, the same as though said decision had never been made.

The entry in question, as originally made, being as shown, a *prima facie* valid entry, and the land covered thereby having been relieved from the operation of the withdrawal for the benefit of said railroad company, by the restoration thereof by departmental order of December 1887, as stated, the grounds upon which said entry was held for cancellation have ceased to exist. The company having failed to make selection of the land for indemnity purposes prior to the promulgation of said order of restoration, its rights in the premises are concluded thereby, and the effect thereof is to relieve Mudgett's entry from any conflict with said grant or the withdrawal based thereon. There is, consequently, no longer any controversy between him and said company in reference to said land. His rights thereto attached immediately upon the restoration thereof as aforesaid.

The decision of your office of April 18, 1877, holding Mudgett's entry for cancellation is therefore reversed, and the papers now before me are returned to you for appropriate action in the premises, in view of the foregoing.

The entry of Mudgett may be examined, free from any question of

conflict with the rights of the railroad company, under said grant, with a view to issuance of patent thereunder, if his final proof be found in all respects sufficient, or upon proper application by the transferee now in possession of the land in question, if such final proof be found defective, I see no good reason why the latter may not be allowed to purchase the land under the act of June 15, 1880, as suggested by you.

The land having been segregated from the public domain by the entry of Mudgett, subject only to the prior right of selection by said company, under said withdrawal, no subsequent rights could attach thereto as long as said entry remained intact upon the records. The land was in no sense public land after it had been entered at the local office and certificate of entry obtained. Witherspoon *v.* Duncan (4 Wallace, 218). I concur therefore in your conclusion that the settlement and filing of Thompson were clearly illegal, and that he can not be held to have acquired any rights thereunder.

SPECULATIVE CONTEST—HOMESTEAD ENTRY—RESIDENCE.

DAYTON *v.* DAYTON (ON REVIEW).

A contest for the purpose of making a speculative entry under the homestead law, is as much a speculative contest as though brought for the purpose of speculation without such entry.

An entry under the homestead law for any other purpose than the establishment of a home to the exclusion of one elsewhere, is an entry in bad faith, and a contest with a view of making such an entry is in bad faith, and no preference right can be secured thereunder. An entry obtained by virtue of such a contest is invalid and should be canceled.

Residence cannot be acquired or maintained by going upon or visiting land solely for the purpose of complying with the letter of the law. The act of going upon, and the occupancy of the land, must concur with the intent to make it a permanent home to the exclusion of one elsewhere.

A motion for review on the ground that the decision is contrary to the weight of evidence, if grantable at all, where there is some evidence to sustain the decision, can only be allowed where the latter is clearly against the palpable preponderance of the evidence.

A motion for review may be amended where no party in interest can be surprised by the matters set up in the proposed amendment, or suffer any detriment from the allowance thereof.

Secretary Vilas to Commissioner Stockslager, February 25, 1889.

In the case of James R. Dayton *v.* Lyman C. Dayton, involving the SE. ¼ of Sec. 14, T. 123, R. 64 W., Aberdeen district, Dakota, both of said parties move for a review of the departmental decision therein of October 1, 1887. (6 L. D., 164.)

For a full statement of the proceedings, as they appear of record throughout the various stages of the controversy between the Daytons in reference to said land, reference is made to the departmental decis-

ion of August 8, 1884, in Dayton and Dayton *v.* Scott (11 C. L. O., 202), and the decision of October 1, 1887, in Dayton *v.* Dayton (6 L. D., 164), now under consideration.

It is sufficient to state here, that the land was originally entered by one, Andrew L. Scott, under the timber culture law, and both the Daytons claim preferred rights as successful contestants of said entry, and the question before this Department for consideration in said decision now sought to be reviewed, was, whether either of the Daytons had a preferred right of entry, and, if so, which. It was held in said decision, that the contests of both were in bad faith, and therefore that neither had the preferred right of entry.

In said motion for review, it is not claimed, that the substantive facts upon which said decision is predicated are not correctly stated therein, but error is alleged in the conclusions both of fact and law drawn therefrom.

In the motion of Lyman C. Dayton there are twelve specifications or assignments of error. The first four allege errors in findings or conclusions of fact as follows:

1. Error in fact in finding that Lyman C. Dayton has not, in fact established or maintained at any time a *bona fide* residence on the land.'

2. Error in fact in holding that said Lyman C. Dayton has never 'in good faith ever had any residence on the land.'

3. Error in fact in holding that the contest of said Lyman C. Dayton against the timber culture entry of Scott was 'not in good faith' for the purpose of securing the land as a homestead by and through compliance with the conditions and requirements of the homestead law.

4. Error in fact in holding that said Lyman C. Dayton never 'at any time has intended to take the land for *bona fide* settlement.'

The first and second of these assignments are in substance the same and involve both the act of going on the land and the intent accompanying the act; the fourth relates to the intent alone; and the matter alleged as error in the third would seem to be the conclusion drawn from the matters of fact, the erroneous finding of which is set up in the first, second and fourth.

As appears from said third assignment of error as well as the entire history of the case, Lyman C. Dayton bases the good faith of his contest of the entry of Scott on the claim, that said contest was "for the purpose of securing the land as a homestead by and through compliance with the conditions and requirements of the homestead law," and as showing that such was his purpose, he has from time to time introduced affidavits as to residence and improvements. On the affidavits so introduced, taken in connection with the other facts of the case, this Department found, as alleged in said first, second and fourth assignments of error, that he never in fact "at any time established or maintained or had a residence in good faith on the land," and "never at any time intended to take the land for *bona fide* settlement," and from these facts arrived at the conclusion as alleged in the third assignment of error, that his

contest was not in good faith for the purpose named. If it was not in good faith for that purpose, then he can not be heard to say that it was in good faith at all, as he has distinctly placed his claim of good faith upon *that* ground alone; and, if the evidence introduced to establish that claim, not only fails to support it, but shows, as found by this Department, that he "never in good faith established or maintained residence on the land and never at any time intended to take the land for *bona fide* settlement," then there was no error in the conclusion that the contest was not in good faith "for the purpose of securing the land as a homestead by and through compliance with the requirements and conditions of the homestead law."

There is no pretence of newly discovered evidence and no new evidence offered, and the ground of the motion of Lyman C. Dayton as disclosed by the above four assignment of error, is, that the said findings of fact were contrary to the weight of the evidence then before this Department. Under Rule 76 of Practice, motions for review of a departmental decision are only allowable "in accordance with legal principles applicable to new trials at law," and, when the ground of the motion for a new trial at law is that the verdict is contrary to the weight of the evidence, such motion, if grantable at all where there is some evidence to sustain the verdict, can only be allowed where the latter is clearly against "the palpable preponderance of the evidence." (Hilliard on New Trials, 2d Ed., p. 458, Sec. 21; ib., p. 466, Sec. 37; ib., p. 456, Secs. 19 and 20.) The evidence in this case as to residence showed, as stated in said decision, that Lyman C. Dayton paid occasional visits to the tract, having in the meantime a home in Minneapolis, at which he lived regularly. Residence can not be acquired or maintained by going upon or visiting a claim *solely* for the purpose of complying with the letter of the law with a view of thereby acquiring title to the land, but the act of going upon and the occupancy of the land must concur with the intent to make it a permanent home to the exclusion of one elsewhere. Without such intent there can not be good faith within the meaning of those words as applied to the homestead and pre-emption laws. The facts of this case leave no room to doubt, that Lyman C. Dayton has never had such intent, and therefore the said findings of fact complained of in the above assignments of error were not only not against but clearly in accord with the "palpable preponderance of the evidence."

The remaining eight assignments of error by Lyman C. Dayton allege errors in law and, with slight shades of difference, all substantially assert the proposition, that the cancellation of his homestead entry of September 25, 1884, was unauthorized in the absence of charges filed against said entry setting forth some breach on his part of the requirements of the homestead law, or a regular contest of said entry in conformity to the rules and regulations of this Department governing contests in ordinary cases—in other words, that the cancellation of said

entry was without "due process of law" and therefore erroneous. The proposition is formulated (with the exception of the italics) in the printed argument of counsel as follows:

Where a homestead entry is valid at its inception, the entryman secures an estate or interest in the land which can not legally be forfeited by the Land Department, except for breach by the entryman of some condition expressly imposed by the homestead law, and then only upon notice to him and by due process of law.

As seen from the first clause of said proposition, it is made expressly applicable only to entries valid at their inception and unless the entry of Lyman C. Dayton was valid at its inception, it is a pure abstraction, so far as this case is concerned.

The argument of the counsel is based upon an assumption of the validity of the entry at its inception. To assume that, is a *petitio principii*, an assumption of the whole matter in dispute, inasmuch as the validity of the entry at its inception was dependent upon the validity of his contest and claim of preference right thereunder.

It is true a preference right of entry was accorded him under his contest by the departmental decision of August 8, 1884; but a rehearing of that decision was duly applied for and granted, and thereupon the local officers and your office held, in effect, that the contests of both the Daytons were invalid and of no force, so far as the securing of a preference right of entry was concerned, and this Department on appeal, in said decision now sought to be reviewed, affirmed said ruling on the ground that said contests were in bad faith. From the discussion, *supra*, of the first four assignments of error of Lyman C. Dayton, it appears that there was no error in so holding as to his contest. The contest being in bad faith, he secured no preference right of entry thereby, and his said homestead entry being dependent on such preference right was therefore invalid and properly ordered to be canceled. The foundation having been removed, the superstructure necessarily fell.

The rehearing of the decision of August 8, 1884, which accorded Lyman C. Dayton the preference right of entry, was granted for the purpose (so far as he was concerned) of ascertaining whether he in fact was entitled to such right. As to said rehearing and the questions to be determined thereat, he had due and legal notice, and, the validity of his entry as dependent on his preference right being necessarily involved in those questions, the cancellation of said entry as the result of said rehearing was in no sense without "due process of law."

As to James R. Dayton, his original motion for review having been held insufficient by this Department because indefinite and uncertain, his counsel prepared and asked leave to file an amendment pending the hearing of the motion of Lyman C. Dayton. This was objected to by the counsel of the latter. The allowance of amendments, on such conditions as the court in its discretion may impose as a penalty for culpable negligence in the party applying to amend or for the protection of the rights of the opposite party, is favored in the law for the promotion of

the ends of justice. In this case, no party in interest can be surprised by the matters set up in the proposed amendment or suffer any detriment from the allowance thereof, and it is therefore allowed.

It is only necessary to notice the fifth assignment of error in said amended motion, which is as follows:

That the decision (of October 1, 1887) was contrary to law in dismissing the contest of James R. Dayton on the ground that he had not shown good faith, when it was impossible for him to show good faith prior to his making a filing upon the land, because good faith can only be shown after filing is made.

This position is manifestly untenable, as, if true, it would preclude all inquiry as to the good faith of a contest *per se*. The good faith of a homestead entry valid at its inception if called in question could not be shown except by matters occuring after entry, but the good faith of a contest may be enquired into and shown on the hearing thereof. The contest of James R. Dayton, both on the hearing and rehearing in this case, was found not to have been in good faith and on that ground was dismissed. His first contest was accompanied by an application to make timber culture entry of the land. He subsequently, however, entered another tract under the timber culture law, and having thus exhausted his right to make entry under that law, he now, like Lyman C. Dayton, bases the good faith of his contest, upon the ground that it was instituted for the purpose of securing the land as a homestead by compliance with the requirements of the homestead law. The evidence on his part in support of this claim is, as to improvements, not as strong as that of Lyman C. Dayton, and, as to residence, is about the same. The views expressed in reference to the evidence of residence on the part of Lyman C. Dayton are applicable to that of James R. Dayton, and there was no error in finding on said evidence, that James R. Dayton had "never in good faith established or maintained residence on the land," and never in fact "intended to make a *bona fide* settlement thereon."

It is to be borne in mind, that the ground of the decision of October 1, 1887, is, that the contests of both the Daytons were in bad faith, and, consequently, that no preference right of entry had been acquired by either. The good faith of said contests is therefore the decisive, if not the only, question involved in the present inquiry, and, the parties having predicated their claim of good faith upon their intent to secure the land as a homestead by compliance with the homestead law, and having introduced evidence as to improvements and residence in support of such claim, said evidence thereby became competent and relevant to said question and has been considered herein solely as bearing thereon.

This, however, is not the only evidence bearing on said question. That said contests were not in good faith is further apparent from all the leading facts and circumstances of the case and the entire conduct of said parties in reference thereto, as disclosed by the record and set forth in said departmental decision of October 1, 1887. The land involved in

this case is within the corporate limits of the city of Aberdeen, which it is claimed were established by the incorporation of said city, April 20, 1882. Said city was in fact projected and its settlement begun long before that time. The land has become very valuable—far too valuable for entry for ordinary homestead purposes—and its prospective increase in value, it is reasonable to assume, was well known to the Daytons, and, probably, sheds light upon the *animus* of their prolonged and desperate struggle for its ownership. Each charges the other with resorting to unscrupulous methods to secure an unfair advantage, and the facts disclosed by the record go far to establish the truth of the charge in both instances. When by the decision of October 10, 1883, your office held both contests "inoperative," James M. Dayton, the son of James R. Dayton, filed an application to make timber culture entry of the land, and, soon thereafter, Mrs. Nell, the mother of Lyman C. Dayton, made a similar application, he representing her as counsel on appeal from the rejection of said application. This is a sample of the movements and counter movements of these parties, and has the appearance of an attempt when by reason of said decision of October 10, 1883, they despaired of securing title in their own names, to obtain it indirectly by the agency of members of their respective families. They both had homes when the struggle began, which (so far as the record discloses) they still retain; James R. Dayton's being near by in Aberdeen, and that of Lyman C. Dayton's, in Minneapolis. Their extraordinary and prolonged efforts to secure the land would therefore seem to be animated by something else than the necessity or desire for a home. The prospective enhancement in the value of the land about the time the controversy began and its subsequent increased and constantly increasing value point to speculation as the main, if not only, incentive.

It is contended in argument by counsel for Lyman C. Dayton, that a contest can not be held to be speculative when brought for the purpose of homestead entry of the land involved in the contest, and which is actually followed by such entry. This is true as to a contest brought in good faith for the purpose of a *bona fide* homestead entry, but a contest for the purpose of making entry under the homestead law for speculative purposes is as much a speculative contest, as if brought for the purpose of speculation without such entry.

An entry, however, under the homestead law for any other purpose than that contemplated by said law—namely, the establishment of a home to the exclusion of one elsewhere—is an entry in bad faith, within the meaning of said words as applied to said law, whether said purpose be speculation or not; and a contest with a view of making such entry, is a contest in bad faith, under which no preference right of entry can be acquired.

As I am of the opinion, that there was no error in holding that both contests were in bad faith, it follows, that the motions for review must

be denied, and it is unnecessary to consider matters relating to the regularity of said contests in other respects.

The city of Aberdeen having applied to intervene and show a superior right to the land or a portion of it, the decision of October 1, 1887, concludes with the following provision, in reference to the claim of said city:

In order that the claim now and heretofore asserted by the city of Aberdeen may be presented in due form, you will direct that no entries of the land be allowed until such time as the right of said city thereto may be duly determined, and to such end notice should be duly given the attorneys appearing for said city, requiring the presentation of the city's claim under the townsite laws within sixty days after notice of this decision.

As action under said decision of October 1, 1887, was suspended during the pendency of the motions for review and revocation thereof, the above provision, forbidding allowance of entry of said land until the claim of said city thereto is determined, is hereby expressly continued of force, and it is directed that sixty days, after due service of notice hereof on the attorneys of said city, be allowed for the presentation of said claim, if it has not already been duly presented.

SURVEYS—PRIVATE CLAIM—APPROPRIATION ACT.

JOHN McDONOGH & CO. ET AL.

An appropriation for surveys confined to "lands adapted to agriculture and lines of reservations" is available for the survey of a private claim, the extent of which has been finally settled by the Department, and a survey directed in accordance therewith.

Section 2411 R. S., providing *per diem* rates for making public surveys is only applicable to the States of Oregon and California.

Secretary Vilas to Commissioner Stockslager, February 25, 1889.

I am in receipt of your communication of the 11th instant, relative to the location and survey of private land claims of John McDonogh & Company and Henry Fontenot, eastern district, New Orleans, Louisiana, asking to be advised whether under the provisions of the act making appropriation for the surveys of the present fiscal year (1887 and 1888, page 525), said appropriation is available for the location and survey of said claims, and whether, under existing laws, a contract can be entered into for the location and survey of said claims at the per diem rates.

By decision of the Department of January 6, 1888 (6 L. D., 473), the depth of said grant was ascertained, and you were directed to close the survey of the public lands upon said grant, in accordance with the rule laid down in said decision.

The act making appropriation for the survey of public lands for the present fiscal year provides, "That in expending this appropriation

preference shall be given in favor of surveying townships occupied in whole or in part by actual settlers, and the surveys shall be confined to lands adapted to agriculture and lines of reservations."

This survey is for the purpose of establishing a line of reservation, it having been directed by the decision above referred to that the surveys of the public lands should be closed upon said line, so as to segregate the lands within the limits of said grant from the public lands, but from the character of the land as described in your said communication, you would not be authorized to enter into a contract at the highest rate of mileage provided by said act, said rate being allowed only in cases where the lands are "mountainous lands, or lands *covered with dense timber or underbrush*."

It does not appear from your letter that these lands are covered with *dense timber* or *under brush*, but simply that they are swamp and overflowed, and covered with cypress timber. I do not think that lands of this character were contemplated by the act above referred to, unless the timber is of that dense character contemplated by the act.

There is no authority under section 2411 of the Revised Statutes for making a contract for the survey of this claim at the per diem rates, said section being applicable alone to the States of Oregon and California.

Modified, 13 L.D. 354 (See 32 L.D. 21)

RAILROAD GRANT—ACT OF MARCH 3, 1857.

ST PAUL MINNEAPOLIS & MANITOBA RY. CO.

The grant to the State of Minnesota in aid of a railroad "from Stillwater, by way of St. Paul and St. Anthony to a point between the foot of Big Stone Lake and the mouth of Sioux Wood River, with a branch *via* St. Cloud and Crow Wing, to the navigable waters of the Red River of the North" is in effect an entirety and indivisible.

If the indemnity-lands provided for one of such lines or branches shall prove insufficient to make up the losses sustained along such line or branch, then the deficiency may be supplied from the indemnity limits of the other lines or branches.

This construction of said grant having been adopted by the Department as a basis of adjustment, and followed for many years, has become a rule of property and should not be modified.

It is well settled, as a rule of administration that, with certain exceptions, the final decisions of the head of a Department, in proper discharge of duty, must be accepted as conclusive upon his successor in office.

Secretary Vilas to Commissioner Stockslager, February 26, 1889.

In your communication under date of the 26th of November, 1888, referring to the grant made to the Territory of Minnesota by the act of March 3, 1857, to aid in the construction of certain railroads therein mentioned, the increase of that grant by the act of March 3, 1865, and other acts upon the subject, to which reference will be hereinafter more particularly made, you present the question whether the grant made to aid the railroad "from Stillwater, by way of St. Paul and St. Anthony,

to a point between the foot of Big Stone Lake and the mouth of Sioux Wood River, with a branch *via* St. Cloud and Crow Wing, to the navigable waters of the Red River of the North, at such point as the Legislature of said Territory may determine", the route of which branch was subsequently changed by Congress, " may be considered as an entirety and indivisible, or whether it should be construed as several separate and distinct grants each applicable to the particular line or branch specified,—that is to say, whether, if it be found that the quantity of indemnity lands along any one of the lines or branches is not sufficient to make up the loss of lands from the odd sections within the grant for such line or branch, the deficiency may be supplied from lands within the indemnity limits pertaining to the other lines or branches;" and referring to the conflicting opinions of Mr. Secretary Thompson and Mr. Secretary Chandler upon the question involved, you state, in view of the doubt entertained by you respecting the unity of the grant and the indication of a similar doubt entertained in the decision made by me in the Guilford Miller case, you deem it your duty, before proceeding to prepare lists for the approval of the Department, to submit the question for consideration and request such instruction in the premises as may be deemed proper.

To ascertain the rights of the State and its corporate agencies for construction of the railroads and the duty of the Department in the adjustment of the grant, it will be most convenient to first collate the legislation upon which the question arises, with a statement of the facts concerning the interpretation of the grant and the construction of the road thereunder; from which the nature of the question as it originally existed and as it now comes before the Department will be more plainly presented.

The act of March 3, 1857, (11 stats., 195) provided in the first section:

That there be and is hereby granted to the Territory of Minnesota, for the purpose of aiding in the construction of railroads, from Stillwater, by way of Saint Paul and Saint Anthony, to a point between the foot of Big Stone Lake and the mouth of Sioux Wood River, with a branch *via* Saint Cloud and Crow Wing, to the navigable waters of the Red River of the North, at such point as the legislature of said Territory may determine; from Saint Paul and from Saint Anthony, *via* Minneapolis, to a convenient point of junction west of the Mississippi, to the southern boundary of the Territory in the direction of the mouth of the Big Sioux River, with a branch, *via* Faribault, to the north line of the State of Iowa, west of range sixteen; from Winona, *via* Saint Peters, to a point on the Big Sioux River, south of the forty-fifth parallel of north latitude; also from La Crescent, *via* Target Lake, up the valley of Root River, to a point of junction with the last mentioned road, east of range seventeen, every alternate section of land, designated by odd numbers, for six sections in width on each side of each of said roads and branches; but in case it shall appear that the United States have, when the lines or routes of said roads and branches are definitely fixed, sold any sections, or any parts thereof, granted as aforesaid, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent, or agents, to be appointed by the Governor of said Territory or future State to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tiers of sections above specified, so much land, in alternate sections, or parts of sections,

as shall be equal to such lands as the United States have sold, or otherwise appropriated, or to which the rights of pre-emption have attached, as aforesaid; which lands (thus selected in lieu of those sold, and to which pre-emption rights have attached as aforesaid, together with the sections and parts of sections designated by odd numbers as aforesaid, and appropriated as aforesaid) shall be held by the Territory or future State of Minnesota for the use and purpose aforesaid: *Provided*, That the land to be so located shall, in no case, be further than fifteen miles from the lines of said roads or branches, and selected for and on account of each of said roads or branches: *Provided further*, That the lands hereby granted for and on account of said roads and branches, 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 legislature of Minnesota, by an act approved May 22, 1857, conferred upon the Minnesota and Pacific Railroad Company all the interest and estate, present and prospective, of the Territory and the future State "in or to any or all the lands granted by the government of the United States" for the purpose of aiding in the construction of the railroad and branch first mentioned in the grant of 1857; and authorized the company to locate and construct a railroad from "Stillwater, by way of Saint Paul and Saint Anthony, *via* Minneapolis, to the town of Breckenridge, on the Sioux Wood River, with a branch from Saint Anthony, *via* Anoka, St. Cloud and Crow Wing, to St. Vincent, near the mouth of the Pembina river."

By another act, approved the same day, the legislature of Minnesota conferred in like terms the lands granted for the second road and branch mentioned in the grant of 1857 upon the Root River Valley and Southern Minnesota Railroad Company and the Minneapolis and Cedar Valley Railroad Company, the latter company to take so much of the grant as was applicable to the road from Minneapolis to "a convenient point of junction west of the Mississippi", and thence *via* Faribault to the north line of the State of Iowa.

In 1858, the Commissioner of the General Land Office ruled with respect to the latter road that selections for the branch, in lieu of lands disposed of within the granted limits, must be made from the indemnity limits of the branch and not of the main line; but, on the 6th of August following, he submitted the matter to the then Secretary of the Interior (Mr. Thompson) for instruction, calling attention to the fact that the legislature of Minnesota had, by its acts conferring the grant on the two companies last named, manifested its understanding that the grant of Congress authorized selection of indemnity from the indemnity limits of the main road or branch for deficiencies upon either. Replying by letter of the 27th of August, 1858, Secretary Thompson said:

Though disposed to a liberal construction of said act of Congress in favor of the grantee, I am nevertheless of the opinion that the most correct and harmonious view of the provisions of said act (which controls our action) requires us to regard said road and branch as separate roads. . . . . In fact, the entire phraseology of the act is peculiarly explicit, as distinguishing the branches as roads severed from the main lines, and appears to have been carefully prepared for the purpose of establishing the branches as separate roads.

Thus the decision of the Department at that time, although applied only to the second grant mentioned in the act of 1857, unquestionably interpreted the aid as being separate to the "road" and to the "branch" mentioned in each case.

In 1862, Congress, by a joint resolution, approved on the 12th day of July (12 Stat., 624), provided for a change of part of the branch line, but this was subsequently repealed by the act of 1865, as will be seen from the quotation therefrom hereinafter.

The grant made by the act of 1857, as so interpreted, appears to have failed to induce the construction of the roads projected by Congress and the State, and, in consequence thereof, by the act of March 3, 1865 (13 Stat., 526), it was further provided as follows:

Be it enacted, etc., That the quantity of lands granted to the State of Minnesota to aid in the construction of certain railroads in said State, as indicated in the first section of an act entitled 'An act making a grant of land to the Territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said territory, and granting public lands, in alternate sections, to the State of Alabama, to aid in the construction of a certain railroad in said State,' approved March third, eighteen hundred and fifty-seven, shall be increased to ten sections per mile for each of said railroads and branches, subject to any and all limitations contained in said act and subsequent acts, and as hereinafter provided.

Sec. 2. *And be it further enacted,* that the first proviso in the first section of the act aforesaid shall be so amended as to read as follows, to wit: *Provided,* That the land to be so located shall in no case be further than twenty miles from the lines of said roads and branches, to aid in the construction of each of which said grant is made; and said lands granted shall, in all cases, be indicated by the Secretary of the Interior.

* * * * * * *

Sec. 6. *And be it further enacted,* That the lands hereby and heretofore granted to said Territory or State of Minnesota shall be disposed of by said state for the purposes aforesaid only, and in manner following, namely: When the Governor of said state shall certify to the Secretary of the Interior that any section of ten consecutive miles of said road is completed in a good, substantial, and workmanlike manner, as a first-class railroad, and the said secretary shall be satisfied that said State has complied in good faith with this requirement, the said Secretary of the Interior shall issue to the said State patents for all the lands granted and selected as aforesaid, not exceeding ten sections per mile, situated opposite to and within a limit of twenty miles of the line of said section of road thus completed, extending along the whole length of said completed section of ten miles of road, and no further. And when the Governor of said State shall certify to the Secretary of the Interior, and the Secretary shall be satisfied that another section of said road, ten consecutive miles in extent, connecting with the preceding section or with some other first-class railroad, which may be at the time in successful operation, is completed as aforesaid, the said Secretary of the Interior shall issue to the said State patents for all the lands granted and situated opposite to and within the limit of twenty miles of the line of said completed section of road or roads, and extending the length of said section, and no further, not exceeding ten sections of land per mile for all that part of said road thus completed under the provisions of this act and the act to which this is an amendment, and so, from time to time, until said roads and branches are completed. And when the Governor of said State shall so certify, and the Secretary of the Interior shall be satisfied that the whole of any one of said roads and branches is completed in a good, substantial, and workmanlike manner, as a first-class railroad, the said Secretary of the Interior shall issue to the said State patents to all the remaining lands

granted for and on account of said completed road and branches in this act, situated within the said limits of twenty miles from the line thereof, throughout the entire length of said road and branches: *Provided*, That no land shall be granted or conveyed to said State under the provisions of this act on account of the construction of any railroad or part thereof that has been constructed under the provisions of any other act at the date of the passage of this act, and adopted as a part of the line of railroad provided for in this act: *And provided*, That nothing herein contained shall interfere with any existing rights acquired under any law of congress heretofore enacted making grants of land to the State of Minnesota to aid in the construction of railroads: *And provided further*, That said lands, granted by this or prior acts, shall not in any manner be disposed of, except as the same are patented under the provisions of this act; and should the State fail to complete any one of said roads or branches within eight years after the passage of this act, then the said lands undisposed of as aforesaid, granted on account of said road or branches, shall revert to the United States.

* * * * * * *

Sec. 9. *And be it further enacted*, that the provisions of this act shall also be construed so as to apply and extend to that portion of the line authorized to be vacated by the joint resolution approved July twelfth, eighteen hundred and sixty-two, entitled 'A joint resolution authorizing the State of Minnesota to change the line of certain branch railroads in said State, and for other purposes,' notwithstanding the vacation thereof by said State, as though said joint resolution had not passed, and also to the line adopted by said State, in lieu of the portion of the line so vacated.

By the fourth section of the act of Congress of July 13, 1866 (14 Stat., 97), it was further enacted:

That the lands granted by any act of Congress to the State of Minnesota to aid in the construction of railroads in said State, specifically, lying in place, in any division of ten miles of road, shall not be disposed of until the road shall be completed through and coterminous with the same: *Provided, however*, That this provision shall not extend to any lands authorized to be taken to make up deficiencies.

Meantime, by an act of the legislature of Minnesota, approved March 10, 1862, all the rights, privileges, franchises, lands, property and interests, granted to the Minnesota and Pacific Railroad Company, were transferred and granted to the St. Paul and Pacific Railroad Company, including the entire land grant first given by the act of March 3, 1857. And therefore, Congress passed the act of March 3, 1871 (16 Stat., 588), in the following words after the enacting clause:

That the Saint Paul and Pacific Railroad Company may so alter its branch lines that, instead of constructing a road from Crow Wing to Saint Vincent, and from St. Cloud to the waters of Lake Superior, it may locate and construct, in lieu thereof, a line from Crow Wing to Brainerd, to intersect with the Northern Pacific Railroad, and from St. Cloud to a point of intersection with the line of the original grant at or near Otter Tail or Rush Lake, so as to form a more direct route to St. Vincent, with the same proportional grant of lands to be taken in the same manner along said altered lines, as is provided for the present lines by existing laws: *Provided, however*, That this change shall in no manner enlarge said grant, and that this act shall only take effect upon condition of being in accord with the legislation of the State of Minnesota and upon the further condition that proper releases shall be made to the United States by said company, of all lands along said abandoned lines from Crow Wing to St. Vincent, and from St. Cloud to Lake Superior, and that upon the execution of said releases such lands so released shall be considered as immediately restored to market without further legislation.

The foregoing recital presents all the legislation which is supposed to be in any wise material or helpful to the determination of the question now under consideration. Upon this legislation, as so subsisting, a controversy was raised in the Land Office, and carried by appeal to the Department, in reference to the right of the branch line to lands within the indemnity limits of the main line, involving the precise question now under consideration and the same interests now affected. On the 2d of December, 1875, the Secretary of the Interior (Mr. Chandler) disposed of this appeal in a communication to the Commissioner of the General Land Office, of which the following are the material parts touching the point in issue:

I have considered the case of the St. Vincent extension of the St. Paul and Pacific Railroad *vs.* the first division of the main line of said road, involving title to certain lands claimed by the former within the indemnity limits of the latter. These lands were, April 30, 1874, approved to the State of Minnesota for the former road; but this privilege was revoked November 14, 1874, upon the discovery of a supposed error; and upon the issuing of patents to said company for lands to which it was entitled, patents therefor were withheld, and the selections and certification held for cancellation by your decision of November 19, 1874.

From this decision appeal is taken upon the ground:

1st. That it is not competent for the Department to alter, revoke or vacate the lists in question, or any part thereof.

2nd. That the grant made by the act of March 3, 1857, (12 Stat., 372) for a main line and branch, is by law one undivided grant, with common limits and privileges, and therefore lands withdrawn and reserved for one portion are equally liable to selection for either.

3d. That it is contrary to precedents established by the Department in like cases.

After deciding against the first point claimed, he proceeds:

The second and third points may be considered as one.

The act of March 3, 1857 (11 Stat. 195), makes grants for several railroads in Minnesota, among others the one from Stillwater by way of St. Paul and St. Anthony to a point between the foot of Big Stone Lake and the mouth of the Sioux Wood River *with a branch via* St. Cloud and Crow Wing to the navigable waters of the Red River of the North, at such point as the legislature of said Territory may direct.

A change of the route of the branch was authorized by joint resolution of July 12, 1862 (12 Stat., 624), and act of March 3, 1871 (16 Stat., 588). The latter enactment only has reference to the specific case under consideration. Under it the line was established on which the road has since been built from St. Cloud northwesterly. It authorized the company to alter its branch lines and build its road on the new line indicated "with the same proportional grant of lands to be taken in the same manner along said altered lines as is provided for the present lines by existing laws." This act of 1871 is an amendment to the original granting act of 1857, altering the line of route merely, and should be construed as though it were inserted in it. The company would therefore have the same rights under their grant along the altered line as it would have had, had it constructed its road in the line as originally proposed. Under the act of 1857, the main line and branch were considered as one and the same road. They were built, owned and controlled by the same company and were in fact but one interest.

That portion of the branch road from St. Paul to St. Cloud was located and built under the original act of 1857, and for nearly this entire distance, its grant overlaps that of the main line. The lands accruing under the grant to both roads, main line and branch, were certified April 7, 1864, in one list to the State for the company as

representing one interest. The grant to both being treated as an undivided grant, and the lands withdrawn under it equally liable to selection on account of either line. The lands so certified will be patented upon proper application to this Department. This action was, I think, required by the law, and the same principle should govern the future adjustment of the grant throughout the entire length of the branch road. I am very clear that a withdrawal for the main line should not be construed as a reservation against its branch. What would be the result were the roads separate and distinct, claiming under separate grants, is another question which is not necessary to consider in this connection.

The partition of interests and management of the two roads, and the appointment of a receiver for the branch line by the U. S. circuit court for the district of Minnesota by order of August 1, 1873, is immaterial for the purposes of this case.

I think this point well taken by counsel, and that it is decisive of the case: that if the lands in dispute have been selected in accordance with the principle herein indicated, the lists must be approved and the lands in due course patented to the State for the company.

Your decision is accordingly reversed and the papers in the case transmitted with your letter of June 11th, 1875, are herewith returned.

It was after this decision was made that much of the branch line, so called, extending northwesterly toward the Canadian province of Manitoba, was built. The rule so laid down has from that time until the present governed the adjustment of the grant, invited the expenditure of money for construction, and, having remained unchallenged in any particular, must be regarded as having been taken into account in every estimate of the aid given by the government to induce the fulfilment of the project, so that it fairly comes within the principle which forbids the change of a construction that has been accepted as a rule of property.

In considering the question which you have submitted to me for advice upon, I am compelled, therefore, to recognize at the outset that it is presented at such a time and under such conditions as impose limitations upon judgment which would not affect its examination as an original question. It has been twice ruled upon by my predecessors in this office, and the radical difference disclosed in their opinions must be accepted as proof that the interpretation of the statute is not plain, and that different views might well be taken of its extent and effect. Again, one of these judgments was rendered in reference to the identical railroad now under consideration, and in favor of the identical right now claimed while the other, though relating to the same statute, and therefore equal authority as an opinion, did not adjudicate the same right which is now involved. The decision of Secretary Chandler is an express adjudication that the branch line to St. Vincent is entitled to take lands within the indemnity limits of the main line of which it is a branch, and directed the issuance of patents to the State in aid of the branch line from selections made within the indemnity limits of the main line, and in pursuance of that judgment *patents have been issued accordingly*. It was also by him further adjudged that "the same principle should govern the future adjustment of the grant throughout the entire length of the branch road."

At the time when this opinion was rendered, there had been built, as I understand the facts, only about one hundred and forty miles of the branch line, and there remained for construction, and subsequently were constructed, about one hundred and seventy-seven miles of the branch line. It is therefore obvious that, if this decision were to be changed, not only would it follow that the certifications and patents which have been issued in pursuance of it were illegal and the title wrongfully conveyed to the patentee, but that the rights which the parties interested in the construction of this road were entitled to by reason of it, and upon belief of the possession of which they undoubtedly did build the remaining portion of the road, would be defeated. In view of the fact, which you state in your communication, that the indemnity limits of the branch line are insufficient to afford lands equal to the full measure of the quantity purported to be given, and of the fact that this road was built through a new and remote country, it can hardly be doubted that the expectation that the quantity of the grant would not be less than the indemnity limits of the whole road afforded, must be taken to have been directly operative in securing its complete construction. This decision has remained unquestioned by the Department for thirteen years. Upon the faith of it, not only have lands been patented, but loans have been made upon mortgages which embrace this right as security, the stock of the corporation has been bought and sold, and all those transactions which necessarily inhere in such a business operation and which have been carried on in connection with it for many years, have been affected. To now change this adjudication would necessarily be retroactive in its effect upon all the transactions which have been based upon it, and would constitute little less than a breach of faith on the part of the government. In the case of the United States against Moore (95 U. S., 763), the supreme court said that "the construction given to a statute by those charged with the duty of execution it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons."

In the United States *v.* Burlington & Missouri R. R. Co. (98 U. S., 341), the court, speaking of a construction of a similar grant, said:

> Such has been the uniform construction given to the acts by all departments of the government. Patents have been issued, bonds given, mortgages executed, and legislation had upon this construction. This uniform action is as potential, and as conclusive of the soundness of the construction, as if it had been declared by judicial decision. It cannot at this day be called in question.

Numerous decisions of similar purport have been made by that court, and the rule and its obligation are too well established in reason and authority to require elaborate citation. It is true that the construction of this act by the Department has not been uniform, by reason of the opinion referred to of Secretary Thompson. But it appears to me that this does not alter the application of the rule in this case. The very fact that the first opinion was overruled upon a later consideration tends to show and must have been accepted by persons interested as

proving that the reasons for the later decision were so cogent as to require the change of rule and thus justified its acceptance with greater confidence; and in view of the fact that this was an adjudication of the particular right and has remained so long unquestioned, the application of the general principle decided by the court is as plain as it could be in any case. The decision of Secretary Chandler became a rule of property and is entitled to all the recognition which such a consequence necessarily gives it.

The effect of a change of decision in reference to a question of interpretation, when property rights have arisen, has been fully determined by the supreme court. That tribunal has recognized the right of the supreme court of a State to interpret the constitution of the State and the validity of laws enacted thereunder; but it held in the case of municipal bonds that where, at the time of the loan and issue of such bonds, the decisions of the State court upheld the validity of the law which authorized them, a later decision, denying the constitutionality of such law cannot be admitted to destroy the obligation in the hands of parties who have bought them upon the faith of the earlier decision. Thompson *v.* Lee County (3 Wall., 327); Kenosha *v.* Lamson (9 Wall., 477); Gelpecke *v.* Dubuque (1 Wall., 175); Mitchell *v.* Burlington (4 Wall., 270). The doctrine of these cases is applicable to the question now under consideration, and must be taken in connection with the other principle referred to as rendering it obligatory upon the Department to respect the later adjudication of the Department affecting the right now involved, to the same extent as if it were the only opinion ever promulgated by the Department, because all the consequences in destruction of property rights upon the faith of a decision attach only to the latter.

These decisions show, therefore, that if this question were now presented to the court as a question of law, instead of to the Department, the court would feel bound by the decision of the Department, which has stood as a rule of property for thirteen years, unless, at least, "cogent reasons" demanded of the court a reversal of that determination. But while, perhaps, the *power* may exist in the Secretary now to reverse the adjudication of this case in 1875, yet the familiar canons of limitation upon judicial discretion stand opposed to such action. With certain proper exceptions, the rule is well settled, as a rule of administration, that the final decisions of the head of a Department must, in proper discharge of duty, be accepted as binding upon his successor in the same Department in the same case. The opinions of the Attorneys-General have been uniform to this effect. "If not," said Mr. Attorney-General Toucey, "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." (See references collated in the *State of Oregon*, 3 L. D., 595). This rule stands in part upon the same principles and reasons which support the

familiar rule of all courts of error and appeal, that upon a second appeal or writ of error the court will not hear argument upon any point decided by it on the former appeal, because it will not correct alleged errors so made in the same case. Said Mr. Justice Grier in *Roberts v. Cooper* (20th Howard, 481):

> But we cannot be compelled on a second writ of error in the same case to review our own decision on the first. It has been settled by the decisions of this court, that after a case has been brought here and decided, and a mandate issued to the court below, if a second writ of error is sued out it brings up for revision nothing but the proceedings subsequent to the mandate. . . . . . There would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticism on their opinions, or speculate on chances from changes in its members.

In recent cases the rule has been again re-affirmed. Supervisors *v.* Kennicott (94 U. S., 498); Chaffin *v.* Taylor (116 U. S., 567).

Whatever might be my own opinion, therefore, I should feel bound by this rule of administrative law not to interpose that opinion to reverse an adjudication in this particular case, which has so long subsisted, and when the consequences of such reversal must inevitably be so great a disturbance of property interests, and such extensive and harmful litigation. No case can well be conceived in which this rule rises against the reckless presumption which destroys adjudications from extreme confidence in one's own opinion, with more power and effect.

I base my conclusion, therefore, upon this ground, as denying the right in me to re-consider the former adjudication of the particular interest upon which such rights have grown up. But if we turn to the original question and seek for the "cogent reasons" which should require the reversal of the decision of Secretary Chandler, are they to be found? I have attentively considered this legislation, and it seems to me that the reasons which support his interpretation of the act of Congress, must be conceded to possess great strength.

In the first place, it corresponds with the view which has been taken by the Land Office and the Department of all other similar grants. It was the rule of administration of the first railroad grant by Congress, which was made to the State of Illinois for a railroad "from the southern termination of the Illinois and Michigan canal to a point at or near the junction of the Ohio and Mississippi rivers, with a branch of the same to Chicago, on Lake Michigan, and another, *via* the town of Galena, in said State, to Dubuque, in the State of Iowa." In respect to this, it was decided by the Commissioner of the General Land Office on the 5th of August, 1852, in answer to the question whether the road was allowed "to make up the deficiency which there might be on the main stem or either of its branches, by selecting land on any other portion of the road" that "there was no distinction made between lands selected for the main stem and for the branches, *id est*, no separate lists on account were made."

The same rule was applied to the grants made to the States of Ar-

kansas and Missouri by the act of February 9, 1853 (10 Stat., 155), for a railroad "from a point on the Mississippi opposite the mouth of the Ohio, in the State of Missouri, *via* Little Rock, to the Texas boundary line, near Fulton, in Arkansas, with branches from Little Rock, in Arkansas, to the Mississippi River, and to Fort Smith."

It was also applied in the administration of the grant of May 15, 1856, to the State of Iowa, made in almost similar terms, so far as the point in question goes, with the present, for a road from Lyon City, etc., "with a branch from the mouth of the Tete des Morts to the nearest point on said road" (11 Stat., 9).

This interpretation and administration of the first two grants preceded by some years the passage by Congress of the grant in question to the State of Minnesota, and it is to be presumed that the fact was known to Congress, and the peculiar use of similar language in the grant to Minnesota, and especially the collocation of the words of definition or description of the roads, tend strongly to prove that the same rule of interpretation was distinctly contemplated.

Limiting the view to the act making the grant to the State of Minnesota, it is first to be noted that, irrespective of the question of whether the "branch" could be treated as a part of the "road", it is plain that it was the purpose of Congress that any deficiency in the granted limits should be made up from the indemnity limits without restriction to selection of lands within the limits of coterminous sections. In other words, there can be no doubt that Congress intended that if a deficiency occurred at any point in the granted limits and there were lands within the indemnity limits sufficient to supply all the deficiencies in the granted limits, selections might be made of lands wherever found in the indemnity limits longitudinally, to an extent sufficient to supply such deficiencies. This is now the well-settled interpretation of the language used in such grants as that of March 3, 1857, wherever it was employed. It has been in several cases recognized and enforced by the courts and is not, I believe, questioned in the Department. (United States *v.* Burlington & Missouri R. R. Co., (98 U. S., 334). Moreover, in the particular case, there is no opportunity for doubt that such was the understanding of Congress, because of the expressions in the later acts. Thus in the sixth section of the act of March 3, 1865, after providing that lands shall be granted not exceeding ten sections per mile, situated opposite to and within a limit of twenty miles of the line of each section of ten miles as completed, it is further expressly provided that when

the Secretary of the Interior shall be satisfied that the *whole* of any one of said roads *and* branches is completed in a good, substantial, and workmanlike manner, as a first-class railroad, the said Secretary of the Interior shall issue to the said State patents to all the *remaining* lands *granted* for and on account of said completed road *and* branches in this act, situated within the said limits of twenty miles from the line thereof, throughout the *entire length of said road and* branches.

Also by the fourth section of the act of July 13, 1866, hereinbefore quoted, the proviso of which is equally decisive of the purpose of Congress.

It being thus seen that, beyond all question, Congress intended that the indemnity limits of each specific grant should be available to make good all deficiencies occurring in such grant, for what end or purpose were the terms employed in the particular grant under consideration, by which two of the roads were required to be built with branches, except that the branches were to be regarded as parts of the same enterprise with the main road? If the branches were to be treated as distinct and separate lines for the purposes of grant, why were they not mentioned as distinct lines? In other words, does this act manifest the purpose of Congress to make *six* land grants or *four* land grants? It must be observed that the entire act is devoted simply to making grants of land and prescribing the terms upon which the grants were given; it is not an act for the charter of railroads and the definition of their routes and powers, but simply to induce the construction of certain systems of railroads which were believed to be of such public value as to justify this extensive contribution to their cost. If the Congress had not intended the branch to be in every respect regarded as part of the enterprise which it first described, upon what rational theory can this language and the peculiar arrangement of the description of the different lines be supposed to have been adopted? These inquiries possess peculiar force because of the separation of the branch from the connecting road in the description of the fourth grant. That road might also have been called a branch as well as either of the others. Its western terminal is "a point of junction with" the third of the roads to which aid was given; and the separate description leaves the character of the grant for it unmistakably independent. Thus the difference in the arrangement and description was clearly recognized and it would violate plain rules of interpretation to say that a different effect was not designed by so clear a variation. And when attention is called to the fact, already adverted to, that similar grants had been previously made to the States of Illinois, and to Arkansas and Missouri, and that the interpretation and administration of such grants had treated the branch as part of the road, the conclusion seems irresistible that the collocation of words and phrases in the description of the roads designed to be aided, was in execution of the deliberate purpose to fix the grant for the branches as a part of the grant for the road. It is obvious that the United States suffered no loss by this course. The purpose was to secure the construction of the railroad by giving six sections of land to aid the building of each mile. To treat the whole as one, although the branch departed from the main stem at some point along its course, operated to take no more lands from the government than as if the branch had been extended, as in the case of the grant to Illinois, from one end of the main stem. No more lands than

were proffered by the grant would in the end be taken, and it is not to be presumed that Congress designed that any less should be held out as an inducement for the construction of the road.

This argument is re-enforced by the subsequent legislation in 1865, by which both the quantity of the grant was increased four sections to the mile, and, by the words already quoted, the right to take deficiencies from the entire extent of the indemnity limits for deficiencies occurring at any point, was recognized as a plainly existing right.

Against this view, the argument which would restrict the right to take only from the indemnity limits of the branch for deficiencies in the grant for the branch, and only from the limits of the main stem for deficiencies in the grant for the road, rests entirely upon the use in the act of words of particularization which may be thought to be designed to distinguish the branch from the road, as well as one road from another; as where it is said that the indemnity lands "shall in no case be further than fifteen miles from the lines of said roads or branches, and selected for and on account of *each* of said roads or branches;" and in the next proviso, "that the lands hereby granted for and on account of said roads and branches, *severally*, shall be exclusively applied in the construction of that *road* for and on account of which such lands are hereby granted." But it will be observed that on the theory that Congress intended to grant lands to aid in the construction of but four instead of six distinct enterprises, each to be treated as an entirety, including the branch as part of the road, all this language was equally necessary to be employed to distinguish the relative grants to each; and that inasmuch as such words were necessary for that purpose, and are fully satisfied by that interpretation, it is carrying their force beyond the necessity of their use and raising upon words fully satisfied by the other reading a limiting and narrowing construction, to hold them also to distinguish the "branch" as a separate enterprise from the "road" to which it was necessarily attached, and a construction quite inconsistent with the obvious general purpose and character of the grant. It is to permit a word to destroy a purpose which the act seems to carry plainly on its face. Besides, perhaps as fair an inference can be derived from the different uses of the conjunctions "and" and "or", and from the use of the word "road" as comprehending the branch as well as the main stem, in favor of the other theory, as can be derived from the word "each" and "severally" in favor of the narrower interpretation. Thus, in the first proviso the limit of fifteen miles must necessarily have been expressed to be from either the road or branch, and so the selection must have been for or on account of the road or branch, and therefore the disjunctive conjunction was employed; while, in the next proviso it is said the lands granted for and on account of said roads *and* branches shall be exclusively applied in the construction of that *road* for and on account of which granted, in which case the word road seems to comprehend the branch as part of it; and the adverb "severally"

may as properly be applied to distinguish the four general enterprises as to distinguish the branch from the road, and perhaps more so. Again, in the act of 1865, it is provided that until "the Secretary of the Interior shall be satisfied that *the whole* of *any one* of said roads *and* branches is completed, etc.," patents to all the remaining lands granted for and on account of said completed roads *and* branches are not to be delivered.

I do not perceive anything in the case of the Northern Pacific Railroad Company against Guilford Miller which affects the question now under consideration. No such question was involved in that case, and if any suggestion occurs to the mind of the reader from any language used in that case, either for or against the question here involved, it was not employed for any such purpose, nor was any such idea in my mind.

Upon the whole case, I am unable at least to say that any such "cogent reasons" appear to exist as show that the adjudication made in 1875 in respect to this company ought to be changed, but am of opinion that it is the duty of the Department and your office to proceed in the adjustment of this grant in accordance with the principles then settled and hitherto followed.

HOMESTEAD ENTRY—PRE-EMPTION CLAIM.

JOSEPH W. MITCHELL.

One who has shown due compliance with the pre-emption law, submitted final proof, and made payment for the land, may legally enter another tract under the homestead law, though final certificate may not have issued on his pre-emption proof.

First Assistant Secretary Muldrow to Commissioner Stockslager, February 27, 1889.

The decision rendered November 30, 1888 (7 L. D., 455), in the case of Joseph W. Mitchell, involving his homestead entry for the SW. ¼ of Sec. 12, T. 26 N., R. 29 E., North Yakima, Washington Territory, was recalled by letter of December 24, 1888, some question having been raised as to the proper construction to be placed upon the conclusion reached in said decision.

Mitchell made the entry in question June 6, 1884, and your office held said entry for cancellation for the reason that he had made pre-emption proof on another tract April 28, 1884, on which cash certificate did not issue until June 16, 1884. This decision of your office rested on the theory that Mitchell, at the the time of making homestead entry, was maintaining a pre-emption claim for another tract, and if the facts in the case had supported such conclusion the decision would have been affirmed by the Department. But Mitchell urged on appeal that he should not be made to suffer for the neglect of the land office to promptly issue final certificate on his pre-emption proof, when it was submitted; and examining this ground of appeal, the Department found that as a matter of fact the record in Mitchell's pre-emption claim did

not disclose any fault or irregularity on his part therein. Though it is true that certificate did not issue until June 16, on the proof submitted April 28, yet patent afterwards issued to Mitchell without any question being raised as to the validity or regularity of the final proof proceedings. On this state of facts the Department held in its decision of November 30, that "the record of claimant's pre-emption claim shows that he had, at the date of his final proof, complied with the requirements of the pre-emption laws; though the legal title after that remained in the United States, the equitable title was in him; he could have then before the issuance of the cash certificate, disposed of the land by sale if he had so chosen."

In short the Department found that Mitchell in his pre-emption claim had, on April 28, 1884, done everything that the law required in order to secure his title to the land covered thereby, that he had at that date shown sufficient residence and improvement and paid for the land, and that no presumption as against such conclusion could be properly founded solely upon the fact that the local office did not then issue the certificate.

The phrase "complied with the requirements of the pre-emption law" as used in said decision, was intended to express the finding that Mitchell had performed each obligation laid upon him by said law, not only in the matter of residence and improvement, but also as to payment of the purchase price at the proper time.

The Department therefore adheres to its former conclusion.

PRE-EMPTION ENTRY—INNOCENT PURCHASER—JURISDICTION OF THE DEPARTMENT.

SMITH v. CUSTER ET AL.

The Commissioner of the General Land Office, and the Secretary of the Interior, are vested with full jurisdiction to pass on the validity of a pre-emption entry allowed by the local officers.

A pre-emption claimant acquires no title to public land, until he has fully complied with all the pre-requisite requirements, and paid for the land.

The pre-emptor takes by final proof, payment and the receipt of final certificate, only a right to a patent, in the event that the General Land Office, or the Department on appeal, find that the facts warrant the issuance thereof.

One who purchases land from a pre-emptor prior to patent, acquires no greater right than existed in the pre-emptor, and is charged with knowledge that the legal title remains in the United States, subject to the necessary inquiry and determination by the Land Office and Department on which patent may issue.

A contract to convey the land on receipt of final certificate, made by the pre-emptor prior to final proof, renders the entry fraudulent and requires its cancellation.

It is the duty of the Department to cancel any entry which has been made contrary to law, or of lands not subject to such entry, or by a person not qualified, or where compliance with legal pre-requisites did not take place, or where by false proofs a seeming compliance was fraudulently established.

Secretary Vilas to Commissioner Stockslager, February 27, 1889.

The land involved herein is the NW. ¼ of Sec. 32, T. 5 N., R. 31 E., La Grande district, Oregon.

The record shows that on June 21, 1880, John Custer filed pre-emption declaratory statement for the tract, alleging settlement thereon May 17, of the same year.

He made final proof before a notary public at Pendleton, Oregon, October 16, 1882, which was acted upon and approved by the local officers, October 19, 1882, and cash entry certificate, No. 1177, issued thereon.

On February 10, 1883, the local officers transmitted to your office the corroborated affidavit of D. K. Smith, attacking the validity of said entry, alleging, in substance, that the same is fraudulent and void; that the entry was not made in good faith, for the use and benefit of the entryman, but was in fact made for the use and benefit of one J. H. Cavanaugh, that prior to the date thereof, the entryman, together with his brother Josiah Custer (who at the same time made pre-emption cash entry No. 1176, for the SE. ¼ of said Sec. 32), entered into a written contract, by which they agreed, for the expressed consideration of $1400, to convey to said J. H. Cavanaugh the land here in question, together with that embraced in the entry of Josiah Custer, as soon as title was obtained from the United States; that Cavanaugh paid all the fees and costs attending the making of final proof, and also furnished the money to pay for the land when the entry was made; that in pursuance of said written contract, John Custer did, on the day the entry was made, and before he had received notice that his proof had been favorably acted upon by the local officers, convey to Cavanaugh the land in question, and has since that date exercised no acts of ownership on the same.

Acting upon these charges, your office, on May 1, 1885, directed that a hearing be had to determine the questions raised thereby. The hearing took place before the local officers in June, 1885. Both parties appeared in person and by attorney, and the entry was also defended by one John Walker, transferee of Cavanaugh, who filed affidavits disclosing his interest in the subject matter of the controversy.

Walker further interposed objection to the jurisdiction of the Land Department in the premises, on the ground that final receipt and cash entry certificate had been issued on the proofs submitted, insisting, in effect, that such receipt and certificate were conclusive evidence of the validity of the entry in all respects, so far as the Land Department is concerned.

Upon the testimony submitted, the local officers found against Walker, on the question of jurisdiction, and further, that Custer's entry "was made in fraud of the pre-emption law, at the instance and for the benefit of J. H. Cavanaugh, and not for the use and benefit of the entryman; that at the date of said entry and prior thereto there was an agreement and understanding that the land was to be deeded to Cavanaugh, which agreement was effectuated October 19, 1882, at Pendleton, Oregon, the same day that the entry was made at this office," and thereupon they recommended that the entry be canceled.

From this finding Walker appealed.

On August 23, 1886, your office affirmed the finding below, and held the entry of Custer for cancellation.

Walker again appealed. A number of errors are assigned by him, which amount, in substance, to a contention that said entry is not proven to have been made in fraud of the law, and that your office acted without jurisdiction of the subject matter of the controversy.

The final proof of Custer is to the effect that he is a qualified preempter, with improvements worth about $200; that he established his residence on the land June 17, 1880, and that the same was thereafter continuous.

By the testimony taken at the hearing it is shown that some time prior to October 19, 1882, the following memorandum or agreement, in the handwriting of Cavanaugh, was made and signed by "Custer and Bro.," namely:

PENDLETON, OREGON, 1882.

This memorandum, trade made this day between Jno. Custer and Josiah Custer and J. H. Cavanaugh, in terms following: Custers sell and agree to convey to Cavanaugh the NW. ¼ and SE. ¼ of Sec. 32, (thirty-two) township 5 north, of range 31 east, at the fixed price of fourteen hundred dollars—deeded—in other words, this agreement is intended to be a memorandum of terms and price of the land above named, which Custers hereby agree and bind themselves to deed to Cavanaugh as soon as title is obtained.

CUSTER & BRO.

The final proofs of both John and Josiah Custer were made before the same notary and on the same day. Cavanaugh paid all the costs and fees attending said proofs, and he also furnished the money to pay for the land in both cases, when the proofs were submitted to and approved by the local officers. Some time prior to the date of making proof he negotiated a loan of $500, on the land in question by the Oregon and Washington Mortgage and Savings Bank of Portland, Oregon, to secure which a mortgage was given by John Custer on the land, October 12, 1882. It is also shown that Cavanaugh was in the habit of contracting for the purchase of lands covered by similar claims, and then negotiating loans thereon ostensibly for the benefit of the claimants, but appropriating the money to his own use.

On the same day that the final proof was acted upon by the local officers, Custer made and executed *at Pendleton, Oregon*, a deed of conveyance of the land in question to Cavanaugh for the stated consideration of $2,300. Pendleton is shown to be some fifty miles distant from the local office and in a different county, and at that time the mail communication between the two places was by stage. Notice of the acceptance of Custer's proof on October 19, 1882, was given by the local officers through the mail, and his final receipt and cash entry certificate were forwarded to him through the same source, and it is shown that both were mailed at the local office not earlier than the evening of October

19, 1882. It thus appears that the deed of conveyance from Custer to Cavanaugh was made and executed before the final receipt and certificate were received by the former.

Another memorandum in the handwriting of Cavanaugh is found in the evidence, which is signed by the Custer brothers, and is in the words and figures following:

PENDLESON, OREGON, *Oct.* —, 1882.

Received from J. H. Cavanaugh payment in full for the following lands deeded this day to Cavanaugh, to wit:
and in full payment of all debts, deeds and demands of every kind and character.

JOSIAH CUSTER,
JOHN CUSTER.

Custer never exercised any acts of ownership over the land after the date of his said deed to Cavanaugh.

Custer himself testifies, that he got from Cavanaugh about $700 for the land. He swears in his final proof that he was then twenty-four years of age, but at the hearing, over two years after his proof was made, he swore that he would be twenty-three years old in the following December. Other witnesses, however, testify that he is a man of weak mind and bad memory, and that he was almost entirely under the control ot his brother Josiah, who appears also to have been acting in the interest of Cavanaugh in reference to both entries.

On November 24, 1882, Cavanaugh sold and conveyed the land to Walker, for the stated consideration of $2000. Walker claims to have purchased in good faith without notice of any fraud in the entry. He states that he examined the record of the title to the land and found it in all respects clear and unincumbered, except by the aforesaid mortgage of $500, which he agreed to pay off as a part of the purchase price for the land.

Cavanaugh was not present at the hearing, and does not appear to have taken any interest in the controversy.

I am satisfied on a careful review of all the evidence in the case that there was an agreement and contract made by Custer with Cavanaugh, prior to making final proof, to convey the tract in question to the latter upon receipt of final certificate by the former, and therefore that said entry was fraudulently made by him.

This brings me to the consideration of the question of the jurisdiction of the Land Department to cancel said entry under the circumstances detailed.

Section 2262 of the Revised Statutes provides that before any person claiming the benefit of the pre-emption law shall be allowed to enter lands, he shall make oath, among other things:

That he has not settled upon and improved such land to sell the same on speculation, but in good faith to appropriate it to his own exclusive use; and that he has not directly, or indirectly, made any agreement or contract, in any way or manner,

with any person whatever, by which the title which he might acquire from the government of the United States, should inure in whole or in part to the benefit of any person except himself;

and proceeds to denounce the consequences of falsity in this oath as follows:

And 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; and any grant or conveyance which he may have made, except in the hands of *bona fide* purchasers, for a valuable consideration, shall be null and void, except as provided in section 2288.

The foregoing statement of the facts shows that the oath taken by the entryman was false, and that he falls under the penalty which the statute declares shall ensue. He made no actual conveyance at that time, although he had bargained to convey. Subsequently, he conveyed the land as stated, to a grantee, from whom Walker derives his title. Walker alone, of all concerned, stands in a position where he may claim to be protected as an innocent purchaser. He purchased the title, such as it was, which is evidenced by the receiver's receipt to the pre-emption purchaser. Upon that, and upon his good faith, he claims protection.

In maintenance of this claim he asserts that the Commissioner of the General Land Office, and the Secretary of the Interior are concluded by the decision of the register and receiver, implied by their acceptance of the proofs of the entryman and the receipt of his money and issuance of certificate thereupon; as well as that, as an innocent purchaser, he is entitled to his patent irrespectively of the defects which may now be discovered and adjudged in the entryman's claim to the land. It will be found, I think, that unless the former proposition can be maintained, the latter fails also; and, therefore, that the maintenance of the former is necessary to the establishment of the transferee's right.

I.

The exercise of the jurisdiction questioned has been continuous for a half century or more; indeed, it may be said to have begun with the public land system; but, as the mode of disposition of the public domain was originally simple, and generally by direct sale, the number of cases in which such a jurisdiction was exercised was comparatively few in the earlier years of the government. Since the provision of numerous other methods for acquiring title to public lands, and the change of policy by which direct sales have become few, there has been a great augmentation of the necessity and instances in which the Land Office and the Department should interfere. But, notwithstanding the long and continued usage, parties still frequently contest the jurisdiction.

Yet at this time there are many cases reported in the law books, upon adjudication by both state and federal courts, in which the point is discussed; and, although I have heard two oral discussions of the question, I do not think it necessary to review the cases or present

elaborate argument in support of the conclusion arrived at. I think it very clear upon the statutes and upon the adjudged cases, that the jurisdiction of the land office and the Department stands as well established as the right of almost any tribunal or office of the government to the exercise of any function which it may possess.

It appears to be conceded, in all the arguments in favor of a contrary view, to which my attention has been drawn, that the jurisdiction is clear in cases of contest between two or more settlers claiming the same tract of land; because section 2273 of the Revised Statutes, following the provision in the act of 1841, after laying down generally the rule that the first settlement gives the better right, proceeds to add:

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

It will be apparent, on brief reflection, that this certainly gives the jurisdiction to hear all the inquiries and adjudge all the points which may go to the validity of an entry, provided only some other settler contests; because, it is plain that in such a controversy, if one settler showed that the other claimant was not entitled at all to the right of pre-emption, he, if himself entitled, must clearly prevail, although the other might have made the first settlement. The consequence of this position, therefore, is that, while the General Land Office and the Department may exercise this jurisdiction, at the instigation of a claimant, it may not be done when the government alone is interested. It would therefore follow that the government might be deprived of its lands without authority of law whenever the register and receiver saw fit to permit it to be done, or committed an error otherwise, without any power in the bureau or Department to protect the interests of the government. Then, the land office or Department might prevent the illegal acquisition of the national title at the instance of some other claimant, but could not in the interest of law or of the government as a proprietor. This theory is based upon the expressed grant of appeal in the case mentioned in section 2273, and because section 2263 reads as follows, without providing an appeal:

Prior to any entries being made under and by virtue of the provisions of section twenty-two hundred and fifty-nine, proof of the settlement and improvement thereby required 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;* and all assignments and transfers of the right hereby secured, prior to the issuing of the patent, shall be null and void.

This is a mere inference, however, from the use of language probably employed with no such purpose; but, at all events, the inference is inconsistent with other statutes, to which the phrase "agreeably to such rules as may be prescribed by the Secretary of the Interior" clearly refers. The power to make these rules lies in the grant of authority which

comprehends the jurisdiction in question. These statutes are now incorporated with the revision of 1873.

Section 441 provides:

> The Secretary of the Interior is charged with the supervision of public business relating to the following subjects: * * * Second, The public lands, including mines.

Section 453 provides:

> The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties pertaining to the surveying and sale of the public lands of the United States, *or in any wise 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.

When one considers the nature of the public business relating to lands, and the modes of conducting it, as prescribed by the statutes, the comprehensive grasp of this authority, and the sufficiency of these words as a grant of the full measure necessary become apparent.

The acquisition of the public land through the right of pre-emption is but one of many modes; but, as the one involved in this case, attention will be limited to it. The statutes prescribe many conditions, first, certain classes of lands only are subject to the right; secondly, certain classes of persons only may exercise the right; thirdly, certain acts must be done on the land to acquire the right; and, finally, certain proofs, probatory of these points and others, must be made in order to enjoy it. It is now clearly established doctrine that the pre-emption claimant acquires no right to the public land until full compliance with and performance of all these conditions and final payment. Frisbie *v.* Whitney (9 Wall., 187); the Yosemite Valley case (15 Wall., 77). The law provides for the issuance of patents by the President with all the machinery of a bureau equipped for the preservation of all information concerning the circumstances, condition and disposition of the public lands; the local offices are subordinate agencies for the transaction of the business committed to the General Land Office; the Commissioner is charged with the performance of "all executive duties" relating to the subject; and the Secretary with supervision of the entire public business concerning the lands; and the register and receiver can act only agreeably to the rules prescribed by the Secretary. Under such circumstances, is it to be rationally supposed that the law intended to leave it to the register and receiver to disregard all the limitations and conditions prescribed by statute, or the rules of the Secretary, without any right to review their action on the part of the Commissioner, who is charged with all executive duties, or the Secretary, who is charged with supervision over all? Such a theory makes the subordinate the superior, and inverts the order of authority and administration.

It must be conceded by all, to put a plain case, that if a pre-emption claimant should impose by his false affidavit upon the local officers, the United States are entitled to some redress. Is that redress only to be had by an action in the courts? If so, from what does the necessity

arise? The title is still in the government, and no right to it has been acquired. Or, suppose the local officers should be satisfied, so as to accept payment and issue a receipt, upon proofs which, upon their face, disclose plain non-compliance with law or the regulations; is the President, by whose patent alone can the title pass, bound to issue that patent? Such instances, and one readily multiplies them on reflection, demonstrate the legislation of Congress in the creation of bureau and Department to be absurd, or that this theory is inadmissible.

In further manifestation of the legislative will, Congress has, for many years, provided a class of officers, whose duty is under the direction of the Commissioner of the General Land Office, to examine cases which have been passed by the local officers, with a view to ascertaining whether the facts warrant approval of the action of those officers by the issuance of a patent. This action has been taken year after year, with full knowledge of the claim of jurisdiction; indeed, in avowed aid and support of the exercise of that jurisdiction. If a doubt could exist of the sufficiency of previous legislation to confer it, this regular course of appropriation would itself be sufficient to endow it with all the vigor of congressional sanction.

But, aside from the long maintenance of this authority by departmental assertion, and its long recognition by Congress, the supreme court has abundantly adjudged its rightful existence in numerous cases, has defined its limits, and itself has acknowledged the duty of obedience to the determinations made in its proper exercise. Few questions stand more completely adjudged by that tribunal, almost every effect of the power having been in some form considered. So that it is not surprising that at last the court has been led to use the following language in Steel *v.* Smelting Co. (106 U. S., 450):

> We have so often had occasion to speak of the Land Department, the object of its creation, and the powers it possesses in the alienation by patent of portions of the public lands, that it creates an unpleasant surprise to find that counsel, in discussing the effect to be given to the action of that department, overlook our decisions on the subject. That department, as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different acts of Congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation. Such has been the uniform language of this court in repeated decisions.

And see, Harkness *et ux v.* Underhill (1 Black, 316); Johnson *v.* Towsley (13 Wall., 87); Shepley *v.* Cowan (91 U. S., 340); U. S. *v.* Schurz (102 U. S., 401); Lee *v.* Johnson (116 U. S., 48).

The extent and quality of this power have been as clearly recognized as its existence has been established. The decision of the Department upon a question of fact is final and conclusive upon the courts. In Shepley against Cowan, *supra*, in which one party sought to maintain

his claim by showing the falsity of the proofs presented in support of the pre-emption right which the Department had adjudged in the other's favor, the court said, speaking of the action of the General Land Office:

> There is no evidence of any fraud or imposition practiced upon them, or that they erred in the construction of any law applicable to the case. It is only contended that they erred in their deductions from the proofs presented; and for errors of that kind, where the parties interested had notice of the proceedings before the land department, and were permitted to contest the same, as in the present case, the courts can furnish no remedy. The officers of the land department are specially designated by law to receive, consider, and pass upon proofs presented with respect to settlements upon the public lands, with a view to secure rights of pre-emption. If they err in the construction of the law applicable to any case, or if fraud is practiced upon them, or if they themselves are chargeable with fraudulent practices, their rulings may be reviewed and annulled by the courts when a controversy arises between private parties founded upon their decisions; but, for mere errors *of judgment* upon the weight of evidence in a contested case before them, the *only remedy is by appeal from one officer to another of the department*, and perhaps, under special circumstances, to the President, (91 U. S., 340).

And see also, Johnson *v.* Towsley (*supra*); Quinby *v.* Conlan (104 U. S., 420); Vance *v.* Burbank (101 U. S., 514); Simmons *v.* Wagner (101 U. S., 260); U. S. *v.* Minor (114 U. S., 243); Baldwin *v.* Stark (107 U. S., 463); Lee *v.* Johnson (*supra*).

And in further acknowledgment of the conclusive power of the land department, it has been determined that no writ of mandamus will lie nor injunction go to interfere with the exercise of that judgment which the law reposes in the Secretary or the Commissioner, while the matter is properly before either for action. Gaines *v.* Thompson (7 Wall., 347); Secretary *v.* McGarrahan (9 Wall., 298).

Nor will the courts assume to exercise any jurisdiction upon a case depending in the land office or the Department. Marquis *v.* Frisby, 101 U. S., 473.

And finally, the court has determined that the term of this jurisdiction expires with the issuance of a patent. Moore *v.* Robbins (96 U. S., 530); U. S. *v.* Schurz (102 U. S., 378).

Nothing further can be desired in the way of judicial determination in favor of this jurisdiction. But in many cases by the state courts, it has been upheld. In an able opinion by Chief-Justice Tripp, of Dakota, in United States *v.* Dudley, published in 1887, these cases have been collated and reviewed. Reference to that opinion will amply satisfy the inquirer. An opinion to the contrary by Deady, J., in Smith *v.* Ewing (23 Federal Reporter, 741), may be left to its contest with this weight of authority and to the clear perception of its force in another case by that same judge, reported as Aiken *v.* Ferry (6 Sawyer, 79).

II.

The clear establishment of the jurisdiction of the Department, and of the several propositions above set forth, leads to the easy disposition of the

second point. These cases show that the pre-emption purchaser takes by his final proofs and payment, and his certificate of purchase, only a right to a patent for the public lands in case the facts shall be found by the General Land Office and the Interior Department upon appeal to warrant the issuance of it. Whatever claim to patent he possesses by virtue of his payment and certificate is dependent upon the further action of the Department and its future finding of the existence of the conditions, and his compliance in fact with the prerequisites, prescribed by law to the rightful acquisition of the public land he claims. This being so, it is plain that the purchaser can acquire from the entryman no greater estate or right than the entryman possesses. The purchaser is chargeable with knowledge of the law, which includes knowledge of this law; and is chargeable with knowledge of the state of the title which he buys, in so far, at least, as that the legal title remains in the United States, subject to the necessary inquiry and determination by the land office and Department upon which a patent may issue. He is not then an "innocent purchaser," so far as there may exist reasons why that patent should not issue. He buys subject to the risk of the consequences of the inquiry depending in the Department. He buys a title *sub judice*. At the most, it is but an equitable title, the legal title being in the government. It is a familiar rule that the purchaser of an equitable title takes and holds it subject to all equities upon it in the hands of his vendor, and has no better standing than he. Boones *v.* Chiles (10 Peters, 177); Root *v.* Shields (1 Woolworth, 340).

It is argued, however, that this is inconsistent with the theory that the land so held is liable to taxation, as the supreme court has determined. But the same court has made this point plain also. It is the equitable title only which is taxable; and in case of a sale for taxes, the tax deed transfers only the right which the holder of the equitable title possessed, subject to all the equities in favor of the government, which existed against that holder. The tax deed, like the vendor's voluntary deed, operates to transfer only the vendor's equitable title. Carroll *v.* Safford (3 Howard, 441).

This case was referred to and its rulings affirmed in Witherspoon *v.* Duncan (4 Wall.,) where, after certificate had been issued by the local land officers, and before patent, the land was sold for taxes under the laws of Arkansas. The court, on page 220, say, after the certificate of entry was given, it was the duty of the entryman to see that the taxes were paid. "It is true," continued the court,

> that the entry might be set aside at Washington; but this condition attaches to all entries of the public lands.
>
> They took upon themselves the risk of confirmation, and periled their title when they suffered the lands to be sold for non-payment of taxes. It does not appear from the record why the patent was so long delayed; but the claim was finally approved on the original proofs, and the patent, when issued, related back to the original entry. The lands were, therefore, under the laws of the State, properly chargeable with taxes from the date of the first entry, in 1830.

These adjudications, so strongly supporting the plain reason of the matter, leave me in no doubt of the duty of the Department to cancel any entry which has been made contrary to law, or of lands not subject to such entry, or by a person not qualified to make such entry, or where compliance with the legal prerequisites to such entry did not take place, or where by false proofs a seeming compliance was fraudulently established.

Entertaining these views, your decision is hereby affirmed.

Reversed, 10 L. D. 242

PRACTICE ACT OF JULY 23, 1866-STATUTE.

TAYLOR *v.* YATES ET AL.

In a case involving the rights of several parties, the General Land Office should pass on the claims of each, so that upon appeal to the Department, the whole matter may be finally determined.

The seventh section of the act of July 23, 1866, does not confer a right of purchase upon one who has bought a mere undivided interest in a Mexican grant without designation by particular description of the land so purchased.

The uniform construction of a statute should not be disturbed unless it is shown to be clearly wrong.

Secretary Vilas to Commissioner Stockslager, March 1, 1889.

I have considered the appeal of Mrs. Ann Taylor from the decision of your office, dated March 28, 1887, rejecting her application to purchase the S. ½ of the SW. ¼ of Sec. 3, S. ½ of the SE. ¼ of Sec. 4, the E. ½ of the NE. ¼ and the E. ½ of the SE. ¼ of Sec. 9, W. ½ and the W. ½ of the NE. ¼ and W. ½ of the SE. ¼ of Sec. 10, T. 1 S., R. 3 W., M. D. M., San Francisco, California.

The record shows that said application was filed February 14, 1884, under the provisions of the seventh section of the act of Congress approved July 23, 1866 (14 Stat., 218).

The land applied for under said act was in part included in the homestead and pre-emption claims of R. J. Yates, Mrs. M. Winslow, S. C. Dean, W. M. Rutherford, J. T. Van Duyn, George W. Reinhart, W. L. Yates, Antonio Joaquin, J. S. Avela, Salvador Altamarino, M. S. Davila, Pedro David and Moses Hopkins. A hearing was ordered, and, by stipulation of all parties, the cases were consolidated, and testimony was submitted by the parties in interest. The hearing was commenced before the local officers on May 2, and concluded on November 14, 1884.

Upon the evidence submitted the local officers found that on July 1, 1855, James Taylor, the husband of the applicant, bought the right, title and interest of one Vallean in the Castro sobrante grant, "to the amount of the 4th of one-twentieth of said grant, less 320 acres," and

paid therefor a valuable consideration; that said Taylor, in 1864, moved on to the tract now claimed by his wife; that the testimony of Mrs. Taylor and her daughter shows that when the purchase was made by her husband the land was inclosed by brush fences and natural boundaries on the lines as now claimed by Mrs. Taylor; that immediately after his purchase, Taylor commenced to build more substantial fences, and continued so to do for about four years, until the whole tract was inclosed with fences, except where the same were unnecessary, on account of the brush, bluffs and deep ravines; that the preponderance of the testimony shows that the fences were not completed until 1871 or 1872; that on September 23, 1880, James Taylor conveyed the land to his wife, and both resided upon the land from 1864 until about October, 1882, when Ann Taylor leased the land to William L. Yates and removed to another county.

The local officers rejected the application of Mrs. Taylor to purchase under said act, for the reason that her husband did not buy any particular tract of land, only an undivided interest in the grant. After rejecting Mrs. Taylor's application to purchase, the local officers proceeded to adjudicate the several conflicting settlement claims. From the decision of the local officers appeals were taken by Mrs. Taylor and seven of the other claimants.

On March 28, 1887, your office examined the case, and rendered a decision affirming the action of the local officers in rejecting the application of Mrs. Taylor to purchase under the seventh section of said act. Your office decision, however, states that

As the claims represented under the homestead and pre-emption laws are all dependent to a greater or less extent upon the validity of Mrs. Taylor's claim under the act of July 23, 1866, it is deemed advisable to act at present upon her claim, and upon its final determination to take up the other claims for solution.

Such practice is not to be commended. Having found that Mrs. Taylor was not entitled to purchase under said act, a decision should have been rendered by your office upon the rights of the other claimants, so that, upon appeal, a final determination of the whole matter could be made by the Department.

The record is voluminous, containing more than fifteen hundred pages, and as it now stands presents the anomaly of a case pending in this Department, upon the appeal of one of the parties in interest, while there are a half dozen or more appeals in the same case pending in your office undecided.

The seventh section of said act provides:

That where persons, in good faith and for a valuable consideration, have purchased lands of Mexican grantees or assigns, which grants have subsequently been rejected, or where the lands so purchased have been excluded from the final survey of any Mexican grant, and have used, improved, and continued in the actual possession of the same, as according to the lines of their original purchase, and where no valid adverse right or title (except of the United States) exists, such purchasers may pur-

chase the same, after having such lands surveyed under existing laws, at the minimum price established by law, upon first making proof of the facts as required in this section, under regulations to be provided by the Commissioner of the General Land office.

The construction of said section by this Department has uniformly been to the effect, that it does not confer a right of purchase upon one who has bought a mere undivided interest in a Mexican grant, without designating by particular description the land purchased. Hyatt *v.* Smith (L. & R., Vol. 14, p. 525); Aurrecochea *v.* Sinclair *et al.* (L. & R., Vol. 18, p. 120). In the case of Stevens *v.* Owens *et al.* (3 L. D., 401), Mr. Secretary Teller said:

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, 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.

In the case of Welch *v.* Molino *et al.* (7 L. D., 210), the Department held that the right of purchase under the seventh section of said act is assignable, and, in the absence of any adverse claim, a party has the right of purchase who has bought a tract of land and entered into possession thereof, alter the survey of the grant excluding said land therefrom. In the last named case, the decision states that the purchase was made from the assignees of the Mexican grantees by metes and bounds.

The deed to James Taylor does not purport to convey any particular tract of land, only the "interest of the said party of the first part, in or to that certain portion or tract of land situated in the counties of Contra Costa and Alameda, known as the Castro sobrante, which was granted by the Mexican government in the year 1841, to Juan Jose Castro and Victor Castro, bounded on the west by Rancho of San Pablo and San Antonio, and on the east and north by the Ranchos known as the Moraga, Vallencio and Pinole Ranchos, meaning to convey three-fourths of one-twentieth of said rancho, less three hundred and twenty acres," and the deed from Taylor to his wife conveys to his wife his interest in said rancho by the same description.

The uniform construction of said section ought not to be disturbed, unless it is shown to be clearly wrong. United States *v.* Graham (110 U. S., 219); Brown *v.* United States (113 U. S., 568); 2 Op. Atty. Gen., 558; 10 Op. Atty. Gen., 52; Thomas B. Hartzell (5 L. D., 124); Heirs of Isham Floyd (*ibid.*), 531.

The decision of your office rejecting the application of Mrs. Taylor is affirmed.

SUCCESSFUL CONTESTANT—PRIVATE ENTRY.

ALFRED G. PERKINS.

The preferred right of a successful contestant does not entitle him to make a private cash entry of land not subject thereto.

Secretary Vilas to Commissioner Stockslager, March 1, 1889.

December 6, 1880, Patrick Feeley made homestead entry on the S. ½ of NW. ¼ and E. ½ of SW. ¼, Sec. 24, T. 40, R. 21, Taylor's Falls district, Minnesota. The appellant, Alfred G. Perkins, duly contested said entry, on the ground of abandonment and procured the cancellation thereof, October 25, 1887, and on December 2, of that year, he applied to make private cash entry on a part of said land, to wit, the S. ½ of NW. ¼ of said section 24. The local officers denied the application, on the ground, "that the land sought to be purchased is (was) embraced in the former homestead entry of Patrick Feeley, which . . . . . was canceled . . . . . October 25, 1887, as the result of the contest of said entry by the applicant. The homestead entry took the land out of the market and it can not be entered at private sale until it is restored to market." On appeal, your office affirmed the action of the local officers by decision of January 31, 1888, from which the present appeal is taken to this Department.

It is true, that under the second section of the act of May 14, 1880, the appellant by virtue of his successful contest of the entry of Feeley acquired a preferred right of entry, but the entry thereunder must be such as the land is subject to. Under the ninth regulations of the circular of January 1, 1836, land although once offered (as in the present case) and subsequently temporarily withheld from private sale, is not subject to private sale again until after the notice prescribed by said regulations. 13 Ops., 274; S. N. Putnam (4 C. L. O., 146).

The decision of your office is affirmed.

RAILROAD GRANT—INDEMNITY WITHDRAWAL.

WEIR *v.* SOUTHERN PACIFIC R. R. CO.

An unauthorized indemnity withdrawal is no bar to a homestead application, and such application will defeat a subsequent selection for the benefit of the railroad company.

Land within the primary limits of the subsisting grant to the Atlantic and Pacific Railroad Company, when the map of designated route was filed on behalf of the Southern Pacific, is excepted from the grant to the latter company.

Secretary Vilas to Commissioner Stockslager, March 1, 1889.

I have before me the appeal of the Southern Pacific Railroad Company from your decision of November 19, 1887, holding for allowance John A. Weir's application to make desert-land entry for section 7, T. 3 N., R. 5 W., S. B. M., Los Angeles district, California.

The north half of said section 7, is within the recently restored indemnity limits of the grant of March 3, 1871, to the Southern Pacific Company (16 Stat., 573). On the supposition that this north half had not been selected by the company, your said decision held that it was subject to entry. In point of fact, however, a selection was made October 5, 1887, (four days before the notice of restoration became effective at the Los Angeles district) though such selection had not been noted in your office at the date of your decision. But under this grant the indemnity withdrawal was unauthorized and of no effect (Simon Leger, 7 L. D., 457), and Weir's application to make entry was made May 17, 1887, nearly five months before the company's selection. The latter, therefore not being protected by a valid withdrawal, cannot prevail to defeat the application to enter, which preceded it in time. Upon this ground I approve your conclusion as to said north half.

"The south half of said section is within the twenty mile (primary) limits of said grant (already mentioned) and also within the primary limits of the prior grant to the Atlantic and Pacific Railroad Company, which was forfeited by act of July 6, 1886. Said grant having been within the limits of the then subsisting grant to the Atlantic and Pacific Railroad Company, at the date when the Southern Pacific Railroad Company's map of designated route was filed (April 3, 1871), was excepted from the grant to the latter company." See case of Southern Pacific R. R. Co. (6 L. D., 816). As to this (southern) half of section 7, accordingly, you correctly hold that Weir's proposed entry may be allowed.

Your said decision is affirmed accordingly.

PROCEEDINGS ON REPORT OF SPECIAL AGENT—TRANSFEREE.

DAVID Y. BRADFORD.*

The right of a transferee to be heard in defense of the entry is recognized, where the entry is canceled on the report of a special agent without notice to the transferee; and such right will not be defeated by the fact that the transfer was not of record.

First Assistant Secretary Muldrow to Commissioner Stockslager, December 5, 1888.

I have considered the appeal of the Maryland Land and Cattle Company, as transferee, from your office decision dated July 26, 1887, rejecting its application for a hearing in the case of pre-emption cash entry No. 2872, for the W. ½ S. W. ¼, S. E. ¼ S. W. ¼ and S. W. ¼ S. E. ¼, Sec. 7, T. 15 S., R. 56 W., Pueblo land district, Colorado, made August 18, 1883, by David Y. Bradford.

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* Not reported in Vol. 7.

The record shows that said Bradford filed declaratory statement for said described tract June 6, 1883, alleging settlement December 20, 1882.

On August 4, 1883, in accordance with published notice, he made final proof and payment before the register at Pueblo, which was approved, and final cash certificate issued thereon to him August 18, same year.

Bradford's final proof shows he was thirty-nine years of age, and a naturalized citizen of the United States; he was unmarried; he had never made a pre-emption filing or entry for land other than the tract in dispute. That he made actual settlement on this tract about December 10, 1882, by commencing to build a house and established actual residence on the land about December 15, same year, which was continuous. That the land was unfit for cultivation on account of the absence of water, but he used the tract for grazing exclusively. His improvements consisted of a frame dwelling house one story high, valued at $100.

On December 14, 1885, Special Agent R. G. Dill reported that he visited the tract, found it to be agricultural land, but would not produce crops without artificial irrigation. He also reported that the land was not enclosed; that there was no timber on the tract; that he found a frame cabin there about twelve by fourteen feet in size, but no other improvements or evidence of cultivation. He could not ascertain who built the cabin, or whether the entryman was in the employ of any one or not; that "no transfer is on record on the books of Bent County, Colorado. . . . . I am unprepared to say that a fraud was committed. . . . . No legal proceedings have been instituted, but recommend that the entry be held for cancellation."

On June 27, 1886, your office held the entry for cancellation and on February 2, 1887, the entry was finally canceled upon the report of said special agent.

On April 12, 1887, The Maryland Land and Cattle Company, by its attorney, F. M. Heaton, esq., filed an application to re-open the case in order to prove Bradford's good faith and compliance with the law, and that the said company is a *bona fide* purchaser and owner of the tract in dispute, and in support of said application the following affidavit was also filed at the same time, viz:

STATE OF MARYLAND, Baltimore City,

I hereby certify that upon this first day of April in the year one thousand eight hundred and eighty-seven, before me the subscriber, the clerk of the superior court of Baltimore city, Maryland, personally appeared Bernard Gilpin, Jr., the president of The Maryland Land and Cattle Company, and made oath on the Holy Evangelists of Almighty God, that in or about the month of March, 1886, the said The Maryland Land and Cattle Company purchased from J. F. Seldomridge, who has duly executed a good and sufficient deed unto said company, of the land covered by David Y. Bradford's Pueblo, Colorado, cash entry No. 2872. . . . And another oath that said David Y. Bradford previously sold and conveyed the same by deed duly executed unto the said J. F. Seldomridge. And that The Maryland Land and Cattle Company has

been at no time officially notified of any action looking toward the cancellation of Bradford's entry as aforesaid, and especially ask that a hearing be ordered, in order that said cancellation be set aside. And I also certify that the said Bernard Gilpin, Jr., is personally known to me, and that he is the president of The Maryland Land and Cattle Company of the State of Colorado.

(Signed) BERNARD GILPIN, JR.,
President of The Maryland Land and Cattle Company.

Sworn to and subscribed before me this 1st day of April, A. D., 1887.

JAMES BOND,
Clerk of Superior Court of Baltimore City.

On July 26, 1887, your office decided that

Neither Seldomridge nor The Maryland Land and Cattle Company were parties to the record and no transfers had been entered in the county records at the date of the special agent's examination, and while transferees, when known, are accorded the right to be heard to sustain the validity of the entry, the provisions made in the Rules of Practice whereby they may become parties to the record and thus insured timely notice, it is incumbent upon them to take advantage of such provisions and make their claims known,

and declined to re-open the case or order a hearing.

On September 23, 1887, The Maryland Land and Cattle Company appealed from said decision.

Upon review of the final proof in this case I am convinced that the same is not sufficient to show a compliance with the requirements of the pre-emption law. But as the local officers accepted the same, and in view of the allegations made on behalf of the appellant, which is a fair compliance with Rule 102 of the Rules of Practice, a hearing may be had in the premises for the purpose of ascertaining whether Bradford in fact complied with the law in good faith. It is suggested that a special agent of the government should be in attendance at such hearing.

Your decision is modified accordingly.

COMMUTATION PROOF—RESIDENCE.

SYDNEY F. THOMPSON.

Six months of occasional or periodic visits, or even continuous presence on the land, not with the view of making it a permanent home, to the exclusion of one elsewhere, but merely for the purpose of carrying out the letter of the departmental rule requiring six months residence, and with the intent to discontinue inhabitancy at the end of that period, is not, in any proper sense a compliance with said rule.

First Assistant Secretary Muldrow to Commissioner Stockslager, February 23, 1889.

I have considered the appeal of Sydney F. Thompson from the decision of your office of December 13, 1887, involving his commutation cash entry, No. 925, on Lots 1 and 2 and the N. ½ of SW. ¼, Sec. 13, T. 154 N., R. 64 W., Devil's Lake district, Dakota Territory. By said de-

cision, your office rejects Thompson's proofs, suspends his cash entry and allows him "to submit new proof when he can show full compliance with the law."

The ground of the decision of your office is, that the proof is defective as to residence. For a statement of the material facts disclosed by the record, reference is made to your said office decision. In addition to the facts set forth in said decision, I note that it appears from the affidavits of claimant and his witnesses, that, as soon as he had made proof and immediately on the expiration of the six months during which he visited the land, he discontinued those visits and makes no claim of subsequent residence thereon, though he continued the cultivation thereof. This circumstance, in connection with the other facts of the case, tends strongly to show, that the claimant's visits to the land were merely for the purpose of complying with the letter of the departmental rule requiring six months residence in such cases, and that he originally intended to cease visiting the land at the expiration of said six months. The requirement of the departmental rule is six months residence, and to constitute residence, the intent must concur with the act. Six months occasional or periodic visits, or even continuous presence on a claim, not with the view of making it a permanent home to the exclusion of one elsewhere, but merely for the purpose of carrying out the letter of the departmental rule, and with the intent to discontinue inhabitancy at the expiration of said period, is not, in any proper sense, a compliance with said rule. To hold otherwise, would be to defeat the object of the rule, which is the requirement of evidence of good faith.

As, however, the claimant may have acted under the honest belief that he was complying with the law, and no adverse claim having intervened, the case is one between the government and the citizen, the decision of your office is affirmed. The new or supplemental proof, however, must be submitted during the lifetime of the entry.

HOMESTEAD ENTRY–HEIR–MARRIED WOMAN.

PRESTINA B. HOWARD.

Since the passage of the act of May 14, 1880, the right given the widow, heirs, or devisee of a deceased homesteader by section 2291, R. S., to fulfill the law, make proof, and receive patent, inures to them as well when the homestead right rests on settlement under said act, as when founded on formal application to enter.

While a married woman is not authorized to initiate or make a homestead entry in her own right, she may, as the heir of a deceased homesteader, make application, submit proof, and receive patent.

First Assistant Secretary Muldrow to Commissioner Stockslager, February 23, 1889.

I have considered the appeal of Prestina B. Howard from the decision of your office of January 7, 1888, affirming the action of the local offi-

cers in rejecting her application to make homestead entry on the SW. ¼ of Sec. 33, T. 32 S., R. 63 W., Pueblo district, Colorado.

On November 23, 1886, the appellant first presented to the local officers her application to enter said land under the homestead law, which was rejected by them on the ground that the land was embraced in the "derivative claim of Thos. Leitensdorfer under the Vigil and St. Vrain Grant." On appeal, your office reversed the action of the local officers, holding that the appellant was protected by the act of February 25, 1869 (15 Stat., 440), which provides for the adjustment of the claims of certain actual settlers at the date of the act, "falling within the limits of the located claims of Vigil and St. Vrain." Thereupon appellant duly renewed her application, which was rejected the second time by the local officers, because it appeared that she was a married woman. Your office sustained this action of the local officers, by said decision of January 7, 1888, from which the present appeal is taken.

The appellant, it appears, is the daughter of Jose Benivetes, who settled and made valuable improvements on the land in 1859, moved his family thereon in May, 1860, and made it his home for a period of over twenty years, until his death, June 21, 1881. The appellant went upon the land with her father and lived there with him during his life and has resided there continuously since his death. Her mother died before her father, and appellant was left in possession of the land and improvements as sole heir of her father. At the date of her father's death she was a single woman twenty-one years of age, and the head of a family, consisting of two children by a former husband, James H. Gray, and she remained single and the head of a family until September, 1882, when she married her present husband, Thomas Howard. The improvements consist of a comfortable dwelling, outhouse, fences, ditches, garden and cultivated fields, and are valued at from $3000 to $5000. At the time her father moved upon the land, there was no other settlement within ninety miles, and that he occupied the land as a home in good faith to the exclusion of one elsewhere, and went upon and held it for that and no other purpose, can not be doubted. The land was not surveyed until the latter part of 1869, about ten years after her father settled thereon, and appellant, in an affidavit filed by her, states as the cause of his not entering the land, "that at no time from May, 1860, to his death, June 21, 1881," was the land "open to entry" under the homestead or preemption laws, "by reason of the unsettled condition of a supposed valid (Mexican) land grant, covering the lands, made to Vigil and St. Vrain, and further known as the derivative claim of Thomas Leitendorfer." She further sets forth in said affidavit "that said Leitendorfer's claim prevented" her (appellant) "from entering said land as a homestead, until the" original "filing of her application," which, as above stated, was rejected by the local officers, November 23, 1886, because of said Leitendorfer's claim.

It appears, that there is no subsisting adverse claim which attached

prior to the appellant's application and no claim has since arisen, except the pre-emption filling of one Adam Forbes, offered September 28, 1887, which can in no way affect the validity of appellant's claim.

Sec. 3 of the act of May 14, 1880, (21 Stat., 140,) provides:

That any settler who has settled, or who shall hereafter settle, on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead law, shall be allowed the same time to file his homestead application and perfect his original entry in the United States Land Office as is now allowed to settlers under the pre-emption laws to put their claims on record, and his right shall relate back to the date of settlement, the same as if he settled under the pre-emption laws.

That Benivetes settled upon the land with the intention of claiming the same under the homestead laws, is clear from his long continued occupancy and improvement of it as a home and appears inferentially from that part of the affidavit of appellant, quoted above, giving the cause of his delay in making entry under that law. The limitation in the statute as to time of filing application is intended for the protection of the settler against intervening adverse claims, and as there are none in this case and the good faith, both of Benivetes and appellant, is apparent, the delay in making application, even if not sufficiently excused by the matters set forth in appellant's affidavit, will not be held to defeat the right of entry acquired under the statute by Benivetes's settlement.

Under the homestead act of May 20, 1862 (Rev. Stat., Sec. 2289 *et seq.*), "no right could be initiated or acquired except by entry," and, therefore, "no right could inure to the widow, heirs, or devisees under" Sec. 2291 of the Revised Statutes, "by virtue of settlement of their decedent upon the public land without entry. The act of May 14, 1880 changed the homestead law in this important feature, by providing that a homestead claim to land could be initiated by settlement." Tobias Beckner (6 L. D., 134).

The act of May 14, 1880, and section 2291 of the Revised Statutes are parts of one general system of laws, they relate to the same subject-matter, and are to be construed *in pari materia*. Accordingly, it is held by this Department, that since the act of May 14, 1880, the rights given the widow, heirs or devisees of a deceased entryman, by section 2291 of the Revised Statutes, to fulfill the law, make proof and receive patent, inure to them, as well when the entry is initiated by settlement under said act, as when it is initiated by regular application to enter. (Tobias Beckner, supra.) It is said, The broad underlying principle that controls the question is, that when a person initiates any right in compliance with and by authority of the public land laws, and dies before completing or perfecting that right, it will not escheat and revert to the government, but inure to those on whom the law and natural justice cast a man's property and the fruits of his labor after death. (Tobias Beckner, supra.)

It is well settled, that a married woman is not authorized by Sec.

2289 of the Revised Statutes to make or institute homestead entry; but I am of the opinion, that *as heir* the appellant may make application and proof and receive patent on the entry of her father, initiated by his settlement on the land. The only qualification prescribed by Sec. 2291 in cases of widows, heirs or devises, seeking to exercise rights thereunder, is, that they be "citizens of the United States" at the time patent is issued. Marriage of a female heir is not expressly made a disqualification under said Sec. 2291, and Sec. 2289 can not be held by implication to deprive of the right of inheritance one "on whom the law and natural justice cast a man's property and the fruits of his labor after death." In the case of Dungan *v.* Griffen's Heirs, the latter had homestead claims of their own and hence were disqualified under Sec. 2289 from making further homestead entry, but it was held by this Department, that while "the homestead law only allows one claim to any individual, yet it does not prevent such person from inheriting the inchoate right of another, or receiving the same in a representative capacity." (C. L. L., 254).

The application of appellant as it now stands, not being in her capacity as heir, was properly rejected by your office. She may, however, and should, under the facts disclosed by the record, be allowed an opportunity to amend her application in the particular indicated. You are, therefore, instructed to direct the local officers to allow her sixty days after due notice hereof in which to make said amendment. After which, on her making proof as required by law in such cases, the entry will be passed to patent in her name as heir of said Benivetes. The decision of your office is modified accordingly.

HOMESTEAD ENTRY—NATURALIZATION.

BARTL *v.* WEST.

Under the homestead law, the right of entry is given to a citizen of the United States, or one "who has filed his declaration of intention to become such, as required by the naturalization laws."

A declaration of intention to become a citizen filed by the father, inures under section 2168, R. S., to the benefit of his minor son, if the father dies prior to becoming a citizen.

Secretary Vilas to Commissioner Stockslager, February 25, 1889.

The case of Xaver Bartl *v.* John West involves the NE. ¼ of the NE. ¼, Sec. 7, and the NW. ¼ of the NW. ¼, Sec. 8, T. 34 N., R. 5 E., Olympia land district, Washington Territory, and is brought here on appeal by West from the decision of your office, dated July 16, 1886, affirming that of the local office, and holding for cancellation his pre-emption cash entry, to the extent that the land in dispute is covered by it.

I find from an examination of the record, that the facts stated by you in your said office decision, to which reference is made, are substan-

tially correct, and fully sustain the conclusion that Bartl has the better right to the tracts in question.

A fact not stated by you is shown by the record, however, namely, that when Bartl filed his application to make homestead entry for the land of which the two forties in contest form a part, he accompanied the same with his declaration to become a citizen of the United States.

Based upon this fact, the point is made here, for the first time, that, inasmuch as Bartl, being foreign born, did not file his declaration of intention to become a citizen of the United States before the date of his entry, his prior settlement on the land in dispute can not avail him as against the claim of West; but in answer to this it is claimed and not denied that Bartl came to this country with his father, prior to 1856, when but eight or nine years old, and has resided in the United States ever since; that on the 28th day of April, 1856, his father made his declaration, in due form, before the clerk of the circuit court of Jefferson county, Wisconsin, to become a citizen of the United States, and died before completing his naturalization.

Section 2168 of the Revised Statutes of the United States provides that:

When any alien, who has complied with the first condition specified in section twenty-one hundred and sixty-five, dies before he is actually naturalized, the widow and the children of such alien shall be considered as citizens of the United States, and shall be entitled to all rights and privileges as such, upon taking the oaths prescribed by law.

The first condition of Sec. 2165, referred to above, is the usual declaration of intention, required of aliens who desire to become citizens of the United States. This condition was complied with by Bartl's father, as shown, and he died before becoming actually naturalized. By operation of the statute just quoted, the declaration of the father to become a citizen of the United States inured, upon his decease, to the benefit of the minor son, Xaver Bartl, and the latter thereby became entitled to all the rights, by virtue of said declaration, that the father was entitled to in his lifetime. Under the homestead law, the right of entry is given to a citizen of the United States, or one "who has filed his declaration of intention to become such, as required by the naturalization laws." It appears, therefore, that when Bartl settled on the land in dispute in 1881, he was, in respect to the objection now presented, duly qualified to initiate a homestead claim. For this reason the objection can not be sustained. See case of Scotford *v.* Huck, decided January 12, 1889 (8 L. D., 60). The land in dispute is accordingly awarded to Bartl, subject to his completing his citizenship and otherwise complying with the law. This will have the effect to destroy the contiguity of the two remaining tracts covered by West's filing and entry, and for that reason the latter's entry must be canceled in its entirety, unless he shall elect either to retain one of the forties not in dispute and relinquish as to the remaining tracts, or relinquish his entire

entry, in which latter event, his relinquishment should be allowed without prejudice to his making a new filing for other tracts.

With this modification, your said decision is affirmed.

RAILROAD GRANT—INDEMNITY SELECTION—EXPIRED FILING.

CHICAGO, MILWAUKEE & ST. PAUL RY. CO. *v.* AMUNDSON.

An expired pre-emption filing of record at the date of application to select indemnity, does not bar selection of the land covered thereby, unless it be shown that the pre-emptor had not in fact abandoned his claim.

In such a case a hearing is necessary in order to determine the status of the land at date of selection.

Secretary Vilas to Commissioner Stockslager, February 25, 1889.

I have considered the case of the Chicago, Milwaukee and St. Paul Railway Co. *v.* Jeff. Amundson, as presented by the appeal of the company from the decision of your office, holding for cancellation its selection of N. ½ of the S. E. ¼ and the S. ½ of the N. W. ¼ of section 29, T. 102 N. R. 26 West of the fifth principal meridian, Worthington land district Minnesota. The record shows that said tracts are within the limits of the indemnity withdrawal ordered by your office letter dated August 23, 1866, and received at the local land office on September 10, 1866; that on September 7, 1864, one Daniel F. Rogers filed pre-emption declaratory statement No. 12,817 for said tract (unoffered) alleging settlement thereon August 15, 1864, which filing is still of record; that on June 22, 1876, said company was allowed to select said land (per list No. 16) and a duplicate selection of said land was made by the company in November, 1877; that said Amundson applied to enter said land under the timber culture law, on July 11, 1882, and his application was rejected by the register and receiver because of conflict with said selections by said company. On September 29, 1883, your office ordered a hearing for the purpose of ascertaining whether said "land was actually occupied by a qualified entryman at date of withdrawal or dates of selection by the company. Subsequently Amundson finding it impossible to prove the occupancy of said land at said dates, on account of the lapse of time, applied to your office, through his attorney, to know if a hearing was "necessary under existing rules and regulations," on November 18, 1887, your office decided that the filing of Rogers was subsisting on the official records at the date of the receipt of the withdrawal order, and the dates of selection of the land on account of the railway grant, and served to except the tracts from any effect which said order might have had, and was a bar to the selection of the same for railroad purposes, and that said selections must be held for cancellation. It is unquestionably true that a valid settlement existing at the date of withdrawal excepts the land covered thereby from the effect

of said withdrawal. But it by no means follows that an expired filing (as Roger's was) bars the right of selection of said company. In the case of Bright *v.* Northern Pacific R. R. Co., (6 L. D., 613) the Department held that an expired pre-emption filing at the date of the company's application to select land as indemnity, does not bar the selection unless it be shown that the pre-emptor had not in fact abandoned his claim, and that a hearing should be ordered to determine the status of the tract at the date of selection. The decision of your office is accordingly modified and you will direct the local officers to order a hearing in accordance with the rules of practice to determine the status of said tract at the date of said selections, and whether it was occupied by a qualified pre-emptor. Upon receipt of the testimony taken at said hearing, together with the opinion of the local officers thereon, your office will re-adjudicate the case.

RAILROAD GRANT—WITHDRAWAL—PRE-EMPTION FILING.

SIOUX CITY AND PAC. R. R. CO. *v.* LEWIS ET AL.

A *prima facie* valid pre-emption filing, existing of record, is sufficient to except the land covered thereby from the operation of a withdrawal on general route, authorized by section 7, act of July 1, 1862.

Secretary Vilas to Commissioner Stockslager, February 25, 1889.

I have considered the case of the Sioux City and Pacific Railroad Company *v.* Lewis and Elliott as presented by the appeal of the company from the decision of your office, dated July 8, 1884, rejecting its claim to the SW. ¼ of Sec. 15, T. 20 N., R. 11 E., Neligh land district, in the State of Nebraska, and allowing the applications of R. C. Lewis and of Timry Elliott to enter the south half and the north half of said quarter section, respectively.

Said tract is within the limits of the grant to said company, under the act of Congress, approved July 1, 1862 (12 Stat., 489), and the amendatory act of July 2, 1864 (13 Stat. 356).

On June 27, 1875, within the time required by law, the company filed in your office its map of general route.

By the seventh section of said act of 1862, it is provided:

> That within two years after the passage of this act, said company shall designate the general route of said road, as near as may be, and shall file a map of the same in the Department of the Interior; whereupon the Secretary of the Interior shall cause the lands within fifteen miles of said designated route or routes, to be withdrawn from *pre-emption, private entry, and sale.*

The road was definitely located on January 4, 1868. No withdrawal was made under the provisions of said section seven, but the lands within the limits thereof were held open to settlement and entry under the general land laws of the United States, up to the date of the definite location of the road.

Your office decision states that:

The records show that on May 27, 1867, William E. Ross made homestead entry No. 1353 of said tract, and that said entry remained of record until May 15, 1875, when it was canceled for failure to make proof of compliance with the law within the statutory period,

and your office held that

Under the rulings of this office and the Department, said entry, subsisting at the date when the right of the railroad company attached, excepted the land from the grant, and upon cancellation thereof said land became subject to entry by the first legal applicant.

The company insists that said entry of Ross was illegal, because made after the filing of its map of general route in your office, and that its rights can not be affected by the failure of the Department to withdraw said land, as required by said section. It will be observed, however, that the language of said seventh section is, "The Secretary of the Interior shall cause the lands within fifteen miles of said designated route or routes to be withdrawn from *pre-emption, private entry and sale*," etc.

In the case of the Kansas Pacific Railway Company *v.* Dunmeyer (120 U. S., 629), the supreme court considered said acts, and also the act of July, 3, 1866 (14 Stat., 356), which provided that upon the filing of the map of general route of the road (the Kansas Pacific), "the lands along the entire line thereof, so far as the same may be designated, shall be reserved from *sale* by order of the Secretary of the Interior." The court said (Op., p. 638):

It will be observed that by the act of 1872, upon the filing of the company's map of designation of its general route, the Secretary was required to withdraw the lands within fifteen miles of said designated route from "pre-emption, private entry and sale." In the terminology of the laws concerning the disposition of the public lands of the United States, each of those words has a distinct and well known meaning in regard to the mode of acquiring rights in these lands. This is plainly to be seen in the statutes we are construing. In the third section or granting clause there are excepted from the grant, all lands which at the time the definite location of the road is fixed had been *sold, reserved* or otherwise disposed of, and to which a pre-emption or homestead claim had attached. Here sale, pre-emption, and homestead claims are mentioned as three different modes of acquiring an interest in the public lands, which is to be respected when the road becomes located, and the words are clearly used because they were thought to be necessary.

Whether a withdrawal, which, if it had been ordered, the court, in the Dunmeyer case (*supra*), said the Secretary was "authorized" (Op., p. 636) or "required" (Op., p. 638) to make, under said section, would have operated to reserve the lands in question from the homestead entry of said Ross, is not necessary to be decided in the case at bar. For an inspection of the records of your office shows that one Lawrence Lansing filed his pre-emption declaratory statement, No. 739, for said land on March 7, 1865, alleging settlement thereon same day. Said pre-emption filing being *prima facie* valid and of record at the date of the filing of the map of designated general route served to except said

land from the operation of a withdrawal, if one had been made, as authorized by said seventh section of said act. Malone *v.* Union Pacific Railway Company (7 L. D., 13); Millican *v.* Northern Pacific R. R. Co. (id., 85); Northern Pacific R. R. Co. *v.* Wiley (id., 354); Same *v.* Johnson (id., 357).

It follows, therefore, that the conclusion of your office, rejecting the claim of said company, was correct, and it is accordingly affirmed.

TIMBER CULTURE CONTEST—PRACTICE—REVIEW—HEARING.

POLLARD *v.* RETHKE ET AL.

A charge of sale, relinquishment, and abandonment, is a sufficient basis for a timber culture contest.

Where a new question, or one not previously presented, is relied upon for setting a decision aside, the better practice is to bring such matter before the tribunal rendering the decision, by a motion for review, instead of raising the question on appeal.

The integrity of the record is not impeached by an unverified statement; nor will such a statement warrant a hearing to determine a question of priority alleged in the face of an adverse record.

Secretary Vilas to Commissioner Stockslager, March 1, 1889.

Frederick Kruger appeals from the decision of your office of September 12, 1887, in the case of George D. Pollard *v.* John Rethke, awarding to said Pollard the preference right of entry on Lot 3, Sec. 2, T. 120 N., R. 49 W., Watertown district, Dakota Territory.

Rethke made homestead entry, No. 15,213, of said tract, November 28, 1885, and on May 13, 1887, Pollard filed an affidavit of contest against said entry, accompanied by an application to enter the land under the timber-culture law, alleging as ground of contest that "Rethke has wholly abandoned said trust; that he has relinquished and sold his right, title, and interest thereto and has removed from the Territory of Dakota, and that said transaction was for speculative purposes."

The local officers refused to entertain the contest on the ground that said allegations were "no cause of contest." The next day "the relinquishment of Rethke was filed" and his entry canceled on the records of the local office. May 17, 1887, Frederick Kruger made timber culture entry of the land and on the 24th of said month Pollard appealed to your office from the ruling of the local officers rejecting his application to contest, and, on said appeal, your office reversed said ruling, holding that the allegations of the affidavit of contest were sufficient and awarding to Pollard the preference right of entry.

The affidavit of contest was undoubtedly sufficient as held by your office, and the appellant, Frederick Kruger, does not dispute the correctness of your office decision on that point, but alleges that your office erred:

"1. In holding that the application of George D. Pollard to contest the entry of John Rethke was made prior to the application of Frederick

Kruger to make timber-culture entry without first ordering a hearing to determine the priority of right as between them, and giving said Kruger an opportunity to show that in fact his application was made previous to that of said Pollard."

On the face of the record, Pollard's application to contest and make entry were prior to the timber-culture application of Kruger, the former being marked filed May 13, 1887, and the latter four days thereafter, on the 17th of said month. Your office decision simply awards Pollard the preference right of entry and no allusion is made therein to Kruger's application to enter or claim of priority, and he does not allege and the record does not show, that said claim of priority was in any way brought to the attention of your office, or ever asserted except on the present appeal. There being no claim of priority on the part of Kruger before your office, there was no occasion to order a hearing in reference thereto, and no error in awarding Pollard the preference right of entry.

The appellant, in specifying the grounds upon which he bases his claim of priority, alleges further:

"2. That his timber-culture entry should have been made previous to May 13, 1887 (the date of Pollard's contest) as he forwarded a proper application to enter to the land office at Watertown before that time, but the same was returned to him for an *immaterial* correction, which being made, the entry was allowed by the local officers without any notice to him of the intervening claim of Pollard—by reason of which he lost the opportunity to appeal from the rejection of his first application to enter."

"3. That there is an error in the date of filing the application of Pollard to contest said tract; that in fact said contest was not filed until after the entry of Kruger had been allowed to the tract."

The appellant prays in conclusion that the decision of your office be reversed and a hearing ordered to determine the question of priority as between himself and the contestant.

The above paragraphs numbered 2 and 3 set up matters which do not appear to have been considered by your office, or in any way brought to its attention on the rendition of said decision.

There was no error in said decision on the facts before your office as disclosed by the record. In such a case, where new matter or matter not previously presented is relied upon for setting a decision aside, as a general rule the proper and better practice would seem to be (in consonance with that obtaining in courts of law), to bring such matter in the first instance before the tribunal rendering the decision by a motion for review or reconsideration. Rule 76 of Practice provides for the allowance of such motions "in accordance with legal principles applicable to new trials at law," and the present case falls within the purview of that rule. Of course, if the matter relied on has arisen or been discovered after the case has been removed from your office and while it is pending on appeal before this Department, it must then of necessity

be presented here; but, where practicable, the practice above indicated should be followed.

Proceeding, however, to pass upon the present application (as this Department may, by virtue of its right and duty of supervision, in any case whether brought regularly before it or not), I am of the opinion that it should be rejected as insufficient in itself. Although based on matters contradictory of the records of the local office, it is not verified by affidavit and is wholly unaccompanied by proof or any offer of proof in its support. Such records are at least *prima facie* correct. (2 Wharton on Evidence, Secs. 1302 and 1303.)

The allegation in paragraph 2 above set forth, that the application of Kruger when originally made "was returned to him for an *immaterial* correction" is the averment of a legal conclusion, and, the nature of the correction not being given, it can not be determined whether or not the conclusion is correct. It may be admitted, as stated in said paragraph, that Kruger "forwarded" his application to the local office before May 13, 1887, but this statement alone (the time, mode, and place of forwarding not being given) does not raise even a presumption that it reached its destination before that date; and if it clearly appeared that it did, the entry could not have been allowed at that time, as the land was then covered by the entry of Rethke, which the records show was not canceled until May 14, 1887.

Paragraph 3 places the claim of priority upon an entirely different basis from that set up in paragraph 2, and is wholly inconsistent therewith. The latter concedes the priority in fact of the filing of Pollard's affidavit of contest, while the former expressly negatives it.

Upon such a showing, the application for a hearing to determine the question of priority must be and is denied.

The decision of your office is affirmed.

ACCOUNTS--FEES FOR NOTICE OF CANCELLATION.

GEORGE B. EVERETT.

Fees for giving notice of cancellation, deposited prior to the act of August 4, 1886, but not earned until after the passage of said act, must be accounted for in accordance with the circular regulations of March 15, 1887.

Secretary Vilas to Commissioner Stockslager, March 1, 1889.

Mr. George B. Everett, register of the land office at Mitchell, Dakota, appeals from the following instruction, given by you to the receiver of said office, November 18, 1887, and to which his attention was called by letter "M" of December 21, following, to wit:

In cases where fees for notices of cancellation were deposited with the register prior to August 4, 1886, and the notices were issued since that date, the register must pay the fees over to you, to be accounted for to the United States, as prescribed by circular, dated March 15, 1887.

Said circular—which relates exclusively to fees and has been duly approved by the Department (5 L. D., 577)—calls attention of registers and receivers to the following extract from the act making appropriations for sundry civil expenses of the government for the fiscal year ending January 30, 1887, and approved August 4, 1886, to wit:

All fees collected by registers and receivers, from any source whatever, which would increase their salaries beyond three thousand dollars each year, shall be covered into the Treasury, except only as may be necessary to pay actual cost of clerical services employed exclusively in contest cases, and they shall report quarterly, under oath, all expenditures for such clerical services, with vouchers therefor.

In relation to the disposition to be made of the particular fee now under consideration, the circular says:

The fee of one dollar, authorized to be retained by the register, for giving notice of the cancellation of an entry, as provided by the act of May 14, 1880, will be paid to the receiver, who will deposit it with the other fees, when the entry is canceled and the notice given. Should the cancellation not take place and no notice be given the fee is to be returned to the depositor.

Register Everett contends that the act of August 4, 1886, does not apply to fees collected or received prior to its passage.

It does not apply to fees earned by the register by actually giving the required notice prior to the passage of said act, but, as construed by said circular of instructions, it does, in my opinion, clearly apply to all cases where the fee was deposited in advance and the notice was not actually given and the fee earned until after the passage of the act.

Your instructions in this case, appearing to accord with the general instructions given to registers and receivers in said circular, are approved by the Department.

ALABAMA LANDS—ACT OF MARCH 3, 1883.

THOMAS M. KNIGHT ET AL.

Lands not known to be mineral, covered by *bona fide* settlement and filing, made prior to the act of March 3, 1883, and in accordance with existing regulations, are not required to be offered under said act before the allowance of pre-emption entry therefor.

Secretary Vilas to Commissioner Stockslager, March 1, 1889.

I have considered the appeal of counsel for Thomas M. Knight, John E. Williams, Wiley E. Godfrey and James R. Iveans, from the decision of your office, dated December 3, 1886, adhering to your office decision, dated January 4, 1886, holding for cancellation their several pre-emption cash entries, Nos. 18,179, 18,206, 18,233 and 18,234, of lands in the Montgomery land district, State of Alabama.

The record shows that said Knight, on September 5, 1882, filed his pre-emption declaratory statement, No. 712, for the SW. ¼ of the SW. ¼ of Sec. 18, T. 17 S., R. 6 W., alleging settlement thereon February 10,

1882. On May 2, 1883, the local officers accepted his final proof and payment for said land, and issued cash certificate, No. 15,179, thereon.

The final proof shows that said Knight was duly qualified to make pre-emption cash entry; that he settled and built a house on said land the last of January, 1882; that he established his residence on the land about the first of February, 1882, and has lived on the land continuously since that time; that his improvements consist of one dwelling, two cribs, one stable, a vegetable garden and six acres of cleared land—all valued at $100; and that there are no indications of coal, salines, or minerals, of any kind, upon said land.

The claimant filed the usual non-mineral affidavit.

On January 14, 1882, said Williams filed his pre-emption declaratory statement, No. 629, for the NE. ¼ of Sec. 25, T. 16, S., R. 6 W., alleging settlement thereon December 16, 1881, On June 14, 1883, the local land officers accepted his proof and payment, and issued cash certificate No. 18,206, thereon.

The final proof of Williams shows that he settled as alleged in his said filing, established his residence on said land on December 16, 1881, and his residence has been continuous since said date; that his improvements are worth $60, and that there are no indications of "coal, minerals, or salines" on the land claimed by him. The usual non-mineral affidavit was also filed by said Williams.

On May 19, 1879, said Godfrey filed his pre-emption declaratory statement, No. 121, for the NW. ¼ of the SE. ¼ and the SW. ¼ of the NE. ¼ of Sec. 28, T. 17, S., R. 4 W., alleging settlement thereon May 6, same year. On February 25, 1881, Godfrey made proof, in support of his claim, before the clerk of the circuit court for Jefferson county, in said State, which shows that he settled upon said land as alleged in his said filing, established his residence thereon in May, 1879, and has resided on the land "ever since;" that there are no indications of coal, salines or minerals of any kind on said land, and that his improvements are worth $75.00. The usual non-mineral affidavit by the claimant does not appear in the proof, but there is filed therewith the corroborated affidavit of Mary A. Godfrey, dated November 30, 1881, alleging that said Godfrey died on May 26, 1881; that she is the widow of said Godfrey; that the said Godfrey "was unable pecuniarily" to make said entry; that she was advised that it was not necessary to perfect the entry of said Godfrey immediately after his death; that she has not alienated, and she believes said Godfrey, in his lifetime, did not alienate in any way said land, or make any agreement, with any one, by which the title should inure in whole or part to any other person than herself. On the proof submitted the local land officers, on July 11, 1883, issued final certificate, No. 18,234, in the name of Wiley E. Godfrey.

The record further shows that, on January 17, 1883, said Iveans filed his pre-emption declaratory statement, No. 780, for the N. ½ of the SW. ¼ of Sec. 26, T. 16 S:, R. 5 W., alleging settlement thereon January

10, same year. On February 1, 1883, the claimant gave notice, by publication, of his intention to make final proof in support of his claim, before the clerk of the circuit court, at Birmingham, Alabama, on March 27, 1883. The final proof, made as advertised, shows that the claimant was duly qualified to make pre-emption cash entry; that he settled and commenced his residence on said land in January, 1882, that his residence has been continuous since that time; that his improvements are worth $180, and that there are no indications of "coal, minerals, or salines thereon." The local land officers accepted said proof, received payment for the land, and, on July 11, 1883, issued certificate, No 18,233, therefor.

On January 4, 1886, your office held all of said entries for cancellation, on the ground that, under the act of March 3, 1883 (22 Stat., 487), the lands covered by said entries, were not subject to entry, until they have been offered under the provisions of said act.

On January 20, 1886, the register of said office addressed a letter of inquiry to your office, calling attention to the circular of April 9, 1883, (1 L. D., 655), enclosing a copy of said act, advising them that "all *bona fide* entries, under the homestead laws, may be perfected, regardless of the mineral character of the land, in accordance with rules and regulations governing the same. Entries, whether by cash or location, already allowed and reported to this (your) office, will be examined and disposed of upon their merits, without reference to the question of mineral." The register asked for further instructions in the premises, relative to said entries and others.

On March 26, 1886, the successor of the former register, also, addressed a letter of inquiry to your office, relative to said entries, calling attention to the decision of my predecessor, Secretary Teller (3 L. D., 169), and asking "for instructions as to what disposition to make of the entries."

On December 3, 1886, your office, in reply to said request of the register, referred the local land officers to your office letter, dated May 4, 1883, in the case of Robert Lalley *et al.* (10 C. L. O., 55), the circular letter addressed to the Huntsville and Montgomery land offices, dated April 9, 1883, and the letter of Secretary Teller to your office, relative to the same matter, dated April 23, 1883 (10 C. L. O., 55), and held said entries for cancellation, for the reason that, although a settlement was alleged prior to the passage of said act, "yet all the entries were made subsequent to that date."

Your attention is called to the irregularity in the issuance of the final certificate in the name of W. E. Godfrey, who is shown by the record to have been dead more than two years prior to the date thereof.

The question at issue is, What is the proper construction of said act of March 3, 1883? Does said act require that lands which have been filed for, settled upon, and improved, in accordance with law and the

regulations of the Department in force at the time of such settlement and filing, must be offered at public sale?

The act of March 3, 1883, is entitled, "An act to exclude the public lands in Alabama from the operation of the laws relating to mineral lands." By the first paragraph of the act, after the enacting clause, it is provided:—"That within the State of Alabama all public lands, whether mineral or otherwise, shall be subject to disposal only as agricultural lands." Then follow two provisos, 1st, "That all lands which have heretofore been reported to the General Land Office as containing coal and iron shall first be offered at public sale;" and, 2d, "That any *bona fide* entry under the provisions of the homestead law of lands within said State heretofore made, may be patented without reference to an act approved May 10, 1872, entitled 'An act to promote the development of the mining resources of the United States,' in cases where the persons making application for such patents have in all other respects complied with the homestead law relating thereto."

On April 9, 1883 (1 L. D., 655), your office advised the local officers in said State, not to allow an entry to be made for any lands, lists of which were transmitted to them on October 23, 1879, nor of other tracts that have been since investigated and reported as valuable for minerals, a list of which was enclosed; that all existing *bona fide* entries, under the homestead laws, may be perfected, regardless of the mineral character of the land; that any contest pending in said offices, where the only allegation is the mineral character of the land, must be dismissed, and that entries, whether by cash or location, already allowed and reported to your office, will be examined and disposed of upon their merits, without reference to the question of mineral.

The decision of my predecessor, Secretary Teller, referred to by your office, held that the act of May 14, 1880, has no applicatien to a settlement on lands not subject to homestead entry, "which was the condition of all mineral lands in Alabama, as well as in other States, where the mineral laws are in force," that "no previous right of entry existed to work a constructive intent to include a mere settlement or unperfected homestead claim upon mineral lands in the law confirming entries 'heretofore made'—such confirmation being manifestly intended to grant title, and legalize the official act already done, while providing a new rule for future disposal."

And your office, in the case of Robert Lalley *et al.* (*supra*), held that all entries of lands in Alabama that had been previously reported to your office as containing coal or iron, made subsequent to the passage of said act, were void, and that applications where the affidavits were made before the clerk of the court which failed to reach the local office prior to the passage of said act, must be rejected, although the affiants allege settlement prior to the date of said act.

On April 3, 1884, my predecessor, Secretary Teller, in the case of Nancy Ann Caste (3 L. D., 169), fully considered the effect of the act

of March 3, 1883, and held that the revocation of mineral withdrawals, dated April 22, 1880 (7 C. L. O., 36), shifting the burden of proof from agricultural to mineral applicants, was applicable to the public lands in Alabama: that, where, at the date of entry, no mineral was known to exist, the fact that mineral is subsequently discovered will not operate to deprive a settler, who has settled and filed, 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, and that lands covered by *bona fide* perfected or inchoate settlement claims cannot be offered at public sale under said act.

It is, unquestionably, the rule of law that a pre-emptor has no vested right in the land claimed by him until he has complied in good faith with the requirements of the pre-emption law, paid the purchase money and received his certificate, and that until this is done, it is within the legal and constitutional power of Congress to withdraw the land from entry and sale, though this may defeat the imperfect right of the settler. Frisbie *v.* Whitney (9 Wall., 157); The Yosemite Valley case (15 Wall., 77). But I do not think it was the intention of Congress, as expressed in said act, that actual settlers, who had settled upon and improved lands not known to be mineral in character, prior to the passage of the act, should be compelled to compete with others at a public sale, in order to save their homes and improvements.

Unless the evidence shows the bad faith of the parties, or that the lands claimed were not subject to entry, their entries ought not to be canceled, if they have complied with the requirements of the pre-emption laws, relative to residence, cultivation and improvements.

Your attention is called to the irregularity in transmitting in one letter four cases involving different parties and separate tracts of land.

The decision of your office, holding said entries for cancellation, is reversed.

PRE-EMPTION CONTEST—PRACTICE.

JOSEPH A. BULLEN.

An application to contest an entry should not be allowed where the government, in its own interest, has already instituted proceedings against the entry.

Secretary Vilas to Commissioner Stockslager, March 2, 1889.

From the record before me it appears that Joseph A. Bullen, November 17, 1853, filed pre-emption declaratory statement for Lot 1, Sec. 27, and lots 1 and 2, Sec. 28, T. 49 N., R. 13 W., Willow River, (now Ashland) district, Wisconsin, alleging settlement August 28, 1853. On submission of final proof, cash certificate issued to said pre-emptor February 9, 1854, and on February 18th the land appears to have been sold to George L. Becker.

On March 13, 1854, by executive order, sections 27 and 28 were, with other lands, withdrawn for military purposes, but the records of your office show that on January 18, 1855, section 27, was released from said reservation.

By letter of May 11, 1854, your office informed the local office that said entry was suspended pending the submission of further proof as to the location of the improvements on the various subdivisions of the land entered. No further material action in the case was taken until August 17, 1875, when your office, examining the entry, held that as at the date of the executive order, Bullen had completed his entry, the land entered was not subject to said order of reservation, and finding substantial compliance with the law on the part of the entryman, adjudged him entitled to a patent.

From this decision the Honorable Secretary of War appealed, taking issue therein on the question of the pre-emptor's good faith.

August 23, 1878, the Department decided that before final action would be taken on the entry further evidence should be furnished by the assignee showing the entryman's actual compliance with law and that said assignee was in fact a purchaser in good faith.

The local office was informed of the above decision and considerable effort appears to have been made to secure the required evidence, but with no favorable result.

February 6, 1886, your office directed the local office to notify the present owners of the land of the defects in the proof and allow them sixty days within which to furnish the requisite evidence.

August 28, 1886, the local office transmitted several affidavits tending to show that Bullen was a qualified pre-emptor and complied with the law in all respects.

August 6, 1884, John A. Bardon, applied to enter the land as a homestead, alleging settlement thereon. The application was rejected, on account of the prior entry of Bullen. Bardon appealed, and your office affirmed the decision of the local office, and December 18, 1885, this Department, on appeal, sustained the decision of your office.

Since then, and at various times, Bardon through his attorney, has sought to secure the cancellation of Bullen's entry, alleging the same to be fraudulent, and furnishing affidavits in support of such allegation, but without formal application to contest said entry, until November 16, 1887, when such an application was duly made by said Bardon. But it appears that one Frank W. Gage, applied to contest said entry October 20, 1887, and the local officers have forwarded the contest papers of both parties, advising that, under the circumstances, Bardon should be allowed to proceed with the contest.

It is alleged that Bardon has been actively engaged in securing evidence upon which to enable your office to intelligently act in the premises, and was so engaged at the time when Gage applied to contest said entry, and that he has a plainly superior right over Gage to proceed in the contest.

But it appears to me very obvious from the statement of this case that the government itself is the contestant, and that, as may well be surmised from this history, the pre-emption claimant and the alleged innocent purchaser, neither ever in fact, held any possession of the land; that from the great length of time that has passed, the land has undoubtedly increased very much in value, which may account for the strife between these parties to secure the position of a contestant. If these facts should appear, to allow either of them now to contest the entry, with the rights of an original contestant, would be to award him great advantages not resulting from his action. The Secretary of War was the real contestant, who has prevented the consummation of the entry, and, before this land should be thrown open to purchase under the land laws of the United States, the contest inaugurated by the Secretary of War in the interest of the government should be prosecuted to a completion, and full information in respect to the situation and character of the land obtained, upon which your office may act intelligently for the interests of the public. I have, therefore, to direct that no application to contest be now admitted, but that you cause a special agent of the government to make thorough inquiry and examination into all the facts and take such steps to protect the public interests, as appear to be requisite and proper. The special agent should be directed to make full report to your office, in regard to the present value of the land, its situation and circumstances, and all material facts.

COAL ENTRY—AMENDMENT.

RICHARD GILL.

A cash entry of coal land may be amended after patent, where the entryman exercised reasonable diligence in obtaining the proper description of the land, and the mistake was caused by the indistinct character and partial obliteration of the marks at the section corners.

In such a case however the entryman will be required to re-convey the land improperly patented, and furnish satisfactory evidence of the non-alienation thereof.

Secretary Vilas to Commissioner Stockslager, March 2, 1889.

I have considered the appeal of Richard Gill, from your office decision of September 22, 1886, refusing to amend his coal cash entry—No. 20—for the W. ½ of the NW. ¼, and W. ½ of the SW. ¼, of Sec. 29, T. 4 S., R. 21 E., M., Salt Lake City land district, Utah Territory.

On June 18, 1886, the local office transmitted the entryman's application which was addressed to "The Commissioner of the General Land Office," and duly corroborated by two disinterested witnesses, in which he asked to be allowed to amend his coal cash entry No. 20, from the W. ½ NW. ¼, W. ½ SW. ¼ "Sec. 29," T. 4 S., R. 21 E., to the W. ½ NE. ¼,

and W. ½ SE. ¼ "Sec. 30," T. 4 S., R. 21 E., and as his reasons therefor, he alleges in substance as follows, viz:

That on February 7, 1881, he made coal cash entry No. 20 for the first described tract, and paid thereon the sum of $1600, and on September 6th of the same year, he received from the United States a patent therefor; that at the time he located said entry No. 20, there were no government posts to designate section corners on said land, or near to it, but that there were small corner stones set in the ground, nearly covered and without trenches, so that they could not be designated as to sections. That in making recent improvements on the coal land, and in making a full and regular survey thereof, he found that the tract he has had possession of so long, and which he believed to have entered is really the W. ½ of the SE. ¼, and W. ½ of the NE. ¼ of Sec. 30 in same township and range; that all of his improvements are on the W. ½ of the SE. ¼ and W. ½ of the NE. ¼ of Sec. 30 and not on Sec. 29; that the mistake was not made with any intent or for any purpose whatever, as there is no coal on Sec. 29; that he never claimed or held possession of section 29 as a coal mine, or worked on it to find coal, but that he at all times had possession of and performed work in extracting coal discovered on the designated portion of section 30; that he never made any transfer of the W. ½ NW. ¼, W. ½ SW. ¼, Sec. 29, or any portion thereof; that there is no adverse claim of record against either of said described tracts of land; that he is not in good financial circumstances and could not afford to meet such a serious loss should his application be refused.

Accompanying claimant's application is a certified search from the office of the recorder of Uintah County, Utah Territory, where said land is situate, proving that up to June 1, 1886, there was no record filed in his office showing that claimant had transferred or conveyed any portion of the land covered by his said coal entry No. 20.

You rejected the claimant's application because of the length of time elapsing from the date he filed his declaratory statement to the issuing of patent, and also because you deemed his general affidavit not satisfactorily corroborated.

The record in this case shows that claimant (under the provisions of the act of Congress approved March 3, 1873) on January 11, 1881, filed his coal land declaratory statement No. 453, for the tract which he now desires to relinquish.

In his verified declaratory statement he alleged "that he was in actual continuous possession of said tract from June 1, 1878, and had expended in developing coal mines, in labor and improvements, the sum of $200. The labor and improvements consisting of one tunnel, fifteen feet long, six feet wide and six feet high, and building a wagon road to the mine."

On February 7th, the date when he made actual purchase, he made and filed an affidavit in which he stated that up to that date he had ex-

pended in developing coal mines on said tract, in labor and improvements the sum of $500.

Section 2369, Revised Statutes provides:

In every case of a purchaser of public lands, at private sale, having entered at the land office, a tract different from that he intended to purchase, and being desirous of having the error in his entry corrected, he shall make his application for that purpose to the register of the land-office and if it appear from the testimony satisfactory to the register and receiver, that an error in the entry has been made, and that the same was occasioned by original incorrect marks made by the surveyor, or by the obliteration or change of the original marks and numbers at corners of the tract of land; or that it has in any otherwise arisen from mistake or error of the surveyor, or officers of the land-office, the register and receiver shall report the case, with the testimony, and their opinion thereon, to the Secretary of the Interior, who is authorized to direct that the purchaser is at liberty to withdraw the entry so erroneously made, and that the moneys which have been paid shall be applied in the purchase of other lands in the same district, or credited in the payment for other lands which have been purchased at the same office.

Section 2370, provides:

The provisions of the preceding section are declared to extend to all cases where patents have issued or may hereafter issue; upon condition, however, that the party concerned surrenders his patent to the Commissioner of the General Land Office, with a relinquishment of title thereon, executed in a form to be prescribed by the Secretary of the Interior.

By the said section 2370 the provisions of the preceding section were extended to all cases where patent has issued and it is afterwards discovered that a mistake was made in the description of the land intended to have been entered, where such mistake was occasioned by the causes mentioned in section 2369.

In this case Gill seems to have exercised reasonable care to ascertain the proper description of the land selected by him, and the mistake was occasioned by the indistinct and illegible character and partial obliteration of the marks at the section corners. This applicant obviously acting in good faith made valuable improvements on the land occupied by him and which he supposed he had entered and obtained patent for. It is true a considerable length of time elapsed between his entry and the date of his application to amend, yet this does not necessarily demand a refusal of his petition since there is no adverse claim to the land he is now asking for and in view of the further fact that he made his application as soon as he discovered the mistake.

After a careful consideration of this case, I am of the opinion that the relief asked for should be granted, provided the case is brought within the statute quoted. The decision appealed from is therefore reversed, and it is directed that the case be returned to the register and receiver to take such testimony as may be offered, and report the same, with their opinion thereon, as required by law. And if the facts which form the basis of this application be satisfactorily established to be such as the statute requires, then, upon a proper reconveyance by Gill to the government of all title to the land included in the patent heretofore issued to him under

said coal land entry, which reconveyance must be accompanied by satisfactory proof of non-alienation by him covering the date thereof, said entry be canceled as prayed, and patent issue for the land included in said amended entry.

PROCEEDINGS ON SPECIAL AGENT'S REPORT.

WILLIS E. SIMPSON ET AL.

There is no necessity for a hearing on a special agent's report where the facts as shown thereby are not controverted; but if the entry in such a case is held for cancellation, the claimant, or his assignee, is entitled to be heard before the Department on the record as made.

Secretary Noble to Commissioner Stockslager, March 9, 1889.

This is an application filed by the grantee and mortgagee of the entryman in the above named case, praying for the issuance of a writ of certiorari, commanding the Honorable Commissioner of the General Land Office to certify the record in the above stated case on appeal from the decision of your office, holding the cash entry of Willis E. Simpson for cancellation.

From this application it appears, that the cash entry of Willis E. Simpson was canceled by your office upon the report of a special agent, charging "that said entry was falsely made and for speculative purposes," from which action an appeal was taken, and which was transmitted to the Department, but was returned to your office under the General Instructions of July 6, 1886 (5 L. D., 149), with other cases where entries had been held for cancellation upon the report of special agents, and where appeals had been allowed therefrom. In the instructions above referred to, the Department directed that where entries had been held for cancellation upon the report of a special agent, and the parties notified that they will be allowed the right of appeal, you were directed to order hearings, in accordance with the amended circular of May 24, 1886, instead of transmitting the cases on appeal to the Department.

But the applicant in this case states, that the appeal does not controvert any facts in the report of the special agent against said entry, or any other fact of record; from which it may reasonably be inferred that he elects to stand upon the record as made, and admits the facts stated in the special agent's report. In such a case there would be no necessity for a hearing, and the entryman or his assignee would be entitled to a decision of the Department upon the record as made.

The application is granted, and you are hereby directed to transmit the papers to the Department.

RAILROAD GRANT—INDEMNITY SELECTION.

ATLANTIC AND PACIFIC R. R. CO.

Indemnity selections of unsurveyed lands can not be approved.

Secretary Vilas to Commissioner Stockslager, February 25, 1889.

I have considered the case of the Atlantic and Pacific R. R. Co., on appeal from your office decision of October 3, 1887, rejecting the selection of said railroad company for 10,240 acres of land as indemnity, in Las Cruces, New Mexico district.

The said selections are contained in a list presented by J. A. Williamson, land commissioner of said railroad and is alleged to be 2560 acres in sections 3, 5, 7, 9, 19, and 31, in T. 2, R. 3, and odd numbered sections 13 to 35, inclusive in T. 1, R. 4, and that the basis of these selections is a loss of 10,240 acres within the granted limits on account of a grant to the town of Caboletta in township 12 N., R. 7 W., Territory of New Mexico.

Said selections were rejected by the local officers for the reason that they are unsurveyed and can not be specifically listed as indemnity it being impossible to determine what lands are mineral and set apart by the government, what definite tracts are claimed by actual settlers prior to the grant to the railroad company, nor can the boundaries of private land grants be sufficiently determined to enable them to correctly certify such selections.

A second reason assigned by the local officers was that patents can not be granted to unsurveyed lands and as the certificate of the register and receiver is the basis of a patent in such cases, such action on the part of the local officers would be *ultra vires*.

You sustained the decision of the local officers and in this I concur. Your said decision is accordingly affirmed.

SCHOOL INDEMNITY—FRACTIONAL TOWNSHIP.

STATE OF CALIFORNIA.

If the State has received full compensation on account of a fractional township, it will not be allowed to make a further selection therefor on the ground that in the original selection the basis was improperly described as a part of sections sixteen and thirty-six.

This rule is alike applicable whether such selections were made prior to or since the act of March 1, 1877.

Secretary Vilas to Commissioner Stockslager, February 25, 1889.

By letter of April 14, 1888, the State of California transmitted to your office a list of indemnity school selections of the following tracts, to wit: . . . . . to compensate deficiencies for six hundred and forty

acres in township 39 N., range 17 E., and the following selections, to wit: . . . . . to compensate deficiencies for three hundred and twenty acres in T. 42 N., R. 16 E., Susanville district, California, under the act of February 26, 1859.

You rejected said selections, upon the ground that there was no basis for the same, as selections to compensate deficiencies in said townships had been made and approved to the State prior to the last selection.

It appears that the quantity of land to which the State was entitled, to compensate deficiencies for said fractional townships, had been heretofore certified to the State as indemnity for sections sixteen and thirty-six of said townships, and that the sections named as a basis did not exist. The State, therefore, insists, that, although the State has heretofore received the full quantity of land to which it would be entitled for said townships, yet, as the basis was improperly described, it should now be allowed to select that quantity of land to compensate deficiencies for fractional townships, under the act of February 26, 1859.

The Department, in the case of James Lynch (7 L. D., 580), decided December 29, 1888, held that—

This is a mere technical objection or irregularity, and does not defeat the right of the State's selection, if it is shown that she is entitled to that quantity of land, under the act of February 26, 1859, to compensate deficiencies where sections sixteen and thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional or from any natural cause whatever. Her right to lieu lands in said township did not rest upon any prior appropriation or disposition of either section sixteen or thirty-six, but upon the ground that no such sections existed. Therefore, if it be shown that she had not exhausted her selections as to said township, and the selection is in all other respects proper and legal, it is a valid selection and should not be canceled, because the basis is improperly described as a portion of section thirty-six of said township.

This rule is alike applicable to all cases, whether said selections were made prior to or since the act of March 1, 1877.

Your decision is affirmed.

SWAMP GRANT—BOIS BLANC ISLAND.

STATE OF MICHIGAN.

Lands covered by a temporary reservation, for the benefit of the government, at the date of the swamp grant, are not excepted therefrom, but pass thereunder as of the date of the grant, on being relieved from such reservation.

Secretary Vilas to Commissioner Stockslager, February 25, 1889.

I have considered the recommendation contained in the letter of your office of May 19, last, that the Attorney General be requested to institute proceedings to set aside and cancel the patent issued to the State of Michigan for certain swamp lands, being part of old Fort Mackinaw wood reservation on Bois Blanc Island, in said State.

By executive order of November 8, 1827, a certain portion of Bois Blanc Island was reserved from sale for the purpose of supplying fuel for the garrison at Fort Mackinaw.

The land had previously been surveyed, showing a portion of the sub-divisions to be swamp and overflowed lands.

This was the condition of these lands at the date of the act of September 28, 1850 (9 Stat., 519), granting to the State of Michigan the swamp and overflowed lands within its boundaries.

This reservation continued in force until the act of Congress of July 5, 1884, providing for the disposal of all military reservations, which, in the opinion of the President had become useless for military purposes.

The second section of this act provided that:

> The proceeds of the military reservation lands sold on Bois Blanc Island, near to Fort Mackinaw military reservation, shall be set apart as a separate fund for the improvement of the National Park on the Island of Mackinaw, Michigan, under the direction of the Secretary of War.

This reservation was placed under the control of the Secretary of the Interior July 22, 1884, for disposal under the provisions of said act, and on September 30, 1884, the governor of Michigan transmitted a list of lands within said reservation shown by the survey to be swamp and overflowed, requesting that they be conveyed to the State under its grant.

Said lands being approved and certified to the State, were, upon application of the governor patented to the State March 10, 1885.

There seems to be no question as to the swampy character and condition of these lands. The suit is recommended upon the theory that the grant of September 28, 1850, is a grant of public lands only, and hence it did not embrace lands reserved for any purpose whatever.

The act of September 28, 1850, granted to the State of Arkansas and other States within their respective boundaries, "the whole of those swamp and overflowed lands made unfit thereby for cultivation, *which shall remain unsold at the passage of* the act."

The grant is not a grant of public lands only in the sense as defined by the supreme court in the case of Newhall *v.* Sanger, to wit: of such lands as were then "subject to sale or other disposal under general laws," but a grant of the whole of those swamp and overflowed lands remaining unsold at the passage of the act. This exception was unnecessary because lands previously sold could not be granted; but is significant in determining what lands were granted.

The fee to the lands in question, as well as the use and occupation, was in the United States at the date of the grant of September 28, 1850. They were reserved from sale and set apart for the purpose of supplying fuel to the garrison at Fort Mackinaw, and for no other purpose, and this special temporary use might be terminated by the government at any time. In fact the consumption of the supply of fuel on the reservation would of itself have terminated the object of the reservation, although it would not have released it. These lands were, therefore,

in a condition to be granted, and the question presented is, was this reservation of such a character that the lands had been practically disposed of, or was it the intention of Congress that lands embraced in a reservation of this character should pass by the grant.

Congress may grant any and all lands the fee to which is in the United States, unless such lands have been sold or in such manner disposed of, that another disposition of those lands would be incompatible with the obligation of the government to others. The grant in this case was "a present grant vesting in the State *proprio vigore* from the day of its date, title to all the land of the particular description therein designated, wanting nothing but the definition of the boundaries to make it perfect," Wright *v.* Roseberry (121 U. S., 488), and authorities therein cited.

Although the lands may at the date of the grant be temporarily reserved, or set apart for the use of the government, or for other temporary purposes, not amounting to a disposal of the land, it will not prevent such lands from being subject to the operation of the grant, and when disencumbered, the right attaches as of the date of the grant. Therefore the sole question to be determined is, was the reservation of such a character as to amount to a disposal of the land.

With reference to swamp lands temporarily reserved for the use of the government, or other purposes at the date of the grant not amounting to a disposal of the land, this grant should receive the same construction given to the grant for school purposes.

The school grant is a grant of the sixteenth and thirty-sixth section in every township, which attaches specifically when designated by survey, if not previously sold *or otherwise disposed of.* But the fact that a sixteenth and thirty-sixth section at the date of the grant may have been in reservation for the use of the government, or for other temporary purposes not amounting to an actual disposal of the land, will not prevent such section from being subject to the operation of the grant, if disencumbered at the date of survey.

The question as to the right of a State to the specific school section embraced within a reservation at the date of the grant, came before the supreme court in the case of Ham *v.* the State of Missouri, (18 How., 126). In this case the land was reserved under the act of Congress of March 3, 1811, reserving from sale all lands embraced within the limits of a private land claim, filed in time and in accordance with law until the decision of Congress upon such claim.

An application was presented to the Land Commissioners for confirmation of this claim in due time and in accordance with law, and was rejected by the Commissioners in their report to Congress.

The act of March 1820, passed while this claim was pending before Congress—and therefore in reservation—granted to the State of Missouri, the sixteenth section of every township, and equivalent land where such section had been sold or otherwise disposed of.

Subsequently Congress by act of May 24, 1828, confirmed to Valle and his associates, the tract for which confirmation was prayed—according to a survey made in 1806—providing that said confirmation thus granted, shall only extend to a relinquishment of title on the part of the United States, and shall not prejudice the rights of third parties, nor any title heretofore derived from the United States.

The proceedings under review were founded upon an indictment in a circuit court of the State of Missouri, against plaintiff in error, for waste committed on a sixteenth section belonging to the inhabitants of the township situated within the limits of the confirmation referred to.

It was insisted upon by the defendant, that the land in question being within the limits of the survey of 1806, and the confirmation by Congress, was never public land subject to donation for the use of schools; that the reservation of section sixteen for the use of schools, could only refer to public lands proper, and could not attach to lands embraced in private claims which had previous to, and at the time of such donation been claimed by individuals, and reserved by Congress to satisfy those claims. But the court construed the proviso reserving such lands from sale as neither declaring or importing a final and permanent divestiture or any divestiture whatever of the title of the United States, but merely a temporary arrangement for the purpose of investigation, leaving the title in the government.

Then speaking of the grant to the State of equivalent lands, where section sixteen had been sold or otherwise disposed of, the court say:

Sale, necessarily signifying a legal sale by competent authority, is a disposition final and irrevocable of the land. The phrase "or otherwise disposed of" must signify some disposition of the property *equally efficient*, and equally incompatible with any right in the State present or potential, as deducible from the act of 1820, and the ordinance of the same year.

The court therefore held that the reservation from sale of the lands within the limits of the private land claim, did not prevent the title of the State from attaching to the sixteenth section specifically.

To the same effect is the ruling in the cases of Cooper *v.* Roberts (18 How., 173); Beecher *v.* Wetherby (95 U. S., 517); Buttz *v.* Northern Pacific R. R. (119 U. S., 55).

In the case of Cooper *v.* Roberts the school section in controversy was designated by survey in 1847. At that time it was under lease from the government for the purpose of mining for lead and other ores.

The question was also raised whether the act of 1847 providing for the sale of lands in this region was not an appropriation and disposal of all mineral lands without reference to the school reservation contained in the second section of the act.

In 1850, Congress abrogated the clause of the act of 1847 distinguishing the mineral from other public lands and placed them all alike under the ordinary system for the disposal of the public domain reserving to lessees and occupants the privileges conferred by the act of 1847.

Two questions were presented in the case, (1) Whether the act of 1847 created a legal impediment to the operation of the school grant either by the reservation of the land for public uses, or by its appropriation to superior claims, and (2)—Whether the lease of the lands which existed at the time the section was designated operated as a like impediment.

The township plat was filed in the summer of 1847, and hence the grant attached specifically at that date if the section had not been sold *or otherwise* disposed of.

The lease (as observed by the court) expired by "efflux of time" in September 1848. Upon these facts the court said,

Hence, had there been a legal impediment to the execution of the compact with Michigan, erected either by the second section of the act of 1847, which separated for some purposes the mineral from other public lands, or by the privileges granted to lessees or their assigns, in the 3rd section of that act, it was removed by the repealing clause of the act of 1850, and the non-compliance with the conditions on which the privileges depended. The section number 16, was at that date, disencumbered, and subject to the operation of the compact, whatever might have been its pre-existing state.

The principle broadly and distinctly ruled by the court in this case, is, that the 16th section is subject to the operation of the grant, although in reservation, if disencumbered before the compact has been fulfilled by the assignment of equivalent land; or in other words, that while the grant is a grant in *presenti* attaching to the specific lands which have not at the date of the survey been sold or disposed of, it is nevertheless subject to a reservation of such lands, so long as such reservation shall continue.

In the case of Beecher *v.* Wetherby, the Indian title was extinguished prior to the survey of the township, and by the same act the Indians were permitted to remain on said ceded lands for two years and until the President should notify them that the lands were wanted. While the land was so reserved the 16th section was designated by survey, to wit: in June, 1854, and hence the grant immediately attached. The Indians manifesting unwillingness to remove from their reservation the United States, by treaty, ceded to the Indians these lands for a permanent home, the treaty taking effect upon its ratification in August, 1854.

In 1871, Congress authorized a sale of these lands and directed that the proceeds be applied to the sole and exclusive use and benefit of this tribe of Indians, without exception or reservation. But the court said that the direction to sell said lands for the benefit of the Stockbridge Munsee tribes did not embrace the 16th section, because "it will not be supposed that Congress intended to authorize a sale of land which it had previously disposed of."

Speaking of the rights of the State under the grant the court say:

In the construction of grants supposed to embrace lands in the occupation of Indians, questions have arisen whether Congress intended to transfer the fee, or otherwise; but the power of the United States to make such transfer has in no instance

been denied. In the present case, there can hardly be a doubt that Congress intended to vest in the State the fee to section sixteen in every township, subject, it is true, as in all other cases of grants of public lands, to the existing occupancy of the Indians so long as that occupancy should continue.

Now the court clearly ruled that the temporary reservation of the 16th section did not take it out of the operation of the grant, and that the right of possession passed to the State immediately upon being disencumbered. Furthermore that the direction to apply the proceeds of the sale of the reservation to a particular object did not include the 16th section which had been previously disposed of.

The question before the court in the case of Buttz *v.* Northern Pacific R. R. Co. was whether lands to which the Indian title had not been extinguished (and hence in reservation) passed by the grant to the company. The court held that the grant to the road operated to convey the fee in said lands to the company subject to the right of occupancy by the Indians.

The grant contained a stipulation that the government would extinguish the Indian title as rapidly as might be "consistent with public policy, and the welfare of the Indians." The land was therefore appropriated and reserved for the use of the Indians until public policy and the general welfare of the Indians demanded its extinguishment. How long that would or should continue no one could tell. But yet the grant passed the fee to the company in such lands upon the filing of map of definite location, "subject to that condition so far as the Indian title was concerned."

It is therefore not inconsistent with the theory of a grant *in presenti* that the full free and present enjoyment of rights under the grant should be subject to a contingency.

The principle announced in the cases cited as controlling the grant for school purposes, is alike applicable to the grant of September 28, 1850, granting to the State all of the swamp and overflowed land which shall remain unsold at the date of the grant, which included all land of the character specified, owned by the United States at the date of the act, although they may at that time be reserved from sale, or set apart for some temporary use of the government.

So therefore the swamp land grant is a grant *in presenti* vesting in the State the fee simple to all lands of that description at the date of the passage of the act, subject to the use of the government or other uses for which a reservation is made, so long as that reservation shall continue.

In the matter of the application of the State of Illinois for certification under the swamp land grant, of certain even sections within the six mile limit of the Mobile and Chicago Railroad, Secretary McClellan held that the State had no right to such sections, because they had been reserved for the special purpose of reimbursing the government for lands granted to the road. It was not because the lands were simply in reservation that the claim of the road was rejected, but because the

reservation was of such character as amounted to a disposition of the land for other purposes.

It was the theory of the government, in making grants to aid in the construction of roads, that the land along the route of road would be enhanced in value by the building of the road; and alternate sections were reserved to be disposed of for the benefit of the government, at not less than the double minimum price, to reimburse the government for lands granted to the road. Any other disposition of such lands would be incompatible with the policy of the government in respect to these grants.

It is not intended to hold in this opinion that the swamp grant attaches to any reservation that may amount to a practical disposition of the land, but it is sufficient for the purposes of this case to hold that the wood reservation on Bois Blanc Island, being for mere temporary use for the purpose of supplying the garrison at Fort Mackinaw with fuel, the object of which would terminate with the consumption of the fuel, was not such a sale or disposition of the land as to except it from the operation of the grant.

I am, upon the whole, unable to concur in the recommendation for suit.

CIRCULAR—ACT OF MARCH 2, 1889.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 8, 1889.

Registers and Receivers of United States Land Offices:

GENTLEMEN: Your attention is called to the provisions of an act of Congress entitled "An act to withdraw certain public lands from private entry and for other purposes," approved March 2, 1889, a copy of which is hereto attached, containing eight sections.

The first section of said act provides that from and after its passage "no public lands of the United States, except those in the State of Missouri, shall be subject to private entry." This relates to the private sale or entry of "offered" lands under sections 2354 and 2357, U. S. R. S. See pages 4 to 8, 90 and 91, general circular, January 1, 1889. No sale or location, at private entry, will be admissible, under said first section, except in Missouri, but disposals of this class of "offered" lands under the pre-emption, homestead, or other laws, are not otherwise affected thereby.

The second section of the act allows in general terms any party who has heretofore made a homestead entry and who has not perfected title thereunder to make another homestead entry, while denying such right to any party who perfects title to lands under the pre-emption or homestead laws already initiated, and specifically provides that parties who have existing pre-emption rights may transmute them to homestead

See 9 L.D. 433

entries and perfect title to the lands under the homestead laws, although they may have heretofore had the benefit thereof.

Therefore you will not hereafter reject a homestead application on the ground that the applicant can not take the prescribed oath that he has not previously made such an entry, but he will be required to show by affidavit, designating the entry formerly made by description of the land, number and date of entry, or other sufficient data, that it was made prior to the date of said act, and also that he has not since perfected a pre-emption or homestead title initiated prior to that date. In cases when the former entry was made subsequent to the date of the act, the rule remains unchanged, as given on page 17 of the general circular of January 1, 1889.

The third section provides for permission to be granted in certain cases by the register and receiver of the proper district land office for parties claiming public land as settlers under existing laws to leave and be absent from the land settled upon for a specified period, not to exceed one year at any one time. The applicant for such permission will be required to submit testimony to consist of his own affidavit, corroborated by the affidavits of disinterested witnesses, executed before the register or receiver or some officer in the land district using a seal and authorized to administer oaths, setting forth in detail the facts on which he relies to support his application, and which must be sufficient to satisfy the register and receiver, who are enjoined to exercise their best and most careful judgment in the matter, that he is unable by reason of a total or partial destruction or failure of crops, sickness, or other unavoidable casualty to secure a support for himself or those dependent upon him upon the land settled upon. In case a leave of absence is granted the register and receiver will enter such action on their records, indicating the period for which granted, and promptly report the fact to this office, transmitting the testimony on which their action is based. In case of refusal the applicant will be allowed the right of appeal on the usual conditions.

By reference to section 4 you will observe that it simply fixes at $1.25 per acre the price of certain lands within the limits of railroad grants which had been increased by law to the double minimum price.

The 5th and 6th sections both provide that parties who made homestead entries prior to the date of the act, of less than 160 acres, shall have the right to make an additional entry of a quantity sufficient with the original entry to complete the maximum quantity of 160 acres, without affecting existing rights of soldiers—see pages 26, 27 of circular of January 1, 1889—or of settlers within railroad limits—see pages 21, 22, and 23 *idem*.

1. The fifth section provides for an additional entry of land which shall be contiguous to the land embraced in the orginial entry, for which the final proof of residence and cultivation made on the original entry shall be sufficient, but of which no party shall have the benefit who does not,

at the date of his application therefor, own and occupy the land covered by his original entry, and which shall not be permitted, or if permitted, shall be canceled, if the original entry should fail, for any reason, prior to patent, or should appear to be illegal or fraudulent. Applicants for additional entries under this section will be required to produce evidence that they own and occupy the land embraced in their original entries, to be properly described by legal subdivisions and by reference to the number and date of the original entry, and the evidence to consist of their own affidavits, corroborated by the affidavits of disinterested witnesses, executed before the register or receiver or some officer in the land district using a seal and authorized to administer oaths. In addition to this, the proper homestead application and affidavit must be filed, which may be on the forms prescribed under the act of March 3, 1879 (4–018 and 4–086), properly modified so as to show the section and act under which application is made, and the affidavit modified by striking out the portion that refers to military services, which is not required under this act.

2. The 6th section admits of an additional entry of land, which need not be contiguous to the land embraced in the original, by parties who have complied with the conditions of the law with regard to the original entry, and have had the final papers issued therefor, and with the condition of residence and cultivation of the land embraced in the additional entry, to be made and proved as in ordinary homestead entries.

Application and affidavit will be required in entries under this section (6) and the same forms (4–018 and 4–086) may be used as above stated in reference to entries under the 5th section.

In additional entries under both sections the usual homestead fees and commissions will be required to be paid, and receipts will be issued therefor. Notes will be made on the entry papers and opposite the entries on the monthly abstracts referring to the section and the act under which allowed.

The 7th section of the act prescribes a rule of construction for the act of March 3, 1879, in accordance with which you will receive and properly act upon any evidence which parties desiring to avail themselves thereof may see proper to submit, showing that accident or unavoidable delays have prevented them from making proof on the date specified in the public notice, in cases in which the proof was taken within ten days following that date. But this will not be necessary when continuances are made, as provided for in subdivision 13, on pages 43 and 44, of circular of January 1, 1889, to which you are referred.

The 8th section does not appear to call for remark in this communication.

Very respectfully,

S. M. STOCKSLAGER,
Commissioner.

Approved:

JOHN W. NOBLE,
Secretary.

[PUBLIC—No. 124.]

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

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the passage of this act no public lands of the United States, except those in the State of Missouri, shall be subject to private entry.

SEC. 2. That any person who has not heretofore perfected title to a tract of land of which he has made entry under the homestead law, may make a homestead entry of not exceeding one-quarter section of public land subject to such entry, such previous filing or entry to the contrary notwithstanding; but this right shall not apply to persons who perfect title to lands under the pre-emption or homestead laws already initiated: *Provided,* That all pre-emption settlers upon the public lands whose claims have been initiated prior to the passage of this act may change such entries to homestead entries and proceed to perfect their titles to their respective claims under the homestead law notwithstanding they may have heretofore had the benefit of such law, but such settlers who perfect title to such claims under the homestead law shall not thereafter be entitled to enter other lands under the pre-emption or homestead laws of the United States.

SEC. 3. That whenever it shall be made to appear to the register and receiver of any public land office, under such regulations as the Secretary of the Interior may prescribe, that any settler upon the public domain under existing law is unable by reason of a total or partial destruction or failure of crops, sickness, or other unavoidable casualty, to secure a support for himself, herself, or those dependent upon him or her upon the lands settled upon, then such register and receiver may grant to such a settler a leave of absence from the claim upon which he or she has filed for a period not exceeding one year at any one time, and such settler so granted leave of absence shall forfeit no rights by reason of such absence: *Provided,* That the time of such actual absence shall not be deducted from the actual residence required by law.

SEC. 4. That the price of all sections and parts of sections of the public lands within the limits of the portions of the several grants of lands to aid in the construction of railroads which have been heretofore and which may hereafter be forfeited, which were by the act making such grants or have since been increased to the double minimum price, and also of all lands within the limits of any such railroad grant, but not embraced in such grant, lying adjacent to and coterminous with the portions of the line of any such railroad which shall not be completed at the date of this act, is hereby fixed at one dollar and twenty-five cents per acre.

SEC. 5. That any homestead settler who has heretofore entered less than one-quarter section of land may enter other and additional land lying contiguous to the original entry which shall not, with the land first entered and occupied, exceed in the aggregate one hundred and sixty acres, without proof of residence upon and cultivation of the additional entry; and if final proof of settlement and cultivation has been made for the original entry when the additional entry is made, then the patent shall issue without further proof: *Provided,* That this section shall not apply to or for the benefit of any person who at the date of making application for entry hereunder does not own and occupy the lands covered by his original entry: *And provided,* That if the original entry should fail for any reason prior to patent, or should appear to be illegal or fraudulent, the additional entry shall not be permitted, or, if having been initiated, shall be canceled.

SEC. 6. That every person entitled, under the provisions of the homestead laws, to enter a homestead, who has heretofore complied with or who shall hereafter comply with the conditions of said laws, and who shall have made his final proof thereunder for a quantity of land less than one hundred and sixty acres and received the receiver's final receipt therefor, shall be entitled under said laws to enter as a personal right, and not assignable, by legal subdivisions of the public lands of the United States subject to homestead entry, so much additional land as added to the quantity previously

so entered by him shall not exceed one hundred and sixty acres: *Provided*, That in no case shall patent issue for the land covered by such additional entry until the person making such additional entry shall have actually and in conformity with the homestead laws resided upon and cultivated the lands so additionally entered, and otherwise fully complied with such laws: *Provided, also*, That this section shall not be construed as affecting any rights as to location of soldiers' certificates heretofore issued under section two thousand three hundred and six of the Revised Statutes.

SEC. 7. That the "act to provide additional regulations for homestead and pre-emption entries of public lands," approved March third, eighteen hundred and seventy-nine, shall not be construed to forbid the taking of testimony for final proof within ten days following the day advertised as upon which such final proof shall be made in cases where accident or unavoidable delays have prevented the applicant or witnesses from making such proof on the date specified.

SEC. 8. That nothing in this act shall be construed as suspending, repealing, or in any way rendering inoperative the provisions of the act entitled, "An act to provide for the disposal of abandoned and useless military reservations," approved July fifth, eighteen hundred and eighty-four.

Approved, March 2, 1889.

RAILROAD GRANT—ACTS OF APRIL 21, 1876 AND MARCH 3, 1887.

KIMBERLAND *v.* NORTHERN PACIFIC R. R. CO.

A valid pre-emption claim initiated before notice of withdrawal on general route was received at the local office, is sufficient, under the act of April 21, 1876, to except the land covered thereby from the operation of said withdrawal.

Under the act of March 3, 1887, it is the duty of the Secretary of the Interior to re-adjudicate cases wherever it appears that the pre-emption or homestead entry of a *bona fide* settler has been erroneously canceled on account of a railroad grant, and the plea of *res judicata* cannot be interposed to relieve the company as against such action.

Where part of an entry has thus been erroneously canceled, it should be re-instated to the extent of such cancellation, and a patent issued thereon, if the settler has shown due compliance with the law.

Land covered by the *bona fide* settlement of a pre-emptor, prior to the filing of the map of general route, is not enhanced in price as against the pre-emptor.

Secretary Vilas to Commissioner Stockslager, February 25, 1889.

On April 20, 1871, Lyonell J. Kimberland filed his pre-emption declaratory statement No. 1670, for the S. ½ of the SE. ¼ of Sec. 17, and the N. ½ of the NE. ¼ of Sec. 20, T. 4 N., R. 16 E., Vancouver land district, Washington Territory, alleging settlement October 1, 1870. On July 1, 1871, he submitted his proof, which being duly approved as in all respects satisfactory, he located military bounty land warrant No. 72,621, and thereupon final entry certificate was issued to him.

The tract in the odd numbered section lies within the primary limits of the grant to the Northern Pacific Railroad company, of July 2, 1864 (13 Stat., 365), on its proposed main line of road from Wallula Junction to Vancouver in Washington Territory, as shown by the company's map of general route filed August 13, 1870. The road between the two points named has never been definitely located.

Said tract is also within the indemnity limits of the branch line of said company's road, as constructed, and was selected by the com-

pany for indemnity purposes, May 18, 1885. Patent for the same has not been issued, nor has the selection aforesaid ever been approved.

On December 6, 1873, your office suspended Kimberland's entry because of conflict with the withdrawal of August 13, 1870, on said map of general route of the main line, and upon report of the local officers (by letter dated February 24, 1874) that Kimberland had elected to have his entry canceled as to the conflict, said *location* was, on April 17, 1874, canceled by your office, with directions that he be allowed to substitute "cash" for the tract in the even section.

On June 4, 1874, one Thomas Johnson was permitted by the local officers to make homestead entry for the tract in the even numbered section.

These facts being brought to the knowledge of Kimberland, he at once applied to have his claim re-instated and placed in the same condition as before interfered with by Johnson, and submitted, in support thereof, certain affidavits showing that he actually settled on the land in July, 1866, instead of October, 1870, as alleged in his said declaratory statement, and that in March, 1869, he employed one A. H. Simons, an acting deputy surveyor, to make out and file for him a homestead application for said land; that he paid Simons $16, demanded by him as the land office fees, and thereafter continued to reside upon and cultivate the land, supposing he was completing his homestead residence thereon, until sometime in the year 1870, when he received information that his application had never been sent to the land office and that he had consequently no entry of record for the tract, whereupon, through the assistance of said Thomas Johnson he made out and filed his said pre-emption declaratory statement that but for the breach of trust of said Simons he would have made entry for the entire tract as a homestead long prior to August 13, 1870. Kimberland further states that said Johnson had no authority from him, directly or indirectly, to have his pre-emption entry, or any part thereof, canceled, or to act for him in any manner, and that Johnson's actions in the premises were fraudulent.

These affidavits were forwarded to your office by letter of August 18, 1874, in which the local officers also report that their letter of February 24, 1874, stating that Kimberland had elected to have his entry canceled, was based entirely upon statements made to them by said Thomas Johnson.

The matters involved appear to have been fully considered by your office, and on December 30, 1874, your predecessor, Commissioner Burdett, held that Kimberland is—

Equitably entitled to the whole tract, his good faith as a pre-emptor being fully established, and the improvements upon the land being extensive and valuable. Having failed, however, to appropriate the claim by filing or entry, so as to anticipate the reserved rights of the company, and having accepted the decision of this office adverse to his rights, he can not legally hold the part in the odd section. He is, how ever, entitled to the tract in the even section, and if he so desires, the warrant will be applied to that portion, and the cancellation will be restricted to the odd section.

Johnson's entry was thereupon held for cancellation.

On appeal by Johnson, my predecessor, Secretary Chandler, on November 16, 1875, affirmed the said decision of your office, and in accordance therewith, at the request of Kimberland, said warrant was applied to the eighty acre tract in the even section, and patent issued thereon August 15, 1876.

On December 24, 1887, application was made by Kimberland through his attorney, John Mullan, esq., under the provisions of the act of March 3, 1887 (24 Stat., 550), that his claim to the tract in the odd section be re-instated, and that patent issue to him thereon.

I am now in receipt of your office letter of January 7, 1888, in which, after setting forth the facts substantially as hereinbefore stated, you further report that the withdrawal on the map of general route of the main line of the company's road, filed August 13, 1870, was not received at the local office at Vancouver until October 17, 1870, and that Kimberland's filing and proof show settlement October 1, 1870. You thereupon express the opinion that without considering the affidavits filed by Kimberland, showing settlement in 1868, his claim, as evidenced by his filing and proof, excepted the tract from the withdrawal of August 13, 1870, and that his entry was therefore erroneously canceled. Citing Northern Pacific Railroad Company *v.* Burns (6 L. D., 21). Whereupon you report the matter to this Department for re-adjudication under section three of said act of March 3, 1887, having given notice thereof to the parties in interest.

The record further shows that on August 15, 1871, Kimberland sold and conveyed, by deed of general warranty, the land embraced in his original entry, to one J. J. Golden, for the price of $1,500; that since the purchase by Golden, the town of Goldendale has been located and built on the land, and is now the county-seat of Klikitat County, Washington Territory, with a court house and jail built by the county in 1879, and a population of about seven hundred inhabitants, to many of whom and to other parties lots in said town have been sold and conveyed by said Golden. The town has been incorporated and has a mayor and a regular city government.

It also appears that the tract as originally entered was first settled upon and occupied as early as 1859, by one Hanson, who was succeeded in 1860, by one Walters, that Walters was succeeded by one Stanley, who was in turn succeeded by Kimberland in 1868. It is thus shown that the entire tract has been continuously occupied and claimed by settlers ever since 1859.

With his application Kimberland files the affidavits of himself and several other persons showing that he has not located another claim or made an entry in lieu of the one he claims to have been erroneously canceled, and that he did not voluntarily abandon his said original entry.

The case has been elaborately argued by counsel for both Kimberland and the company.

By the first section of the act of April 21, 1876, (19 Stat., 35), it is provided:

That all pre-emption and homestead entries in compliance with any law of the United States, of the public lands, made in good faith, by actual settlers, upon tracts of land of not more than one hundred and sixty acres each, within the limits of any land grant, prior to the time when notice of the withdrawal of the lands embraced in such grant was received at the local land office of the district in which such lands are situated . . . . and when the pre-emption and homestead laws have been complied with and proper proofs thereof have been made by the parties holding such tracts or parcels, they shall be confirmed, and patents for the same shall issue to the parties entitled thereto.

The third section of said act of March 3, 1887, entitled "An Act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes," provides:

That if, in the adjustment of said grants, it shall appear that the homestead or pre-emption entry of any *bona fide* settler has been erroneously canceled on account of any railroad grant or the withdrawal of public lands from the market, such settler upon application shall be re-instated in all his rights and allowed to perfect his entry by complying with the public land laws: *Provided*, That he has not located another claim or made an entry in lieu of the one so erroneously canceled: *And provided also*, That he did not voluntarily abandon said original entry.

The claim of Kimberland, to the land here in question, was, as shown by his pre-emption filing and proof, in existence prior to the receipt at the local land office at Vancouver, of notice of the withdrawal on map of general route of the company's road, filed August 13, 1870, and was therefore sufficient, under the act of April 21, 1876, (without considering specially in this connection his allegation and proof of settlement in 1868, subsequently submitted as shown,) to except the land from the operation of said withdrawal. (Jacobs *v.* Northern Pacific Railroad Company (6 L. D., 223), and cases there cited). It accordingly follows that Kimberland's entry was, as touching the tract in the odd section, erroneously canceled on account of the withdrawal aforesaid.

It is contended by counsel for the company that the decision of November 18, 1875, being a final adjustment by this Department of the controversy between the company and Kimberland, touching the tract now in question, the principle of *res adjudicata* must be applied as an effectual bar to any further consideration of the question then decided.

I can not agree, especially in view of the provisions of the act under which Kimberland's present application is made, that this contention is sound. In the circular of departmental instructions issued November 22, 1887, relative to the adjustment of railroad grants under the act of March, 1887, it was said by my predecessor, Secretary Lamar, in construing said act:

That a final decision of a former or the present Secretary, is not only no longer a bar to the further consideration of the question decided, but it is made the duty of the Secretary to re-adjudicate the case, notwithstanding the former decision, wherever it appears that the pre-emption or homestead entry of a *bona fide* settler has been erroneously canceled on account of any railroad grant or withdrawal of public lands from market.

It has, moreover, been held that the final rejection by the Department of a claim for a tract of land, preferred under a specific statute does not preclude a subsequent application by the same person, for the same land under a different statute. Blodgett *v.* Central Pacific Railroad Company (6 L. D., 309); Elwell *v.* Northern Pacific Railroad Company (5 L. D., 566).

In the case at bar, Kimberland's good faith in his settlement on the land is abundantly shown, and it now appearing that his entry to the extent that it embraced the eighty acre tract in the odd section, "has been erroneously canceled" on account of said withdrawal of August 13, 1870, and his present application being accompanied by proofs, fully meeting the requirements of the provisos of said third section, his claim comes clearly within the provisions of the act, and the principle of *res adjudicata* can not be interposed to relieve the company against the application thereof, in accordance with its manifest intent and meaning.

Kimberland's application, in view of the foregoing, must be allowed. His entry, to the extent that the same was canceled, should therefore be re-instated, and as his proofs submitted and the military bounty land warrant as originally located, cover the entire tract of one hundred and sixty acres, patent should issue to him for the eighty acres in the odd section not included in the patent heretofore issued, without further payment being required. It being satisfactorily shown that his rights under his settlement were acquired, in reference to the whole tract, as early as 1868, more than two years before the general route of the company's road was fixed, and, therefore, before the lands along the line thereof were affected by the grant to the company, the tract in the even section was not raised in price by the operation of the grant, as against the settlement rights of Kimberland acquired as aforesaid, and the local officers were clearly right in the first instance, in allowing him to cover the whole tract at the minimum rate of one dollar and twenty-five cents per acre.

I have therefore to direct that patent issue to him accordingly. The selection of the tract by the railroad company for indemnity purposes must be canceled.

HOMESTEAD ENTRY—REPAYMENT.

LYDIA KELLEY.

Repayment will not be allowed where an entry is canceled on account of its fraudulent character.

Secretary Vilas to Commissioner Stockslager, February 25, 1889.

I have examined the case of Lydia Kelley, on appeal from your office decision of January 23, 1888, refusing repayment of the fees and commissions on her homestead entry for the SW. ¼ of Sec. 13, T. 99, R. 60 W., Yankton, Dakota.

The record shows that Kelley made homestead entry of above tract October 22, 1881, made proof and received final certificate November 29, 1886.

The proof not being satisfactory to your office, a call was made upon the homesteader to furnish a duly corroborated affidavit, testifying to certain facts referred to in said call.

Upon an examination of the facts contained in said affidavit, your office, on June 16, 1887, rendered a decision, which concluded as follows:

In my opinion Mrs. Kelly has not acted in good faith, and never had any intention of settling upon the land permanently, and the meager character of the improvements, and the utter absence of all farm machinery and stock still further convinces me that she is seeking to obtain title to the land by a colorable compliance with the law only and through fraud. Therefore her final proof is rejected and her original homestead entry and final certificate are held for cancellation.

August 4, 1887, Lydia Kelley was duly notified of the above decision, and one week thereafter her attorney presented at the local office a relinquishment of all her right, title and interest in and to said tract, a quitclaim deed of the same to the United States, an abstract of title thereto, and an application for the repayment of the fees and commissions paid on her said homestead.

January 23, 1888, your office denied the application for repayment, on the ground, "that the law governing the return of fees and commissions does not provide repayment in cases of this character." From this decision Kelley appealed to the Department.

The act of June 16, 1880 (21 Stat., 287), provides that:—

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

It is evident from the language of the statute, that the case at bar does not come within the purview of the above act. Kelley upon being informed of your decision rejecting her final proof and holding her original homestead entry and final certificate for cancellation, voluntarily relinquished her claim. It is clear that whatever loss she may sustain was the result of her fraudulent effort to obtain title to public land without complying with the provisions of law, and the Department will not under such circumstances grant the relief prayed for.

Your decision is accordingly affirmed.

RAILROAD GRANT—ACT OF MARCH 3, 1887.

PARKER *v.* NORTHERN PACIFIC R. R. CO.

The relinquishment of an entry, on receipt of notice from the local office that it had been suspended under departmental direction, on account of conflict with a railroad grant, is not such a "voluntary" abandonment as will bar re-instatement under the act of March 3, 1887.

The act in question is remedial in its nature, and should be construed liberally in favor of the *bona fide* settler as against a grantee of the government.

Secretary Vilas to Commissioner Stockslager, March 2, 1889.

This is an application by John G. Parker, for the re-instatement of his homestead entry No. 1126, On lots 1 and 2 and S. ½ NW. ¼ Sec. 31, T. 21 N., R. 5 E., Olympia district Washington Territory, and is made under section 3, of the act of March 3, 1887, entitled "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads, and for the forfeiture of unearned lands and for other purposes." (24 Stat., 556).

So much of section 3 of the act as is material to the present case is as follows:

That if in adjustment of said grants it shall appear that the homestead or pre-emption entry of any *bona fide* settler has been erroneously canceled on account of any railroad grant or the withdrawal of public lands, from market, such settler upon application shall be re-instated in all his rights and allowed to perfect his entry by complying with the public land laws: *Provided*, That he has not located another claim or made an entry in lieu of the one so erroneously canceled: *And provided also*, That he did not voluntarily abandon said original entry. . . . ."

The lands involved in the application and described above are within the granted limits of the grant of July 2, 1864 (13 Stat., 365), to the Northern Pacific Railroad Company, withdrawal of which took effect on filing map of general route, August 13, 1870. They are also within the limits of the withdrawal for the amended location of the general route, which it was claimed took effect, July 19, 1879. Parker's entry was made the same day, August 13, 1870, that the rights of the company attached under said first named withdrawal, and, as has been held by this Department, said "entry must be regarded as the superior right" and its existence "at the time of filing the map of general route excluded the tracts from the said withdrawal of August 13, 1870." Northern Pacific R. R. Co. *v.* Parker and Hopkins (2 L. D., 569); St. Paul Minneapolis & Manitoba Ry. Co., *v.* Gjuve (1 L. D., 331); Talbert *v.* Northern Pac. R. R. Co. (2 L. D., 536).

July 11, 1873, however, Parker relinquished his entry and abandoned the lands, and said entry was canceled, July 22, 1875, and it was held by this Department, April 15, 1884, in the case of the Northern Pacific R. R. Co. *v.* Parker and Hopkins, *supra*, that by said cancellation, the land covered by the entry "passed to the United States and was included in said withdrawal of July 19, 1879."

The statute above quoted under which the application under consideration is made, provides for the re-instatement of the homestead or pre-emption entries of *bona fide* settlers, which have been "erroneously canceled on account of any railroad grant or the withdrawal of public lands from the market," *provided*, among other things, such settler "did not voluntarily abandon said original entry." The application of Parker is resisted by the railroad company on the grounds—1st. That the entry was not "erroneously canceled" because the cancellation "followed as a consequence of a relinquishment" voluntarily made by Parker, and, 2nd. That Parker "voluntarily abandoned said original entry" and hence "comes within the exception" of said proviso.

Parker set forth in his application "that in May 1873, while improving and cultivating said land under the homestead law, he received notice from the local officers, to the effect, that said land was within the grant of the Northern Pacific R. R. Co., under the 6th section of the act of incorporation of said company, approved July 2, 1864, and that his homestead entry had been suspended, and if said entry was found within the grant, it would be canceled; that having ascertained from the register and receiver that they were acting under instructions of the Commissioner, by approval of the Secretary, and having no redress therefrom, he accordingly relinquished his claim to said land, and that said relinquishment was made under duress and compulsion at the instance of the Department of the Interior, and was not voluntary."

From a copy of the blank used by the local officer in giving such notice, it appears that the notice to Parker referred to by him in his application, recited that "pursuant to instruction from the Commissioner of the General Land Office" he (Parker) was notified that the Hon. Secretary of the Interior has decided relative to the rights of the Northern Pacific R. R. Co., under the 6th section of the act organizing said company, approved July 2, 1864, that said section operates as a withdrawal of the lands within the limits of such grant from the —— day of ———, 187- . . . and then concluded with notice that "whereas" he had "under date of —— day of ———, 1870, made homestead entry" on land "embraced within said grant, therefore his said entry was suspended," etc.

Since the cancellation of his entry, Parker has twice made application to purchase the land under the second section of the act of June 15, 1880 (21 Stat., 237),—the first time, July 9, 1885, and the last time in 1887—both of which applications were denied; and July 14, 1888, he made his present application for re-instatement of his entry under the third section of the act of March 3, 1887. The last application is transmitted without recommendation by your office to this Department for its consideration.

Parker's entire conduct shows, that he has throughout desired to secure the land and would not have abandoned it or relinquished his entry "voluntarily." The character of the notice served on him was such

as to convince him, that by an express decision of this Department relating to the land covered by his entry, it would be impossible for him to hold it, and it would therefore be a useless expenditure of time and money to attempt to do so. This, if it did not, in contemplation of law amount to duress or compulsion, was at least sufficient to render the act of relinquishment and abandonment involuntary within the meaning of the statute, which is remedial in its nature, and should be liberally construed in favor of the *bona fide* settler claiming its benefits as against a mere grantee of the government.

The relinquishment of the entry was made because of the supposed superiority of the rights of the railroad company under its said grant, and the cancellation of the entry following the relinquishment was in reality "on account of" said grant. The right of Parker under his entry was, however, superior to that of the company, under its grant, as hereinbefore shown, and therefore said entry was "erroneously canceled on account of" said grant.

I am of the opinion, that the application for re-instatement of the entry of Parker should be granted, and you are accordingly so instructed.

CALIFORNIA SCHOOL INDEMNITY—ACT OF MARCH 1, 1877.

HAMBLETON *v.* DUHAIN ET AL.

The cancellation of an indemnity selection on the erroneous conclusion that the State "had not sold the land, or if it had, the purchaser did not desire to perfect his claim thereto," would not divest a purchaser of his possession, or right of purchase under the act of March 1, 1877.

The rejection of an application to purchase under said act will not bar a second application, by the same party, based on a different claim of right.

An applicant for the right of purchase under said act, may be regarded as "an innocent purchaser for valuable consideration," if his vendor held without notice of defect in the State's title.

Secretary Vilas to Commissioner Stockslager, March 2, 1889.

In the case of James W. Hambleton *v.* C. C. Duhain and James Whalen, appealed by the defendants from the decision of your office dated November 24, 1886, the record shows the following facts:

On May 30, 1861, the State of California selected the SE. ¼, and the SE. ¼ of the SW. ¼ of Sec. 1, and the NE. ¼ of the SW. ¼ of Sec. 12, all in T. 9 N., R. 2 W., M. D. M., California, in lieu of the same quantity of land in Sec. 16, T. 24 N., R. 6 W., same town and range, at that time included in the Nome Lacke Indian reservation. This selection was approved to the State January 20, 1873. Under proper instructions said reservation was surveyed in 1857, but the land embraced in the survey, from some cause, was never set apart as an Indian reservation by executive order, and it was formally abandoned on July 7, 1870. H. I. Willey, the surveyor-general of California, in a letter, dated January 23, 1884,

"Ex. D.," states that the records of his office show approved locations made by different parties in 1871 and 1872 for said section sixteen, and that two hundred acres of the same were patented by the State December 11, 1874, to one of said locators, and that the balance was so patented to the other locators September 30, 1882. On June 3, 1874, the State of California patented the land in controversy to the heirs of M. A. Wood. On March 9, 1877, Kate V. Wood deeded an undivided one-third interest in said lands to James W. Hambleton, and on September 22, 1879, Edward C. Wood, deeded to the same party an undivided one-third interest in same. On November 18, 1881, Hambleton, by his attorney, applied to purchase the land in controversy under the provisions of the act of March 1, 1877 (19 Stat., 267), relating to indemnity school selections in the State of California. This application was rejected by the local officers on two grounds: 1st, because their records did not show that the State's selection was invalid; and, 2d, because Hambleton was the owner of only two-thirds of the State's title. On appeal to your office the decision was, on January 26, 1883, affirmed, on the ground last stated. No appeal was taken from that decision. On January 23, 1883, the State's selection of the land in controversy was canceled by your office and the State surveyor-general duly notified of the action taken, and he was requested to notify the vendees of the State, if there should be any, that they would be allowed ninety days from receipt of notice within which to make the required proof, and to perfect their titles under the provisions of the second section of said act.

The State surveyor-general, through inadvertence, failed to give Hambleton this notice till subsequent to July 7, 1884. He was, however, notified in February, 1883, by the local officers of said cancellation of the State's selection.

On April 25, 1884, your office addressed the local officers as follows:

> As no application to purchase the land (the land in controversy) has been received through your office, it is to be presumed that the State had not sold the same; or if it had, the purchaser did not desire to perfect his title thereto in the manner provided; and in view thereof I am of the opinion that the said land should be treated as vacant public land.

On May 12, 1884, Duhain entered one hundred and sixty and Whalen eighty acres of the said land under the homestead law.

Hambleton having in 1882-3 acquired the remaining undivided one-third interest in the State's title, made a second application to purchase early in June, 1884, which was rejected by the local officers because of said homestead entries.

On June 23, 1884, the State surveyor-general "requested that the case might be re-opened to enable him to protect the holders of the State titles," which request was granted July 7, 1884. On October 6, following, Hambleton made a third application to purchase, which was rejected by the local officers on the same grounds they rejected his second application. On appeal from this decision you find that Hamble-

ton is the owner of the State's title; that his improvements on the land are valued at $2000; that, prior to their entry, appellants had notice of Hambleton's title, and that when they made actual entry and settlement they found growing crops on the land. You also find that Hambleton's last application was made within ninety days from the date notice was given him of the defective character of the State's title by the State surveyor-general.

These findings of fact are fully sustained by the record in the case. You reverse the decision of the local officers, find Hambleton entitled to purchase, and hold said homestead entries for cancellation. Appellants, by their attorneys, state, that the decision does not, as they conceive, set out all the material facts in the case, and I am asked to consider the statement of facts contained in a brief filed by them with the Commissioner, June 15, 1885. This has been done. The only alleged material fact, insisted on as being shown by the record, and which is omitted from the Commissioner's findings of fact, is "that Hambleton had *knowledge* of the invalidity of the title under the State in November, 1881, and that he had official formal *notice* of the fact from the register and receiver in February and March, 1883." And appellants insist that having such knowledge, at least from the latter date, and having failed to apply to perfect his title under the second section of the act of March 1, 1877, "relating to indemnity school sections in the State of California" (19 Stat., 267), for a period of fourteen months after notice to him of the cancellation of the State's selection, and until after the land in dispute had been disposed of to other parties as vacant public land, he has by such neglect to assert his claim lost all right to make cash entry for said land under the statute aforesaid.

In this view of the law I do not concur. The statute fixes no time within which, after obtaining knowledge of the defect in the State's title, the purchaser from the State shall "furnish proof and make payment for such land." The only express limitation as to time within which this shall be done is found in a regulation of the Department, which also provides that such purchaser shall be notified of the invalidity of the State's title by the State surveyor-general.

Hambleton, it appears, had been cultivating the land, and had been in the quiet undisturbed possession of the same under color of title from the State, for years before appellants' entries were made. His application to purchase was made in due time after he received notice from the State surveyor-general, as provided by departmental regulations, and, under the facts shown in this case, it was made, in my opinion, in a reasonable time after legal notice to him of the defective character of the State's title to the land in controversy.

Appellant further insists that the Commissioner erred, "in ruling that Hambleton was not concluded by his failure to present his proof and payment before an adverse right had been acquired." No valid adverse right has been acquired by appellants to this land. The State's

selection was canceled, it appears, under the erroneous opinion (founded on presumption), "that the State had not sold the land, or, if it had, the purchaser did not desire to perfect his title thereto in the manner provided." This cancellation and the direction to the local officers to treat the land in question as vacant public land, did not make it vacant public land, nor divest Hambleton of his possession.

The further exceptions to your said decision, to wit: 1st, That Hambleton is concluded by the Commissioner's decision, of January 26, 1883, from asserting a subsequent claim to purchase; and, 2d, That he is not an innocent purchaser; are, in my opinion, not well taken. His first application to purchase was rejected solely on the ground that he, at that time, held only an undivided two thirds interest in said lands. Instead of appealing from this decision, he, very sensibly, proceeded to remove the only objection made to his application. His present application was made after he obtained the other undivided third interest in said land, and, since he is now the sole owner of the State title, this application materially differs from the one which was rejected, and, therefore, his failure to appeal from the decision of January 26, 1883, in no manner affects his present claim.

It is not contended by appellants that Hambleton had any knowledge of the defective character of the State's title until after he had purchased an undivided two-thirds interest in said land, nor that he did not pay a valuable consideration for all of said tract, but it is contended that as he had such knowledge before he purchased the third interest last acquired that, therefore, he is not an innocent purchaser. It is not asserted, and there is no evidence tending to show, that the patentees of the State, Hambleton's immediate grantors, had any knowledge whatever of the defective character of the State's title. They, therefore, were purchasers in good faith, without notice. In order to protect his rights, and to obviate the only objection to his request to be allowed to purchase, Hambleton acquired the outstanding undivided third interest. Whether this purchase was made before or after obtaining knowledge of the defective character of the State's title can make no difference, because such right and title as the grantors of this interest had they could convey unimpaired and untainted to him, though he had full knowledge of the defective character of the title conveyed. The late Justice Story, after discussing the doctrine that the grantor with notice of his defective title can not convey a good title to one who knows or is in a position to know of such defect, says:

> But it [notice] in no manner affects any such title derived from another person, in whose hands it stood free from any such taint. Thus, a purchaser with notice may protect himself by purchasing the title from another *bona fide* purchaser for a valuable consideration without notice; for otherwise such *bona fide* purchaser would not enjoy the full benefit of his own unexceptionable title.

Story's Equity Jurisprudence, Sects. 409–10, and cases cited. The doctrine here enunciated is old and well settled.

Hambleton being in the intendment of the statute "an innocent purchaser for valuable consideration," and there being no valid adverse claim to the land in controversy, his application to perfect title should be allowed, and appellants' homestead entries canceled.

Your said decision is accordingly affirmed.

HOMESTEAD—ACT OF JUNE 15, 1880.

WARDEN *v.* SHUMATE.

A homesteader who has sold his interest in the land covered by his original entry, cannot make cash entry therefor under section 2, act of June 15, 1880.

First Assistant Secretary Muldrow to Commissioner Stockslager, March 8, 1889.

I have considered the appeal of Mortimer W. Warden from your office decision of July 23, 1887, denying his application to be allowed to contest the homestead entry of William R. Shumate and cash entry thereunder for the NW. ¼ of Sec. 3, T. 3 S., R. 27 W., Oberlin, Kansas, land district, Kerwin series.

On September 8, 1879, Shumate made homestead entry for said land at the Kirwin land office. Afterwards (the date not appearing) there was filed in the office at Oberlin, a petition to purchase said land under the second section of the act of June 15, 1880 (21 Stat., 237). This application is signed by Wm. R. Shumate and is dated at "Land Office at Oberlin, Kansas, October 18, 1884." Accompanying this application were two affidavits executed by said Shumate October 18, 1884, at Kirksville, Adair County, Missouri, before S. S. McLaughlin, county clerk. This application was allowed and entry made October 31, 1884.

On March 14, 1887, Warden filed in the local office an affidavit of contest against said entry alleging that Shumate had abandoned said land for more than six months prior to the date of said cash entry; that at the date said entry was made Shumate had sold all his right, title and interest in and to said land for a valuable consideration and at the date of said cash proof said Shumate had no interest in said land whatever. With this affidavit was filed an abstract of title showing a warranty deed from said Shumate to one James N. Goodrich dated October 18, 1884, and acknowledged the same day, before S. S. McLaughlin, county clerk, Adair county, Missouri. The register by letter of May 6, 1887, transmitted this application to contest to your office for consideration. Your office decided "Shumate was not required to show residence in purchasing the land under the act referred to, and as to his conveyance to Goodrich, which bears the same date as his application to purchase, it is held by the Department (case of Geo. E. Sandford, 5 L. D., 535), that a previous agreement to sell can in no way impair the right to purchase under said act. The charges made by Warden being immaterial the application for a rehearing is denied."

The true scope of the allegations in said contest affidavit seems to have been overlooked in your office. That allegation was not that there was a previous agreement to sell but that there had been an actual sale and transfer of all his interest. If he had sold his interest in said land prior to the cash entry there was nothing to base said entry upon and it was erroneously allowed.

Watts *v.* Williams (6 L. D., 94); Matthiessen and Ward *v.* Williams (6 L. D., 95).

I am of the opinion that the allegations in Warden's contest affidavit form a sufficient basis for a contest and that a hearing should be had to determine the facts surrounding said entry.

The decision appealed from is reversed and it is directed that a hearing be had in accordance with the rules applicable to such cases notice of which should be given to Shumate and such other parties in interest as shown by the records.

PRACTICE—MOTION FOR REVIEW—RESIDENCE—TRANSFEREE.

MARY CAMPBELL.

A motion for review should be accompanied by an affidavit that the motion is made in good faith and not for the purpose of delay, and set forth affirmatively the specific errors alleged.

If the conclusion reached in the decision is authorized by evidence independently of the matters set forth in the motion for review, an alleged erroneous finding as to such matters is not sufficient ground for review.

Evidence, though newly discovered, which goes only to impeach the credit or character of a witness is not sufficient to authorize the review of a decision.

A motion for review on the ground that the decision is contrary to the weight of evidence if allowable at all, where there is some evidence to sustain the decision, can only be granted where the latter is clearly against the palpable preponderance of the evidence.

If fair minds might reasonably differ as to the conclusion that should be drawn from the evidence, a review should not be granted on the ground that the decision is not supported by the evidence.

Where a pre-emptor makes out, and forwards by mail, his declaratory statement, prior to performing any act of settlement on the land covered thereby, and thereafter goes upon the land, it must be held that in legal effect, as to such pre-emptor, the filing in fact preceded settlement.

Residence can not be acquired or maintained by going upon, or visiting the land, solely for the purpose of complying with the letter of the law, no matter how honestly the claimant may believe such visits all that the law requires.

A purchaser prior to patent takes no better title than the entryman has to confer, and whatever right is thus acquired is subject to the subsequent action of the Land Department.

Secretary Noble to Commissioner Stockslager, March 11, 1889.

I have considered the motion of W. A. Mathewson as grantee of Mary W. Campbell for a review of the decision of this Department of January 27, 1888, affirming your office decision holding for cancellation the pre-

emption cash entry of said Mary W. Campbell on the NW. ¼ of Sec. 8, T. 124 N., R. 61 W., Aberdeen district, Dakota Territory.

The motion is as follows:—

This application is made on the good faith of Mary W. Campbell in making said final proof and upon the facts as set forth in accompanying affidavits, that she did not file upon the land until after she had made settlement and upon the further fact that the house built on said land was bought and paid for by the claimant and was not put upon the land simply for the purpose of making final proof; that the said W. A. Mathewson was a purchaser for value in good faith, supposing and believing that the law had been complied with by the said Mary W. Campbell in all respects.

There is no affidavit accompanying this motion, as required by Rule of Practice 78, "that the motion is made in good faith and not for the purpose of delay," and the motion is objectionable in not affirmatively setting forth the specific errors complained of. We are left to infer that the idea intended to be conveyed by the motion is, that in said departmental decision the reverse of the statements contained in the motion was found, and that this was not only error, but error to the injury of the claimant—in other words, that without the alleged erroneous finding as to said matters, this Department could not have arrived at the general conclusion of said decision, namely, that the claimant "never established or maintained residence on the land." If said conclusion was authorized by the other facts established by the evidence independently of the matters set forth in the motion and notwithstanding their existence as stated in the motion, then the alleged erroneous finding as to said matters can not be claimed to have worked injury to the claimant and consequently is not ground for a new trial at law or a review and revocation of a departmental decision. (Hilliard on New Trials, 2nd Ed., p. 40; Rule of Practice, 76).

I am of the opinion that said conclusion was so warranted by the other facts in the case set forth in said decision; but, if there be doubt about this, were said assumed findings in fact erroneous? As to filing before settlement, the admitted facts are that the claimant made her declaratory statement and the necessary pre-emption affidavit and mailed them to the local officers fifty miles distant one evening before she had ever gone upon or seen the land, and the next morning went upon the land. She had done her part toward the filing before going on the land and in legal effect there was as to her a filing before settlement, and there was no error in so holding. As to the building and ownership of the house, the only evidence is that of the claimant and Hardy Campbell and they contradict each other on the question of ownership. She testified that the lumber was furnished and the house built by Hardy Campbell, but that she had labored for him as a house-servant, and, as he had not otherwise paid her anything for said labor, she "considered" she had thereby paid for the house, and it was so understood by him and she knew of no claim to the house by him. He testified that he bought and paid for the lumber and built the house, with the understanding between him and claimant, that if she repaid

him what the lumber cost, she was to keep the house—otherwise, he was to remove it after she had made proof. The evidence shows that he in fact removed the house from the land on the same day or the day after the proof was made.

Motions for review of departmental decisions are only allowable "in accordance with the legal principles applicable to motions for new trials at law." (Rule of Practice 76). When the ground of the motion is that the verdict is contrary to the weight of the evidence, new trials at law if grantable at all where there is contradictory evidence on both sides and consequently some evidence to sustain the verdict, can only be allowed where the latter is clearly against the "*palpable* preponderance of the evidence." (Hilliard on New Trials, 2nd Ed., p. 458, Sec. 2; ib., p. 466, Sec. 37, ib., p. 456, Sections 19 and 20).

On the state of the evidence as above set forth in reference to the ownership of the house, if there be any preponderance at all in favor of the claimant's ownership, it is by no means clear or palpable, but the most that can be claimed is, that "fair minds might reasonably differ as to the conclusion to be drawn from" said evidence, and it is quite clear, that in such a case, "a review of a departmental decision should not be granted on the ground that it is not supported by the evidence." Neilson *v.* Shaw (5 L. D., 387).

There is no pretense of any newly discovered evidence, and no new evidence is offered, except evidence affecting the credibility of said Hardy Campbell by tending to show hostility on his part towards the claimant. Evidence, however, even though newly discovered, "which goes only to impeach the credit or character of a witness, is not sufficient ground for a new trial at law." (Hilliard on New Trials, 2nd Ed., p. 505, Sec. 19, and page 509, Sec. 25), and hence under Rule of Practice 76 does not authorize a review of a departmental decision. It is sometimes said, that this rule as to new trials is a general rule, subject to exception in cases "so imperative as to require the interposition of the court to prevent a palpable wrong." (Ib., p. 509, Sec. 24).

The present is not such a case, however, as it clearly appears, from the testimony of Mary Campbell and her witnesses at the hearing, and the statements contained in her affidavit accompanying the motion for review, without considering the testimony of Hardy Campbell or the other witnesses for the government, that, as found in said departmental decision, she "never established or maintained residence on the land."

The claimant testified on the hearing, as set forth in said departmental decision, that she was on the land "as much as they told me" (her) "the law required." The facts as to residence set out in her said affidavit attached to the motion for review, are not materially different from those testified to on the hearing as stated in said departmental decision, and show that she went on the land, "assisted in building the house, and staid there over night," thereby claiming to have established residence, and that she "was not absent from said land until"

she "made final proof, one week at a time except during the winter, when she staid there from November to February once each month and from February to April......three times, one time three days and the other time two days each." In the meantime she had elsewhere a regular place of living with her child. After making proof her visits ceased altogether, and within a month after cash entry she sold and conveyed her interest in the land to Mathewson for $1100, and one of her witnesses testified that she offered to sell before making proof. She admits that she visited the land only as much as she was told "the law required" and seems to have acted on the idea, that such visits at intervals of not more than six months at any one time were sufficient. Residence, however, cannot be acquired or maintained by going upon or visiting a claim solely for the purpose of complying with the letter of the law with a view of thereby acquiring title to the land, no matter how honestly the claimant may believe such visits all that the law requires. To establish residence, the act of going upon the land must concur with an intent to make it a permanent home to the exclusion of one elsewhere. Without such intent, there cannot be good faith within the meaning of those words as applied to the homestead and pre-emption laws.

Stress is laid by counsel for applicant upon the fact, that the local officers approved Mrs. Campbell's original proof and also found in her favor in the hearing. In their written opinion on the hearing, however, the local officers do not hold, that she has shown compliance with the law, but only that "the residence is such as has often been accepted," and in that connection say, "We conceive the law liberal enough to make some reasonable allowances in behalf of a poor widow working to support herself and children." The law, it is true, authorizes "reasonable allowances" to be made in favor of all classes of claimants, but an allowance which abrogates the law itself is not reasonable, and those charged with the administration of the law have no power to make such allowance.

As to the approval by the local officers of Mrs. Campbell's original proof, it is to be borne in mind, that there was no flaw in that proof on its face. She and her two final proof witnesses (one of whom, on the hearing swore he had never seen her on the land though he lived in sight of the house thereon) testified in said proof, that her residence had been "continuous" and there was no disclosure made in said proof of her absence or of the other facts, tending to show that she had "never established or maintained residence" on the land. These facts were not voluntarily disclosed in the proof but were first brought to the knowledge of the officers of the law by the report of the special agent and at the hearing ordered on said report; and herein lies a broad distinction between the present case and that of James H. Marshall (3 L. D., 411) cited by counsel for applicant. In the latter case, Marshall, in making his proof testified that his residence had been "continuous

as per statement" and in said statement (which was attached to his proof) made a full and honest disclosure of all the particulars as to his residence, improvements &c., and Secretary Teller, in holding that the entry should be sustained, says:

> I do not find any evidence of fraud in Marshall's proceedings. 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 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 have not deemed it necessary to comment upon the testimony of the witnesses for the government, but I note one significant fact—heretofore referred to—testified to by government witness Lambro, as to which he is corroborated by Mrs. Campbell's witness J. H. Clark, and which is to a certain extent admitted by Mrs. Campbell in her testimony on the hearing. Lambro states, "She" (Mrs. Campbell) "told me she intended to sell the land as soon as she could, after making proof. She said she made an agreement with J. H. Clark to sell him the land before she made proof." Clark says:

> She offered to sell me the land before she proved up; there was no price agreed upon—the talk was, that if she proved up all right and wanted to sell, I would buy it of her, if I could raise the money. It was about a month or so before she made proof.

Mrs. Campbell in effect testifies that before making proof she had a conversation with Clark about selling him the land after she had made proof.

The fact that she was trying before she made proof, to make an agreement for the sale of the land after proof, and that immediately on making proof her visits to the land ceased altogether, and she in fact sold it within a month thereafter, tend strongly to show that at the time she made proof she had the intent to sell, and, if this was the case, her proof was not merely "deficient" as was said of the proof in the case of James H. Marshall *supra*, but was fraudulent as well.

The plea of Mathewson, that he is a *bona fide* purchaser for value without notice, if admitted to be true, cannot avail him. The doctrine is well settled that a purchaser prior to patent "takes no better title than the entryman has to confer, and whatever right is thus acquired is subject to the subsequent action of the land Department." (R. M. Chrisinger, 4 L. D., 347).

The motion for review is denied.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 1st, 1889.

Registers and Receivers of the United States Land Offices, at Guthrie and Kingfisher Stage Station, Indian Ty.

GENTLEMEN: The 12th, 13th, 14th and 15th sections of an act of Congress, approved March 2, 1889, entitled "An act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the year ending June 30, 1890, and for other purposes," a copy of which sections is hereto attached, embrace provisions for the disposal of certain lands therein designated. Pursuant to these provisions, the President has issued his proclamation of the twenty-third instant, copy also attached, opening a described portion of the lands so designated for settlement and entry from and after a date therein given—and your offices have been established for the disposal thereof, accordingly.

These lands have been surveyed, and you will be supplied with the township plats, tract books, blank forms, official circulars, and other requisites for the proper transaction of your business in connection therewith.

You will observe that the statute reserves sections 16 and 36 in every township for school purposes and the proclamation reserves for Government use and control the following, viz: one acre of land in square form in the north west corner of section nine, in township sixteen north, range two west, of the Indian Meridian in Indian Territory, and also one acre of land in the south east corner of the north west quarter of section fifteen, township sixteen north, range seven west of the Indian Meridian in the Indian Territory. The remainder of the lands are made subject to entry by actual settlers under the general homestead laws with certain modifications.

Your attention is directed to the general circular issued by this office January 1, 1889, pages 13 to 30 inclusive, 42 to 57 inclusive, and 86 to 90 inclusive, as containing the homestead laws and official regulations thereunder. These laws and regulations will control your action, but modified by the special provisions of the said act of March 2, 1889, in the following particulars, viz:

1. The rule stated on 17th page of said circular under the title, "Only one homestead privilege to the same person permitted," is so modified as to admit of a homestead entry being made by any one, who, prior to the passage of said act, had made a homestead entry, but failed, from any cause, to secure a title in fee to the land embraced therein, or who, having secured such title, did so by what is known as the commutation of his homestead entry. See Section 2301 U. S. R. S., page 88, and statement on page 19 of said circular under the title "Commutation of Homestead Entries." A person desiring to make another entry under

this provision will be required to make affidavit to the facts necessary to entitle him to do so under the laws and rules, designating in the affidavit his former entry by description of the land, number and date of entry, with the name of the land office where made, or other sufficient data to admit of readily identifying it on the official records, which affidavit you will transmit with the other entry papers to this office.

With regard to persons making homestead entries and failing to acquire title thereunder, or commuting them, after the passage of said act of March 2, 1889, the rule stated on page 17 of said circular, as to second homesteads, is operative, and will be enforced, in relation to these lands as well as others.

2. The statute provides for the disposal of these lands "to actual settlers under the homestead laws only," and while providing that "the rights of honorably discharged Union soldiers and sailors in the late civil war as defined and described in sections 2304 and 2305 of the Revised Statutes, (See pages 24, 25 and 26 of said circular) shall not be abridged," makes no mention of sections 2306 and 2307 thereof, under which soldiers and sailors, their widows and orphan children are permitted, with regard to the public lands generally, to make additional entries, in certain cases, free from the requirement of actual settlement on the entered tract—see pages 26 and 27 of said circular. It is therefore held that soldiers' or sailors' additional entries cannot be made on these lands under said sections 2306 and 2307, unless the party claiming will, in addition to the proof required on pages 26 and 27 of said circular, make affidavit that the entry is made for actual settlement and cultivation, according to section 2291, as modified by sections 2304 and 2305 of the Revised Statutes, and the prescribed proof of compliance therewith will be required to be produced before the issue of final certificate.

3. It is provided in the statute that section 2301 of the Revised Statutes shall not apply to these lands. See pages 19 and 88 of said circular. Therefore, entries made thereon will not be subject to commutation under that section.

Any person applying to enter or file for a homestead will be required first to make affidavit in addition to other requirements that he did not violate the law by entering upon and occupying any portion of the lands described in the President's proclamation dated March 23, 1889, prior to twelve o'clock, noon, April 22d, 1889, the affidavit to accompany your returns for the entry allowed.

The statute provides that townsite entries may be allowed under sections 2387 and 2388 U. S. R. S., but limits the area in any such entry to one half section or 320 acres, as the maximum, whatever the number of inhabitants. For instructions as to entries under said sections of the Revised Statutes, you are referred to the circular issued by this office July 9, 1886, sub division III, pages 4 and 5. Should applications for

townsite entries or filings be presented by parties in interest, in the absence of officers properly qualified to make entry, in trust for the inhabitants, under the provisions of said section 2387, you will note the applications on your records, forward a report thereof to this office with any papers presented, and await instructions before allowing any entry of the land.

No rights under the town site laws can be acquired to any of the lands described in the said proclamation prior to the time therein prescribed for the same to become open to entry and occupancy as aforesaid, viz; 12 o'clock, noon of the 22d of April, 1889.

It appears that by the President's order of the 26th December, 1885, a reservation was established for military purposes of the following subdivisions of land within the boundaries described in said proclamation of the 23d March, 1889, and which reservation still continues, viz; SW¼ of Section 15, S½ of section 16, S½ of section 17, SE¼ of section 18, E½ of Section 19, all of section 20, all of Section 21, W½ of Section 22, W½ of Section 27, all of Section 28, all of Section 29, the E½ of Section 30, NE¼ of Section 31, N½ of Section 32, N½ of Section 33, and NW¼ of Section 34, all in Township 12 North, Range 4 West of the Indian Meridian.

These tracts, in view of their reservation under the President's order of December 26, 1885, are not subject to settlement or entry under the act of March 2, 1889, aforesaid, and the laws of the United States applicable thereto. See Sections 2258 and 2289 U. S. R. S., and you will permit no entry or filing for any portion thereof.

It is thought that the foregoing will be found sufficient for your guidance in any cases that may arise, but should unforeseen difficulties present themselves, you will submit the same for special instructions.

Respectfully,

S. M. STOCKSLAGER
Commissioner.

Approved.

JOHN W. NOBLE,
Secretary.

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[PUBLIC—No. 155.]

An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the year ending June thirtieth, eighteen hundred and ninety, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * * * * * *

SEMINOLE LANDS.

SEC. 12. That the sum of one million nine hundred and twelve thousand nine hundred and forty-two dollars and two cents be, and the

same hereby is, appropriated, out of any money in the Treasury not otherwise appropriated, to pay in full the Seminole Nation of Indians for all the right, title, interest, and claim which said nation of Indians may have in and to certain lands ceded by article three of the treaty between the United States and said nation of Indians, which was concluded June fourteenth, eighteen hundred and sixty-six, and proclaimed August sixteenth, eighteen hundred and sixty-six, and which land was then estimated to contain two million one hundred and sixty-nine thousand and eighty acres, but which is now, after survey, ascertained to contain two million thirty-seven thousand four hundred and fourteen and sixty-two hundredths acres, said sum of money to be paid as follows: One million five hundred thousand dollars to remain in the Treasury of the United States to the credit of said nation of Indians and to bear interest at the rate of five per centum per annum from July first, eighteen hundred and eighty nine, said interest to be paid semi-annually to the treasurer of said nation, and the sum of four hundred and twelve thousand nine hundred and forty-two dollars and twenty cents, to be paid to such person or persons as shall be duly authorized by the laws of said nation to receive the same, at such times and in such sums as shall be directed and required by the legislative authority of said nation, to be immediately available; this appropriation to become operative upon the execution by the duly appointed delegates of said nation, specially empowered so to do, of a release and conveyance to the United States of all the right, title, interest, and claim of said nation of Indians in and to said lands, in manner and form satisfactory to the President of the United States, and said release and conveyance, when fully executed and delivered, shall operate to extinguish all claims of every kind and character of said Seminole Nation of Indians in and to the tract of country to which said release and conveyance shall apply, but such release, conveyance, and extinguishment shall not inure to the benefit of or cause to vest in any railroad company any right, title, or interest whatever in or to any of said lands, and all laws and parts of laws so far as they conflict with the foregoing, are hereby repealed, and all grants or pretended grants of said lands or any interest or right therein now existing in or on behalf of any railroad company, except rights of way and depot grounds, are hereby declared to be forever forfeited for breach of condition.

SEC. 13. That the lands acquired by the United States under said agreement shall be a part of the public domain, to be disposed of only as herein provided, and sections sixteen and thirty-six of each township, whether surveyed or unsurveyed, are hereby reserved for the use and benefit of the public schools, to be established within the limits of said lands under such conditions and regulations as may be hereafter enacted by Congress.

That the lands acquired by conveyance from the Seminole Indians hereunder, except the sixteenth and thirty-sixth sections shall be dis-

posed of, to actual settlers under the homestead laws only, except as herein otherwise provided (except that section two thousand three hundred and one of the Revised Statutes shall not apply): *And provided further*, That any person who having attempted to, but for any cause, failed to secure a title in fee to a homestead under existing law, or who made entry under what is known as the commuted provision of the homestead law, shall be qualified to make a homestead entry upon said lands: *And provided further*, That the rights of honorably discharged Union soldiers and sailors in the late civil war as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes shall not be abridged: *And provided further*, That each entry shall be in square form as nearly as practicable and no person be permitted to enter more than one-quarter section thereof, but until said lands are opened for settlement by proclamation of the President, no person shall be permitted to enter upon and occupy the same, and no person violating this provision shall ever be permitted to enter any of said lands or acquire any right thereto.

The Secretary of the Interior may, after said proclamation and not before, permit entry of said lands for town-sites, under sections twenty-three hundred and eighty-seven and twenty-three hundred and eighty-eight of the Revised Statutes, but no such entry shall embrace more than one-half section of land.

That all the foregoing provisions with reference to lands to be acquired from the Seminole Indians including the provisions pertaining to forfeiture shall apply to and regulate the disposal of the lands acquired from the Muscogee or Creek Indians by articles of cession and agreement made and concluded at the city of Washington on the nineteenth day of January in the year of our Lord eighteen hundred and eighty-nine.

SEC. 14. The President is hereby authorized to appoint three commissioners, not more than two of whom shall be members of the same political party, to negotiate with the Cherokee Indians and with all other Indians owning or claiming lands lying west of the ninety-sixth degree of longitude in the Indian Territory for the cession to the United States of all their title, claim, or interest of every kind or character in and to said lands, and any and all agreements resulting from such negotiations shall be reported to the President and by him to Congress at its next session and to the council or councils of the nation or nations, tribe or tribes, agreeing to the same, for ratification, and for this purpose the sum of twenty-five thousand dollars, or as much thereof as may be necessary, is hereby appropriated, to be immediately available: *Provided*, That said Commission is further authorized to submit to the Cherokee nation the proposition that said nation shall cede to the United States in the manner and with the effect aforesaid, all the rights of said nation in said lands upon the same terms as to payment as is provided in the agreement made with the Creek Indians of date January nineteenth, eighteen hundred and eighty-nine, and ratified by the present Congress;

and if said Cherokee nation shall accept, and by act of its legislative authority duly passed, ratify the same, the said lands shall thereupon become a part of the public domain for the purpose of such disposition as is herein provided, and the President is authorized as soon thereafter as he may deem advisable, by proclamation open said lands to settlement in the same manner and to the same effect, as in this act provided concerning the lands acquired from said Creek Indians, but until said lands are opened for settlement by proclamation of the President, no person shall be permitted to enter upon and occupy the same, and no person violating this provision shall be permitted to enter any of said lands or acquire any right thereto.

SEC. 15. That the President may whenever he deems it necessary create not to exceed two land districts embracing the lands which he may open to settlement by proclamation as hereinbefore provided, and he is empowered to locate land offices for the same appointing thereto in conformity to existing law registers and receivers and for the purpose of carrying out this provision five thousand dollars or so much thereof as may be necessary is hereby appropriated.

Approved, March 2, 1889.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION. (26 Stat 1544)

Whereas, pursuant to Section eight, of the Act of Congress approved March third, eighteen hundred and eighty-five, entitled "An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the year ending June thirtieth, eighteen hundred and eighty-six, and for other purposes," certain articles of cession and agreement were made and concluded at the City of Washington on the nineteenth day of January, in the year of our Lord, eighteen hundred and eighty-nine, by and between the United States of America and the Muscogee (or Creek) Nation of Indians, whereby the said Muscogee (or Creek) Nation of Indians, for the consideration therein mentioned, ceded and granted to the United States, without reservation or condition, full and complete title to the entire western half of the domain of the said Muscogee (or Creek) Nation, in the Indian Territory, lying west of the division line surveyed and established under the treaty with said Nation, dated the fourteenth day of June, eighteen hundred and sixty-six, and also granted and released to the United States all and every claim, estate, right or interest of any and every description in and to any and all land and territory whatever, except so much of the former domain of said Muscogee (or Creek) Nation as lies east of said line of division surveyed and established as aforesaid, and then used and occupied as the home of said Nation, and which articles of cession and agreement were duly accepted, ratified and confirmed by said Muscogee (or Creek) Nation of Indians by act of its council, approved on the thirty-first day of January, eight-

een hundred and eighty-nine, and by the United States by act of Congress approved March first, eighteen hundred and eighty-nine, and

Whereas, by Section twelve of the Act, entitled "An Act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the year ending June thirtieth, eighteen hundred and ninety, and for other purposes," approved March second eighteen hundred and eighty-nine, a sum of money was appropriated to pay in full the Seminole Nation of Indians for all the right, title, interest and claim which said Nation of Indians might have in and to certain lands ceded by article three of the treaty between the United States and said Nation of Indians, concluded June fourteenth, eighteen hundred and sixty-six, and proclaimed August sixteenth, eighteen hundred and sixty-six, said appropriation to become operative upon the execution by the duly appointed delegates of said Nation, specially empowered to do so, of a release and conveyance to the United States of all right, title, interest and claim of said Nation of Indians, in and to said lands, in manner, and form, satisfactory to the President of the United States, and

Whereas, said release and conveyance, bearing date the sixteenth day of March, eighteen hundred and eighty-nine, has been duly and fully executed, approved and delivered and

Whereas, Section thirteen of the Act last aforesaid, relating to said lands, provides as follows:

SEC. 13. That the lands acquired by the United States under said agreement shall be a part of the public domain, to be disposed of only as herein provided, and sections sixteen and thirty-six of each township, whether surveyed or unsurveyed are hereby reserved for the use and benefit of the public schools to be established within the limits of said lands under such conditions and regulations as may be hereafter enacted by Congress.

That the lands acquired by conveyance from the Seminole Indians hereunder, except the sixteenth and thirty-sixth sections, shall be disposed of to actual settlers under the homestead laws only, except as herein otherwise provided (except that section two thousand three hundred and one of the Revised Statutes shall not apply): *And provided further*, That any person who having attempted to, but for any cause failed to secure a title in fee to a homestead under existing laws or who made entry under what is known as the commuted provision of the homestead laws shall be qualified to make a homestead entry upon said lands; *And provided further*, That the rights of honorably discharged Union soldiers and sailors in the late civil war as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes shall not be abridged; *And provided further*, That each entry shall be in square form as nearly as practicable, and no person be permitted to enter more than one-quarter section thereof, but until said lands are opened for settlement by proclamation of the President, no person shall be permitted to enter upon and occupy the same, and no person violating this provision shall ever be permitted to enter any of said lands or acquire any right thereto.

The Secretary of the Interior may, after said proclamation and not before, permit entry of said lands for town-sites, under sections twenty-three hundred and eighty seven and twenty three hundred and eighty eight, of the Revised Statutes, but no such entry shall embrace more than one half section of land.

That all the foregoing provisions with reference to lands to be acquired from the Seminole Indians, including the provisions pertaining to forfeiture shall apply to and

regulate the disposal of the lands acquired from the Muscogee or Creek Indians by articles of cession and agreement made and concluded at the city of Washington, on the nineteenth day of January, in the year of our Lord eighteen hundred and eighty-nine.

Now, therefore, I, Benjamin Harrison, President of the United States, by virtue of the power in me vested by said Act of Congress, approved March second, eighteen hundred and eighty-nine, aforesaid, do hereby declare and make known, that so much of the lands, as aforesaid, acquired from or conveyed by the Muscogee (or Creek) Nation of Indians, and from or by the Seminole Nation of Indians, respectively, as is contained within the following described boundaries, viz: Beginning at a point where the degree of longitude ninety-eight west from Greenwich, as surveyed in the years eighteen hundred and fifty-eight, and eighteen hundred and seventy-one, intersects the Canadian River; thence, north along and with the said degree to a point where the same intersects the Cimarron River, thence up said river, along the right bank thereof, to a point where the same is intersected by the south line of what is known as the Cherokee lands lying west of the Arkansas River, or as the "Cherokee Outlet," said line being the north line of the lands ceded by the Muscogee (or Creek) Nation of Indians to the United States by the treaty of June fourteenth, eighteen hundred and sixty-six, thence, east along said line to a point where the same intersects the west line of the lands set apart as a reservation for the Pawnee Indians by Act of Congress approved April tenth, eighteen hundred and seventy-six, being the range line between ranges four and five east of the Indian Meridian, thence, south on said line to a point where the same intersects the middle of the main channel of the Cimarron River, thence, up said river, along the middle of the main channel thereof, to a point where the same intersects the range line between range one east and range one west (being the Indian Meridian) which line forms the western boundary of the reservation set apart respectively for the Iowa and Kickapoo Indians, by Executive Orders dated respectively, August fifteenth, eighteen hundred and eighty-three; thence south along said range line or meridian to a point where the same intersects the right bank of the North Fork of the Canadian River; thence up said river, along the right bank thereof, to a point where the same is intersected by the west line of the reservation occupied by the Citizen Band of Pottawatomies, and the Absentee Shawnee Indians, set apart under the provisions of the treaty of February twenty-seven, eighteen hundred and sixty-seven, between the United States and the Pottawatomie tribe of Indians and referred to in the Act of Congress approved May twenty-three, eighteen hundred and seventy-two; thence south along the said west line of the aforesaid reservation to a point where the same intersects the middle of the main channel of the Canadian River; thence up the said river, along the middle of the main channel thereof, to a point opposite to the place of beginning and thence north to the place of beginning (saving and excepting one acre of land in square

form in the northwest corner of section nine, in township sixteen north, range two west, of the Indian Meridian in Indian Territory, and also one acre of land in the southeast corner of the northwest quarter of section fifteen, township sixteen north, range seven west, of the Indian Meridian in the Indian Territory; (which last described two acres are hereby reserved for Government use and control), will at and after the hour of twelve o'clock, noon, of the Twenty-second day of April next, and not before, be open for settlement, under the terms of and subject to, all the conditions, limitations, and restrictions contained in said act of Congress approved March second, eighteen hundred and eighty-nine, and the laws of the United States applicable thereto.

And it is hereby expressly declared and made known that no other parts or portions of the lands embraced within the Indian Territory than those herein specifically described, and declared to be open to settlement at the time above named and fixed, are to be considered as open to settlement under this Proclamation or the act of March second, eighteen hundred and eighty-nine aforesaid; and

Warning, is hereby again expressly given that no person entering upon and occupying said lands before said hour of twelve o'clock, noon, of the Twenty-second day of April, A. D. eighteen hundred and eighty-nine, hereinbefore fixed, will ever be permitted to enter any of said lands or acquire any rights thereto, and that the officers of the United States will be required to strictly enforce the provision of the Act of Congress to the above effect.

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

Done at the City of Washington, this Twenty-third day of March, in the year of our Lord one thousand, eight hundred and eighty-nine, and of the Independence of the United States the one hundred and thirteenth.

[SEAL.] BENJ. HARRISON.

By the President,

JAMES G. BLAINE,

Secretary of State.

RAILROAD LANDS—ACT OF JANUARY 13, 1881.

BENJAMIN H. EATON.

Land excepted from a railroad grant, and consequently not withdrawn for its benefit, is not subject to purchase under the act of January 13, 1881, as land "restored to the public domain."

A purchaser under said act must show actual settlement on the land, and that he is not entitled to acquire title under the pre-emption, homestead, or timber culture law.

Secretary Noble to Commissioner Stockslager, March 15, 1889.

Benjamin H. Eaton appeals from your office decision of February 15, 1887, rejecting his application to purchase, under the act of January

13, 1881 (21 Stat., 315) the S. ½ of the NW. ¼ of Sec. 35, T. 6 N., R. 67 W., Denver, Colorado.

The application of Eaton was transmitted to your office on June 3, 1885, accompanied by his affidavit in which he makes oath that on or about October 1, 1870, he applied to the Denver Pacific Railroad Company to be allowed to purchase from it the tract in question, and that soon thereafter he occupied said tract by placing thereon improvements to the value of $300 or more; that he has been in actual peacable possession of the tract, cultivating it annually and has expended a large sum in irrigating the land by ditches and canals.

The tract is situated within the limits of the grant to the Denver Pacific Railroad Company, whose road was definitely located August 20, 1869. Eaton claims the right to purchase the same under the act referred to, by reason of his said improvements, and occupancy thereof, as stated by him, alleging that he was the first applicant to purchase from said company.

It further appears from the records of your office that, on August 25, 1866, one Timothy S. Nettleton made homestead entry for said tract, and that on November 6, 1873, his entry was canceled for failure to make proof within the time prescribed by law.

On March 27, 1882, your office rejected the claim of said company to the tract in question, and from such rejection no appeal was ever taken.

It further appears that on January 19, 1885, Ella N. Cooper filed pre emption declaratory statement for said tract, alleging settlement on the 18th of the same month, and that on March 3, 1885, George W. Briggs made timber-culture entry therefor.

The provisions of the act of January 13, 1881 (21 Stat., 315), under which Eaton applies to purchase are—

That all persons who shall have settled and made valuable and permanent improvements upon any odd-numbered section of land within any railroad withdrawal in good faith and with the permission or license of the railroad company for whose benefit the same shall have been made, and with the expectation of purchasing of such company the land so settled upon, which land so settled upon and improved, may, for any cause, be restored to the public domain, and who, at the time of such restoration, may not be entitled to enter and acquire title to such land under the pre-emption, homestead, or timber-culture acts of the United States, shall be permitted, at any time within three months after such restoration, and under such rules and regulations as the Commissioner of the General Land Office may prescribe, to purchase not to exceed one hundred and sixty acres in extent of the same by legal subdivisions, at the price of two dollars and fifty cents per acre, and to receive patents therefor.

In the case of Roeschlaub *v.* Union Pacific Railway Company *et al.* (6 L. D., 750) the Department, in construing said act, held that the right of purchase therein provided, extends only to lands which had been withdrawn for the benefit of a railroad company, and afterwards, for some cause, *restored* to the public domain.

The instructions issued under said act, by the Commissioner of the General Land Office, accord with this view. See circular of April 30, 1886 (5 L. D., 165).

The land in question was excepted from the operation of the grant to the railroad company by the homestead entry of Nettleton, which was in existence at the time the company's right attached, and the same was consequently never withdrawn for the benefit of said company. It is in no sense, land "restored to the public domain," and for the reasons stated, is not subject to purchase under the provisions of said act.

Moreover, it does not appear that Eaton ever made actual settlement on the land he seeks to purchase, and he does not show, as required by said act, that he may not have been entitled to enter and acquire title to the land under the pre-emption, homestead or timber-culture laws of the United States.

He is clearly not entitled to purchase the land involved under said act, and your said decision rejecting his application is affirmed.

PRE-EMPTION CLAIM—PRIVATE CASH ENTRY.

GAINER *v.* PAAZIG.

The failure of a pre-emptor to file for unoffered land within the statutory period works a forfeiture of his claim only in favor of the "next settler" who has given the required notice and complied with the conditions of the law.

Where such land is subsequently offered, a purchaser at private cash entry is not a "settler" within the meaning of the statute, who can take advantage of the pre-emptor's default in filing.

The only case in which land "settled and improved" by a pre-emptor becomes "subject to the entry of any other purchaser," by reason of the pre-emptor's failure to file within the specified period, is where the land is subject, "at the time of settlement," to private entry.

Secretary Noble to Commissioner Stockslager, March 15, 1889.

I have before me the appeal of Wiley Gainer, from your decision of August 12, 1887, denying his application to make homestead entry of lot 1, section 30, and lots 5, 6, and 10, section 29, T. 4 S., R. 14 W., Gainesville district, Florida, and also denying his application to contest the private cash entries of Louisa Gargett, Marguerita J. Paazig, and John Casson, for the same tract.

In an affidavit of his own, the statements of which are substantially corroborated by no less than nine of his neighbors, Wiley Gainer sets forth the following facts:

That I settled on this place in 1868 and have been living on it continuously ever since, being eighteen years. Having formerly been a slave, without any education, I did not know my duty under the law, and as nearly all the settlers on St. Andrews Bay were living upon public land without entering the same and were not molested in their rights of settlement, I did not know that it was necessary for me to apply for the land. Last year (1886) when a land excitement was started here I was advised to make application for my homestead. When I had raised the money and got the numbers of my land, I was informed that it was no use, as Van Kirk, Dubois & Webb, three land speculators had entered me out. When the lands near here were surveyed last month I found out from the surveyor that Van Kirk & Co., had not entered the lot

1 my houses were on, I then made application in proper form through clerk circuit court, Calhoun county. . . . . All I have is upon this land, the accumulation of years of toil and poverty. I have put up two houses besides other buildings, eight hundred panels of fencing, dug three hundred yards of ditches, and cleared over twenty acres of land, besides planting an orchard and vineyard. If I am deprived of this land I lose everything and have to begin life anew. The parties entering my land are non-residents and have homes already up north and want my land for speculation from its enhanced value owing to my improvements.

January 25, 1886, Louisa Gargett made private cash entry No. 11,004 for said lot, Sec. 29; on March 12, 1886, Marguerita Paazig made private cash entry No. 11,185, for said lot 1, Sec. 30; and on March 25, 1886, John J. Casson made private cash entry No. 11,240 for said lots 5 and 6, Sec. 29.

Upon this state of facts you made the following ruling:

At the time Gainer made settlement on the land as claimed by him, he had under section 2265, Rev. Stats., three months from date of settlement to make his claim of record at the proper local office, which he neglected to do, said land being then designated as unoffered. May 20, 1881, this land was offered at public sale and thereafter became subject to private cash entry, and Gainer failed also to avail himself of the right accorded him by section 2264, Rev. Stats., to put his claim on record. The foregoing entries were made at the dates stated. This office is not insensible to the strong equities of Gainer in the premises, and to the great loss he would suffer by being deprived of his claim and the accumulation of years of toil; but the law is plain, and he having failed, albeit through lack of knowledge of his rights and the legal requirements, cannot now invoke the interposition of this office. I must therefore affirm your action rejecting his application to enter the land and also refuse his application to contest said entries on the complaint made, subject to the right of appeal in due time.

In this conclusion I do not concur. While of course Gainer can not be allowed to enter the tract so long as the latter is actually covered by the uncanceled cash entries mentioned, I am of the opinion that he should be permitted to contest those entries in a proceeding to which the owners of said entries should be specially cited.

In the absence of a statutory provision *attaching such a consequence* to a settler's failure to file declaratory statement or make homestead entry within the period allowed him for so doing, the forfeiture or destruction of his (the settler's) interest in his claim can not properly be enforced by the Department simply on the ground that he (the settler) has in fact failed to make filing or entry in accordance with the direction upon the subject.

The statutory provision for the filing of a record claim "by every claimant for land *not yet proclaimed for sale*" is contained in Sec. 2265 of the Revised Statutes, and *that* expressly states the consequence of a default upon the settler's claim, to wit: That that "claim shall be forfeited and the tract awarded to the *next settler*, in the order of time, on the same tract of land who *has* given (the required) notice and otherwise complied with the conditions of the law." Except as against such a "next settler who has given notice, etc.," the filing (or entry) may be made *after* the expiration of the three months period, and no forfeiture

is incurred: Johnson *v.* Towsley (13 Wall., 72). The cash entrymen here are not "settlers" at all, and therefore cannot insist that Gainer shall be deprived of his claim and improvements, for *their* benefit, simply because he omitted to file within three months after his settlement (i. e. thirteen years before the land was "offered" and *eighteen* years before these particular entrymen applied to purchase). The only case in which the statute provides that "land settled and improved" by a pre-emption claimant shall, because of his failure to file within the specified period, become "subject to the entry of any other purchaser," is the case mentioned in Sec. 2264, to wit, one in which the land is "subject at the time of settlement to private entry." The present case is not touched by that, inasmuch as Gainer's settlement was made some thirteen years before the land first became "subject to private entry."

There being no provision in the law for forfeiting such a claim upon this ground, *except* in favor of "the next settler who has given notice etc.," and there being in this case no settlers at all, other than Gainer himself, I see no reason why the latter should not be allowed to make entry, after he shall have duly established the facts alleged in a proper proceeding against the adverse claimants. A hearing should be ordered for this purpose.

Your said decision is modified accordingly.

CIRCULAR—ACT OF MARCH 3, 1887.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., February 13, 1889.

Registers and Receivers, United States Land Offices:

GENTLEMEN: The following instructions under the act of Congress approved March 3, 1887 (24 Stat., 556), are forwarded for your guidance.

THE FIRST SECTION

Directs that all railroad land grants not adjusted heretofore shall be adjusted immediately, that is without unnecessary delay. The duties thereunder pertain to the General Land Office and Department of the Interior.

THE SECOND SECTION

Provides for the recovery by the United States of title to lands which from any cause have been erroneously certified or patented "to or for the use or benefit of any company" on account of a railroad grant, whenever the fact may be ascertained that a certificate or patent has been erroneously issued, and prescribes the duties of the Secretary of the Interior and Attorney-General in connection therewith.

THE THIRD SECTION

Provides "That, if in the adjustment of said grants, it shall appear that the homestead or preëmption entry of any *bona fide* settler has been

erroneously canceled on account of any railroad grant, or the withdrawal of public lands from market, such settler, upon application, shall be reinstated in all his rights and allowed to perfect his entry by complying with the public land laws; *provided*, that he has not located another claim or made an entry in lieu of the one so erroneously canceled; *and provided also*, that he did not voluntarily abandon said original entry; *and provided further*, that if any of said settlers do not renew their application to be reinstated within a reasonable time, to be fixed by the Secretary of the Interior, then all such unclaimed lands shall be disposed of under the public land laws, with priority of right given to *bona fide* purchasers of said unclaimed land, if any, and if there be no such purchasers then to *bona fide* settlers residing thereon."

Three classes of persons are provided for under this section.

First. Bona fide settlers whose homestead or preëmption entries have been erroneously canceled on account of a railroad grant or withdrawal.

Second. Bona fide purchasers of such unclaimed lands.

Third. Bona fide settlers residing thereon.

The rights of the several classes to the lands referred to in the section are successive in the order stated in the section. The first in right is the homestead or preëmption settler whose entry has been wrongfully canceled. If he elects to assert his right, and has not been disqualified by locating another claim or making another entry in lieu of the entry erroneously canceled, his right is absolute, and the successive rights of the remaining two classes can not attach if he lawfully asserts his claim. If he fail to claim the land, or is disqualified under the act, the second class of persons, who are the *bona fide* purchasers of the land unclaimed by him, attach, and have precedence over the third class. The *bona fide* purchasers here referred to are those who, without knowledge of wrong or error, have purchased from the railroad company lands which have been previously entered by a preëmption or homestead settler, whose entry has been erroneously canceled, as described in the first clause of the third section, and which land the preëmption or homestead settler did not elect to claim after the recovery by the proceedings prescribed by the second section of the act.—*Attorney-General's Opinion, Nov.* 17, 1887 (6 *L. D.*, 272).

Parties of the first class desiring to avail themselves of the benefits of this section should present their applications without unnecessary delay, after notice of intention as required by the act of March 3, 1879, in preëmption and homestead cases. The application must in every instance be accompanied by proof showing:

1. The facts respecting the date of the applicant's settlement, duration of residence, and value of improvements upon the public land.

2. Whether he has located any other claim under any of the laws of the United States authorizing settlements upon public lands.

3. Whether he has abandoned the land embraced in his canceled entry or filing, if so, the causes which led to the abandonment.

4. Whether any other person or persons are residing upon the land.

5. That such persons as may be so residing upon the land have been notified of the intention of the claimant to apply for the re-instatement of his filing or entry, and the manner of giving such notice must be shown.

Should an adverse claimant appear to dispute or contest the right of re-instatement proceedings will be had in accordance with Rules of Practice as in ordinary contests.

While the act contains no provision relative to persons whose entries or filings have not been canceled, but whose lands have been certified or patented on account of railroad grants, it follows as a matter of course, that their rights should be protected, and the mode of procedure in such cases will be the same as in the cases where cancellation has been made, except that the parties should apply to make final proof and payment instead of for re-instatement of entry; but in such case proceedings will be deferred until the title has been restored to the United States as provided by section two of the act. The instructions of Nov. 22, 1887 (6 L. D., 276), under this section, are hereby modified in accordance with the foregoing.

Proceedings on applications by parties of the second class will be governed by instructions under the fourth section.

Applicants of the third class will be required to submit evidence, in addition to that relating to their own settlement or claims, showing whether there are persons of the first or second class residing upon, in possession of, or claiming lands.

THE FOURTH SECTION

Relates to all lands which have been erroneously certified or patented on account of railroad grants, except those mentioned in the third section, and by the grantee company sold to citizens or to persons who have declared their intention to become citizens of the United States; and provides that after the title to such lands has been restored to the United States as contemplated by the second section of the act, persons who have purchased such land in good faith, their heirs or assigns, shall be entitled to the lands upon making proof at the proper land office, whereupon patents shall issue relating back to the date of the original certification or patenting, and the grantee company will be required to pay the United States for such lands at the price at which other similar lands are legally held by the Government.

The purchaser from the company is not debarred by the act from recovering from the company the amount of purchase money paid by him less the amount paid by the company to the United States for the land.

A mortgage or pledge of such lands is not a sale within the intention of the act.

No forfeiture is declared by this act against any land grant for conditions broken (and no entry is authorized for lands legally within such grant), but no rights of the United States on account of breach of conditions are waived by the act.

An applicant for land under this section will be required to publish

notice of intention to make proof as in preëmption and homestead cases, and the proof must show:

1. That he is, or has declared his intention to become, a citizen of the United States.

2. That he is a *bona fide* purchaser from the company or some person claiming title under it, and the character of the instrument conveying the land to him.

3. The amount of purchase money paid to the company.

4. What part, if any, of the purchase money paid to the company has been refunded to him or any person acting as his agent.

5. Whether he has instituted proceedings against the company for the recovery of any portion of the purchase money; if so, for what portion.

6. The value and character of the improvements, if any, made or acquired by him upon the land.

7. Whether there is any person of the first class under the third section entitled to the right of entry under the preëmption or homestead laws.

Upon the submission of satisfactory proof as prescribed above, the register will issue certificate, in duplicate—numbered in the regular cash series—with annotations thereon showing that the entry is allowed without payment under the fourth section of the act of March 3, 1887 (24 Stat., 556).

THE FIFTH SECTION

Relates to lands within the limits of railroad grants, coterminous with constructed portions of the lines of road, not conveyed on account of, but excepted from, the grants.

Under this section, when the company has sold to citizens of the United States or persons who have declared their intention to become such citizens, the numbered sections prescribed in the grant and coterminous with the constructed portions of the road, within either the granted or indemnity limits, and which upon the adjustment of the grant are shown to be excepted from the operation of the grant, it shall be lawful for such purchasers (if their purchases are *bona fide*) to purchase said land from the Government by payment of the Government price for like lands, unless said lands were at the date of purchase in the *bona fide* occupancy of adverse claimants under the preëmption or homestead laws, in which case the preëmptor or homestead claimant may be permitted to perfect his proof unless he has since voluntarily abandoned the land.

Under the last proviso of said section, however, if a settlement was made on said lands subsequent to December 1, 1882, by persons claiming the same under the settlement laws of the United States, it will defeat the right of the purchaser, whether said purchase was made prior or subsequent to December 1, 1882, and the settler will be allowed to prove up for said lands as in other like cases.

Applicants to purchase under this section will be required to publish

notice of intention as directed by instructions under the third and fourth sections, and the proof must show:

1. That the tract was of the numbered sections prescribed by the grant.
2. That it was coterminous with constructed parts of said road.
3. That it was sold by the company to the applicant, or one under whom he claims, as a part of its grant.
4. That it was excepted from the operation of the grant.
5. That at the date of said sale it was not in the *bona fide* occupancy of adverse claimants under the preëmption or homestead laws, whose claims and occupancy have not since been voluntarily abandoned.
6. That it has not been settled upon subsequent to the first day of December, 1882, by any person or persons claiming the right to enter the same under the settlement laws.
7. That the applicant is, or has declared his intention to become, a citizen of the United States.
8. And that he, or one under whom he claims, was a *bona fide* purchaser of the land from the company.

The proof upon these points being found satisfactory, the entry will be allowed and the usual cash certificate and receipts will be issued thereon reciting the fact that the entry is in accordance with the fifth section of the act of March 3, 1887, (24 Stat., 556).

No entry will be allowed under this section until it shall have been finally determined by this Department that the land was excepted from the grant.

THE SIXTH SECTION

Provides that when any such lands have been sold and conveyed as the property of the company for State and county taxes, and the grant to the company has been thereafter forfeited, the purchaser at such sale shall have the preference right for one year from the date of this act, and no longer, in which to purchase said lands from the United States by paying the Government price for said lands, provided said lands were not previous to or at the time of the taking effect of such grant in the possession of or subject to the right of an actual settler.

The period prescribed by the statute for presenting applications under this section having expired, instructions as to methods of procedure are deemed unnecessary.

THE SEVENTH SECTION

Authorizes the Secretary of the Interior to refuse to certify or convey lands on account of any railroad grant where it shall appear to him that to do otherwise would give to the grantee more lands than the granting act contemplated giving.

Very respectfully,
S. M. STOCKSLAGER,
Commissioner.

Approved:
WM. F. VILAS,
Secretary.

PRE-EMPTION ENTRY—RESIDENCE.

JAMES EDWARDS.

If the improvements are shown by the evidence to be commensurate with the means of the claimant, their inferior character should not be taken as an indication of bad faith.

After the establishment of residence, absences occasioned by sickness are excusable, and do not interrupt the continuity of the residence.

The fact that the claimant while necessarily absent from the land, on account of sickness, voted in the precinct where he had been taken for treatment, will not in itself raise a conclusive presumption of abandonment, where he subsequently returned to the land.

Secretary Noble to Commissioner Stockslager, March 15, 1889.

I have considered the appeal of James Edwards from the decision of your office of May 10, 1887, rejecting his final proof in the matter of his pre-emption filing, No. 12,435, for N. ½ of NW. ¼, NW. ¼ of NE. ¼, Sec. 19, and SW. ¼ of SE. ¼, Sec. 18, T. 7 S., R. 17 E., Stockton district, California.

The declaratory statement was filed April 24, 1884, alleging settlement April 1, of that year. Proof was made February 14, 1887, from which it appears, as stated in your office decision, that "actual residence was established, September 11, 1885," and the claimant remained continuously on the land from that time until April, 1886, a period of about seven months. About the latter date he was found sick in his house on the tract by a neighbor, who carried him provisions during his sickness, and subsequently he was taken to the hospital in Merced City, about thirty miles distant from his claim. He remained in the hospital about two months at that time, and several times since has been there a month at a time, but the witnesses testify positively, that he has never been absent from the land since he established residence, as above stated, in September, 1885, except when sick and carried to the hospital. While in the hospital in Merced, November 2, 1886, he voted in a general State election. When discharged from the hospital, however, he returned to his claim and was living there at the time he made proof. His improvements consist of a dwelling house, twelve by fourteen feet, "shake" roof, board floor, stone chimney and fire-place, two windows and a door, of the value of $50.00, and a corral about two hundred feet in diameter, valued at $50.00. The house was furnished with a bunk and bedding, a table, two or three benches, dishes, cooking utensils and a bake-oven. The claimant was a single man, with no family, and old, poor, and sickly. The land was suitable for grazing. The claimant had no farming implements or stock, but had cultivated two acres as a garden.

Your office sustained the action of the local officers in rejecting the proof, on the grounds, that "the pre-emptor must prove six months uninterrupted residence next prior to application to enter and the making

of such improvements as shall make it apparent that he has taken the land for a permanent home."

The improvements of the claimant, while meagre, are shown by the evidence to be all that the claimant had the means of making, and, being commensurate with his ability, their inferior character and extent do not indicate bad faith. As to residence, it is shown, and found in your said decision, that he established it upon the land in September, 1885, and remained continuously upon the land for seven months thereafter, and has never since been absent except when sick and carried to the hospital, from which when discharged he invariably returned to the land. Residence being once established, subsequent absences necessitated by sickness are excusable, and do not show or tend to show abandonment of such residence, and, therefore, the continuity of the residence is not broken thereby. Patrick Manning (7 L. D., 144).

It is true, the claimant voted at Merced, while in the hospital there, November 2, 1886. This is a circumstance to be considered in connection with all the other facts of the case, as bearing upon the question of the claimant's abandonment *vel non* of the residence which he had acquired upon the tract entered. Did it show an intent to make the hospital or the election precinct in which it was located his home, and thus prove such abandonment?

The claimant testifies that before voting at Merced, November 2, 1886, he had voted in Mariposa county where the claim is located, and that when he voted at Merced his name was on the "great register" of Merced county. Previous to that time it must have been upon the register of Mariposa county. The "Political Code" of California forbids registration in different counties at the same time. (Codes and Statutes of California, Vol. 1 Sec. 1104). That code also provides that before a person's name can be entered on the register of one county, in case of former registration in another county, there must be presented a certificate showing the cancellation of such prior registration, and in addition thereto, "Proof, by the affidavit of the party, that he is an elector of the county in which he seeks to be registered," and one of the qualifications of an elector is that he "shall have been a resident . . . . of the precinct in which he claims his vote thirty days, next preceding the election." (Ib. sections 1097 1083).

The claimant, therefore, must in order to have had his name placed upon the "great register" of Merced county, have procured a certificate showing the cancellation of his registration in Mariposa county, and have made affidavit that he had been a resident of the precinct at Merced for thirty days preceding the election at which he voted.

A strong presumption is raised by these facts, that, at the time he voted and had his name placed on the register at Merced, he had abandoned his residence on his claim, but this presumption is to a large extent rebutted by the fact, that after so voting and registering and as soon as he was discharged from the hospital he returned to the land.

It being conceded that he had once acquired residence on the claim, his subsequent voting and registering at another place to which he had been carried on account of sickness and where he was under treatment in a hospital—in view of his return to the claim after so voting and registering and as soon as discharged from the hospital—might be held to be evidence tending to show illegal voting, rather than a change of residence.

Your office and the local officers, while rejecting the claimant's proof do not find that there was bad faith as to residence or hold the entry for cancellation, and the claimant in his appeal to this Department prays, if his proof cannot be accepted that at least he be allowed to make proof of further and continual residence and additional improvements, and that upon such further showing the land be awarded him.

In view of the conflicting facts and circumstances of the case bearing on the question of abandonment of residence, and in the absence of an intervening adverse claim, I am of the opinion that the claimant's entry should be suspended, and he be allowed to make proof as requested by him, and if said proof be otherwise sufficient, that said entry—inasmuch as its life time has expired—be then submitted to the Board of Equitable Adjudication for action thereon under the appropriate rule. You are accordingly so instructed, and the decision of your office is modified accordingly.

RAILROAD GRANT—INDEMNITY WITHDRAWAL.

CENTRAL PACIFIC R. R. CO. *v.* DOLL.

A settlement made on land included within an indemnity withdrawal is unavailing as against the right of selection on the part of the company; but the company cannot be heard to object to such settlement, after the revocation of the withdrawal and in the absence of a selection.

The order revoking the indemnity withdrawal, made for the benefit of this company, took effect as soon as issued; and a settlement on land included within said order, existing at the date of its issuance, will be protected as against a subsequent selection.

Secretary Noble to Commissioner Stockslager, March 15, 1889.

I have considered the case of the Central Pacific Railroad Company *v.* Josiah Doll, on appeal of the said railroad company from your office decision of November 19, 1887, approving the pre-emption cash entry of said Doll for the N. ½, NE. ¼, Sec. 15, T. 41 N., R. 9 W., M. D. M., Shasta, California, land district.

The record shows that said land is within the indemnity limits of the grant of July 25, 1866, to the California and Oregon (now Central Pacific) Railroad Company, the withdrawal for which took effect September 6, 1871.

Doll filed his declaratory statement March 11, 1886, alleging settlement January 1, 1884.

At the time Doll made his final proof the said railroad company offered formal protest against the acceptance of said proof and against the entry.

In your said decision you say, "inasmuch as the indemnity withdrawal has been revoked, and the land not selected for railroad purposes, the company has now no interest in the land, and its protest is dismissed."

On appeal the Railroad Company, as grounds of error, claim:

1st. That as the land was withdrawn in 1871, it was not subject to pre-emption settlement by Doll in 1884.

2nd. Error in holding that the railroad company had not selected the lands.

Upon the first proposition above, it may be said in reply that the record shows Doll to have made his settlement in January, 1884, and to have remained thereon continuously until he made final proof in October, 1886, and while as against the said railroad company's rights this settlement would have been unavailing, had they exercised them in time, they cannot now be heard to raise the question as they no longer have any interest in the land.

As to second ground of error assigned, *i. e.*, that it was error to hold that said company had not selected said lands, no evidence of a selection is submitted and upon inquiry at the proper division of the land office, it appears that list No. 11, which it is alleged in the appeal was filed in the local offic ctober 7, 1887, did not reach the General Land Office until after your said decision was promulgated and the amended list now on file does not contain the land in controversy so that it can not now be determined by me whether the said tract was or was not in the original list. But if it was it is immaterial in the view I take of the case. Said list was not filed until October 7, 1887, and while the land officers could not receive filings until the expiration of the thirty days notice, October 14, 1887, the order of revocation took effect as soon as issued and actual settlement might have been made at once. See Atlantic and Pacific Railroad Co. (6 L. D., 84 (92)).

The order of revocation was made August 15, 1887, and as a new settler might, after that date and before the application of the company to select, have made settlement upon said lands, and as there would then exist no legal reason why his settlement should not ripen into a title, the railroad company would acquire no right thereto as against such new settler, by subsequently including the same in a list of selections. Northern Pacific Railroad Co. *v.* Waldon (7 L. D., 182). It cannot be said that Doll an actual settler at the time the restoration took effect, could have less right to the land than such new settler.

Your said decision is accordingly affirmed.

TIMBER CULTURE CONTEST—RELINQUISHMENT.

SORENSON *v.* BECKER.

A relinquishment filed after the initiation of a contest does not inure to the benefit of the contestant, unless it be found that it was filed as the result of the contest.

In case of a timber culture contest, accompanied by an application to enter, the right of the contestant depends upon the establishment of the default alleged against the entryman; but such right cannot be defeated by a relinquishment filed after the initiation of the contest.

First Assistant Secretary Muldrow to Commissioner Stockslager, March 22, 1889.

I have considered the case of James O. Sorenson *v.* Charles Becker on appeal by the former from your office decision of March 3, 1887 cancelling his timber culture entry for the SE¼ of Sec. 18 T. 109 N., R. 53 W., Watertown Dakota land district.

One Ann Leonard made timber culture entry for said land June 18, 1878. On May 21, 1884 Charles Becker filed affidavit of contest sworn to May 19, against said entry alleging failure to break, cultivate and plant to tree seeds, cuttings or trees, as required by law in the first, second, third, and fourth years. It is stated by Becker and in your office letter of September 20, 1884 that this affidavit was accompanied by an application to make timber culture entry for said tract.

On May 22, 1884, Sorenson appeared at the local office and presented a relinquishment executed May 20, by Ann Leonard, of her entry and at the same time presented his application to make timber culture entry for said tract. This relinquishment was accepted, Leonard's entry canceled and Sorenson's application to make timber culture entry allowed. On the same day, Becker's affidavit of contest was rejected being marked "Rejected May 22, 1884 as relinquishment of the entry is this day filed in this office, and the entry canceled and awarded to the first legal applicant tendering the fees and commissions." Becker appealed from that decision and your office, on September 20, 1884 decided "when Becker presented his application to make timber culture entry with his affidavit of contest thereby complying with the requirements in such cases he acquired a prior right to enter the land whenever it should become vacant either by reason of said contest or otherwise," allowed Becker's application to entry and held Sorenson's entry for cancellation. It should be noted that there is nothing in the record now before me to show that Sorenson was served with notice of Becker's appeal or that he was given an opportunity to present his claims to your office prior to the rendition of said decision. Becker was notified of this decision and of his preference right of entry December 5, 1884, and on the 11th of that month filed his application to make timber culture entry for said land, which application was allowed and entry No.

10588 made by said Becker. By letter of May 14, 1885 your office wrote to the local officers, "Timber culture entry No. 10588 Charles Becker SE ¼ Sec. 18 T. 109 R. 53 Dec. 11, 1884, is suspended for conflict with timber culture entry No. 10080 James O. Sorenson same tract, May 22, 1884," and directed them to notify Becker that he would have sixty days to show cause why his entry should not be canceled. On June 17, 1885, Ann Leonard filed a petition asking that she be allowed to withdraw the relinquishment of her said timber culture entry and that a hearing be ordered in the matter of Becker's contest against said entry. In her affidavit in support of said application, which affidavit is corroborated by Sorenson and seven other witnesses it is set forth, that up to the date of her relinquishment she had fully complied with the requirements of the law in all particulars; that at the time of making said relinquishment she knew of no contest; that "my relinquishment was not made for purposes of speculation, but simply and only because I am a widow and old and poor and unable to give my tree claim proper attention, and that I never received or was to receive more for my said relinquishment than my tree claim had cost me for filing, breaking, planting, cultivating and other expenses." This petition was refused by your office, and in the letter of March 3, 1887, passing upon the same, it was said "the entry of Sorenson is this day canceled." On May 24, 1887, Sorenson filed an appeal "from the action of the Hon. Commissioner of the General Land Office in ordering the cancellation of said entry." After considerable correspondence between your office and the local officers, it was concluded that Sorenson had not been notified by the local officers of the decision of March 3, 1887, and that his appeal was filed in time and should be allowed.

Becker claims that because Leonard's entry was canceled upon relinquishment filed after the filing of his contest affidavit he became entitled to a preference right to enter said land. This does not, however necessarily follow. That right is extended to one who "has contested, paid the land office fees and procured the cancellation" of an entry by the provisions of the second section of the act of May 14, 1880 (21 Stat., 140). Unless it be found that the filing of this relinquishment was brought about by the filing of the contest affidavit the contestant is not under the decisions of the Department entitled to a preference right of entry. The act of June 14, 1878 (20 Stat., 113) provided that if at any time before the issuance of patent the claimant thereunder should fail to comply with any of the requirements of that law "then and in that event such land shall be subject to entry under the homestead laws, or by some other person under the provisions of this act," the rights of the parties to be determined as in other contested cases. Unless Leonard had failed to comply with the requirements of the law at the date of the filing of Becker's affidavit of contest and accompanying application to enter, if such application did accompany his affidavit, he (Becker) secured no right thereunder. If such failure on the part of Leonard

did really exist then Becker should not be deprived of the legitimate fruits of his diligence in bringing that failure to the notice of the proper authorities by a relinquishment filed subsequently to his application to contest and make entry. In view of all the circumstances of this case I am of the opinion that the rights of these respective parties can be determined only by a hearing had for that purpose. You will therefore please direct the local officers to order a hearing of which all parties in interest should have due notice, to determine whether or not there was a failure on Leonard's part to comply with requirements of the law under which her entry was made and whether the execution or filing of her relinquishment was due to the attack by Becker upon the validity of her said entry, and such other facts as may be of service in determining the rights of these parties.

The decision of your office is accordingly modified.

RAILROAD GRANT—TIMBER TRESPASS.

NORTHERN PACIFIC R. R. CO.

The right of recovery as against a railroad company for the value of timber taken from odd sections within the indemnity limits, is not defeated by a subsequent selection of the lands by the company.

Secretary Noble to the Attorney General, March 19, 1889.

I have the honor to acknowledge receipt of a communication from the Department of Justice of the 12th ultimo, transmitting a copy of a letter from the United States district attorney for Minnesota relative to the timber trespass cases of the United States *v.* De Graff and Co., and the Northern Pacific Railroad company, asking whether said suits should be brought to trial at the adjourned term of the court in April next. In the communication from the Department of Justice above referred to, it is stated that "the question is, whether the lands involved in the trespass are on the even or the odd numbered section."

It appears from the report of the special agent upon which such suit was recommended, and also from the report of the Commissioner of the General Land Office, that these suits were brought for the recovery of the value of timber and railroad ties taken from odd sections only of land in the State of Minnesota, within the forty miles indemnity limits of the Northern Pacific road known as the second indemnity belt.

The suit was instituted upon the recommendation of the Commissioner of the General Land Office, made August, 1883. At this date the land upon which the trespass was alleged to have been committed had not been selected by the railroad company, but on May 24, 1884, the Commissioner made another report in which he stated that prior to the commencement of the suit the railroad company selected said lands

under the indemnity provisions of its grant—said selections having been made October 17, 1883.

The lists of said selections are now pending before the land department for examination, and will be finally approved and certified to the company in the progress of the adjustment of said grant, if upon said examination it should appear that said selections are legal and proper in all respects; yet although said selections may eventually be certified to the company, such certification can only relate to the date of selection—and not defeat the right of the government to recover for a trespass committed on said land prior to selection, because the title of the company to indemnity land attaches from the date of selection only, and not at the date of the grant.

In the case of Barney *v.* Winona Railroad Company (117 U. S. 232) the court after observing that there is a well established distinction between "granted lands" and "indemnity lands" said:

> The former are those falling within the limits specially designated, and the title to which attaches when the lands are located by an approved and accepted survey of the line of the road filed in the Land Department, as of the date of the act of Congress. The latter are those lands selected in lieu of parcels lost by previous disposition or reservation for other purposes, and the title to which accrues only from the time of their selection.

Again in the case of the Kansas Pacific Railroad company *v.* Atchison Topeka and Santa Fe Railroad Company, the court held that the right to select lands within indemnity limits, in lieu of lands lost in the granted limits, conferred only a *right to select them* within certain limits and did not confer a right to any specific land or lands, capable of identification.

The court say:

> That grant to Kansas as stated, conferred only a right to select lands beyond ten miles from the defendant's road upon certain contingencies. It gave no title to indemnity lands in advance of their selection. (112 U. S. 42.)

To the same effect is the ruling in the case of McCreery *v.* Haskell (119 U. S., 327), holding that the approval of the Secretary of indemnity school selections vests the title in the State as of the date of selection.

Under the ruling of the supreme court in the cases above cited, it would seem that the right of the government to recover for the value of timber taken from lands in the indemnity limits of a railroad grant and subsequently selected by the company, would not be defeated, although the selections might be eventually approved and certified to the company; but in my judgment, the case is rather technical, and justice does not require the prosecution of the claim—but all is submitted for your further consideration.

MINING CLAIM—SURVEY—CIRCULAR OF DECEMBER 4, 1884.

ENGINEER MINING AND DEVELOPING COMPANY.

In the survey of a claim that conflicts with a prior valid lode claim, where the ground in conflict is excluded, the applicant's right is limited to a line passing through the point where the lode intersects the exterior line of the senior location.

Secretary Noble to Commissioner Stockslager, March 19, 1889.

This is an appeal by The Engineer Mining and Developing Company from your office decision of Jany. 28, 1888, requiring to be amended the survey under which William Schultz and the Engineer Mining and Developing Company made mineral entry December 28, 1885, for the Eldorado lode claim in E½ Sec. 17, T. 43 N., R. 8 W., N. M. P. M., Lake City, Colorado. The Eldorado claim was located July 31, 1877. It was surveyed in July 1885 and the survey was approved on August 26, 1885, and publication began September 4th following. The said survey overlaps on its southerly end the "B. F. Requa" lode claim which had been previously (June 14, 1876) located.

By said letter dated January 28, 1888, addressed to the United States surveyor general at Denver Colorado, your office stated that said survey had not been made in accordance with the circular approved December 4, 1884. (3 L. D., 540.)

By the same letter your office directed "within that portion of the "Eldorado" survey to which the claimants rights are restricted by said circular they must have a new survey of their claim made, the end lines of which must be parallel;" and also that the amended survey be connected with a United States mineral monument within two miles, it appearing that the township survey "has been questioned by letter "E" of March 31, 1883."

Section 1 of the said circular finds that the rights granted to locators are restricted to locations on veins, lodes, or ledges situated on the public domain, and directs that when the survey conflicts with a prior valid lode claim or entry, and the ground in conflict is excluded the claimants "right to the lode claimed terminates when the lode in its onward course or strike intersects the exterior boundary of such excluded ground and passes within it." Said circular in section 2 provides further "the end line of 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."

The appellant contends that under section 2336, Revised Statutes, it had certain rights to the space in conflict between the survey referred to and the said prior location, and that it is beyond the power of your office to limit such rights.

Section 2336, *supra*, provides:

Where two or more veins intersect or cross each other, priority of title shall govern; and such prior location shall be entitled to all ore or mineral contained within

the space of intersection; but the subsequent location shall have the right of way through the space of intersection for the purposes of the convenient working of the mine. And where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection.

In the case at bar the survey overlaps but does not cross or intersect the prior location. It cannot therefore be held to come within the purview of section 2336, the manifest purpose of which is to provide for the working of such claims as cross and lie on both sides of a senior location or entry.

In the case of Branagan *et al. v.* Dulaney (13 C. L. O., 190) upon which the appellant relies, the supreme court of Colorado considered the respective rights of a junior and senior location which crossed each other.

In the present case no part of the over-lapping space is embraced in the "Eldorado" application or entry but said space is expressly excluded therefrom. From the survey as it now stands the lode appears to strike the exterior line of the B. F. Requa lode claim at a point north of the line surveyed as the southerly end line of the "Eldorado."

The appellant's right does not extend beyond a southerly end line (parallel with the north line) through the point where the lode intersects the exterior line of the said senior location. The surface right being simply an adjunct to the lode claim, such right could not extend beyond the same. It was therefore proper to require the end lines of the survey to be re-adjusted so as to accord with the requirements of the law and the regulations.

Your decision is affirmed.

RAILROAD GRANT—SETTLEMENT CLAIM.

NORTHERN PACIFIC R. R. CO. *v.* ANRYS.

A claim resting on settlement, residence and improvement, and existing at the date when the grant becomes effective, is such a claim as contemplated by Congress in the excepting phrase "occupied by homestead settlers."

Secretary Noble to Commissioner Stockslager, March 19, 1889.

The land involved herein is the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and Lot 5, Sec. 7, T. 5 N., R. 2 E., Vancouver land district, Washington Territory.

The tract in question lay within the limits of the withdrawal for the benefit of the Northern Pacific Railroad Company, under the grant of July 2, 1864 (13 Stat., 365), on map of general route of its road filed August 13, 1870, and is in the primary limits of said grant as indicated by map of the definite location of the company's road, filed September 22, 1882.

On March 23, 1887, A. P. Anrys applied to make homestead entry for the tract, accompanying his application by affidavits, alleging, in effect,

that the land was covered by the homestead settlement claim of one Isaac Newland, prior to and on August 13, 1870, and was thereby excepted from the operation of the withdrawal on general route. On these allegations a hearing was had April 26, 1887, after notice to the company, at which Anrys appeared and submitted testimony, but the company made default.

The local officers found in favor of Anrys, and were of opinion that his application to enter the tract should be allowed.

Upon appeal by said company, your office, on November 7, 1887, affirmed the finding of the local officers, and rejected the company's claim to the land. The company now appeals to this Department.

It is shown by the testimony submitted at the hearing, that Isaac Newland settled on the land in question (then unsurveyed) on or about the first of February, 1870, with a view to acquiring title thereto under the homestead law, and erected a dwelling-house thereon; that at the date of his settlement he was a citizen of the United States, with a family consisting of his wife and five children, and otherwise qualified to make homestead entry; that he moved his family to, and took up his residence on the land about the first of March, 1870, and thereafter continued to reside thereon, with his family, making it his exclusive home, until some time in May, 1871. He cleared, enclosed and cultivated a portion of the land, raising oats, potatoes, turnips and other vegetables thereon, during the season of 1870, and built a chicken-house, milk-house and barn, which improvements, together with his dwelling house, were worth about $110.00. He also had a span of horses, two colts and nineteen head of cattle on his claim. In the meantime the land was surveyed, and Newland finding that he was on an odd section, and that his land was claimed by the said railroad company, and that the company intended to oppose his claim thereto, became discouraged, and sold his improvements and part of his stock to one John Colvin in the early spring of 1871, and moved off the land in the month of May following. Colvin immediately moved on to the land and continued to reside there until November, 1871, when he was succeeded by one Fritz Kettler, who was in turn succeeded by one J. C. Bronson in 1877. Bronson remained on the land, cultivating and improving the same until the month of June, 1881, when he sold his improvements to the applicant A. P. Anrys at the price of $216.00. Anrys at once moved to and took possession of the tract and has continuously resided thereon, with his family, making the same his exclusive home ever since. He has built a new barn, planted an orchard of some fifty fruit trees and otherwise added to the improvements on the claim, to the extent that such improvements are now worth about $700. Colvin and Kettler each cultivated and improved the land during the time of his residence thereon. It thus appears that the tract has been continuously occupied and claimed by settlers ever since the date of Newland's settlement, namely, February 1870, and also that Anrys had settled on the

same prior to the definite location of the company's road, and was living on and claiming the land at the date of such definite location. It also appears that the land was not surveyed until after the map of general route of the company's road had been filed.

I am clearly of the opinion, in view of the foregoing, that the claim of Newland, acquired by his settlement, residence and improvements, prior to and covering the date of the withdrawal on general route, was such a claim as served to except the land in question from the operation of such withdrawal. Northern Pacific R. R. Co. *v.* Bowman (7 L. D., 238); same *v.* Evans (id., 131).

Nor did the land pass to the company on definite location of its road, for at that date the tract was covered by the settlement claim of Anrys, the present applicant, who had settled in June, 1881, and was still living on and claiming the same. Southern Pacific R. R. Co. *v.* Lopez (3 L. D., 130); Central Pacific R. R. Co. *v.* Wolford (id., 264); Brown *v.* Central Pacific R. R. Co. (6 L. D., 151); Holmes *v.* Northern Pacific R. R. Co. (5 L. D., 333).

It is not necessary that actual entry should be made by a homestead settler, in order to defeat the claim of the railroad company to land covered by such settlement. A claim resting on settlement, residence and improvement, existing at the date of withdrawal on general route is sufficient, as we have seen, to except the land covered thereby from the operation of such withdrawal, and the same principle applies to such a claim existing at the date of definite location of the company's road. Moreover, it seems to me that this is such a case as the Congress contemplated by the excepting phrase "occupied by homestead settlers," used in the third section of said grant of July 2, 1864.

For these reasons your said office decision, rejecting the company's claim to the land in question is affirmed, and the application of Anrys to enter the same will therefore be allowed.

SURVEY—SPECIAL RATES—ACT OF OCTOBER 2, 1888.

Augmented rates authorized for the survey of mountainous and heavily timbered land.

Secretary Noble to Commissioner Stockslager, March 23, 1889.

I am in receipt of your communication of January 18, 1889, relative to the petition of a large number of settlers upon unsurveyed lands in townships 38, 39, 40 and 41, S., range 12, W., and township 39 S., range 13, W., Willamette Meridian Oregon.

It appears that in September, 1887, and again in April, 1888, the surveyor general for Oregon advertised for proposals for the execution of the surveys in several of said townships, but that, on account of the country being mountainous and broken, no surveyor would undertake the work at the mileage rates allowed ($9 for standard and meander

lines, $7 for township exterior lines, and $5 for subdivisional lines); and he recommended that, where the lines pass over lands that are mountainous, heavily timbered, or covered with dense under-growth, he be authorized to allow the augmented rates provided by the act of October. In this recommendation you concur.

The paragraph of said act relative to such surveys is as follows (Stats. of 1887–88 p. 525):

For surveys and re-surveys of public lands, one hundred thousand dollars, at rates not exceeding nine dollars per lineal mile for standard and meander lines, seven dollars for township lines, and five dollars for section lines; except as to mountainous lands, or lands covered with dense timber or underbrush, the rate shall not exceed thirteen dollars per mile for standard and meander lines, eleven dollars for township lines, and seven dollars for section lines, when the survey is made upon the order of the Secretary of the Interior: *Provided*, That in expending this appropriation, preference shall be given in favor of surveying townships occupied, in whole or in part, by actual settlers; and the surveys shall be confined to lands adapted to agriculture and lines of reservation.

On January 25, 1889, my predecessor, Secretary Vilas, in case of a similar petition and recommendation, authorized the survey of certain lands in the immediate vicinity of those herein described, at the enhanced rates allowed under the act above quoted.

In view of the facts herein set forth, you are authorized to grant the prayer of the petitioners, and to instruct the U. S. surveyor general for Oregon to invite proposals for the survey prayed for, at a compensation not exceeding the augmented rates allowed by said act of October 2, 1888.

Overruled, 28 L. D. 126

RAILROAD GRANT—WITHDRAWAL—SETTLEMENT CLAIM.

NORTHERN PACIFIC R. R. CO. URQUHART.

A withdrawal on general route made for a branch line of this road, will not operate to reserve lands for the benefit of the main line.

The settlement and occupancy of a qualified pre-emptor, existing at the date of definite location, are sufficient to except the land covered thereby from the operation of the grant.

Secretary Noble to Commissioner Stockslager, March 23, 1889.

I have considered the case of the Northern Pacific Railroad Company *v.* Donald Urquhart, on appeal by the former from your office decision of November 1, 1886, holding that the E. ½ of the NE. ¼ of Sec. 13, T. 22 N., R. 30 E., North Yakima, Washington Territory land district, was excepted from the grant to said company of July 2, 1864 (13 Stat., 365).

On June 14, 1883, Donald Urquhart filed pre-emption declaratory statement for this tract and other land, alleging settlement September 30, 1877, and, on December 27, 1883, made final proof thereunder before the local officers, upon which final certificate was issued.

When the papers in the case were examined in your office, it was held that "the filing and settlement of Urquhart operated to except the land in question from the attachment of the grant." The railroad company appealed from that decision.

The land was within the limits of the withdrawal made on the filing August 20, 1873, of map of general route of the branch line of said road. Afterwards, on June 11, 1879, said company filed what was denominated an amended map of the general route of said branch line, and a withdrawal of lands along the general route as shown by said amended map was ordered by your office.

The land here in controversy fell entirely outside the limits of that withdrawal even if it had been authorized by law.

On September 1, 1879, the lands within the first withdrawal and not within the limits of the withdrawal attempted to be made on the said amended map of general route were by your office ordered to be restored to the public domain. These tracts came within the limits of said grant as fixed by the filing October 4, 1880, of the map of definite location of the main line of said road, between Wallula Junction and Spokane Falls. The branch line of the road for the benefit of which this land was withdrawn in 1873, was finally located entirely outside the limits of that withdrawal and did not include in either the forty or fifty mile limits, as fixed by the definite location, the tract in dispute, and said company thereby indicated that it no longer had any claim to the land included in the withdrawal made upon the filing of the first map, for the construction of said branch line.

It can not be held that the company could rightfully claim the benefit of the withdrawal made for the benefit of the branch line of said road for the main line. If it were allowed to receive the benefit of the withdrawal on general route of the branch line for the definite location of the main line, it would thus withhold from settlement two distinct belts of land for the benefit of one and the same line of road, since there had already been a withdrawal for the benefit of the main line, and this was certainly not contemplated or warranted by the law. The company can claim no right to said land prior to the filing of its map of definite location October 4, 1880, and this is admitted in the argument filed in support of its appeal. It is contended that the facts in the case do not show such a claim to the land by Urquhart as would serve to except this tract from the grant to the company.

At the time of Urquhart's alleged settlement, he was an alien, but on July 20, 1880, he declared his intention to become a citizen of the United States. In the matter of settlement and residence the claimant and one of his final proof witnesses state that he built a house and begun his residence thereon in 1879, while the other witness states that he had known the claimant only about two years and that he (claimant) had established his residence there "prior to 1881." Urquhart had not been continuously present on this land all the time from 1877 to date

of his final proof, but it is shown and admitted by the company, that he used this land during that time for grazing purposes.

I concur in the conclusion reached in your office that said tracts were, by reason of Urquhart's claim thereto, excepted from the operation of the grant, and the decision appealed from is therefore hereby affirmed.

PRE-EMPTION—SECTION 2260 R. S.

PAYNE *v.* CAMPBELL.

Joint ownership in land is sufficient, under section 2260 R. S., to preclude such a proprietor from removing therefrom to settle upon other land in the same State or Territory.

Secretary Noble to Commissioner Stockslager, March 25, 1889.

I have considered the case of Charles H. Payne *v.* John J. Campbell, on appeal by Campbell from your office decision of August 14, 1886, rejecting his final proof and holding for cancellation his pre-emption filing for the SW. ¼ of the NE. ¼ the S. ½ of the NW. ¼ and the NE. ¼ of the SW. ¼ of Sec. 2, T. 11 S., R. 41 E., W. M., Le Grande land district, Oregon.

Campbell filed his pre-emption declaratory statement for said tract June 6, 1883, alleging settlement May 20, 1883, and in accordance with published notice made final proof December 17, 1885, against the acceptance of which Payne who on September 10, 1885, filed his pre-emption declaratory statement for the same tract alleging settlement August 21, 1885, filed protest. A hearing was had, the testimony being by stipulation of the parties, taken before E. H. Van Slyck, a notary public at Baker City, Oregon. The local officers decided in favor of the claimant, and on appeal by Payne, your office held that Campbell moved from land of his own to settle on that in controversy, and therefore such settlement was illegal, and that his filing should be canceled. From that decision Campbell appealed.

Campbell, in his final proof in answer to the question, "Did you leave other land of your own to settle on your present claim"? said, "I did not." In his cross-examination at the hearing, Campbell testifies that when he made his settlement on the land in controversy he removed from a tract of land near Baker City containing about one hundred and forty acres where he had resided seventeen or eighteen years, and which was and still is owned by himself and his two sons jointly. This showing clearly brings the claimant within the inhibition of the second clause of section 2260 of the Revised Statutes and it is therefore unnecessary to consider the question of his residence on and inhabitancy of the land upon which questions the testimony is somewhat contradictory. Nor is it necessary here to pass upon Payne's claim or to decide what right, if any, he obtained by virtue of his alleged settlement.

For the reasons herein stated your said office decision rejecting Campbell's final proof and holding his filing for cancellation is affirmed.

PRICE OF DESERT LANDS—STATUTE.

DANIEL G. TILTON.

The price of desert lands within the limits of a railroad grant may be properly fixed at double minimum.

When there are different statutes *in pari materia*, though made at different times and not referring to each other, they should be taken and construed together as one system and explanatory of each other.

Secretary Noble to Commissioner Stockslager, March 25, 1889.

September 28, 1887, Daniel G. Tilton made application to make desert land entry for Sec. 24, T. 11 N., R. 14 W., San Bernardino meridian, Los Angeles district, California. He accompanied the application with a tender of twenty-five cents per acre of said land. The tract being "within the granted limits of the Southern Pacific Railway," the local officers held it to be double-minimum land under Sec. 2357 of the Revised Statutes, and, under sections three and eight of the circular of June 27, 1887 (5 L. D., 708), refused said tender of twenty-five cents, and demanded fifty cents per acre, which Tilton refused to pay, and for that reason the local officers rejected his application. Your office sustained the action of the local officers by decision of February 7, 1888, from which he appeals to this Department.

Section 2357 (Revised Statutes) is of *general* application to the "public lands" of the United States, and, as to alternate sections of such lands, reserved along the line of railroads within the granted limits thereof, provides that they shall be double minimum in price.

It is insisted by the counsel for appellant, that, as to lands subject to the operation of the "desert land act" (act of March 3, 1877, 19 Stat., 377), the latter being subsequent in point of time to section 2357, is a repeal thereof. While the "desert land act" fixes the price of lands subject to entry thereunder, at one dollar and twenty-five cents per acre in ordinary cases, it does not expressly make such lands an exception to the above general rule laid down in Sec. 2357, in reference to reserved lands within the granted limits of railroads. Repeal by implication is not favored. "Laws are presumed to be passed with deliberation and with full knowledge of all existing ones on the same subject; and it is, therefore, but reasonable to conclude, that the legislature, in passing a statute, did not intend to interfere with or abrogate any prior law relating to the same matter, unless the repugnancy between the two is irreconcilable." Every statute "must be considered with reference to the state of the law subsisting when it came in operation and when it is to be applied; it can not otherwise be rationally construed." (Sedg. Stat. & Con. Law, pp. 106, 104.) These statutes are parts of one general system of laws regulating the disposal of the public domain and are to be construed *in pari materia*. "All acts in *pari materia* are to be taken together as if they were one law," and

"where there are different statutes in *pari materia*, though made at different times . . . . . , and not referring to each other, they shall be taken and construed together as one system and as explanatory of each other." (Ib. pp. 209, 210.) Under such construction, Sec. 2357 of the Revised Statutes and the desert land act do not conflict, but each has a separate and appropriate field of operation; the former regulating the price of desert lands reserved to the United States along railway lines, and the latter, the price of other desert lands not so located. There is nothing in the nature of the case which renders it proper that desert lands be made an exception to the general rule any more than lands entered under the pre-emption laws. Lands reserved to the United States along the line of railroads are made double minimum in price because of their enhanced value in consequence of the proximity of such roads. Desert lands subject to reclamation are as much liable to be increased in value by proximity to railroads as any other class of lands and hence the reason of the law applies to them as well as to other public lands made double minimum in price. To hold desert lands an exception to the general rule regulating the price of lands reserved along the lines of railroads, would be to make the laws on this subject inharmonious and inconsistent. Hence, I am of the opinion, that the circular of June 27, 1887 (5 L. D., 708), (which was approved by Secretary Lamar) is in accord with the law in directing (Sec. 3), that "The price at which lands may be entered under the desert land act is the same as under the pre-emption law, viz: Single minimum lands at $1.25 per acre, double minimum at $2.50 per acre," and (Sec. 8), that the payment made on application to enter double minimum lands under said act shall be one fifth the double minimum price, viz: "fifty cents per acre." See case of John Cameron (7 L. D., 436).

The decision of your office is affirmed.

SWAMP GRANT—UNSURVEYED LANDS.

STATE OF FLORIDA.

Selections may be made of unsurveyed swamp lands by estimated areas, if the entire body of land is unquestionably of the character granted, and the selection does not conflict with the claims of others.

Secretary Noble to Commissioner Stockslager, March 25, 1889.

The Department is in receipt of a communication from your office of the 28th ultimo, enclosing a communication from the chief of the swamp land division, relative to unsurveyed lands inuring to the State of Florida, under the swamp land grant of September 28, 1850.

The case referred to in the communication of the chief of the swamp land division was decided by my predecessor January 12, 1889, in which he held that under the regulations of the Department, which allowed

selections of unsurveyed swamp lands to be made and certified by estimated areas, where an entire body was swamp and overflowed, selections so made and reported to the General Land Office, prior to the passage of the act of March 3, 1857, were confirmed by said act and the title thereto made complete and perfect. (8 L. D., 65.)

You now ask to be instructed as to the action that should be taken in cases where the selections have been made and reported "since the passage of the confirmatory act of March 3, 1857."

In the decision of the Department above referred to, the Secretary observing that the grant of September 28, 1850, is not a grant of lands by legal subdivisions, but a grant of "the whole of those swamp and overflowed lands, made unfit thereby for cultivation, which remain unsold at the passage of the act, says:

> The failure to make a subdivisional survey of the township, can in no wise affect the right of the State under the grant to all of the swamp and overflowed lands, as contemplated by the grant, and the only purpose to be subserved by a subdivision of the township is to enable the Secretary to determine whether by such subdivisional survey there might be one or more legal subdivisions, the greater part of which is dry and fit for cultivation. If, however, "the *whole* of a township, or any particular or specified part of a township, or the *whole* of a tract of country bounded by specified surveyed or natural boundaries, is of the character embraced by the grant," a subdivisional survey of the township would not be necessary to enable the Secretary to make out a list and plat of the swamp and overflowed lands in accordance with the provisions of the act, because if "the whole of the township" or the whole of a tract of country bounded by specified surveyed or natural boundaries, is swamp and overflowed, it necessarily follows that a subdivision of the land would show that the greater part of each smallest legal subdivision is swamp and overflowed, and therefore of the character of lands described in the grant.

Hence, I can see no reason why selections may not be made of large bodies of unsurveyed swamp land by estimated areas if the *entire body is unquestionably swamp*, and if it is absolutely certain that a subdivisional survey would show the greater part of every smallest legal subdivision to be swamp and overflowed within the meaning of the act.

If, however, there is any doubt whatever as to the swampy character of the entire body so selected, or if the selections interfere with or may conflict with the claims of others, as in the cases referred to in the communication of the chief of the swamp land division of persons who have purchased from entrymen lands bordering on lakes or rivers meandered on the old surveys, or where there is the least uncertainty in determining whether the greater part of each smallest legal subdivision that may be embraced in such selections is of the character contemplated by the grant, the selections should not be acted upon until there has been a subdivisional survey, so that the character of the land as to each smallest legal subdivision may be accurately ascertained.

The proper course to be pursued by the land department as to selections of unsurveyed swamp lands must therefore be determined according to the facts in each particular case. But, while the selections of unsurveyed lands is not prohibited by the act, yet I am of the opinion

that in all cases where the swampy character of the entire body is not absolutely certain, the selection should not be approved, until a subdivisional survey has been made, and the character of the legal subdivisions accurately determined.

DESERT LAND ENTRY—RELINQUISHMENT.

ZELIA J. FULLER.

When the relinquishment of a desert land entry is filed in the local office, the entry should be at once canceled, and the land thereafter held open to settlement and entry without further action.

First Assistant Secretary Muldrow to Commissioner Stockslager, March 25, 1889.

On November 5, 1886, your office held the homestead entry of Zelia J. Fuller, made April 15, 1886, for the NW. $\frac{1}{4}$ of Sec. 4, T. 29 S., R. 29 E., Visalia land district, California, for cancellation as invalid, on account of conflict with desert land entry, No. 195, of one John Barker, made April 21, 1877.

From this decision claimant appealed.

With her appeal she files her affidavit, made December 4, 1886, in which it is stated, among other things, that she, in good faith, purchased of said Barker his right to said tract of land, and that on April 15, 1886, Barker relinquished in due form, at the local office, so much of his desert land entry as embraced the tract in question, and the same was, to that extent, then and there canceled, whereupon, claimant made homestead entry therefor, as stated. Immediately thereafter she proceeded to make improvements on the land, and has built a house thereon, twenty by twenty-four feet, has broken and cultivated twenty acres thereof and has four thousand grape vines planted and growing on the same, all by aid of artificial irrigation; that she has about three-quarters of a mile of lumber and wire fence, with lumber enough on the land to enclose her grape vines with a tight fence, and has otherwise improved the tract to the value, in all, of $1,000.

By a memorandum endorsed on the homestead application papers of claimant, it appears that on February 14, 1887, your office canceled the desert land entry of Barker, so far as the same was in conflict with the entry of claimant, "on the ground of relinquishment."

In the case of Sears *v.* Almy (6 L. D., 1), the Department, following the previous ruling in Fraser *v.* Ringgold (3 L. D. 69), held, in effect that desert land entries are subject to the provisions of the act of May 14, 1880 (21 Stat., 140), and that when the relinquishment of a desert entry is filed in the local office, the entry should be at once canceled, and the land thereafter held open to settlement and entry without further action.

By departmental circular, issued June 27, 1887 (5 L. D., 708-12), it is provided, among other things, that "when relinquishments of desert land entries are filed in the local land office the entries will be canceled by the register and receiver in the same manner as in homestead, pre-emption and timber culture cases, under the first section of the act of May 14, 1880."

Applying to the case at bar the rule thus established, it would seem that the local officers acted properly in canceling Barker's entry, as stated, upon the filing of his said relinquishment, and allowing claimant to make homestead entry for the tract relinquished, and that your office erred in holding the entry thus allowed for cancellation as invalid, because of conflict, as aforesaid.

Your said office decision is therefore reversed, and claimant's entry will be allowed to remain intact.

PRACTICE—APPEAL—INTERLOCUTORY ORDER.

SMALLEY *v.* HAWBLITS.

An appeal will not lie from a decision of the Commissioner ordering a hearing.

First Assistant Secretary Muldrow to Commissioner Stockslager, March 28, 1889.

By letter of May 12, 1888 you transmitted the appeal of William Hawblits from your office decision of February 20, 1888, ordering a hearing upon the contest affidavit filed by Joseph H. Smalley against the homestead entry made by said Hawblits for the SE. ¼ of section 9 T. 21 S. R. 31 W., Garden City land district Kansas.

The attorneys for Smalley move to dismiss the appeal on the ground, "That said appeal is taken from a ruling of the Commissioner, which in so far as it affects the defendant is interlocutory and not a final judgment, therefore not appealable."

In answer to said motion the attorneys for Hawblits say:

We do not care to discuss authorities, as the only question in issue is, is the action of the Hon. Commissioner interlocutory or not?—merely a question of fact.

The record shows that Hawblits made homestead entry for said tract March 12, 1886, and that Smalley filed affidavit of contest February 26, 1887, charging that defendant "has wholly abandoned said land and has never established a residence thereon since making entry." Notice was issued appointing September 27, 1887, as the date of hearing at the local office but upon an affidavit filed September 13, 1887, by the contestant stating that he had used due diligence in his efforts to obtain personal service upon the defendant but has been unable to do so, the hearing was continued to October 31, 1887. Prior to this last named date the contestant filed several affidavits reciting his efforts to secure personal service upon the defendant and the failure of all of them.

Among others was the affidavit of the assistant postmaster at Garden City wherein he states that a registered letter (alleged to have contained a notice of the hearing) was received at the post-office at Garden City and presented to the defendant who refused to receive it. Upon these affidavits the contestant asked for a further continuance until such time as he could make personal service.

The defendant filed affidavits relative to his residence upon the tract, denying that he had abandoned it, and stating that the contestant could have served notice upon the defendant by using proper diligence, and he moved that the contest be dismissed for want of service of notice. The local officers sustained the motion and dismissed the contest. From such action the contestant appealed and your office held that upon the showing made the contestant was entitled to a continuance, and you returned the affidavit of contest to the local office "as the basis of the hearing to be had after due notice to the parties in interest, service to be made by publication if contestant so desires. (See Rule 11 of Practice.)

Rule 81 of Practice provides that:

An appeal may be taken from the decision of the Commissioner of the General Land Office to the Secretary of the Interior upon any question relating to the disposal of the public lands and to private land claims, except in case of interlocutory orders and decisions and orders for hearing or other matter resting in the discretion of the Commissioner.

The decision from which the appeal is taken merely ordered a hearing upon the charges contained in the contest affidavit, and was not a final judgment upon the right of the defendant or any one else to the tract of land involved. The language of the rule excludes appeals from the action of your office in ordering hearings and the Department has uniformly held that from such an order, or from an interlocutory decision of your office, an appeal can not be taken. J. H. Murray (6 L. D., 124); Atlantic and Pacific R. R. Co. *v.* McCabe (4 L. D., 94); Jones *v.* Campbell (7 L. D., 404); Heitkamp *v.* Halvorson (3 L. D., 530).

The appeal is dismissed.

RAILROAD GRANT—INDEMNITY SELECTION.

ATLANTIC AND PACIFIC R. R. CO.

Indemnity selections should be made from lands nearest the granted sections in which the loss is alleged.

Secretary Noble to Commissioner Stockslager, March 29, 1889.

I have before me the appeal of the Atlantic and Pacific Railway Company from your office decision of October 4, 1887, approving the action of the local officers at Prescott, Arizona, under date of June 27, 1887, rejecting said company's list of proposed indemnity selections (163,-381.62 acres), upon the ground that the lands selected "are not nearest to the lost lands, as required by Department instructions." (See circular, 4 L. D., 90.)

In principle, this instruction seems to be justified by the following ruling of the supreme court, on an analogous question:

Although there was no express limitation of the distance from the road in which the land was to be selected, it was necessarily implied that the selection should be made of alternate sections nearest the road, of which the land has not been previously sold, reserved, or otherwise disposed of. The company was not at liberty to pass beyond land open to its appropriation, and take lands farther removed from its road. Wood *v.* Burlington & Missouri R. R. Co. (104 U. S., 329).

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

TIMBER TRESPASS—ACT OF MARCH 3, 1875.

UNION RIVER LOGGING RAILROAD CO.

Civil and criminal proceedings advised where timber was taken by a railroad company, prior to application for right of way privileges under the act of March 3, 1875, and not for the purposes contemplated by said act.

Question submitted as to the jurisdiction of the Department to revoke an order of approval made on application for the benefits of the right of way act.

Secretary Noble to the Attorney-General, March 29, 1889.

I have the honor to transmit herewith a report from the Commissioner of the General Land Office, dated January 8, 1889, with accompanying papers therein referred to relative to an alleged timber trespass committed by the Union River Logging Railroad Company, in Washington Territory.

It appears from said report and papers therein referred to, that the Union River Logging Railroad Company was incorporated in 1883, under the laws of Washington Territory, for the purpose and object of building, equipping, running, maintaining, and operating a railroad for the transportation of saw logs, piles and other timber, and wood and lumber, and to charge and receive compensation and tolls therefor; the line of said road being intended to run from a point on tide water in Lynch's Cove at the head of Hood's Canal, in Mason county, and running thence in a general northeasterly direction, a distance of about ten miles, to a point at or near the northeast corner of township twenty-four north, range one west, Willamette Meridian.

No application was made by said company for the benefit of the right of way provided for by the act of March 3, 1875, but on August 17, 1888, they filed in the office of the Secretary of Washington Territory, in accordance with the laws of said Territory, supplemental articles of incorporation, providing for a line of road from a convenient point on tide water in Lynch's Cove, at the head of Hood's Canal, in Mason county, and running thence in a general northeasterly direction to a convenient point on tide water in Dyes Inlet in the county of Kitsap, in said Territory; and also a branch from said line at some convenient

point thereon between Lynch's Cove and Dye's Inlet, and running thence in a general northerly direction to or near the town of Seabeck on Hood's Canal, in said county of Kitsap; and also a branch from some convenient point on the line of said road between said Lynch's Cove and Dye's Inlet, and running in a general northeasterly direction to tide water at or near Port Orchard, in the county of Kitsap.

Said supplemental articles of incorporation declared that the object of the company was to maintain and operate said railroad and branch to carry freight and passengers, and to receive tolls therefor, and also to engage in and carry on the general logging business and provide for the cutting, hauling, transportation, buying, owning, acquiring and selling all kinds of logs, spars, piles, poles, lumber and timber, as provided for in the original articles of incorporation.

Subsequently, said company filed in this Department a copy of the original and supplemental articles of incorporation of the Union River Logging Railroad Company, duly certified, under the seal of the Territory by the Secretary of the Territory, and under the corporate seal of the company by the secretary of the company, with due proofs of organization thereof; a copy of the territorial law under which said company was organized, duly certified, and all other affidavits and certificates required by the regulations of the Department to carry into effect the act of March 3, 1875, granting the right of way to railroads over the public lands, and on January 29, 1889, the articles of incorporation and maps of definite location of said Union River Logging Railroad Company were approved by the Department, as being in conformity with the act.

This trespass is alleged to have been committed by John McReavy, Edward McReavy, and John Latham, officers of said railroad company, under its original organization, prior to the filing of the articles of incorporation in this Department or application for the benefit of the act of March 3, 1875, and the cutting and removal of said timber, prior to the approval of the articles of incorporation, was not only a technical violation of the law, but from the statements disclosed by the report of the special agent and the affidavits accompanying the same, it seems to have been cut and removed by said parties for the use principally of the timber itself. An offer of settlement has been made by the present president of the company at the lowest rate, but in view of the facts alleged by the special agent and all the circumstances attending the cutting and removal of this timber, I recommend that suit be brought to recover the full value of the timber unlawfully cut from the public lands and appropriated by said company, and that criminal proceedings be instituted against John McReavy, Edward McReavy, John Latham, and the former officers of said railroad company, as recommended by the Commissioner.

Another question presented in this case is, whether steps should not be taken to revoke and cancel the approval by the Department of the

articles of incorporation and maps of definite location of the Union River Logging Railroad Company.

It will be seen from the papers herewith submitted, that this company was incorporated, as before stated, in 1883, and that five miles of road was constructed, along which the timber trespass alleged was committed; that no effort was made by the company from 1883, to 1889, to secure the right of way, and that the sole object of the road as originally incorporated was for the purpose of building, equipping, running, maintaining and operating a railroad for the transportation of saw logs, piles and other timber, and wood and lumber, and it was not then contemplated that it should be used for the purpose of common carriers; that the company did not apply for the benefits of the act of March 3, 1875, after filing with the Secretary of the Territory the supplemental articles of incorporation, until January 1889, when they filed said articles in the Department for the purpose of securing the benefit of said act of March 3, 1875, said company having then changed hands, and was then, and is now, owned by the Puget Mill Company, the present officers being, William Walker, president, E. G. Ames, secretary, and D. B. Jackson, superintendent.

From the application of said parties, and the papers filed therewith, there was nothing to indicate that the company was not entitled to the benefits of said act, but in the affidavit of Edwin C. Bemis, filed with the report of the special agent, he states:

> I am satisfied that said road, from the route and contemplated terminus of the same, and the character of the country through which it passes and is intended to pass, is only being constructed for the purpose of personal and private gain, viz: The transportation of logs, timber and wood, and that it will never be used for transportation of passengers and general freight, and that said road as soon as the timber in that locality is cut and removed to the mills or tide water said road will be abandoned, as the scarcely settled country and small settlement through which it passes and small village which it will reach will not justify the maintenance or operation of any kind of a railroad. I do not believe that said road is being constructed with a view of operating it as a common carrier, or for the benefit of the general public, but simply for private gain, and as a means of transporting the timber in that locality (which is mostly owned by the company that is constructing said road) to the mills or tide water.

This is corroborated by other witnesses, whose affidavits are herewith submitted.

In view of this allegation, I respectfully request an opinion as to whether the Department still retains jurisdiction for the purpose of making investigation as to the purpose and object of said incorporation, and of canceling and revoking its order, if it should appear that said approval was improperly granted, and if you should be of the opinion that this Department has no longer jurisdiction in the premises, I then request that suit be brought for the purpose of revoking and canceling said approval, upon the ground that the purpose and object of this road is not such as is contemplated by the act of March 3, 1875, granting the right of way over the public lands to railroads, if in your judgment such suit can be maintained.

RAILROAD GRANT—ACT OF FEBRUARY 8, 1887.

VICTORINE *v.* NEW ORLEANS AND PAC. R. R. CO.

By the terms of section 2, act of February 8, 1887, lands occupied by actual settlers at the date of the definite location of this road, and still remaining in their possession, are held to be excepted from the grant.

The fact that the land covered by such occupancy was at the date of settlement included within a grant for another company, will not operate to deprive the settler of the benefit of said act, where such grant was subsequently forfeited.

Secretary Noble to Commissioner Stockslager, March 30, 1889.

I have considered the case of John B. Victorine *v.* the New Orleans Pacific Railroad Company, on appeal by the latter from your office decisions of January 23, and February 28, 1888, holding for cancellation the claim of said railroad company for the SE. ¼ of Sec. 7, T. 4 S., R. 1 E., La. M., New Orleans land district.

The tract is within the twenty mile granted limits of the grant by act of March 3, 1871, to the New Orleans, Baton Rouge and Vicksburg, now New Orleans Pacific Railroad Company, and was withdrawn November 29, 1871, and October 15, 1883. It was contained in a list of the company filed December 28, 1883.

Victorine alleged in his application to make homestead entry, that he had settled upon said land in January, 1863, and had remained thereon continuously ever since.

Your office, by letter "F" of March 19, 1887, ordered a hearing to determine whether Victorine had made settlement upon the tract as alleged, and whether he was still in possession of the same March 19, 1883, the date of the definite location of the railroad, and, if it is still in his possession.

After due notice, such hearing was had, and the local officers found in favor of said Victorine. Your office, by letter "F" of January, 1888, affirmed the conclusion of the local officers, and rejected the company's claim for said land, and on February 28, 1888, your office, by letter "F," denied a motion for review, filed by said railroad company.

The evidence shows conclusively, that residence had been established by Victorine in 1863 and continuously maintained as alleged, and, indeed, the railroad company made no effort to deny this, and their only assignment of error is, that you erred "In holding that Sec. 2, act February 8, 1887, applies to the tract in controversy."

The act of February 8, 1887 (24 Stat., 391), forfeited part of the lands granted to the New Orleans, Baton Rouge and Vicksburg Railroad Company by the act of March 3, 1871, and confirms the title of the New Orleans Pacific Railroad Company to the remainder.

In section two of said act it is provided:

That all said lands occupied by actual settlers at the date of the definite location of said road, and still remaining in their possession, or in possession of their heirs or assigns, shall be held and deemed excepted from said grant, and shall be subject to entry under the public land laws of the United States.

But in a brief filed in another case, counsel for said railroad company argues that the tract claimed by Victorine was in 1863, the date of his settlement, withdrawn for the "Opelousas" railroad.

By this is doubtless meant the railroad from New Orleans by Opelousas, to the State line of Texas, to which a grant of lands was made June 3, 1856 (11 Stat., 18); but the land in controversy is situated in the part of said grant which was forfeited by act of July 14, 1870 (16 Stat., 277), and if Victorine had established his residence thereon immediately after said forfeiture there can be no doubt but he would be of the class coming within the proviso of section two of the act of February 8, 1887, and the fact that he was already living on the tract when the forfeiture was declared would certainly not give him any less right under said act than would be given to a new settler.

As the settlement of Victorine was made in 1863, long prior to the definite location, and his possession and occupancy has ever since been continuous, it follows that your decision is correct, and the same is accordingly affirmed.

RAILROAD GRANT—CONFLICTING HOMESTEAD CLAIM.

LAITY *v.* NORTHERN PACIFIC R. R. CO.

The allowance of a homestead entry for land included within the existing entry of another is irregular; but on the cancellation of the prior entry, the one remaining of record is *prima facie* valid, and sufficient to except the land covered thereby from withdrawal on general route.

Land covered by settlement rights, at the date of definite location, is excepted from the operation of the grant made for the benefit of this company.

Secretary Noble to Commissioner Stockslager, April 1, 1889.

On November 7, 1870, Eliza J. Stocking, now Laity, made homestead entry for the E. ½ of SW. ¼, N. ½ of SE. ¼, Sec. 11, T. 15 N., R. 3 W., Olympia, now Vancouver, land district, Washington Territory.

This entry was canceled by your office letter of April 19, 1872, for conflict with the grant to the Northern Pacific Railroad Company. On February 13, 1886, Eliza J. Laity, *nee* Stocking, filed in the local office an application to have her said entry re-instated.

On November 5, 1887, your office rejected the claim of the said company to the land involved, and directed that in the absence of appeal Laity's entry should be re-instated. From this decision the company appeals here.

The tract in question is within the limits of withdrawal ordered upon the map of general route of the company's road, filed August 13, 1870, and also within the limits of the grant as designated by the map showing the definite location of said road opposite this land, filed September 13, 1873. Said land was also embraced in homestead entry, No. 501, made by Henry M. Gooddell, on February 9, 1865, and canceled Feb-

ruary 18, 1868. It was also covered by homestead entry, No. 661, made by Lewis F. Warren, on August 1, 1867, which entry was canceled October 4, 1870.

Laity's application was based upon her accompanying affidavit, wherein she averred that when she made her said entry *i. e.*, November 7, 1870, she was advised by the register that the land was subject thereto; that at that time she was a widow, with three children; that she had previously bought the improvements of said Warren; that she built a house on the land, in which she lived continuously from January, 1871, until the fall of 1884; that she fenced the entire tract, set out and cultivated an orchard, "built a hen house and root house," and during the five years immediately succeeding the date of her entry expended upon the land not less than eight hundred dollars; that in the fall or winter of 1875, she offered to make final proof, which was refused, her entry having been canceled, and that she married John Laity in the fall of 1876, *i. e.*, six years after making her said entry.

It is claimed by the company that your office erred in holding that "the entry of Warren excepted the tract in dispute from the operation of the withdrawal on general route, filed August 13, 1870."

Counsel insist that said entry having been made before the cancellation of the Gooddell entry, "was *prima facie* illegal and void, and hence did not affect said land or the withdrawal thereof;" that the Gooddell entry having been canceled before said withdrawal, the land then passed by the grant, and the subsequent entry by the applicant was illegal.

I am not favorably impressed with this contention. Although the Warren entry (made in the presence of the existing entry of Gooddell) was irregularly allowed, still the same, after the said prior entry had been canceled, remained of record, and was at the date of said withdrawal *prima facie* valid. It can not, therefore, be said that the land was then free from "pre-emption or other claims or rights," the condition in which it must have been in order to have passed by the grant to the appellant. Moreover, in the case of the Northern Pacific Railroad *v.* Bowman (7 L. D., 238), the Department, upon the authority of Newhall *v.* Sanger (92 U. S., 76), and Kansas Pacific R. R. *v.* Dunmeyer (113 U. S., 629), held that any question as to the lawfulness or validity of such claim is immaterial.

I therefore concur in the conclusion reached by your office, that the land was excepted from the operation of the said withdrawal, and that it was subject to the applicant's entry, when the same was made.

The record shows the land to have been at the date of definite location subject to the applicant's settlement rights. Consequently, it could not at that time be affected by the grant. Northern Pacific R. R. *v.* Evans (7 L. D., 131).

It appears that the applicant had, in the fall of 1875, when she offered to make proof, as stated, complied with the homestead law, and that she was then qualified to make entry thereunder. Her said entry was,

therefore, erroneously canceled. Her application to have the same reinstated should be allowed, and she should be permitted to submit proof showing compliance with the law at the time when she first offered to make the same, *i. e.*, in the fall of 1875.

Your decision is affirmed.

STATE SELECTION—ACT OF JUNE 9, 1880.

STATE OF FLORIDA.

Under the act of June 9, 1880, the right of the State to select indemnity is confined to "vacant, unappropriated public lands."

Secretary Noble to Commissioner Stockslager, April 1, 1889.

I have before me the appeal of the State of Florida from your decision of January 28, 1888, holding for cancellation list No. 9 of selections (under special indemnity certificate No. 1), filed May 26, 1886, for conflict with Helena M. Chase's pre-emption cash entry, No. 12049, made July 25, 1887, under declaratory statement filed June 1, 1886, for the E. ½ SW. ¼ and N. ½, SE. ¼, of section 2, T. 2 S., R. 27 E., Gainesville district, Florida.

The State claims under the act of June 9, 1880, (21 Stat., 171), which provided for the selection, as indemnity for certain relinquished lands, of "vacant, unappropriated public land of the United States in Florida."

The proofs show that at the date of the selection in this case the tracts in question were not "vacant, unappropriated public lands," the settlement, claim and improvements of Helena N. Chase having before that date attached or been placed upon the land—Chase's entry must unquestionably prevail.

Your said decision is accordingly affirmed.

RAILROAD GRANT—CONFLICTING PRE-EMPTION CLAIM.

NORTHERN PAC. R. R. CO. ET AL. *v.* GJUVE.

An unexpired pre-emption filing of record at date of definite location, raises a conclusive presumption as to the existence of the claim, and is sufficient to except the land covered thereby from the grant to the Northern Pacific.

Though under the grant to the St. Paul, Minneapolis, and Manitoba Company, the existence of such a "claim," without a "right," might not except the land covered thereby, it would however raise a presumption of right, which in the absence of proof would be conclusive.

Secretary Noble to Commissioner Stockslager, April 1, 1889.

I have before me the appeals of the Northern Pacific Railroad Company and the St. Paul, Minneapolis and Manitoba Railway Company (St. Vincent Extension) from your office decision of February 2, 1887,

rejecting their respective claims to, and allowing Gjuve's application to make homestead entry of, the N. ½ SW. ¼, SW. ¼ NW. ¼ and SW. ¼ SW. ¼, Sec. 3, T. 135 N., R. 44 W., 5th P. M., Fergus Falls, Minnesota.

The tract in question is geographically within the primary limits of the grants in aid of the Northern Pacific company and the St. Paul, Minneapolis, and Manitoba Railway company, the lines of which were definitely located November 21, 1871, and December 19, 1871, respectively. At those dates the land was covered by Anders Gulbranson's pre-emption declaratory statement, No. 558, filed February 17, 1871. That declaratory statement alleged settlement July 4, 1870, and still remains uncanceled upon the records.

On July 10, 1883, Bjorn C. Gjuve applied to enter the said tract as a homestead, supporting his application by a corroborated affidavit, to the effect that during June, 1871, he (Gjuve) settled on said tract, and in July, 1871, offered to make pre-emption filing for the same, but that the local officers refused his filing because of its being in conflict with the railway grant. Thereupon, in September, 1871, he (Gjuve) settled upon another piece of land, for which he subsequently obtained patent, and then, in 1877, moved back upon the track here in question, with his family, and resided thereon continuously down to the date of his said application to make homestead entry of the same, cultivating the same and making improvements thereon, which, at that date, were estimated at $1,800.

Gjuve's said application to make homestead entry, having been rejected by the local officers, he appealed to your office, and on October 22, 1883, your predecessor, Commissioner McFarland, ordered a hearing "to ascertain the status of the lands (on) September 19, 1871."

On December 29, 1883, the Northern Pacific Company applied to list the land; but the local officers rejected the application, and the company appealed.

On January 11, 1884, the hearing, ordered as aforesaid was held. The homestead applicant, and the St. Paul Minneapolis and Manitoba Company, appeared; but the Northern Pacific Company, your letter says, "was not represented and probably was not notified of said hearing, because the Secretary of the Interior had long before (May 13, 1873,) decided that the rights of the St. Paul company to lands in conflicting or overlapping limits of the two grants were superior to those of the Northern Pacific company."

After said hearing the local officers decided in favor of Gjuve, and the St. Paul company appealed.

On June 16, 1885, the Northern Pacific company applied to list the entire section, embracing the tract in question. This application was rejected, and an appeal was taken.

By its said letter of February 2, 1887, your office held that the pre-emption filing of Anders Gulbranson excepted the land from the operation of both grants. Both companies appeal; the Northern Pacific

road, in particular, complaining that it has been allowed no "opportunity to show the status of Gulbranson's claim at the date of the definite location of its road," and asking "that a hearing be allowed the company to show whether or not Gulbranson had abandoned his claim at the time of definite location, for, *if* he had, then the land was not excepted from the grant."

Gulbranson's declaratory statement having been filed in February, 1871—some ten months before the definite location—raised a presumption, on the face of the record, that when the Northern Pacific grant attached, in November, 1871, the pre-emption claim thereby evidenced was in existence and excepted the tract from the operation of the grant. As to the St. Paul company—while a mere *claim*, without a "right," might not have excepted the land from the grant—the filing of Gulbranson would raise a presumption of a right, which the company had, at the hearing ordered for the purpose, full opportunity to contradict. Though represented at the hearing, the company made no attempt to prove nor has it indeed, anywhere alleged it a fact—that Gulbranson did not, at the date in question, have a pre-emption "right" such as the filing purported to show that he had.

The decision appealed from is accordingly affirmed.

RAILROAD GRANT—ACT OF MARCH 3, 1887.

MICHAEL DONOVAN.

The object of section three, act of March 3, 1887, is not only to correct all decisions of the Land Department erroneously canceling the entry of a *bona fide* settler within the limits of a railroad grant, whether the land in question had been certified to the company or not, but also to re-instate such settler, if qualified under said act, in all his rights to lands for which his application to file or enter may have been erroneously rejected by the local office.

Under said act such settler is entitled to perfect his homestead entry for the entire tract originally applied for, notwithstanding the issuance of patent to him, under the homestead law, for a part of the land included in his original application.

The right to re-instatement thus conferred upon the settler, whose application to enter was erroneously rejected, is superior to that of a *bona fide* purchaser from the railroad company.

A judicial decree awarding possession of the land to such a purchaser as against the settler, is not such an adjudication as will preclude the Department from taking jurisdiction under said act.

Secretary Noble to Commissioner Stockslager, April 1, 1889.

I have before me the report of your office of the 14th instant, adverse to the application of Michael Donovan for the institution of proceedings under the act of March 3, 1887 (24 Stat., 556), to restore to the United States title to the E. ½ of the NW. ¼ of Sec. 35, T. 101 N., R. 28 W., fifth principal meridian Worthington, Minnesota, and asking to be re-instated to his right to make homestead entry of said tract.

This tract is within the twenty miles indemnity limits of the Southern Minnesota Railway Company. The withdrawal of lands on account of the grant was made September 10, 1866, and at said date the tract in controversy, together with the E. ½ of the SW. ¼ of Sec. 26, was embraced in the homestead entry of one Lyman Barkley, which was canceled January 14, 1868.

The tract in dispute was excepted from the withdrawal for the benefit of said grant by reason of the entry of Barkley, and after the cancellation of his entry the tract became subject to selection by the road, or to entry under the homestead and pre-emption laws by the first legal applicant.

On June 6, 1868, Michael Donovan, the petitioner, presented his application to the local office to make homestead entry of all the land embraced in the former entry of Barkley, and was informed by the local officers that he would be allowed to enter the eighty acres in the even section, but would not be allowed to enter the eighty acres in Sec. 35, as the same was railroad land and not subject to entry. Whereupon, he made entry of the E. ½ of the SW ¼ of Sec. 26, upon which final certificate issued May 18, 1875, and which was patented to him July 1, 1875.

Subsequently to the application of Donovan, to make entry of said tract, to wit, the E. ½ of the NW. ¼ of Sec. 35, the railroad company selected said tract on account of the grant, and it was certified to the State for the benefit of the railroad company March 25, 1871.

Upon the filing of Donovan's petition, the railroad company was called upon to show cause, within thirty days, why said petition should not be granted, and in response thereto the company on December 16, 1888, filed its answer objecting to the granting of said petition, upon the following grounds:—

1st. The act of March 3, 1879, does not in any sense apply to indemnity lands, and an additional homestead entry under said act is not permissible.

2nd. Donovan when he made homestead entry 5797, for eighty acres in section 26, exhausted his homestead right, and therefore he has no right to the land herein involved which requires the protection referred to in the Rule.

It can not be questioned that at the date of Donovan's application to make entry of said tract it was open public land, subject to entry under the pre-emption or homestead laws by the first legal applicant; that Donovan was the first legal applicant after the cancellation of the homestead entry of Barkley, and that his application was improperly rejected. But you denied the petition, upon the ground that Donovan waived his claim to the tract in the odd section by eliminating the same from his homestead application after its rejection, and perfecting entry for the land in section 26, and that when he perfected said entry he exhausted his right under the homestead law, and was not in a position to assert a legal claim to the land in section 35 after it was selected and certified on account of the grant. It is upon this ground, mainly, that

the railroad company, also, defends. But, in addition thereto, the company has filed a certified copy of the record of the district court of the sixth judicial district of Minnesota, in the case of Michael Donovan *v.* Thomas S. Thompson, involving the right of possession to the land in question, for the purpose of showing that by judicial process the grantee of the railroad company has been declared to be in legal possession of said land.

The third section of the act of March 3, 1887, provides:

> That if, in the adjustment of said grants, it shall appear that the homestead or pre-emption entry of any *bona fide* settler has been erroneously canceled on account of any railroad grant or the withdrawal of public lands from market, such settler upon application shall be re-instated in all his rights and allowed to perfect his entry by complying with the public land laws: *Provided*, That he has not located another claim or made an entry in lieu of the one so erroneously canceled: *And provided also*, That he did not voluntarily abandon said original entry: *And provided further*, That if any of said settlers do not renew their application to be re-instated within a reasonable time, to be fixed by the Secretary of the Interior, then all such unclaimed lands shall be disposed of under the public land laws, with priority of right given to *bona fide* purchasers of said unclaimed lands, if any, and if there be no such purchasers, then to *bona fide* settlers residing thereon.

It was undoubtedly the intention of the act to protect the *bona fide* settler in all his rights as against the railroad company, and, therefore, the object and purpose of section three, above quoted, was not only to correct all decisions made by the Department or the General Land Office, erroneously canceling the homestead or pre-emption entry of any *bona fide* settler to lands within railroad grants, whether said lands had been certified to the company or not, but, also, to re-instate the settler in all his rights to lands upon which he may have settled, and for which his application to file or enter may have been rejected by the local office, provided it be shown that said application to file or enter was erroneously rejected, and that the settler had not located another claim or made entry in lieu of the land for which his application to file or enter had been so erroneously rejected.

In such case, the Department is re-invested with jurisdiction to re-instate the settler in all his rights, and allow him to perfect his entry or filing by complying with the public land laws, if application to be re-instated in such rights be made within a reasonable time.

While it is true that as between the government and the settler, he acquired no vested right upon the mere application to enter, yet he had an inchoate right as against every one else, and if it appears that the land was subject to entry at the date of his application, and such application has been erroneously rejected, his right to the land under this section is made superior to that of a *bona fide* purchaser for value from the railroad company.

In this case it appears from the record that, although Donovan's application was rejected, he nevertheless, upon the refusal of the register to allow him to enter the same as a homestead, still remained in possession of said land, and made improvements thereon, by fencing and

cultivating the same; that in 1881 he had fenced about fifteen acres of said land, used the same for pasture, and is still in possession of said land.

These facts are not denied by the company in answer to the rule, and said facts are substantially set forth in the decree of the court in the case of Donovan *v.* Thompson, above referred to, although the court held that Donovan is not an actual settler on the land, and has not constantly occupied the same, or caused the same to be so occupied, since the year 1868, and that he is not entitled to the possession of the same and has no claim, right, or interest in the same: that the Southern Minnesota Railway Company is the legal owner of said land, and the defendant (Thompson) is the equitable owner of the same and is entitled to the possession of the tract.

This decision is not such an adjudication of the rights of the parties as will prevent the Department from taking jurisdiction of the case under the third section of the act of March 3, 1887, and the only question remaining is, whenever Donovan has exhausted his homestead right and waived all right to the land within the odd section by perfecting homestead entry and receiving patent for the land in section 26.

It is insisted by the company that Donovan would have no right to make an additional entry except under the act of March 3, 1879, which applies to even sections only, and within granted limits, and that as the land in controversy is within the indemnity limits, he was not restricted to eighty acres at the time of making his homestead entry, and can not, therefore, make additional entry under the act of March 3, 1879.

In my opinion his rights will not depend upon said act of March 3, 1879, but upon his right under the act of March 3, 1887, to be re-instated to all the rights under his application to enter the same under the homestead law, which was erroneously rejected, and the mere fact that he made entry of part of the land embraced in his application, will not bar him of the right to be re-instated in the same manner as if the entry had been made and was subsequently erroneously canceled.

It is not the making of an additional or a second homestead, but an application to be restored to his original homestead right.

This question seems to have been settled by the decision of the Department in the case of Holmes *v.* Northern Pacific Railroad Company (5 L. D., 333).

In that case Holmes made entry for a tract of eighty acres in section 24, together with a tract of eighty acres in section 13, being adjoining land. The entry, so far as it covered the land in the odd section, was canceled by the decision of the Department, being in conflict with a railroad grant, and Holmes perfected entry to the eighty acres in the odd section, and received patent therefor. Subsequently, Holmes applied to amend his entry so as to embrace the land in section 13, being part of the tract covered by his original entry and which was canceled as before stated, claiming that said tract was excepted from the grant

to the railroad company by the homestead entry of one Miller that existed at the date of withdrawal, and which was canceled after withdrawal and prior to Holmes's entry.

Your office held, that under existing rulings, the entry should have been allowed, but as Holmes's right to the tract in controversy was fully considered and adjudicated under the rulings in force at the date of the cancellation, it could not now be re-opened. The Department, however, held that although the case as then presented, between the railroad company and Holmes, was *res adjudicata*, yet that as it appeared at the date of the application to amend the company was not entitled to the land, having been excepted therefrom by the entry of Miller, under the rulings of the Department then in force, there was no reason why the case should not be considered as one solely between Holmes and the government, and that he should be allowed to amend his entry so as to embrace all the land originally covered by it. It was, therefore, held that no other rights having intervened, and the question being one solely between Holmes and the government, he was entitled to such favorable action as would secure to him the benefits of his original entry and the improvements made thereon. It was accordingly directed that his original entry should be re-instated, and that patent should issue to him for the entire one hundred and sixty acres, upon surrendering the patent that had been issued for the eighty acres, it appearing that his final proof covered the entire one hundred and sixty acres.

But independently of this, the act of Congress of March 2, 1889, allows an additional homestead entry for such a quantity of land as with the land already entered shall not exceed one hundred and sixty acres, in all cases where a person has hertofore made entry and final proof for a less quantity than one hundred and sixty acres.

Considering that it was the purpose of the act of March 3, 1887, to protect all *bona fide* settlers in their rights to lands covered by their settlements and improvements, whether the application to enter or file had been rejected, or, having been allowed, was afterwards erroneously canceled, or for any part thereof, by the officers of the Land Department, and where the application was rejected or erroneously canceled as to part of an entry made, such settler would be entitled to perfect his entry to the entire tract originally applied for, notwithstanding the issuance of patent for part of the land, I am of opinion that this case should be re-instated, and that Donovan should be allowed to perfect his entry of the remaining portion of the land covered by his original application in accordance with the fifth section of the act of March 2, 1889.

This class of cases seems to be provided for by that part of the circular to registers and receivers of February 13, 1889 (8 L. D., 348), which is as follows:

While the act contains no provision relative to persons whose entries or filings havnot been canceled, but whose lands have been certified or patented on account of

railroad grants, it follows, as a matter of course, that their rights should be protected, and the mode of procedure in such cases will be the same as in the cases where cancellation has been made, except that the parties should apply to make final proof and payment instead of for re-instatement of entry; but in such case proceedings will be deferred until the title has been restored to the United States as provided by section two of the act. The instructions of November 22, 1887, under this section, are hereby modified in accordance with the foregoing.

The decision of your office is reversed, and you are hereby directed to make demand upon the Chicago, Milwaukee and St. Paul R. R. Company for reconveyance of said land, and if the company refuse to reconvey you will return the papers to the Department to be submitted to the Attorney General for the purpose of instituting proceedings against the company to have said certification canceled as provided for by the second section of the act of March 3, 1887.

Further action on the application of Donovan will be suspended until said land has been reconveyed, or until the final determination of the question by court, in the event the company shall refuse to reconvey said land.

SWAMP LAND—ACT OF MARCH 3, 1857.

STATE OF ARKANSAS.

A list of swamp-land selections filed, and finally rejected, prior to the passage of the act of March 3, 1857, is not within the confirmatory provisions of said act.

Secretary Noble to Commissioner Stockslager, April 1, 1889.

I have before me the appeal of the State of Arkansas from your office decision of January 30, 1888, refusing to approve a list of lands which the State claims to have "selected and reported to the General Land Office as swamp and overflowed lands . . . . prior to March third, A. D., eighteen hundred and fifty-seven."

The act of March 3, 1857 (11 Stat., 251; Rev. Stat., 2484) provides that:

Lands selected and reported to the General Land Office as swamp and overflowed land by the several States entitled to the provisions of said act of September 28, 1850, prior to March third, A. D., eighteen hundred and fifty-seven, are confirmed to said States respectively so far as the same remained vacant and unappropriated and not interfered with by an actual settlement under any law of the United States.

The question thus arises, whether the lands now asked for were in fact "selected and reported to the General Land Office as swamp and overflowed lands prior to March third, A. D., eighteen hundred and fifty-seven."

Said lands are part of those named in a list, embracing 277,053.01, acres, which was marked "Supplemental 'C'", and dated August 27, 1853. As to this list, your said decision says:

The only evidence on file or of record in this office that said list was ever sent to the Commissioner of the General Land Office by the surveyor-general, is a letter from the surveyor-general of the same date as the list—August 27, 1853—stating that he sent a list of lands in that district—"Red River"—and four other lists. Said letter

was answered in this office September 13, 1853, informing the surveyor-general that said lists were defective, there being no certificate that the lands therein described were of the character contemplated by the swamp grant and that they could not be acted on until properly certified and they were therewith returned to the surveyor-general. There is nothing to show that the list in question was ever returned by the surveyor-general to this office; on the contrary, there is strong presumptive evidence, not only that it was not returned, but that the surveyor-general did not intend to return it. Much the larger portion of the land embraced in said list was subsequently reported in other lists, and the fair presumption is, that the surveyor-general could not truly make the required certificate and consequently place such lands as he could properly certify in the lists.

It thus seems that said list of August 27, 1853,—including the lands now in question,—was received at your office between that date and the 13th of September, 1853, and, on the latter date returned, with other lists, to the surveyor-general, on the ground that the certificate was defective, and at the same time it was answered that, "until properly certified," it "could not be acted on." This, in effect, was a rejection of the list at that time, and it in no way appears that between that time and the date of the passage of the confirming act (March 3, 1857) anything was done to re-instate this list as one pending in the Department for approval: On the contrary, it appears that many of the tracts mentioned were subsequently selected by other lists, to that extent implying the abandonment of the rejected list of August 27, 1853.

In the Michigan swamp grant adjustment (7 L. D., 525), my predecessor, Secretary Vilas, held that the act of 1857, did not operate to confirm lists of lands, which had been filed in your office before the 3rd of March, 1857, but to replace which certain revised or amended lists had, before that date, been made out and filed. The principle of this decision is that only selections pending, as such at the date of the passage of the act, and not also all lists before that time finally disposed of, were intended to be confirmed.

Applying this principle to the case in hand, I am of the opinion that the list of August 27, 1853, having been rejected in September, 1853, and having never been re-instated, was not, on the 3rd of March, 1857, in a condition to be confirmed by the act passed on that day.

Your said decision is accordingly affirmed.

MINING CLAIM—RELOCATION—SECTION 2324 R. S.

ANDERSON ET AL. *v.* BYAM ET AL.

If work is renewed on a claim, after it has once been open to re-location, but before a re-location is actually made, the rights of the original owners stand as they would if there had been no failure to comply with the statutory condition.

Secretary Noble to Commissioner Stockslager, April 2, 1889.

I have considered the appeal of George Anderson *et al.* from the decision of your office of February 28, 1888, allowing the application of

Byam *et al*, original locators, for patent of the "Bonanza Placer," and in effect denying the application of said Anderson *et al.* to re-locate said claim under the name of the "Arkansaw Placer"—the said claim, or claims, being situate in the Sacramento Land District, California. The material facts are sufficiently stated in said office decision, to which reference is hereby made.

Section 2324 of the Revised Statutes provides, that, upon a failure by the original locator, or locators, of a mineral claim to comply with the requirements of said section as to labor to be performed or improvements to be made thereon annually, "the claim or mine upon which such failure occurred shall be open to re-location in the same manner as if no location of the same had ever been made, provided, that the original locators, their heirs, assigns or legal representatives, have not resumed work upon the claim after failure and before such location." In discussing this statute, the supreme court of the United States say, "Mining claims are not open to re-location until the rights of a former locator have come to an end. A re-locator seeks to avail himself of mineral in the public lands which another has discovered. This he can not do until the discoverer has in law abandoned his claim, and left the property open for another to take up," and "if work is renewed on a claim after it has once been open to re-location, but before a re-location is actually made, the rights of the original owners stand as they would if there had been no failure to comply with the condition" imposed by the statute. Belk *v.* Meagher (104 U. S., 282).

I have carefully considered the voluminous evidence in the case and the entire record, and concur in the finding of your office, that Byam *et al.* resumed work upon said "Bonanza Placer" within the meaning of the statute prior to the location of Anderson *et al.* The decision of your office is affirmed.

RAILROAD GRANT—FINAL PROOF—ACT OF MARCH 3, 1879.

NORTHERN PAC. R. R. CO. *v.* DOW.

The failure of a railroad company to appear in response to final proof notice, given in accordance with the act of March 3, 1879, and assert its right to land claimed by virtue of its being within granted limits, precludes the subsequent assertion of such right.

Secretary Noble to Commissioner Stockslager, April 2, 1889.

I have considered the appeal of the Northern Pacific Railroad Company against William Dow from your decision of July 23, 1887, rejecting its claim to the N ½ of NE ¼ and E ½ of NW ¼ Sec. 13 T. 134 N., R. 41 W., Fergus Falls, Minnesota.

The tract in question is within the twenty mile granted limits of the Northern Pacific Railroad Company and within the twenty mile indemnity limits of the St. Paul, Minneapolis and Manitoba, St. Vincent Ex-

tension Railway. The line of the former was definitely located November 21, 1871, and lands in the indemnity limits of the latter were ordered withdrawn by your office letter of February 6, 1872.

The plat of survey of said township was filed in the local office April 27, 1872, and the records of your office show that Michael Huss filed pre-emption declaratory statement on said tract June 8, 1872, alleging settlement October 5, 1869, and that William Dow filed declaratory statement on said tract March 26, 1877, alleging settlement October 1, 1873.

November 8, 1883, Dow gave notice, in accordance with the act of Congress of March 3, 1879, of his intention to transmute his pre-emption to a homestead entry on January 9, 1884, and claiming the benefits of the act of March 3, 1877, and May 27, 1878, would offer final proof and perfect his claim on the same day, which notice was duly posted and published in accordance with law and regulations, and was served by the register and receiver upon the St. Paul, Minneapolis and Manitoba Railway Company.

On the day fixed Dow appeared at the district land office, with the witnesses named in the published notice. The St. Paul, Minneapolis and Manitoba Railway Company was represented by attorney, and a hearing was held. The Northern Pacific Railroad Company failed to appear at the hearing.

The evidence adduced at the hearing shows that Huss—the original pre-emptor—settled upon the land in the fall of 1870. Benjamin Grath, one of claimant's witnesses, testified that Huss made settlement in the month of October or November 1870, and Levi H. Berry, the other witness, testified that Huss made settlement in the year 1870 or in 1871.

Upon this testimony and the homestead proof made on that day, the local officers, on January 19, 1884, rendered an opinion in favor of Dow.

From this action the company duly appealed, and on July 23, 1887, your office rendered a decision awarding the tract to Dow. From this decision the St. Paul, Minneapolis and Manitoba Railway Company failed to appeal.

September 14, 1887, the Northern Pacific Railroad Company filed an appeal from your said decision, and the issue is therefore to determine the respective rights of the latter company and the claimant William Dow.

It will be observed that the Northern Pacific Railroad Company failed to appear on the day appointed for offering final proof and perfecting his claim by the entryman, neither did it appeal from the decision of the local officers in favor of claimant.

The question therefore arises whether by its failure to do so, it thereby waived all right to appear afterwards and assert a claim to the land adverse to Dow.

The Department has uniformly held, that the failure to thus appear and assert its claim is conclusive.

In the analogous case of the Atlantic and Pacific Railroad Company *v.* Forrester, reported in 1 L. D., p. 475, my predecessor, Secretary Teller, held:

I am constrained to the opinion that the company, having failed to answer the regular citation, issued upon Forrester's notice, was guilty of laches, by reason of which it may be held to have waived its right to assert title to the tract in question, or to object to the consummation of his claim to the same.

The same doctrine is affirmed in the cases of the Atlantic and Pacific Railroad Company against Buckman (3 L. D., 277); Nyman *v.* the St. Paul, Minneapolis and Manitoba Railway Company (5 L. D., 396); Brady *v.* the Southern Pacific Railroad Company (5 L. D., 407); Northern Pacific Railroad Company *v.* Sturm (5 L. D., 295).

The appeal of the Northern Pacific Railroad Company is, therefore, dismissed, and your decision is accordingly affirmed.

Overruled so far as in conflict, 29 L. D. 689

PRIVATE CLAIM—ACT OF JUNE 2, 1858.

HARDEE *v.* THE UNITED STATES.

It must appear that the claim for which indemnity is asked under section 3, act of June 2, 1858, has been confirmed by Congress and has not been located or satisfied in whole or in part. Until due proof of such facts has been made there is no basis for indemnity under said act.

Where a claim depends for confirmation upon the third section of the act of March 3, 1819, the confirmee, or his legal representative, must identify the land in order to determine whether it was covered by a claim under the two preceding sections of said act.

Secretary Noble to Commissioner Stockslager, April 4, 1889.

I have considered the appeal of D. C. Hardee as legal representative of James Bryson, deceased, from the decision of your office dated May 22, 1888, refusing to modify your office decision dated December 1, 1887, holding for cancellation the certificates of location issued by the United States surveyor general for Louisiana, under the provisions of the act of Congress approved June 2, 1858 (11 Stat. 294) in satisfaction of the private land claim of said Bryson in said State.

The record shows that said claim was entered as No. 19 of Register "D" Commissioner J. O. Cosby's report "of claims to land in the district west of Pearl river, in Louisiana founded on orders of survey (requettes) permission to settle, or other written evidence of claim, which, in the opinion of the commissioner ought not to be confirmed." (American State Papers Green's Ed. Vol. 3 p. 56.) The claim is derived from an order of survey dated August 8, 1806, issued by C. de Grampre for six hundred arpens of land situated in Feliciana in said State, claiming "cultivation and inhabitation from 1806."

Under date of February 5, 1877, the United States surveyor general of said State transmitted to your office, for appropriate action, six certificates of location Nos. 338 A. to F. inclusive containing in all 510.42 acres issued by him to D. C. Hardee as legal representative of said

Bryson under the provisions of the third section of said act of June 2, 1858, in full satisfaction of said claim.

Your office, on December 1, 1887, considered the application for action upon said certificates, and held the scrip for cancellation for the reason that the claim was not confirmed by the act of March 3, 1819, and hence indemnity scrip could not issue under the provisions of the third section of said act of 1858. Thereupon the attorneys for the scrip claimant asked your office to reconsider said decision on the ground that said claim was confirmed by the third section of said act of 1819, and that Bryson "would clearly have been entitled to a donation for six hundred and forty acres had he been placed in the technical list of 'actual settlers,'" and that he was in no worse condition being an actual settler before 1813, with an incomplete title in his pocket, than if he had not had such title.

On March 22, 1888, your office again considered the case, and refused to change its former decision. The grounds of error alleged by the appellant are—First. Error in holding that said claim was not confirmed by section three of said act of 1819. Second,—Error in holding that the locus of said claim must be shown, as required in settlement claims, "before the question of its confirmation can be determined." In said appeal, counsel "waive delays" and "claim the right to introduce new evidence under rule of practice 100." No additional evidence has been furnished nor has any argument been submitted by counsel in support of said allegations of error. Nevertheless, the case has received careful consideration. By the third section of said act of 1819 it is enacted:

That every person, or his legal representative, whose claim is comprised in the lists or register of claims reported by the said commissioners, and the persons embraced in the list of actual settlers, or their legal representatives, not having any written evidence of claim reported as aforesaid, shall, where it appears by the said reports, or by the said lists, that the land claimed or settled on had been actually inhabited or cultivated by such person, or persons, in whose right he claims, on or before the fifteenth day of April, 1813, be entitled to a grant for the land so claimed, or settled on, as a donation: *Provided*, That not more than one tract shall be thus granted to any one person, and the same shall not contain more than six hundred and forty acres; and that no lands shall be thus granted which are claimed or recognized by the preceding sections of this act.

The first of the preceding sections recognizes as valid and complete titles, certain claims founded on grants from the Spanish and British governments reported by the commissioners provided for by the act of Congress approved April 25, 1812 (2 Stats. 713).

The second section of said act of 1819, provides:

That all claims reported as aforesaid and contained in the several reports of the said commissioners, founded on any order of survey, requette, permission to settle, or any written evidence of claim, derived from the Spanish authorities which ought in the opinion of the commissioners to be confirmed and which by the said reports appear to be derived from the Spanish government before the twentieth day of December, 1803, and the land claimed to have been cultivated and inhabited on or before that day shall be confirmed in the same manner as if the title had been completed.

It is manifest that the claim of Bryson was not confirmed by either of said sections for the reason that it was not founded on a complete grant, as contemplated by the first section, and since it was not recommended for confirmation by said commissioner, although founded upon written evidence, it does not come within the provision of the second section of said act. Nor does the claim come within the provisions of the third section of said act of 1819, because that section applies, by its express terms to claims based upon inhabitancy and cultivation "not having any written evidence of claim reported as aforesaid."

The third section of the act of June 2, 1858, provides, among other things, that—

> Where any private land claim has been confirmed by Congress, and the same, in whole or in part, has not been located or satisfied, either for want of a specific location prior to such confirmation, or for any reason whatsoever, other than a discovery of fraud in such claim subsequent to such confirmation, it shall be the duty of the surveyor general of the district in which such claim was situated, upon satisfactory proof that such claim has been so confirmed, and that the same in whole or in part remains unsatisfied, to issue to the claimant, or his legal representatives, a certificate of location for a quantity of land equal to that so confirmed and unsatisfied.

The ruling of the Department has been uniform, so far as I am advised, that it must appear that the claim for which indemnity is asked under said third section of 1858, has been confirmed by Congress and has not been located or satisfied in whole or in part. Until due proof of this is made there is no basis for indemnity under said act of 1858.

John Shafer (5 L. D. 283); Stephen Sweayze (idem 570); Madam Bertrand (6 L. D. 487); William Goforth (8 L. D. 80).

Conceding the correctness of the claimant's position in his said motion for reconsideration, namely, that Bryson, being an actual settler prior to 1813, was in no worse condition "with an incomplete title in his pocket, than he would have been without it," still, the conclusion of your office was correct and in harmony with the ruling of this Department. For in the case of D. C. Hardee (7 L. D. p. 1) my predecessor Mr. Secretary Vilas, held that "where a claim depends for confirmation upon said section three of the act of March 3, 1819, the confirmee, or his legal representative must identify the land in order to determine whether it was covered by a claim under the two preceding sections of said act."

A careful examination of the whole record discloses no good reason for disturbing the decision of your office and it is accordingly affirmed.

PRE-EMPTION—FINAL PROOF.

LEWIS S. CHASE.

The statutory period within which final proof should be made for unoffered land, begins to run from the expiration of the three months after settlement, and not from the date of filing.

Secretary Noble to Commissioner Stockslager, April 4, 1889.

Lewis S. Chase appeals from the decision of your office of March 31, 1888, involving his pre-emption declaratory statement, No. 581, for the

NW. ¼ of SE. ¼, N. ½ of SW. ¼ and SE. ¼ of NW. ¼, Sec. 13, T. 3 S., R. 86 W., Glenwood Springs district, Colorado.

Said declaratory statement was filed November 17, 1887, and alleged settlement March 1, 1885. It is stated in your office decision, that "In the declaratory statement receipt issued, the filing is said to expire December 1, 1887," which is thirty-three (33) months from the alleged date of settlement and thirty (30) months from the expiration of the three months after settlement within which the statute requires the declaratory statement to be filed for unoffered lands. (Sections 2265 and 2267, Revised Statutes.)

Chase contends, that this was error, claiming, that he was entitled to thirty months within which to make proof and payment from the date of filing his declaratory statement, and not from the expiration of said three months after settlement. The statute, section 2267 of the Revised Statutes, allows thirty (30) months within which to make proof and payment for the land, to be computed from "the date prescribed" in section 2265 for filing declaratory statements (three months after settlement), and not from the date of filing such statement. Your office was correct in so holding. As is said, however, in your office decision, "In the absence of an adverse claim, the failure to make proof within the statutory period, would not affect his" (Chase's) "right to do so thereafter."

The decision of your office is affirmed.

SCHOOL LAND–INDEMNITY SELECTION.

HENRY WILDS.

Where the State makes indemnity selection in lieu of lands covered by settlement at survey, the reservation, by the act of selection, is transferred from the basis to the indemnity; and by the same act the reservation of the basis is relinquished, and the land restored to entry.

Secretary Noble to Commissioner Stockslager, April 4, 1889.

Henry Wilds appeals from your office decision of May 16, 1887, affirming the action of the local officers at Spokane Falls, Washington Territory, in rejecting his application to make pre-emption filing for the NW. ¼ of the SE. ¼, the N. ½ of the SW. ¼, and the SW. ¼ of the NW. ¼, of Sec. 36, T. 18 N., R. 42 E.

For the reason that the land applied for is a part of a school section, and it is not shown that the present applicant settled prior to survey of said section, or that he has a superior claim to the land, or such a claim as would defeat the right of the State, for the use and control of which school-sections are reserved under the law.

Accompanying the appeal from the local office to your office are certain affidavits, setting forth that one Hamilton Laird, a qualified pre-emptor, in May, 1872 (prior to survey), settled upon said tract with the intention of claiming the same under the pre-emption law; that he con-

tinued to reside thereon until survey, when he made pre-emption filing for the same; that said Laird afterward abandoned the tract. Prior to such abandonment, however to wit, September 20, 1880, the State made selection, in lieu of said quarter-section, of one-quarter of Sec. 20, T. 17 N., R. 41 E.

The Territory, "having exercised the right of selection of equivalent lands in lieu of the lands within the" said "thirty sixth section, occupied by an actual settler prior to survey, the reservation, by the act of selection, is transferred from the basis to the indemnity; and by the same act the reservation of the basis is relinquished, and the land restored to entry." Thomas E. Watson (6 L. D. 71).

The action of your office affirming that of the local office in rejecting Wilds' declaratory statement is therefore reversed.

PRACTICE—CONTINUANCE—MOTION TO DISMISS.

MILLS *v.* MUHLSTEIN.

The failure of the contestant to appear and proceed with the case, on the day to which it has been regularly continued, justifies the local office in sustaining a motion to dismiss the contest.

In a case where such action has been taken, the entry should not thereafter be canceled on the evidence already submitted by the contestant, without affording the entryman further opportunity to submit testimony.

First Assistant Secretary Muldrow to Commissioner Stockslager, April 4, 1889.

I have considered the case of William A. Mills *v.* Jacob Muhlstein on appeal by the latter from the decision of your office of June 28, 1886, holding for cancellation his homestead entry for the N. W. ¼ of section 26, T. 1, N., R. 86 W., Denver Colorado land district.

Muhlstein made homestead entry for said tract May 21, 1883, and on August 28, 1885, Mills filed contest affidavit against said entry alleging "that the said Jacob Muhlstein has wholly abandoned said tract; that he has changed his residence therefrom for more than six months since making said entry or has never established a residence thereon; that said tract is not settled upon and cultivated by said party as required by law." The trial under this contest was, after several continuances, finally begun on December 14, 1885, both parties being present. Several witnesses were examined for the contestant and, while the contestant himself was on the witness stand, and before the completion of his cross examination, the trial was continued until January 6, 1886. On this latter date the entryman appeared with witnesses but the contestant failed to appear either in person or by attorney. The entryman testified in his own behalf and the testimony of another witness in his behalf was being taken when it was announced that the deposit made by the contestant for the payment of the costs of said contest had been exhausted and the claimant refusing to advance fees for the taking of

testimony, the taking of further testimony was discontinued. The entryman thereupon filed a motion to dismiss said contest on the following grounds.

First that the contestant has made no case against claimant for the cancellation of his homestead entry; Second, That the contestant has shown bad faith in not prosecuting his contest as evinced by his failure to appear and give claimant the right of cross-examination of witness; Third, In making default in payment for taking testimony of claimant under rule 54 thereby preventing claimant from making full proof, herein and directly evading the requirements of said rule with a view to prevent a fair and impartial hearing herein.

The local officers in passing upon this motion said, "Upon consideration of the evidence offered, the motion to dismiss is granted and we therefore recommend that the contest be dismissed." No appeal from that decision was filed. Your office, however, considered the case, held that it should not have been dismissed after the contestant had previous to his default, submitted testimony showing failure on the part of defendant to comply with the law as to residence on the tract entered, and upon the testimony submitted held the entry for cancellation.

The failure of the contestant to appear on the day to which the trial of this case was continued for further cross examination and to further prosecute his contest evinced an abandonment of that contest on his part and justified the action recommended by the local officers. It is true that in the interest of the government the investigation of this matter might properly have been continued but even in this event I apprehend the entryman should have been afforded a further opportunity to present testimony in support of his claim. The testimony submitted by the contestant, would indicate that the entryman had not prior to the initiation of this contest built a house or established his residence on the land embraced in his said entry. Even admitting this to be true, yet it does not necessarily follow that said entry in the absence of an adverse right or claim must be cancelled. The failure is one that might be cured by the establishment of actual residence and subsequent compliance in good faith with the requirements of law.

The decision appealed from is reversed, the contest is dismissed, and said entry will be allowed to stand subject to due compliance with law.

PRACTICE—CERTIORARI—SUPERVISORY AUTHORITY.

ASHER *v.* HOLMES.

The supervisory authority conferred upon the Department is exercised under certain rules formulated to avoid confusion in the practice.

An application for certiorari will not be granted where it is apparent that the failure of the applicant to be heard on appeal, or through motion for re-hearing, is the result of his own negligence.

Secretary Noble to Commissioner Stockslager, April 5, 1889.

I am in receipt of your office letter dated February 21, ultimo transmitting the application of Nathaniel R. Holmes to have certified up for

departmental action under rules eighty-three and eighty-four of practice the record in the case of Daniel A. Asher *v.* Nathaniel R. Holmes, involving the NE ¼ of Sec. 24, T. 20 S. R. 14 W. Larned district, Kansas.

It appears from a copy of a decision of your office in the case, dated December 19, 1888, and with the papers before me, that Nathaniel R. Holmes made timber culture entry for the tract described January 29, 1876; that Daniel A. Asher on December 7, 1885, filed an affidavit of contest against said entry charging that Holmes had wholly failed during the sixth, seventh, eighth and ninth years to plant, replant or cultivate trees, seed, nuts or cuttings on any portion of said tract; that he allowed trees to be plowed up, etc., and that not more than eight hundred trees were growing on said tract at that time. Hearing was had before the local office February 17, 1886, at which testimony was offered showing that in 1878 Holmes planted about sixteen acres in trees; that in 1879 and 1880 he replanted where the first planting had failed to grow; that nothing further in the way of planting, replanting or cultivation was done prior to the contest except some replanting done in 1883, and that there were not more than one thousand trees on the land. The local office on this showing held the entry for cancellation, and on appeal your office, under date May 4, 1888, affirmed that action.

Holmes, it appears, was served with notice of your office decision July 13, 1888. He took no further action till October 1, 1888, when he filed in the local office an application for a rehearing, assigning as grounds therefor, that in the spring of 1884, he planted black walnuts on the tract; that but few of said nuts germinated during that season; that he did not replant the following year, 1885, for the reason that from what he knew of such seeds, and from what had been told him, he believed they would sprout and grow that season (1885); that a goodly number of them did so grow; that the witnesses who testified at the trial based their testimony on an actual count made during the winter when the ground and many of the young trees were covered with snow, and consequently many of the young walnut trees which germinated in 1885 were not counted; that he has now over seven thousand trees in a growing thrifty condition; that he was ignorant of these facts at the time of the trial; that he has cultivated the land during each year since 1885, and that he can prove these facts by two witnesses whose whereabouts he did not know at the date of the trial. Your office did not regard the showing above outlined as sufficient to warrant an order for rehearing and the motion was denied. Said motion not having been filed until after the expiration of the time allowed by the rules of practice for the filing of an appeal, this application for certiorari was filed, asking that the Department exercise its supervisory authority in the matter, and re-open the case. While that supervisory authority exists it is exercised under certain rules which it is found necessary to follow, otherwise confusion would arise in the practice and injustice rather than justice would result.

Diligence in following a remedy must have its reward and negligence or laches must pay the penalty which law and good practice impose.

Holmes had his day in court. He made his showing, and on that an adverse judgment was rendered by the local office. From that he duly appealed, and your office on the record made at the hearing sustained the finding of the local officers. From that he neglected to appeal within the time prescribed by the rules, and then out of time moved a rehearing which was by your office denied. After all this, on the 25th of January 1889, only four days prior to the expiration of the thirteen years within which, under the law he was required to make final proof, he made application for an extension of four years within which to make full compliance with the law and proof of the same. Said application filed under the second section of the timber-culture act is, as stated in the application for *certiorari*, "on account of the destruction of trees on this land in 1879, 1880, 1881 and 1882, by reason of severe and unusual drouth." Said application filed in the face of an adverse right acquired by a judgment final under the rules in favor of the contestant, comes rather late, and it is doubtful whether it could properly receive favorable consideration.

If not, then the claimant is out, for on his own showing it would not be possible for him to prove that he has for not less than eight years cultivated and protected the requisite number of trees. Consciousness of this fact is evidently the reason why the claimant asks for the extension.

It is averred, however, in behalf of the applicant as a reason why his petition for certiorari should be allowed, that his case was not properly managed at the hearing; that pending the proceedings his attorney was called away and a new attorney not familiar with the case was called in to take his place; that owing to this fact, and claimant's own ignorance of what was necessary to make a proper defence, all the material facts were not brought out.

The fact of his attorney being called away pending the trial might have furnished a good ground for a motion for continuance. This was not made however. Claimant instead called in a new attorney and proceeded with the case without objection. His plea of an imperfect showing for the reasons stated is therefore not tenable, and does not, in view of all the circumstances furnish a good reason for the exercise of supervisory authority to re-open the case.

One of the grounds for this petition is, newly discovered evidence. Said petition sets out neither the character of that evidence nor the reasons why it was not furnished at the hearing.

In his motion for new trial, filed in your office and passed upon by your office decision of December 19th last, he stated his ability to sustain his claim by two witnesses whose whereabouts he did not know at the time of the trial, but it does not appear that he made any showing as to what efforts were made to ascertain their whereabouts or procure their attendance at the trial.

His entire proceeding in the case seems to have been characterized by a degree of negligence to condone which at this stage of the proceedings under the contest would be to injure the contestant who by a trial regularly had and a judgment duly rendered (and which under the rules applicable to such trials has become final), has acquired a statutory right, to wit, a preferred right to enter the land. Upon a full consideration of the matter presented in all its phases, I am unable to conclude that the case is one which as it stands would justify interposition under and by virtue of the supervisory authority existing in this Department. The application is therefore denied, and returned to be placed in the proper file.

TIMBER CULTURE ENTRY—"DEVOID OF TIMBER."

WILLIAM DREW.

A timber culture entry should not be canceled on the ground that the land covered thereby is not "devoid of timber," where the entry was allowed in accordance with existing rulings as to the character of land subject to such entry, and the entryman thereafter proceeded to comply with the statutory requirements.

First Assistant Secretary Muldrow to Commissioner Stockslager, April 6, 1889.

I have considered the appeal of William Drew from your office decision of September 8, 1887 holding for cancellation his timber culture entry for the E $\frac{1}{2}$ of the SE $\frac{1}{4}$ of Sec. 24 T. 23 N. R. 39 E. Spokane Falls, Washington Territory land district.

Drew filed his application to make timber culture entry for said tract filing therewith a special affidavit setting forth "that on said section 24 there are not more than forty small scrubby pine trees; that there is no other timber on the section but about one-fourth of an acre of brush in small bunches; that all the wood on said section, if all the timber was to be cut and piled would not amount to twenty-five cords; that said section is in the edge of a treeless country; that for over a hundred miles in a northwesterly, or westerly or southwesterly direction one can find no timber at all."

The local officers allowed said application, and entry was made February 8, 1887. When the papers were examined in your office it was held that the affidavit showed that said section was not naturally devoid of timber and the entry was held for cancellation.

In his appeal the claimant states "there are forty-eight trees that will measure twelve inches through, and they are all scrubby pine. If all the trees were cut up they would make about thirty cords of wood. If I can not hold that as a timber culture, please give me my right back and the money for the entry I have fully complied with the law so far. I have plowed ten acres on the same."

Under the rulings in force at the date this entry was allowed, this tract was subject to such entry. In the case of James Spencer (6 L. D., 217), it was held that the former rulings of the Department were too liberal and not in harmony with the statute, and it was then said—

The former ruling on this subject will not be allowed to prevail longer; timber culture entries made after the date of this decision must be made of land in the language of the statute "devoid of timber." Entries allowed under the former ruling in which the law in other respects has been complied with, will not be affected by the ruling as herein announced.

In the case of L. W. Willis (6 L. D., 732), the rule laid down in the Spencer case as to the character of land subject to entry under this law was adhered to, but it was said—

I cannot follow the case of Spencer however in holding that because at the time the application to enter was made at the local office another opinion was held at the Department, therefore this entry should be now allowed. Had the local land office received the entry and thus have induced the entrymen to proceed with the expenditure of money and labor which the law requires in the prosecution of a timber culture claim, the case might have been very different.

In the case of Candido *v.* Fargo (7 L. D., 75), the entry was allowed to stand because made upon land subject to entry under said law as construed at the date of said entry. In the case now under consideration the entry was made for land subject to such entry under the construction of the law then followed and the entryman proceeded to comply with the requirements of said law,—and the case therefore comes clearly within the ruling in said case of Candido *v.* Fargo, *supra.* Under the authority of that case the decision appealed from is reversed, and it is directed that Drew's entry be allowed to stand, subject to future compliance with the law.

HOMESTEAD CONTEST—RELINQUISHMENT—REVIEW.

HEMSWORTH *v.* HOLLAND. (*On Review.*)

The rule that a homestead contest is premature, if filed before the expiration of six months and a day after entry, can only be invoked for the benefit of the contestee.

A relinquishment filed pending contest, and as the result thereof, inures to the benefit of the contestant.

The Department on review may properly consider any material question, which it appears from the record was not considered in the original disposition of the case.

A ruling that the contestant is not entitled to a preference right made by the Commissioner in a decision ordering a hearing, will not bar the subsequent assertion of such right, though no appeal wasta ken therefrom.

Secretary Noble to Commissioner Stockslager, April 9, 1889.

The plaintiff in the above stated case has filed a motion for review of the decision of the Department of July 28, 1888 (7 L. D., 76), affirming the decision of your office holding for cancellation the homestead entry of Hemsworth of the W. ½ of the NW. ¼ of Sec. 4, T. 16 N., R. 20 W., 6th P. M., Grand Island, Nebraska, awarding said tract to Holland.

The substance of the error alleged is, that the Department having held that "the sole question presented by this record is that of the respective rights of the parties by virtue of settlement and improvement," it was error to hold that defendant Holland was the first legal settler upon said tract, and in not holding that the said plaintiff Hemsworth first made settlement and filing thereon.

The tract involved, to wit: the W. ½ of the NW. ¼, aforesaid, was embraced in the homestead entry of one Pendleton P. Lee, made September 28, 1883, for the entire NW. ¼ of said section. On March 29, 1884, Holland filed contest against said entry, charging that Lee had abandoned the land for more than six months after entry, upon which a hearing was ordered May 16, 1884. A hearing was had on said contest on May 16, 1884, when Holland submitted evidence in support of his contest, showing that Lee had never resided upon the tract, and upon this showing the local officers sustained said contest, and gave notice thereof to Holland, on June 26, 1884. Within thirty days thereafter, Holland filed declaratory statement for the said NW. ¼. This is a concise statement of every act done by Holland to show a right to said tract.

Hemsworth, who had obtained a relinquishment from Lee in December, 1883, presented it to the local officers on April 12, 1884, and made application to file for the S. ½ of the SE. ¼ of Sec. 33, T. 17 N., R. 20 W., and the "W. ½ of the NW. ¼ of Sec. 4, T. 16 N., R. 20 W." Said relinquishment was held by the local officers without action, until a special affidavit should be filed showing why it was given, and his application to file for the land aforesaid was rejected.

On June 25, he again presented the relinquishment, accompanied by the required affidavit, and renewed his application to file for the tract aforesaid, whereupon the local officers held Lee's entry for cancellation and dismissed the contest, but rejected the application of Hemsworth, for the reason that it conflicted with the preference right of Holland. From this action Hemsworth appealed.

In passing upon the appeal of Hemsworth, the General Land Office held that his application should have been received as of the date presented, subject to the preference right of Holland, whereupon Hemsworth made homestead entry of the land embraced in his declaratory statement, presented June 25, 1884.

On December 14, 1884, Hemsworth applied for a hearing to determine the respective rights of the parties, alleging prior settlement, and that Holland's contest was premature, having been brought prior to the expiration of six months from the date of entry.

Your office held that as the contest of Holland was premature, he acquired no rights thereby, and the decision of August, 1884, was modified to this extent.

The local officers were then directed to order a hearing to determine "the rights of the respective claimants to the tract in conflict by virtue of settlement and improvement." Upon this issue the local officers found

in favor of Holland, which was affirmed by your office and also by the decision of the Department now under review.

It is insisted by applicant, that Holland can claim no right by virtue of his contest, and that the Department can not consider that question, for the reason that the Commissioner had, in his letter ordering a hearing, decided that said contest had been prematurely brought, and no appeal having been taken therefrom, said question was, therefore, finally adjudicated; and for the further reason that the Department, in its decision of July 28, held that the "sole question presented by this record is that of the respective rights of the parties by virtue of settlement and improvement."

The failure of Holland to appeal from that part of the Commissioner's decision holding that he had no preference right by virtue of said contest, did not bar him of his right to assert his claim by virtue of said contest, if such right existed, because said decision was simply an order directing a hearing to determine the right of the parties as to settlement and improvement, granted upon the application of Hemsworth without notice to Holland from which Holland had no right of appeal. In compliance with said order he was required to submit proof showing settlement and improvement on the tract; but he could also have availed himself of any right thereafter before the Commissioner or the Department, upon the ground of his preference right as a contestant, if such right was clearly shown by the record.

The record shows that Lee made entry of the tract September 28, 1883, and on October 15th thereafter abandoned the tract. Hemsworth obtained from Lee a relinquishment of the tract, as early as December 7, 1883, but it was never presented to the local office until April 12, 1884. Holland filed contest against said entry on March 29, 1884, charging abandonment for more than six months after entry. At this date the entry appeared of record and was evidence to Holland of the continued segregation of the land.

The rule that a contest is prematurely brought if filed before the expiration of six months and a day, applies only to the contestee for the reason that he can at any time before the expiration of that period defeat said contest by curing his laches. But as against third parties this rule does not apply.

In the case of Seitz *v.* Wallace (6 L. D. 299) the Department held—

As the affidavit of contest is only in the nature of an information and not essential to a contest, and jurisdiction is acquired by service of notice and not by the contest affidavit, the authority of the Land Department to entertain a contest is not abridged by the fact that the affidavit of contest was filed *before* the expiration of the period covered by the charge where the notice was served *after* such period.

In this case the contest was filed on the day after the expiration of six months and service was made by publication in a newspaper commencing April 3, 1884—after the proper showing had been made under the rules providing for service upon non-residents. The hearing was

fixed for May 16, 1884, at the local office. Service was also made by posting on the tract, April 15th, and by registered letter mailed March 29, 1884, addressed to Pendleton P. Lee, Broken Bow, Nebraska, the post-office nearest the land and the last known address of the entryman.

On April 12, 1884, after the publication of notice in the newspaper, Hemsworth appeared at the local office and filed said relinquishment with an application to enter the land.

I do not think it can admit of a doubt that the filing of this relinquishment by Hemsworth was induced by the contest of Holland. It appears from his own testimony that he did not intend to apply for this land except upon certain contingencies, and on two occasions had offered the relinquishment for sale. While the relinquishment had been executed prior to the contest, it had not been filed in the local office and could at any time prior to the filing have been revoked. It was the filing in the local office that perfected Lee's relinquishment.

Considering all the facts in the case I am satisfied that the contest of Holland—so far as rights of third parties are affected thereby—was not premature, and that the cancellation of this entry may properly be said to be the result of Holland's contest.

Although the Department in the decision now under review considered that the "sole question presented by the record is that of the respective rights of the parties by virtue of settlement and improvement," it will not conclude the Department in the investigation of the case on review, and if it clearly appears from the record that a material question upon which the rights of either party depends was not considered by the Department, it will be considered on motion for review.

It appearing from the record that Holland was entitled to said land by virtue of his right as a successful contestant, it is unnecessary to pass upon the question of priority of settlement and improvement.

The motion is denied and the papers are herewith returned.

HOMESTEAD ENTRY—ACT OF JUNE 15, 1880.

EDWIN DOOLITTLE.

An application to purchase under section 2, act of June 15, 1880, should be allowed, if the land was properly subject to the original entry, and the purchase will not interfere with the rights or claims of others who have subsequently entered the land.

The cancellation of the original entry is no bar to favorable action on an application to purchase under said act.

An intervening entry, canceled on relinquishment before application is made to purchase, does not bar the allowance of such application.

Secretary Noble to Commissioner Stockslager, April 9, 1889.

I have considered the appeal of Edwin Doolittle from your decision of October 18, 1887, rejecting his application to purchase under the

second section of June 15, 1880 the E. ½ of NE ¼ and E ½ of SE ¼ Sec. 30, T. 3 R. 26, Oberlin, Kansas.

The record shows that Doolittle made homestead entry of above tract October 18, 1879, and that said entry was canceled for abandonment January 13, 1883.

January 27, 1883, Kate Doom made homestead entry on the E ½ of NE ¼ and N ½ of SE ¼ embracing one hundred and twenty acres of the tract in question, which portion she relinquished before Doolittle's application to purchase. Doom's entry was duly canceled.

October 18, 1887, your predecessor rejected Doolittle's application upon the ground that the cancellation of Doom's entry will not restore Doolittle's right to purchase the land under said act.

From this decision Doolittle duly appealed to the Department.

Section 2 act of June 15, 1880 (21 Stat., 237), 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 homestead, may have been attempted to be transferred by bona fide instruments in writing, may entitle themselves to said lands by paying the government price therefor, provided, this shall in no wise interfere with the rights or claims of others who may have subsequently entered such lands under the homestead laws.

From the language of the above section, it would appear that in considering an application under this act, the only question that presents itself is, was the land properly subject to the original entry, and will the proposed purchase interfere with the rights or claims of others who have subsequently entered such lands.

There seems to be no doubt that this tract was properly subject to such entry, and no adverse claim intervenes as the subsequent entry of Kate Doom terminated and ceased to exist by her own voluntary act before Doolittle applied to purchase under the act of June 15, 1880.

The Department has repeatedly held that under the act of June 15, 1880, a homestead settler, even after the cancellation of his original entry, can purchase the same tract, provided it does not interfere with a subsequent right. Samuel M. Mitchell (1 L. D. 96); Hollants *v.* Sullivan (5 L. D. 115); Northern Pacific R. R. Co. *v.* Elder *et al* (6 L. D. 409).

In the case of Samuel M. Mitchel, above cited, the land was covered by three separate homestead entries, which were duly canceled. In the case at bar, Doolittle purchased the land under the act of June 15, 1880, and his rights are subservient only to any adverse claim that may have attached subsequently to the cancellation of his entry, including any equities that may exist in favor of the later entryman. The later entryman, however, does not set up any rights, claims or equities, and there was therefore no bar to Doolittle's purchasing the land under the act of June 15, 1880.

Your decision therefore rejecting the application of Edwin Doolittle to purchase the tract in question, under the act of June 15, 1880, is accordingly reversed.

PRACTICE—DEATH OF CONTESTANT—RIGHT OF APPEAL.

JOHNSON *v.* CLEAVELAND.

The rule that the right of the contestant is personal and terminates with his death, applies only to contests in which the contestant has no other claim or right than the preferred right he may secure as a successful contestant.

The heirs of a deceased pre-emptor are entitled to be heard on appeal from a decision of the General Land Office awarding the land to an adverse claimant.

Secretary Noble to Commissioner Stockslager, April 11, 1889

By letter of November 3, 1888, you transmitted to the Department an appeal, filed by M. D. Hyde, attorney for the heirs of Parks B. Johnson, from your decision of May 7, 1888, dismissing the contest in said case.

Since the case has been pending before the Department, Messrs. Curtis & Burdett, attorneys for Cleaveland, have filed a motion to dismiss said appeal, upon the ground that the death of the contestant, which occurred prior to the date of your decision, works an abatement of the contest as between the parties.

The rulings of the Department, that a contest is only a personal right that dies with the contestant, applies only to contests where the contestant has no claim or right to the tract, except the preference right which he may acquire as a successful contestant, but does not apply in cases where the contest is based upon a superior claim or right to a tract of land, and is brought for the purpose of determing the superior or prior right to said tract as between the contestant and the contestee.

By reference to your decision of May 7, 1888, it appears that this contest was brought by Johnson against Cleaveland, for the purpose of determining the priority of right to the tract involved, by virtue of settlement and application to enter the land, upon which a hearing was had before the local officers, and appeal was taken therefrom by Johnson, November 7, 1885.

While the case was pending in your office, Johnson died, to wit: during the year 1887. Your office decided adversely to the contestant, Johnson, and held that, "if the contestant is dead, no appeal will lie in the case, as no one else can appeal for him."

It is upon this ruling of your office that the motion to dismiss is based.

Section 2269 of the Revised Statutes provides, that—

Where a party entitled to claim the benefits of the pre-emption laws dies before consummating his claim, by filing in due time all the papers essential to the establishment of the same, it shall be competent for the executor or administrator of the estate of such party, or one of his heirs, to file the necessary papers to complete the same; but the entry in such cases shall be made in favor of the heirs of the deceased pre-emptor, and a patent thereon, shall cause the title to inure to such heirs, as if their names had been specially mentioned.

It appearing from the record in this case, that the heirs of Johnson have the right to file an appeal from your decision, the motion to dismiss is denied, and the appeal will be considered in its order on the docket.

COMMUTATION PROOF—EQUITABLE ADJUDICATION.

EDEN MERRYMAN.*

An entry may be referred to the Board of Equitable Adjudication where the final proof was taken at the time and place designated, but not before the officer named in the notice.

Secretary Vilas to Commissioner Stockslager, June 22, 1888.

By letter of February 14, 1887, you rejected the commutation proof offered November 27, 1886, by Eden Merryman on his homestead entry for the E. ½ of the NE. ¼ and the E. ½ of the SE. ¼, of section 13, T. 9 S., R. 24 E., Stockton land district, California, on the ground that it was taken before the judge of the superior court of Fresno county whereas it was advertised to be taken before the clerk of the superior court of said county.

The proof seems to be satisfactory in respect to residence and improvement. It was taken at the time and place advertised but before the judge and not before the clerk of the superior court of Fresno county. The judge certifies that no one appeared to protest; and Clark and McKenzie of Fresno City, attorneys for claimant, write that they are solely to blame for the irregularity and that it would be a serious hardship on the claimant to require him to make new proof.

The irregularity, in my opinion, is not a material one, and I think the case is one that may properly be referred to the Board of Equitable Adjudication, and I, therefore, direct its reference to that tribunal for its action.

PRE-EMPTION FINAL PROOF—RESERVATION.

L. J. CAPPS.

Published notice of an application to make pre-emption cash entry, so far reserves the land covered by such application as to prevent its being properly entered by another, pending the consideration of said application.

Secretary Noble to Commissioner Stockslager, April 4, 1889.

I have before me a motion for review of departmental decision rendered August 20, 1888 (not reported), in the case of L. J. Capps on appeal from your office decision of November 24, 1886, rejecting his pre-emption final proof for the SE. ¼ of Sec. 29, T. 2 N., R. 48 W.,

* It will be observed that the proof in this case was submitted before an officer not designated in the act of June 9, 1880.

Denver land district Colorado. Said departmental decision approved the action of your office rejecting the final proof in said case, and went further. It also concluded that the pre-emption filing should be canceled on the ground "that the claimant never established a *bona fide* residence upon the land." In the motion for review of said decision it is averred that error was committed in giving consideration to certain *ex parte* statements which had been made adverse to claimant by persons whom he had had no opportunity to cross-examine; also that said decision is error in holding that claimant had not established a residence upon the tract covered by his filing, and that he had a residence elsewhere. It is further urged that the evidence in the case shows compliance by the claimant with each and every requirement of the pre-emption law; but if the Department does not sustain this contention then it is insisted that the filing should have been allowed to remain intact subject to a showing in compliance with law subsequent to tender of proof, the filing not then having expired and there being no adverse claim of record.

* * * * * * *

Upon a careful consideration of the whole record, I am convinced that the judgment made by the Department in its decision of August 20, 1888, directing cancellation of the filing was not warranted by the evidence. While this is true, I do not think the explanations as made can properly be regarded as sufficient to justify the acceptance of the final proof and the issuance of final certificate. Moreover, I find in the record a petition and statement under oath by one Albert E. Birdsall, setting out that he, on the 27th of January, 1888, made homestead entry No. 11243 of the tract in question. He makes charges similar to those herein recited as to the failure of Capps to comply with the requirements of the pre-emption law in the matter of residence, and he asks to be heard on this question. He thus virtually makes himself an applicant to contest as a party in interest, and under the circumstances I think he should be heard. It may here be remarked that if he was allowed to make homestead entry of the land in January, 1888, as he states, the action of the local officers allowing said entry at that time was erroneous.

Capps had in September 1886 applied to make final proof and pre-emption entry of the tract and had offered proof. Said application and proof were rejected by the local office and by your office on the ground of insufficiency in the showing as to residence, and the matter was at the date when the homestead entry of Birdsall was allowed, pending on appeal before this Department.

Published notice of an application to make pre-emption cash entry so far reserves the land covered by such application as to prevent its being properly entered by another pending the consideration of said application. Until final decision on the appeal of Capps from the rejection of his final proof, no entry covering the same land ought to have been al-

lowed. The departmental decision of August 20, 1888, and now under consideration, is hereby revoked and you will direct that a hearing be ordered on the charges made by Birdsall with notice to him as contestant, as well as to the claimant. On the evidence taken at such hearing the local officers will take action subject to appeal as in other cases. The homestead entry of Birdsall will stand suspended pending proceedings under this order, and subject to the final judgment in the claim of Capps.

DESERT LAND ENTRY—CIRCULAR REGULATIONS.

JAMES BOWMAN.

An application to enter, made in accordance with existing regulations, should not be rejected, because not in conformity with subsequent regulations.

Secretary Noble to Commissioner Stockslager, April 12, 1889.

On April 18, 1887, the application of James Bowman to file desert land declaration was presented at the local office in Cheyenne, Wyoming, embracing the S. $\frac{1}{2}$, NE. $\frac{1}{4}$ & SE. $\frac{1}{4}$, Sec 10, and W. $\frac{1}{2}$ and SW. $\frac{1}{4}$, of NE. $\frac{1}{4}$, Sec. 11, T. 17 N., R. 67 W. The local officers rejected the same on the ground that, "the declaration appears to have been sworn to more than two months prior to presentation." Appeal was taken, but on May 4, 1887, was withdrawn by claimant and a new application filed.

This application was also rejected on July 5, 1887, by the local officers "because the declaration appears to have been sworn to more than two months prior to presentation."

On appeal your office on October 10, 1887, affirmed the action of the local officers. As ground for said rejection your office states:

> The affidavits of applicants and witnesses must in every instance either of original application or final proof be made at the same time and place and before the same officer. See General Land Office circular of June 27, 1887. Your action is, therefore, approved.

Claimant appealed.

It appears that prior to the first application of Bowman, part of the land in question was covered by the desert land entry of one Oliver W. Mead the relinquishment of which was filed March 8, 1887. This relinquishment was transmitted to your office and the entry declared canceled by your office letter of April 12, 1887.

The second application was sworn to by Bowman in New York City on April 27, 1887, and presented at the local office May 4, following. The corroborated affidavits were executed in Cheyenne on the latter date. It appears from the record that these papers were held by the local officers until July 5, ensuing when they were rejected as stated.

The provision of the circular relied on by your office is as follows:

> The declaration and corroborating affidavits may be made before either the register or receiver of the land district in which the lands are situated, or before the judge or

clerk of a court of record of the county in which the lands are situated, and if the lands are in an unorganized county then the affidavits may be made in an adjacent county; the depositions of applicant and witnesses in making final proof must be taken in the same manner, and the authority of any practice or regulation permitting original or final desert land affidavits to be executed before any other officers than those named above, is hereby revoked. The affidavits of applicant and witnesses, must in every instances either of original application or final proof be made at the same time and place and before the same officer. (5 L. D., 710).

As this circular was not promulgated until after the rights of claimant were initiated, the provision thereof can in no manner affect such rights.

At the date of the presentation of the second application the former entry had been canceled, the land was vacant and subject to appropriation by the first legal applicant. It does not appear that any more time than was necessary for transmission of the application intervened between the date of its execution and its presentation.

Said decision is, therefore, reversed and unless there be some other valid objection, the application will be allowed.

INDIAN LANDS—ACT OF JULY 4, 1884.

DAVID H. ROBBINS.

The prohibition against the final disposition of lands included within the act of July 4, 1884, extends to entries made prior to the passage of said act.

Secretary Noble to Commissioner Stockslager, April 10, 1889.

On May 25, 1883, David H. Robbins made homestead entry, No. 3273, of Lots 1, 2, and 3, and the NW. ¼ of the SW. ¼ of Sec. 28, T. 43 N., R. 27 W., Taylors Falls land district, Minnesota. Your office, by decision of May 15, 1886, held the entry for cancellation as to lot 1, because to that extent it conflicted with the prior homestead entry of Show-Vash-King, No. 6239, for which final certificate was given September 2, 1879. (It appears that the patent has not yet issued.) From said decision Robbins appeals, alleging several grounds of error—which need not be considered, in view of the fact that said lot 1 is within the limits of the tract which, by act of July 4, 1884 (23 Stat., 89), Congress provided "shall not be patented, or otherwise disposed of in any manner, until further legislation by Congress." (See Robert Lowe, 5 L. D., 541.)

Robbins made his said homestead entry more than fourteen months before the passage of the act of July 4, 1884; nevertheless, said act, in my opinion, inhibits patenting this land.

Your decision is accordingly modified, and no action looking to the patenting of said entry will be taken until further legislation by Congress.

PRIVATE CASH ENTRY—INDEMNITY WITHDRAWAL.

DELBRIDGE *v.* FLORIDA RY. AND NAVIGATION CO.

A private cash entry, made in good faith, of land included within an indemnity withdrawal, may be referred to the Board of Equitable Adjudication, where the withdrawal is subsequently revoked, and no adverse claim exists.

Secretary Noble to Commissioner Stockslager, April 13, 1889.

I have considered the case of Charles L. Delbridge *v.* Florida Railway and Navigation Company, on appeal of the former from your office decision of December 1, 1887, holding for cancellation his private cash entry for lot 1, Sec. 9, T. 28 S., R. 25 E., Gainesville, Florida, land district.

The tract is within the indemnity limits of the withdrawal ordered March 26, 1881, under grant of May 17, 1856 (11 Stat., 15).

Said withdrawal was revoked August 15, 1887, but no restoration to private cash entry was made, and the lands have never been re-offered.

In your said decision, you say: "Mr. Delbridge's entry, having been made subsequent to said withdrawal, was improperly allowed, and is therefore held for cancellation."

Said private cash entry was made March 16, 1882, and still belongs to the entryman.

Under the law as construed in Julius A. Barnes (6 L. D., 522), the entry in question was improperly allowed, the land at the time being withdrawn by executive order, and the local officers should not have allowed the entry.

The rules for submission to the Board of Equitable Adjudication of matters pertaining to the public lands provides in rule thirteen that there shall be submitted to such Board—

All private sales of tracts which have not been previously offered at public sale, but where the entry appears to have been permitted by the land officers, under the impression that the land was liable to private entry, and there is no reason to presume fraud or to believe that the purchase was made otherwise than in good faith.

And rule thirteen provides for the submission to said Board of—

All *bona fide* entries on land which had been once offered, but afterward temporarily withdrawn from market, and then released from reservation, where such lands are not rightfully claimed by others.

The said Railway and Navigation Company is not here asserting any claim to be the rightful owner of said land. It can only claim a contingent right, *i. e.*, if the company upon final adjustment of its grant should be found entitled to any more indemnity lands, it might conclude to select the tract in question as a part thereof.

There is not now any withdrawal. The entry seems to have been made in good faith, and to have been allowed through inadvertence or ignorance on the part of the local officers more than six years ago.

I think it properly comes under the rule in Pecard *v.* Camens (4 L.

D., 152), as voidable but not void, and may properly be submitted to the Board of Equitable Adjudication.

Your said decision is modified accordingly.

FINAL PROOF PROCEEDINGS—EQUITABLE ADJUDICATION.

URIAH SLOAN.

An entry may be referred to the Board of Equitable Adjudication, where the final proof was not taken before the officer named in the notice, but was submitted at the time and place designated, and before an officer authorized to take final proof.

The fact that the officer designated in the notice had no authority under the law to take final proofs, would not modify the above conclusion.

Secretary Noble to Commissioner Stockslager, April 15, 1889.

I have considered the appeal of Uriah Sloan from the action of your office of March 2, 1889, rejecting his commuted homestead proof and requiring claimant to "submit new proof after due publication and posting of notice taken before an officer authorized to take said proof."

Said proof was rejected because "it was advertised to be taken before a superior judge, an officer not authorized to take commuted proof, and was taken before the county clerk."

The record shows that notice was published of the intention of Sloan and others to make final proof before the judge of the superior court of Monterey county, at Salinas, on Thursday January 6, 1887, and that commutation homestead proof upon their several claims was taken on the day advertised before M. L. Dexter, county clerk of Monterey county and ex officio clerk of the superior court thereof (the same being a court of record) at the office of said clerk, who certified that said proof was taken before him on account of the absence from the county of the judge of said superior court.

The act of March 3, 1877, provided that final proofs in homestead entries may be made before the judge, or in his absence before the clerk of any court of record in the county and State or district and Territory in which the lands are situated; but the act of June 9, 1880, having application alone to pre-emption and commuted homestead proof, provided that said proof may be taken before the clerk of the county court or of any court of record in the county and State or district and Territory in which the lands are situated.

In the case of James A. Cain (7 L. D., 482) the Department held that—

In the absence of protest or adverse claim, an entry may be referred to the Board of Equitable Adjudication, where the testimony of the final proof witnesses was not taken on the day named, or before the officer designated, but the claimant's own evidence was submitted in accordance with the notice.

Again, in the case of Judith M. Clarke (Id. 485) it was held that—

In the absence of protest or adverse claim an entry may be referred to the Board of Equitable Adjudication, where the testimony of the claimant and his final affidavit were not submitted before the officer designated, but the evidence of his witnesses was taken in accordance with the notice.

If the claimant has complied with all the requirements of the law as to inhabitancy, cultivation, improvement, etc. and the proof was taken at the time and place designated in the notice, before an officer authorized to take such proof, and no protest or objection was offered to such proof, I can see no reason why the technical defect may not be cured by the Board of Equitable Adjudication as well in cases where no part of the proof was taken before the officer named in the notice, as in cases where part of the proof was made before such officer. Nor does the fact that the officer designated in the notice was not authorized to take such proof affect the principle upon which the rule is founded. It is the authority of the officer taking the proof that is alone to be considered.

The proofs in these cases were taken before an officer authorized to take such proofs, although he was not the officer designated in the notice, and they were taken at the time and place named in the advertisement. There is nothing to indicate that any one was misled by this technical failure to comply with the law as to the taking of said proof, and no protest having been filed, I am satisfied that the law has been substantially complied with, so as to authorize said case to be submitted to the Board of Equitable Adjudication, and I so direct.

TIMBER LAND APPLICATION—RESERVATION.

HENRY A. FREDERICK.

An application to purchase timber land under the act of June 3, 1878, should not be rejected on account of a temporary order of reservation, made by the General Land Office, after the application was filed and notice thereof given.

If the character of the land covered by the application, and included within the reservation, is called in question a hearing should be ordered on that issue.

Secretary Noble to Commissioner Stockslager, April 19, 1889.

I have considered the appeal of Henry A. Frederick from the decision of your office dated April 11, 1888, rejecting his application to purchase the SW. $\frac{1}{4}$ of section 26, T. 10 S., R. 26 E., Mount Diablo meridian, Stockton, California, under provisions of the act of Congress approved June 3, 1878, (20 Stat., 89).

The record shows that on May 27, 1887, the register gave due notice by publication that said Frederick had that day filed his application to purchase said tract under said act, and all persons who held any adverse claims for said land should present them to the local office within sixty days from the first publication of said notice. No protest or adverse claim was filed, and the claimant, on August 24, 1887, offered his final proof, made before the register of said office, and payment for said land. The proof and payment were refused by the local officers, for the reason that your office on July 30, 1887, reserved said land from entry.

On appeal, your office affirmed the action of the local office, for the reason that said land "was held for reservation by office letter "C" of July 30, 1887." The record does not contain a copy of said decision of your office reserving said tract, but an inspection of the records of your office shows that the local officers were directed not to allow any entries in sections 26 and 35 of said township. No reason was stated in your office letter for such reservation, but a pencil memorandum on the press copy indicates that there are "big trees" on the sections.

The applicant filed his affidavit with his appeal from the local officers' action in rejecting his said proof, in which he alleges (*inter alia*) that he made application and offered proof, and tendered payment for said land, which was rejected as aforesaid; that claimant was informed and believed that one Noble F. Pickle entered certain lands in section 26, and that your office was informed that the land so entered by said Pickle contained a grove of large trees or sequoyias, and that said land was necessary and suitable for a public park; that thereupon your office withdrew from sale the remainder of said section 26, for the purpose of making an investigation of the true character of the lands embraced in said section; that claimant knows from a full and personal examination of said tract that, upon it there are no large trees or sequoyias, and that it will not be beneficial or useful for a public park; that the tract in question is only valuable for its timber; that it contains no minerals, and on account of its elevation and intersection by gulches, its mountainous character, and the fact that snow remains upon said tract as late as May 24th, it is unfit for agriculture; that the tract contains a growth of pine, sugar-pine and fir, not large, and not in groves or parks, and only valuable for milling. The claimant, therefore asked that his proof be accepted, and patent issued for the land.

Your office refused to accept the proof as aforesaid. Said timber land act provides—

That surveyed public lands of the United States within the States of California, Oregon, and Nevada, and in Washington Territory, not included within military, Indian or other reservations of the United States, valuable chiefly for timber but unfit for cultivation, and which have not been offered at public sale according to law, may be sold to citizens of the United States, or persons who have declared their intention to become such, in quantities not exceeding one hundred and sixty acres, to any one person, at the minimum price of two dollars and fifty cents per acre.

Section two of same act requires the applicant to—

File with the register of the proper district a written statement in duplicate, one of which is to be transmitted to the General Land Office, designating by legal subdivisions the particular tract of land he desires to purchase, setting forth that the same is unfit for cultivation, and valuable chiefly for its timber or stone; that it is uninhabitable; contains no mining or other improvements, except for ditch or canal purposes, where any such do exist, save such as were made by or belong to the applicant, nor as deponent verily believes, any valuable deposit of gold, silver, cinnabar, copper or coal; that deponent has made no other application under this act; that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indi-

rectly made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title he might acquire from the government of the United States, should inure in whole or in part, to the benefit of any person except himself, which statement must be verified by the oath of the applicant before the register or receiver of the land office within the district where the land is situated etc.

Section three provides for publication of notice for sixty days within which adverse claims shall be filed.

In the case at bar the applicant filed his statement, under oath, and publication was commenced prior to the date of said letter of your office directing the local officers "to allow no entries or filings upon sections 26 and 35, T. 10 S., R. 26 E., M. D. M., until further advised." But it has been the general ruling of this Department that the filing of the sworn statement does not segregate the land, and that the tract applied for is subject to entry under the settlement laws subject to whatever rights the timber land applicant may have. Smith *v.* Martin (2 L. D., 333); Hughes *v.* Tipton (idem 334); Capprise *v.* White (4 L. D., 176).

In the case of Falk Steinhardt (7 L. D. 10) the Department held that the preliminary affidavit required of the entryman was the same under both the timber culture and timber land laws, to the extent that the condition of the land must be set forth in each case.

In the case of L. J. Capps, on motion for review, it was held, on April 4, 1889 (8 L. D.,), that "Published notice of an application to make pre-emption cash entry so far reserves the land covered by such application as to prevent its being properly entered by another pending the consideration of said application." If that decision be correct—and it undoubtedly is—there would seem to be no good reason why the same ruling should not apply to a timber land application where publication has been made, and where parties have an opportunity to file their adverse claims within the period of publication.

In the present case, Frederick had done all that the law required to entitle him to entry, if the proof is credible and the land was subject to entry under said act. In the case of the heirs of William Friend (5 L. D., 38) the Department held that the right of a timber land applicant to a patent becomes vested when he has furnished the proofs by the law, and paid the purchase money, citing Stark *v.* Starrs (6 Wall., 402), and Wirth *v.* Branson (98 U. S., 118). It was also held that where the applicant had tendered the purchase money for the land, he had done all that the law requires in that respect. But the sole ground of the rejection of said application to purchase is that your office had directed the reservation of said selections including said tract.

It is well settled that where land has been reserved by competent authority it is not subject to sale or entry. Wolcott *v.* Des Moines Co. (5 Wall., 681). And by "competent authority is meant the President and officers acting under his authority." (Grisar *v.* McDowell, 6 Wallace, 381).

In the opinion of Attorney General MacVeagh, it is held that "where a homestead entry of public lands has been made by a settler, the land

so entered cannot, whilst such entry stands, be set apart by the President for a military reservation prior to the completion of full title in the settler; but that where a pre-emption filing has been made of public lands, the land covered thereby, may be set apart by the President for such reservation at any time previous to payment and entry by the settler under the preemption law." See also case of John Campbell (6 L. D., 317).

It does not appear, however, from the order of your office that the land in controversy was set apart for any public purpose, or for any specific period; that it was a temporary withdrawal, and, not being disapproved must be presumed to have been made under the direction of the Secretary of the Interior. David B. Emmert (3 L. D., 55); Wolsey *v.* Chapman (101 U. S., 769).

The affidavit of the applicant alleges that the land is subject to entry; that there are no large trees upon the land, and that he has complied in good faith with the requirements of the law. If it be conceded that the action of the local officers was correct under the direction of your office, still I am of the opinion that a hearing should be had to determine the true character of the land. If it should appear that the land is of the character contemplated by said act, then Frederick should be permitted to complete his entry by paying for the land, and upon receipt of the purchase money the local officers should issue the final entry papers.

The decision of your office is modified accordingly.

FINAL PROOF PROCEEDINGS—TRANSFEREE—EQUITABLE ADJUDICATION.

JOHN SARGENT.

Where the land is misdescribed in the published notice, the proof submitted by the pre-emptor may be accepted, in the absence of protest, after publication of special notice by the transferee.

Failure to submit the final proof on the day advertised may be cured by a reference to the Board of Equitable Adjudication.

Secretary Noble to Commissioner Stockslager, April 19, 1889.

John Sargent, who discloses under oath that he is a party in interest as grantee of Anthony Krantle, appeals from the decision of your office of April 14, 1888, involving the latter's pre-emption cash entry, No. 1732, for lot 11, Sec. 14, T. 20 N., R. 3 E., Helena district, Montana Territory.

Krantle filed pre-emption declaratory statement, No. 6010, for said land, February 19, 1884, alleging settlement on the 15th of that month. Notice was given by publication that he intended, on September 18, 1884, at Sun River, to make final proof in support of his claim, before John Kerler, a notary public. In said notice, the description of the

land is defective in not giving the number of the range, and the proof of the claimant's witnesses was taken before said notary, September 16, 1884, two days prior to the time designated in the notice, and that of claimant was taken before the register, September 20, 1884, two days subsequent to said time.

The proof related to said land and was in itself sufficient, showing compliance with the law as to residence, improvements and cultivation. The local officers accepted it, and, September 22, 1884, on payment of the purchase money by Krantle, allowed entry to be made and issued to him final receipt and certificate.

On March 19, 1887, about two years and a half after the allowance of said entry, your office suspended it, because the proof had "not been made on the day advertised," and required the original claimant (Krantle) to make "new publication and new proof thereunder."

It does not appear, that notice of said requirement was served in any way on Krantle, and Sargent (the appellant), July 8, 1887, made and filed an affidavit showing substantially, that after said entry had been allowed, he purchased said land from Krantle for the sum of $600.00, and thereupon Krantle left the country, and that his subsequent place of residence was unknown and he (Sargent) after diligent effort has been unable to discover the same, and said affidavit concludes with the prayer, that, in consideration of this state of facts, he "as the successor in interest" of Krantle "and present owner of the land . . . . . . be allowed to submit proof of the full compliance by said Krantle with the pre emption law, and, upon the submission of said proof, that said entry be relieved from suspension and approved for patent."

Thereupon, your office by the decision of April 14, 1888 (from which the present appeal is taken), denied said prayer of Sargent and again required, that republication and new proof be made by the original claimant, Krantle.

As to the requirement by your office, that new publication and proof be made by the original claimant in this case, the facts are substantially the same as those in the case of the United States *v.* Clark *et al.* (6 L. D., 770), in which it was said by this Department, "that to require new proof and publication to be made by the pre-emptor, when, as in this case, he can not be found and service of this requirement can not be had upon him is, in effect, the denial to his grantee of any right to remedy the otherwise fatal mistake made . . . . . . in the description of the land. The decisions of this Department recognize the right of a grantee, after the issue of final certificate, to show his grantor has complied with the requirements of the law, and thereby acquired a good title to the land. John C. Featherspil, 4 L. D., 570."

There being no adverse claim and no protest having been filed to the allowance of said entry, you are instructed in this case, as was done in said case of the United States *v.* Clark *et al.*, that, in view of the fact, that service can not be had upon Krantle, the register be directed to

cause to be published for the full period of thirty days notice, setting forth that Anthony Krantle did, by his witnesses, on September 16, 1884, before John Kerler, a notary public, at Sun River, Montana Territory, and on September 20, 1884, by himself, before the register of the said district, make final proof for said land, and requiring any adverse claimant or other person knowing any reason why such proof should not be accepted, to appear at the land office of said district and make the same known on or before the expiration of said thirty days.

If no objection is filed to said entry within the time prescribed in said notice, said entry, on the proof already made by Krantle, will (because of his default in not making the same on the day advertised) be submitted to the Board of Equitable Adjudication for appropriate action thereon by said Board.

The decision of your office is modified accordingly.

PRE-EMPTION—PROOF AND PAYMENT.

PRE-EMPTION—FINAL PROOF—INTERVENING SETTLEMENT.

DAVIS *v.* DAVIDSON.

A pre-emptor is required to make proof and payment within thirty-three months from the date of his settlement; but, in the absence of an intervening adverse right, he may be allowed to perfect his title after the expiration of the statutory period.

An intervening adverse claimant, alleging settlement rights acquired after the default of the pre-emptor, must show, in order to defeat the pre-emptor's right of purchase, an actual settlement, based on substantial and visible acts of improvement.

First Assistant Secretary Chandler to Commissioner Stockslager, April 19, 1889.

July 18, 1884, Daniel O. Davis, the appellant, filed a pre-emption declaratory statement, No. 4114, for the NE. $\frac{1}{4}$ of Sec. 28, T. 1 N., R. 15 E., Dalles district, Oregon, alleging settlement July 17, 1884.

Said land, it appears, was "unoffered," and section 2265 (Revised Statutes) requires the claimant for such land to file his declaratory statement therefor "within three months from the time of settlement" thereon, and section 2267 R. S., requires him, to "make the proper proof and payment for the land claimed within thirty months" from the expiration of said three months, or, in other words, within thirty-three months from the date of settlement. The thirty-three months from the date of Davis's settlement expired April 17, 1887, but notice of his intention to make proof in support of his claim was not published until November 26, of that year, and he did not in fact offer proof until January 11, 1888. The proof then offered showed him to be a qualified pre-emptor, and that he had, with his family (a wife and seven chil-

dren) resided upon the tract as a home continously from July 18, 1884, and had improved it to the value of over $200, his improvements consisting of a dwelling, twenty-two by thirty feet, habitable at all seasons, a granary, sheds, fencing, and forty acres of land cultivated, on which he had each season since settlement raised crops of wheat, barley, corn and potatoes.

It appears, however, that November 16, 1887 (after the expiration of said thirty-three months from Davis's settlement and before said proof was offered), John P. Davidson filed declaratory statement, No. 6242, for said land, alleging settlement thereon, November 11, 1887, and when Davis made said proof, January 11, 1888, Davidson appeared before the local officers as an adverse claimant and offered "in evidence only the records . . . . . showing the respective dates of the filings" of Davis and himself. Thereupon, the local officers interrogated Davidson as to his alleged settlement on the land, November 11, 1887, and he testified, that he first came to the vicinity of the land in September, 1887, and stopped with one Emerson, living near by, who informed him that Davis' "time had run over" and the claim "could be jumped;" that at "*dusk*" on the evening of November 11, 1887 (the date of his alleged settlement), he in company with said Emerson went upon the land and dug eight post holes about eight inches deep "in a gully near the South East corner of the tract, and set up two posts, and, also, "started a square rock foundation for a house," using therefor about fifteen "rocks," "some large and some small;" and that these were his only acts of settlement and he had never resided on said land.

Upon this state of facts, the local officers rendered dissenting opinions; the register holding, that the "act of settlement of Davidson was insufficient to base a declaratory statement upon," and that, therefore, Davis should be allowed to make payment for the land and consummate his entry thereon, and the receiver holding the reverse. Your office, by decision of March 30, 1888, sustained the ruling of the receiver and held that the proof of Davis must be rejected, "in view of the intervention of the adverse right of Davidson." From said decision Davis now appeals to this Department.

Section 2265 of the Revised Statutes provides, that in case the preemption claimant is in default, in not filing his declaratory statement "within three months from the time of the settlement," "his claim shall be forfeited and the tract awarded to the next settler, in order of time, on the same tract of land, who has given such notice and otherwise complied with the conditions of the law." Section 2267 as before stated, requires proof and payment to be made within thirty months from the expiration of said three months, but does not affix any penalty, by forfeiture in favor of a subsequent settler or otherwise, in case of default in not complying with said requirement.

Davis complied with the requirement of section 2265 by filing his declaratory statement within the prescribed time, but failed to make

proof and payment as required by section 2267, for which failure (as just stated) the statute prescribes no penalty.

The pre-emptor's right, however, is defined to be "a right to purchase at a fixed price, in a limited time, in preference to others" (Bowers *v.* Keesecker, 14 Ia., 307, cited in J. B. Raymond, 2 L. D., 857), and "under this doctrine" (if there be an adverse claimant) "no right as a pre-emptor to purchase after the expiration of the limited time is recognized, such right having expired with the time." (J. B. Raymond, *supra*). But where there is no adverse claimant and the question is one between the government and the claimant and the latter has acted in good faith and otherwise complied with the law, the limitation as to time is not enforced by the government and the claimant may be allowed to perfect his title by proof and payment after the time prescribed by the statute.

Davis has complied with all the requirements of the pre-emption law except as to proof and payment within the prescribed time, and his failure in that particular, it is stated, was occasioned by his inability to sooner raise the necessary money. His good faith can not be doubted, and, the question in this case is, do Davidson's alleged acts of settlement entitle him to the status of an adverse claimant?

Your office bases its decision, that Davidson's acts "constitute a settlement," upon a quotation from an opinion of the Assistant Attorney General, dated November 7, 1881, given to Secretary Delano, in the case of Allman *v.* Thulon (1 C. L. L., 690). That case arose under the townsite act of July 1, 1864 (13 Stat., 344; Revised Statutes, 2382), and, in defining the meaning of the words "actual settler," used in the proviso to the second section of that act, the Assistant Attorney General uses the language quoted by your office, to wit: "A person is a settler, who intending to initiate a claim . . . . . does some act, connecting himself with the particular tract claimed, such act being equivalent to the announcement of such intention, and from which the public generally may have notice of his claim." Secretary Delano, however, expressed himself as "not entirely clear in his mind" as to this question of law among others involved in said case, and allowed the decision of the Commissioner to stand, notwithstanding the recommendation of the Assistant Attorney General that it be reversed; and said opinion of the Assistant Attorney General, as to what constitutes an "actual settler" within the meaning of said Townsite law, has been expressly held by this Department to be incorrect in the cases of Samuel M. Frank, 2 L. D., 628, and Elmer *v.* Bowen, 4 L. D., 337.

But, conceding for argument's sake, that the said definition of a "settler" is correct as applied to the pre-emption law, which requires a "settlement in person" (Section 2259, Revised Statutes), the acts of Davidson do not satisfy the last clause of said definition, namely, that the acts of settlement shall be acts "from which the public generally may have notice of his claim." The digging a few holes in "*a gully*,"

near a corner of the tract, placing posts in two of them and laying fifteen rocks on the ground in rectangular form (whether in the "*gully*" or not, is not stated), at "dusk" in the evening, are not calculated to give the "public generally" notice of a claim. The time and place selected by Davidson indicate, if his acts were otherwise sufficient to constitute settlement, an intent to make (if that were possible) a clandestine appropriation of the land, and not an open, honest settlement with a view of giving the public notice of his claim. "One of the objects of settlement is to furnish notice to all comers, that the tract settled upon is claimed by the settler." Barnett *v.* Crow (5 L. D., 372).

But I am of the opinion, that Davidson's acts of settlement even if open and notorious, were in themselves insufficient. In the case of Howden *v.* Piper (3 L. D., 162), Howden went upon the land February 11, 1882, with three others and "picked" about a half an hour upon a piece of ground, six by eight feet, to the average depth of about one inch, as the commencement of a cellar, and "then erected two boards at a different place, in the form of a cross, about eight feet high, 'to show,' as he said, that the land was taken." He then left the land, and "shortly afterward went to his former home in Iowa for the purpose of bringing to Dakota" (to his claim) "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, erecting during that month a house (which he afterwards continuously occupied) and out-buildings, broke several acres (plowing directly over the 'cellar'), and sowed wheat." His good faith was conceded, but his original acts of settlement, although followed by actual residence and improvement about two months and a half after said acts, were held by the Department insufficient, and an intervening adverse claim was allowed. "These acts," it is said in that case, "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. . . . . 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."

If the acts of Davidson could be called to any extent an "improvement" of the land, they were but little, if any, more substantial and permanent than those of Howden, and did not constitute actual *present* settlement, but at most indicated an intention to reserve the land for *future* settlement. The law, moreover, accords the pre-emptive right to those who "make a settlement in person on public land . . . . . and who inhabit and improve" the same. At the time Davis offered his proof, and when Davidson testified as to his alleged acts of settlement, January 11, 1888, two months had elapsed from the date of his alleged settlement, November 11, 1887, and he had not commenced inhabiting the land or done anything further toward its improvement, or

evinced any intention or desire to do so, although he testifies, that he had access to the land and was not prevented by intimidation or otherwise from so doing.

I do not concur with your office in rejecting Davis's proof because of the "adverse right of Davidson," and, that being the only obejction thereto, you are directed to approve the same, and on compliance by Davis with the further requirements of the law, his entry will be allowed and passed to patent. The decision of your office is reversed.

SALE OF ISOLATED TRACTS—SECTION 2455, R. S.

T. L. CHAMBERLIN.

The discretionary authority vested in the Commissioner of the General Land Office, by section 2455 of the Revised Statutes, to order into market isolated tracts of unoffered land, is not restricted by the later statute of July 15, 1870.

Secretary Noble to Commissioner Stockslager, April 19, 1889.

I have considered the appeal of T. L. Chamberlin from the decisions of your office, dated June 9, 1887, and February 27, 1888, rejecting his application to have ordered into market under the provisions of section 2455 of the U. S. Revised Statutes, the NE. ¼ of the SE. ¼ of Sec. 28, T. 13 N., R. 6 E., M. D. M., Sacramento land district, California.

The record shows that your office on June 9, 1887, rejected said petition, which alleges that said land has been used for school and cemetery purposes, by the citizens, for many years; that it is not suitable for agricultural purposes, and that title to the land is desired so that it may be kept for public uses.

The ground upon which said petition was refused is, that the land was offered on February 16, 1859, at one dollar and twenty-five cents per acre, and having been subsequently withdrawn from private entry was raised to two dollars and fifty cents per acre, and, therefore, under the provisions of section 2367 of the U. S. Revised Statutes could not be ordered into market under said section 2455 of the Revised Statutes.

Your office, on February 27, 1888, declined to reconsider its said decision, and the applicant has appealed to this Department. The appeal is from both decisions of your office, but the letter of transmittal states, that the appeal is from the decision dated February 27, 1888, refusing to reconsider the former decision of your office.

Under the Rules of Practice, strictly speaking, no appeal lies from the decision of your office refusing a reconsideration of its former decision, but the appeal lies from the decision sought to be reviewed, and by Rule No. 79, "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."

Section 2455, under which said application is made, reads—

It may be lawful for the Commissioner of the General Land Office to order into market, after due notice, without the formality and expense of a proclamation of the President, all lands of the second class, though heretofore unproclaimed and unoffered, and such other isolated or disconnected tracts or parcels of unoffered lands which, in his judgment, it would be proper to expose to sale in like manner. But public notice of at least thirty days shall be given by the land-officers of the district in which the lands may be situated, pursuant to the directions of the Commissioner.

This section is a compilation of section five of the act of Congress, approved August 3, 1846 (9 Stat., 51).

By section 2367 of the Revised Statutes it is provided, that—

Whenever lands in California, subject to private entry, have been or are hereafter withdrawn from market for any cause, such lands shall not, thereafter, be held subject to private entry, until they have first been opened for at least ninety days to homestead and pre-emption settlers, and again offered at public sale.

Your office construes the latter section as prohibiting the exercise of the discretion conferred by said section 2455. A careful consideration of the two sections leads me to a different conclusion. Section 2367 is a compilation of section one of the act of July 15, 1870 (16 Stat., 304), and it does not in terms repeal said section 2455. Besides, the applicant does not ask to be permitted to make private entry of the land in question; that can not be done under said section 2367. But there is nothing in that section to prevent, in my judgment, your office from ordering into market, after due notice, this isolated tract, and allowing all persons to bid for said land at a public sale thereof. That would be a public sale, not a "private entry" of the land in question. The government will then receive the benefit contemplated by its uniform policy of allowing competition at the public sale of said tract, and every one will have a fair and equal opportunity of purchasing, if it is worth more than the price fixed by law for its disposal. Eldred *v.* Sexton (19 Wall., 195).

The object sought by the applicant appears to be a worthy one, and his petition should be granted.

The decision of your office must be and it is hereby reversed, and you will please order said tract into market, in accordance with the provisions of said section 2455.

PRE-EMPTION—TRANSMUTATION—ACT OF MARCH 2, 1889.

JOSEPH BURGEL.

Under section 2, act of March 2, 1889, a pre-emptor, whose claim was initiated prior to the passage of said act, is entitled to transmute his claim into a homestead entry, notwithstanding the fact that he may have heretofore had the benefit of the homestead law.

Secretary Noble to Commissioner Stockslager, April 19, 1889.

I have before me the appeal of Joseph Burgel from your decision of October 13, 1886, cancelling his homestead entry, No. 9690, for the

SW. ¼, Sec. 31, T. 154 N., R. 60 W., Grand Forks district, Dakota, but denying his petition that such cancellation be without prejudice, and that he be permitted to transmute into a homestead his pre-emption declaratory statement for the SW. ¼ of Sec. 6, T. 153 N., R. 60 W., in the said district.

Since the date of said decision Congress has expressly provided—

That all pre-emption settlers upon the public lands whose claims have been initiated prior to the passage of this act may change such entries to homestead entries, and proceed to perfect their titles to their respective claims under the homestead law, notwithstanding they may have heretofore had the benefit of such law, but such settlers who perfect title to such claims under the homestead law shall not thereafter be entitled to enter other lands under the pre-emption or homestead laws of the United States. (Proviso to section 2, act of March, 1889).

Burgel settled upon the land May 26, 1886; hence, under this enactment, his petition must be granted, it appearing that he is a "pre-emption settler upon the public lands, whose claim (was) initiated prior to the passage of (said) act," and his request being that he be allowed to change his pre-emption to a homestead entry. This the provision quoted expressly permits him to do, "notwithstanding his having heretofore had the benefit of the homestead law."

Your said decision is modified accordingly.

PRACTICE—REVIEW—CERTIORARI—REPAYMENT.

OSCAR T. ROBERTS.

A motion for the review of a decision denying a writ of certiorari will not be considered as such, but as a petition invoking the supervisory authority of the Secretary.

Though the applicant for a writ of certiorari may have failed to appeal within the time fixed by the rules of practice and hence not be entitled to the writ on the ground of the wrongful denial of his appeal, yet, if it appears that he is justly entitled to relief, it may be granted under the Secretary's supervisory authority.

An entry allowed by the local officers on testimony they deemed sufficient but rejected by the General Land Office and Department, is an entry "erroneously allowed," and repayment may be accorded if there was no concealment, or false testimony in the final proof or evidence of bad faith.

In such a case where the entryman is not able to show further compliance with law as required, but relinquishes, and applies for repayment under the advice of the General Land Office his relinquishment will not impair his right under such application.

Secretary Noble to Commissioner Stockslager, March 20, 1889.

This is a motion for review of the decision of the Department of October 6, 1888, refusing to direct a certification of the record in the above stated case.

While the motion should not be entertained as a motion for review of the decision complained of, yet as it presents a case calling for the

exercise of the supervisory power of the Secretary it may be considered as a petition filed for that purpose.

The closing paragraph of rules of practice provides:

None of the foregoing rules shall be construed to deprive the Secretary of the Interior of the exercise of the directory and supervisory powers conferred upon him by law.

So that notwithstanding the applicant may not have appealed within the time prescribed by the rules, and consequently may not for that reason be entitled to a certiorari on the ground of a wrongful denial of his appeal by the Commissioner; yet if the case now presented is such as to show that he is justly entitled to relief at the hands of the Secretary, there seems to be no good reason why it may not be granted in the exercise of said supervisory power.

The facts presented by this application are substantially as follows:

Roberts made homestead entry of a tract of land December 10, 1884, and commuted the same to cash entry December 18, 1884. Your office rejected his final proof upon the ground that it was not sufficient to satisfy the requirements of your office and held his entry for cancellation for want of proof showing a *bona fide* residence on said tract.

Upon appeal the Department modified your decision holding as follows:

There is no concealment by the entryman in his final proof and no evidence of bad faith on his part. Under the circumstances disclosed by the record the entryman should be allowed to make new proof, showing compliance with the law as to residence, cultivation, etc., within a reasonable time. His cash entry will remain suspended until such proof is furnished.

Prior to the promulgation of the decision, Roberts alleges that he went to St. Paul where he had an aged mother and a sister residing who demanded his care and protection, and finding it impossible to return to Dakota, and comply with the requirements of the decision of the Department, he made application for the return of the purchase money paid by him which the Department held had been erroneously allowed, and in reply to his application received the following letter from your office:

In reply to yours of February 15, 1887, to the Honorable Joseph Wheeler, referred by him to this office, you are advised that if you find yourself unable to comply with what is required by the decision of this office and Department in relation to your cash entry, and desire to apply for the return of the purchase money, you should make application to the register and receiver in accordance with the enclosed form (4-109) accompanied by a relinquishment of the tract in question. C. E. No. 717, Bismarck, D. T. NW. ¼, Sec. 18, T. 139 N., R. 81 W.,

Respectfully,

(Signed) S. M. STOCKSLAGER,
Assistant Commissioner.

In compliance with this letter of advice he filed another application with the local officers accompanied by a relinquishment of the tract. Your office denied said application upon the ground that the entry-man was allowed to make new proof showing compliance with the law as to residence, cultivation etc., within a reasonable time, and that Roberts,

instead of availing himself of the opportunity allowed by the decision of the Department, relinquished his entry and asked for the return of the purchase money.

Roberts alleges that he had made valuable improvements on the tract, and that the reason he could not return and make further residence was because his mother and sister demanded his care and protection, and that in order to fulfill this duty he would be compelled to lose the tract and his improvements.

The law does not require the entryman to remain on the tract after he has made final proof and received certificate of payment. His entry is then complete. If, however, the entry is allowed by the local officers upon testimony which they deemed sufficient, but which was rejected by the Commissioner and the Secretary, on appeal, such entry was erroneously allowed and the entryman would be entitled to the return of the purchase money, if there was no concealment or false swearing in his final proof and no evidence of bad faith on his part. Minerva A. Widger (6 L. D., 694).

If it is shown by the record that Roberts would be entitled to repayment by reason of his entry having been erroneously allowed by the local officers, the fact that he relinquished his entry, acting upon the advice from your office would not impair or defeat that right.

In view of the fact that the question presented by this application is one solely between the government and the entryman, and does not involve or affect in any manner the rights of others, and in view of the strong equities presented therein, I direct that the record in said case be certified to the Department that the right of the applicant to repayment may be passed upon.

OKLAHOMA LANDS—TOWNSITE ENTRY—CORPORATION.

OKLAHOMA CAPITAL CITY TOWNSITE CO.

The provisions of the act of March 2, 1889, with respect to the entry of lands for townsite purposes, under sections 2387, and 2388 of the Revised Statutes, do not extend to a corporation seeking to locate and enter prospective townsites.

Secretary Noble to Commissioner Stockslager, April 19, 1889.

I am in receipt of your communication of the 15th instant relative to the application of the Oklahoma Capital City Townsite and Improvement Company, asking permission to locate and enter certain lands in Guthrie and Kingfisher land districts, for townsites in the Indian Territory, seventeen in number, said application having been referred by the Department to your office on the 11th instant.

I concur in the views expressed by you in your said communication that there is no authority in the Department to grant the application of the Oklahoma Capital City Townsite and Improvement Company to enter lands, as now presented; and I am also of the opinion that the

provisions of the act of March 2, 1889, providing for entries of lands for townsites, under section 2387 and 2388 of the Revised Statutes, do not apply to corporations of this character. Although the President might have the power to reserve lands for townsite purposes under section 2380 of the Revised Statutes, such reservation could not be made for the benefit of a corporation of this character, but would be disposed of in the manner now provided by law.

COMMISSIONER'S OPINION.

A letter was addressed to the Hon. Secretary by Le Grande Byington, esq., as Secretary of the Oklahoma Capital City Townsite and Improvement Company, under date of the 8th instant., at Topeka, Kansas, by direction of the President of that company, enclosing the application thereof for permission to locate and enter certain lands in the Guthrie and Kingfisher districts, for townsites in the Indian Territory, seventeen in number.

* * * * * * *

I find that said company proposes to enter the tracts described in its application, as trustee for the prospective inhabitants, under the provisions for townsite entries in the act of March 2, 1889, which provides that the Secretary may permit entries for townsites, but under sections 2387 and 2388, U. S. R. S. This application does not accord with the requirements of said sections in the following respects, viz:

1. It is not alleged that the tracts in question are now settled upon and occupied as townsites.
2. The entry is not proposed to be made by the "corporate authorities" of the town or "the judge of the county court for the county in which" said towns are situated.
3. The application is not made to the proper district land office.
4. The application is not accompanied with the proof required by the official regulations under said sections as contained in subdivision III, pages 4 and 5, of circular of July 9, 1886 (5 L. D., 265).
5. The application is contrary to rule laid down on page 3 of circular of April 1, 1889, to the effect that no rights under the townsite laws can be acquired in Oklahoma prior to 12 o'clock noon of April 22, 1889.

In connection with this application there is presented as an alternative proposition, a request that this communication be treated and held as an application to the President of the United States to reserve said lands for townsite purposes under sections 2380, 2381, 2382, etc., as prospective centers of population, that the said company may "administer said lands in accord with the laws of Congress and the regulations of the Land Department in respect thereto."

I am of the opinion that the provisions of the act of March 2, 1889, in reference to the Oklahoma lands, that townsite entries may be permitted under sections 2387 and 2388, U. S. R. S., should be construed

as exclusive of any authority to dispose of town lots in any other manner. However this may be the methods of laying out towns and disposing of the lots therein, provided in sections 2380 and 2381, and in sections 2382, 2383, 2384, 2385 and 2386, contemplate that the administration thereof shall be in the hands of the Department, and there is no authority of law by which the administration could be transferred in any event to a private corporation.

I think, therefore, that this application should be returned to the party by whom transmitted with the information that it cannot be entertained for the reasons above expressed.

RAILROAD GRANT—REVOCATION OF INDEMNITY WITHDRAWAL.

MEMPHIS AND LITTLE ROCK R. R. CO.

The indemnity withdrawals heretofore made for the benefit of this road are revoked, as no sufficient reason appears for their further continuance.

Secretary Noble to Commissioner Stockslager, April 23, 1889.

It appears from the records of this Department that the orders withdrawing lands from settlement, under the public land laws, within the indemnity limits of the grant by act of Congress to the State of Arkansas (February 9, 1853, 10 Stat., 155), which lands lie along the line of railroad between the city of Little Rock and the Mississippi river, in said State, opposite to the city of Memphis, Tennessee, are yet in existence, and no sufficient reason appears why they should longer continue.

The benefit of said grant, as to the portion of the road described, was conferred upon the Memphis and Little Rock Railroad Company, of which the Little Rock and Memphis Railroad Company is the successor. A rule was laid, October 22, 1888, upon the last named company, to show cause to the Secretary of the Interior, on or before January 12, 1889, why said withdrawal should not be revoked. Rudolph Fink, president and general manager of the last named company, acknowledged service of said rule October 27, 1888, but has made no showing thereunder.

Since the laying of said rule, and on the 16th instant, "list 5," comprising 311.64 acres of land within the primary limits, and "list 6," comprising 1,028.58 acres of land within the indemnity limits of said road have been approved by me and patents directed to be issued to the State of Arkansas for the benefit of said road. These lists, transmitted by your office, embrace all the land which at present said company appears to be entitled to.

Now, therefore, in view of the foregoing, I direct that all the lands under withdrawals heretofore made and held for indemnity purposes, under said grant, be restored to the public domain and opened to set-

tlement, under the provisions of the general land laws, in accordance with the order given in the case of the Atlantic and Pacific Railroad Company (6 L. D., 91).

[NOTE—An order, similar to the above, was on the same day, entered in the case of the indemnity withdrawals heretofore made under the grant to the Madison and Portage R. R. Co.]

ADDITIONAL HOMESTEAD ENTRY—ACTS OF 1879 AND 1889.

JOHN GOODMAN.

The right to make an additional entry under the act of March 3, 1879, is limited to original entries on even sections, made prior to the passage of said act, and where the entry was restricted by existing laws to eighty acres.

The act of March 2, 1889, authorizes an additional entry of contiguous land, where the original was for a less amount than one hundred and sixty acres, and the entryman still owns and occupies the land covered thereby.

Secretary Noble to Commissioner Stockslager, April 23, 1889.

I have before me the appeal of John Goodman from your decision of June 10, 1886, holding for cancellation his (Goodman's) final homestead certificate No. 6162, issued May 1, 1884, "so far as it relates to the S. ½, NW. ¼" of section 35, T. 116 N., R. 31 W., 5th P. M., Benson district, Minnesota.

Such S. ½, NW. ¼ of the section was included in such final certificate by virtue of its having been taken by Goodman, on July 1, 1879, as an additional homestead entry under the act of March 3, 1879, his original entry which covered the N. ½ of said NW. ¼ of section 35, having been made April 7, 1879. As you correctly hold, however, it was error to permit him to make such additional homestead entry of the land in question, the original entry not having been made prior to the passage of the act, the section not being an even one, and the entryman not having been restricted, in making his original entry, to eighty acres only. This being so, your decision that, as an additional entry under the act of March 3, 1879, the entry in question was wholly unauthorized, was correct, and must be affirmed.

Since the making of said decision, however, Congress, by the act of March 2, 1889, has provided

That any homestead settler who (had, prior to the passage of said last-mentioned act) entered less than one-quarter section of land, may enter other and additional land lying contiguous to the original entry, which shall not, with the land first entered and occupied, exceed in the aggregate one hundred and sixty acres, without proof of residence upon and cultivation of the additional entry and if final proof of settlement and cultivation has been made for the original entry when the additional entry is made, then the patent shall issue without further proof, *Provided*, That this section shall not apply to or for the benefit of any person who at the date of making application for entry hereunder, does not own and occupy the lands covered by his original entry (Sec. 5, act of March 2, 1889, 8 L. D., 317).

It would seem from the record before me, that the case at bar is one to which this enactment would literally apply, so that, if Goodman should "make application for entry" thereunder, and at the date of such application he should still "own and occupy the lands covered by his original entry," he would be entitled to patent covering the additional entry in question.

In view of this conclusion, it is deemed unnecessary to pass upon Goodman's application to purchase the additional tract under the act of June 15, 1880 (21 Stats., 237).

The decision appealed from is modified so that the final certificate shall stand suspended to allow Goodman to apply under the above cited provisions of the act of March 2, 1889.

SECOND HOMESTEAD ENTRY—DILIGENCE.

EDWIN EDWARDS.

Second entry is permissible, on the relinquishment of the first, where it appears that a mistake was made, and through no fault of the entryman the entry as made did not cover the land intended to be entered.

First Assistant Secretary Chandler to Commissioner Stockslager, April 23, 1889.

Edwin Edwards appeals from your office decision of February 7, 1888, rejecting his application to make homestead entry of the SW. ¼ of the NW. ¼ of Sec. 9, T. 6 S., R. 22 W., Kirwin land district, Kansas, in lieu of the S. ½ of the SE. ¼ of Sec. 34, T. 5 S., R. 23 W.

Said Edwards in his corroborated affidavit, accompanying his application, says:

That he procured the services of one J. C. Wright, a locater, in Norton county, Kansas, to show him a vacant tract of land, and that for said service he paid said Wright the sum of twenty dollars; that when said Wright showed the said W. ½ of the NE. ¼ of said Sec. 34 he took pains to keep this affiant from seeing the improvements on said tract; . . . . . that said affiant was a stranger in this part of the country, and was compelled to employ some one to show him vacant land; that the tract embraced in his homestead is rough land, and entirely different from the land he thought he was entering . . . . . that the land he thought he was entering—to wit, the W. ½ of the NE. ¼ of Sec. 34, T. 5, R. 23—is embraced in the entry of one Burch, who is an adverse claimant to said land, by virtue of declaratory statement No. 22,005, dated May 28, 1886, and homestead entry No. 22074, dated June 26, 1886; that said Burch has a sod house on said land, and said house was on said land before this affiant discovered that a mistake was made in his homestead entry.

Your office decision holds that "it does not seem that Edwards exercised proper care and diligence in ascertaining the true condition of the land he sought to enter. By due diligence he would have ascertained the facts as readily before the entry as after."

A stranger who, aware of his own ignorance, procures at a heavy expense the services of a person who has been recommended to him as a

professional and competent land locater, and accompanies him to make a personal examination of the land, would seem to be using due diligence in ascertaining the facts. It is easily conceivable how such a stranger, traversing for the first time an unfenced and almost unpopulated prairie, might be misled into the supposition that certain improvements, if seen by him, were just beyond, instead of just within, the limits of a tract which he sought to enter. No harm or loss can result from granting the application; no loss to the government, for the tract sought to be relinquished is already in occupation of another; and none to any one else, for there is no adverse claimant to the tract applied for.

While it is true that an entry can not be amended to a tract other than that which the party intended to enter, yet on the authority of the departmental decision in the case of A. J. Slootskey (6 L. D., 505), a party may be allowed to make a second entry, of a different tract of land, upon the relinquishment of his first entry, if it is shown that the first entry was made by mistake, and that the party exercised proper care and diligence in attempting to ascertain the true location and condition of the land he sought to enter. It appearing from the record in this case that applicant made entry of a different tract from that which he supposed he was entering, and having furnished a satisfactory explanation and excuse for said mistake, I see no reason why his application to make another entry should not be granted, upon his filing a relinquishment of his former entry.

Your office decision is reversed, and Edwards' application will be granted.

Overruled, 34 L. D. 568 (See F. R. Rousseau, 47 L. D. 590)

MINING CLAIM—PUBLICATION—ADVERSE PROCEEDING.

GROUND HOG LODE *v.* PAROLE & MORNING STAR.

If the last day of publication comes on Sunday and the adverse claim is filed on the succeeding Monday it is in time to cause a stay of proceedings for the institution of suit in accordance with the statute.

Secretary Noble to Commissioner Stockslager, April 25, 1889.

I have considered the appeal of A. D. Cady from the decision of your office, dated April 17, 1888, affirming the action of the local officers, dated November 28, 1887, rejecting his adverse claim presented against the allowance of the application for patent for the Parole and Morning Star lode claims, because the same was "not filed within sixty days from date of first publication."

Your office finds, that posting was made on the claim and in the local office on September 28, 1887, and the notice of application for patent published in a weekly paper, commencing September 28, and continued until November 30, 1887; that John Arrighi, on November 23, 1887, filed an adverse claim against said application, claiming the General Tom Thumb lode, and thereafter filed an affidavit, stating that he did not intend to commence suit in support of his said adverse claim, and

withdrew all objections to Brady's application; that said Cady, at 9:30 P. M., on November 28, 1887, through his agent, offered to file an adverse claim, alleging conflict with the Ground Hog lode, owned by him.

It appears that Sunday was the sixtieth day after the first day of publication, and your office held, upon the authority of Miner *v.* Marriott *et al.* (2 L. D., 709), and the Great Western Lode Claim (5 L. D., 510), that, "the legal period of publication during which an adverse claim should have been filed, expired November 27, 1887," and that, if Cady delayed until the last day and that day was Sunday, he could not look to your office for relief, as there was no law allowing your office to extend the time prescribed by law for filing adverse claims.

The record also, shows that said Cady, on December 27, 1887, commenced suit in support of his adverse claim.

It must be conceded that, if said protest and adverse claim had been presented on November 27, 1887, it would have been in time. But that day was Sunday, and the adverse claim was presented the following day.

By section 1630 of the General Statutes of Colorado (1883, p. 538), it is provided (*inter alia*), that certain days therein specified shall—

> be treated and considered as is the first day of the week, commonly called Sunday: *Provided*, That in case any of the said holidays shall fall upon a Sunday, then the Monday following shall be considered as the said holiday, and all notes, bills, drafts, checks, or other evidence of indebtedness, falling due or maturing on either of said days, shall be deemed as due or having matured on the day previous to the first of said days; and in case the return or adjourned day in any suit, matter or hearing before any courts, shall come on any day before mentioned, such suit, matter or proceeding, commenced or adjourned as aforesaid, shall not by reason of coming on any such day, abate, but the same shall stand continued on the next succeeding day, at the same time and place, unless the next day shall be the first day of the week, when in such case, the same shall stand continued to the day next succeeding at the same time and place.

In the case of Salter *v.* Burt (20 Wendell, 205), the Supreme Court of New York decided, that, "when the day of performance of contracts, other than instruments upon which days of grace are allowed, falls on Sunday, that day is not counted and compliance with the stipulations of the contract on the next day is deemed in law a performance." See also case of George Leinen (8 L. D., 233).

In view therefore of the fact that suit has been commenced in support of said adverse claim, and also that the protest and adverse claim were offered on Monday following the Sunday which was the sixtieth day after the first day of publication, I am of the opinion that the protest and adverse claims were offered in time, and should have been accepted by the local land officers.

The papers should be returned to the local officers, with instructions to accept and file said adverse claim, as of the date when offered, and to suspend the proceedings in their office, until the final determination of said suit, as required by section 2326, of the U. S. Revised Statutes.

The decision of your office is modified accordingly.

DESERT LAND ENTRY—FINAL PROOF.

OSCAR CROMWELL.

While the Land Department has no authority to extend the time within which proof of reclamation should be made, it will, in the absence of an adverse claim, give an equitable consideration to final proof submitted after the expiration of the statutory period, if the delay is satisfactorily explained.

First Assistant Secretary Chandler to Commissioner Stockslager, April 25, 1889.

In the matter of the application of Oscar Cromwell for an extension of the time within which to reclaim from its alleged desert condition section 26 T. 40 N., R. 1 W., Mount Diablo meridian, California, appealed from the decision of your office dated May 1, 1888, denying said application, reference is made to said decision for a statement of the facts in the case.

The act of March 3, 1877 "to provide for the sale of desert lands in certain States and Territories" (19 Stat. 377), allows a party who has filed his declaration of intention to reclaim a tract of desert land, not exceeding one section, three years within which to prove that he has reclaimed such tract from its desert condition. The Department concurs with your office in the opinion that you have no authority, on the application of a party intending to reclaim and enter, to extend this period. Counsel for the appellant contend that this ruling is not in harmony with the spirit of the act. In this he is in error. The spirit of the act can only be gathered from its terms. It is liberal in its character, giving three years within which to comply with its provisions. Fixing the time within which the entry shall be made, this Department has no power in advance to enlarge upon its conditions by extending the time beyond the statutory period for making the entry. To do so would be a sort of remedial departmental legislation, which would override and ignore the will and intent of Congress as expressed in the act, and, carried to its legitimate results, would turn this Department into a legislative body to provide for any emergency, disregarding positive enactment. Such a theory is not tenable and can not be upheld, and while this Department can not legislate, it can in the interests of equitable principles, as between itself and the entryman, if the entry is not completed in statutory time, waive a strict literal compliance with the act, and, in the absence of valid adverse claims, parties who labored under difficulties similar to those alleged in this case have been allowed to make final proof and entry after the expiration of said statutory period. Alexander Toponce (4 L. D., 261); Owen W. Downey (6 *ib.*, 23); Riley Garrett (7 *ib.*, 79).

Should appellant hereafter make final proof showing full compliance with the desert land law—excepting only as to the time within which proof of reclamation should have been made—and give a satisfactory

excuse and explanation of the delay in making such proof, and that he used diligence in doing so, his case will then be duly considered by the Land Department.

The decision of your office is affirmed.

PRE-EMPTION ENTRY—EQUITABLE ADJUDICATION.

MELISSA J. CUNNINGHAM.

A pre-emption entry may be submitted to the Board of Equitable Adjudication where it was allowed on final proof submitted by a married woman, who, prior to marriage had complied with all the requirements of the law and tendered her final proof, but on the erroneous rejection thereof, re-offered the same, after marriage, in accordance with said decision of the local officers.

The filing of a declaratory statement is not made a condition precedent to the exercise of the pre-emptive right, but is merely a protection against subsequent settlers.

First Assistant Secretary Chandler to Commissioner Stockslager, April 25, 1889.

January 9, 1888, your office held for cancellation the pre-emption cash entry number 825, made April 15, 1885, by Melissa J. Cunningham (born Glover) for lots 1 and 2, and the S. ½ of the NE. ¼ of section 4, T. 30, R. 25 W., Valentine, Nebraska, for the reason that the claimant having been a married woman at date of final proof was not a qualified pre-emptor.

At first blush it might appear that you are correct and have followed the precedent of the Department and the statute itself, but upon a mature deliberation I am constrained to believe that you are in error in your conclusion based upon the facts of *this case*, and that the opinion herein expressed is in consonance with the spirit of the act and the equitable rulings of this Department.

In considering this case let us bear in mind the necessary qualifications and requirements of a pre-emptor. The statute section (2259) provides for three classes of persons who may avail themselves of the pre-emption laws, viz:

1st, The head of a family;

2d, Widow; and

3d, Single person over twenty-one years of age.

Each claimant must be a citizen of the United States or have filed a declaration of intention to become such; shall make settlement in person on the public lands subject to pre-emption; shall inhabit and improve the same and shall have or erect a dwelling thereon.

When all these conditions are present subject to the rules of the Department respecting settlement, a pre-emptive right exists.

Section 2259 is silent as to how long these conditions shall last as to these three classes of persons to entitle them to the benefits thereof,

but section 2263 gives the Secretary of the Interior the power to prescribe rules and regulations with reference thereto. Following the rules thus prescribed and the construction placed upon the statute by the Department, we find:

1st, Six months residence is required as evidence of good faith.

2d, Improvements sufficient in value to satisfy the Department that the claimant's intent is to honestly avail himself of the bounty of the government.

3d, That the condition which either of these classes assume at time of settlement shall continue until after the claimant perfects his entry, hence if Mrs. Cunningham at the time of her entry was an incompetent entryman, she was made so not by statute but by a construction and *rule* of the Department, which being in constraint of marriage the law abhors, and courts do not favor, so that if the construction placed upon the statute is correct, it ought not to be extended beyond the period when the entryman is, as a matter of law, entitled to avail himself of the benefits of the act. It is conceded that she was a competent entryman of the third class above mentioned down to the time of her marriage, and what do we find the undisputed facts with reference to her qualifications?

At the time her declaratory statement was filed for her by her brother-in-law, March 1884, she was a *single person*; (*a*) over 21 years of age; (*b*) a citizen of the United States; (*c*) she made settlement in person April 23, 1884; (*d*) upon lots 1 and 2 and the S. ½ of the NE. ¼ of section 4, T. 30, R. 25, a tract of public land subject to pre-emption; (*e*) that she inhabited and improved the same; (*f*) and had erected a dwelling house thereon; (*g*) and lived on that land until March 3, 1885, for a longer period than the six months required by the Department as evidence of good faith.

Here we find all the qualifications of a pre-emptor. Having all the qualifications as such, she went to the local land office at Valentine, Nebraska, to complete her entry. While her final proof was being taken she was asked if she had signed a certain paper (declaratory statement) which was shown her. In reply thereto, she said: "I did not sign it; it is my brother-in-law's handwriting." Thereupon the local officers informed her that she must make a new application and live upon the land six months before making final proof. In this the local office was in error. "The filing of a declaratory statement is not made a condition precedent to the exercise of the pre-emptive right, but is merely a protection against subsequent settlers." Ellen Barker (4 L. D., 514).

At this time she had literally fulfilled every requirement of the statute and should have been permitted to complete her entry. She had a legal right to demand it. To have refused would have been error. Now at that time, having the *legal* right to perfect her entry, and being prevented from so doing by misleading and erroneous advice given her

by the officers of the government in whom she confided, shall she, in *equity* as between herself and the government, be prejudiced by her subsequent action?

These acts which, it is claimed, disqualify her, are predicated upon this state of facts.

When told she must make new application she says:

"I told them I was to be married next week; then they held a consultation after which they told me there was no law in the United States to hinder my marriage; that if I made new application and re-advertised I could be married, return after my marriage and give final proof."

She paid the fee required for taking the rejected testimony (which would imply that she had already made her final proof), paid the fee again required for pre-emption filing and paid for advertising the second time.

April 15, 1885, she returned to the local office, made proof which was accepted and final certificate issued which you hold for cancellation for the reasons heretofore suggested, notwithstanding she asks that her case may be submitted to the Board of Equitable Adjudication for its consideration.

It strikes me, from the facts in this case, that the statute has not been violated to the extent that Mrs. Cunningham shall not merit recognition at the hands of the Department. The claimant remained in the condition required thereby for that period of time which entitled her to enter this tract and undoubtedly would have continued in that state for the time erroneously required by the local officers had they not misled her.

The plainest principles of natural justice ought to obtain in a case of this character. It is a familiar principle of equity jurisprudence that equity considers as done that which should have been done. Applying that principle to this case, Mrs. Cunningham's entry should have been perfected and allowed March 3, 1885.

Suppose Mrs. Cunningham had perfected her entry at that time and had married the next day and when her entry came up for consideration it had been rejected for some irregularity in perfecting it, such as defective notice or proof, etc., and the entry held for cancellation unless new notice should be given or new proof furnished, would she notwithstanding her marriage be permitted to perfect her entry? Most certainly. In such case her rights are to be determined by her status at the date of entry. Her marriage neither detracts from nor adds to her qualifications at that date.

In equity what is the difference between the two cases? I am not unmindful of the provisions of the statute nor the rules and decisions of the Department construing the same, wherein it is held, by a long line of decisions, that a single woman seeking to avail herself of the benefit of the pre-emption law must remain in that condition from the incep-

tion to the completion of her entry. That her marriage in the meantime waives her pre emption right. Porgeot (7 I. D., 280), and cases cited.

I am not prepared to question the correctness of those decisions and this opinion is not to be construed as a license to single women who desire to avail themselves of the benefit of the pre-emption law to marry between the time of the inception of the entry and the time when it should be perfected. But these rules and decisions are not applicable to this case for the reason that here Mrs. Cunningham did not marry until after she had *perfected* her right to enter nor until after she should have been permitted *in law* to have done so. Before her marriage she gave notice of her intention to make final proof and after due publication thereof appeared at the local office with her witnesses for that purpose; desired to perfect her entry, pay for the land, and receive certificate therefor.

The affidavit of Geo. L. Fisher, offered in support of the claim of Mrs. Cunningham shows that he was clerk in the local office at the time.

As he very well remembers, her final proof was rejected solely on account of some defect in the original declaratory statement, and that she was advised by both the register and receiver, that she could remedy the defect by making out a new declaratory statement, and re-advertising once and making another final proof and that the fact of her marriage would not invalidate her final proof, *for the reason that she had offered to make proof and virtually did make proof before she married.*

Equity should treat all this as having been done when she was prevented from so doing by the advice of the local office, where no adverse claim intervenes and the government alone is making the inquiry for the purpose of determining the bona fides of the claimant.

Here are strong equities and I am inclined to think that her land should be passed to patent upon the proof she virtually made at that time. I am quite sure the case ought to go to the Board for its consideration.

In the case of Lydia Steele (1 L. D., 460), the Department held, that the pre-emption entry of a married woman, when all necessary acts, including publication of intention to make proof, had been performed prior to marriage, should be submitted to the Board of Equitable Adjudication. Without discussing the correctness of the rule in that case, it is sufficient to say that the case now under consideration presents stronger grounds for refusing the cancellation of this entry, and considering that the entry in this case should have been allowed when the claimant first offered to make proof, I direct that it be submitted to the Board of Equitable Adjudication.

MINING CLAIM—ADVERSE PROCEEDINGS.

NORTHWESTERN LODE AND MILL SITE COMPANY.

When it appears from protest, filed during the period of publication, that an adverse proceeding is pending in the courts, the local office should suspend action pending the final disposition of such proceeding, although it may have been instituted prior to the application for patent.

The pendency of an adverse proceeding, instituted to determine the right of possession, at the time when application for patent is made, renders it unnecessary for the adverse claimant to commence another action after filing protest.

On final determination of judicial proceedings patent may issue to the applicant for such portion of the claim as he shall appear from the decision of the court to rightly possess, if a vein or lode has been discovered therein.

First Assistant Secretary Chandler to Commissioner Stockslager, April 25, 1889.

I have considered the case of Northwestern Lode and Mill Site Company on appeal of Wm. M. Beardsly, owner of said claim from your office decision of July 3, 1888, holding for cancellation part of the entry of said Beardsly for the lode claim above named in Central City land district, Colorado.

It appears from the record that Beardsly filed application for patent September 30, 1885, and after said application was made and during the sixty days publication of notice Geo. M. Reardon as attorney in fact for Frank S. Reardon and Alexander Campbell filed a protest against the issuance of patent and asking that all proceedings be suspended on account of the pendency in the supreme court of Colorado of a suit involving the possessory right of a portion of the said Northwestern Lode, of which the said Frank S. Reardon and Alexander Campbell claimed to be the owners, the said portion being known as the Stanislaus Lode.

With the protest is the affidavit of the said George W. Reardon, alleging substantially that the Stanislaus Lode was located by Alexander and John Campbell August 25, 1881, and they held undisputed possession for nearly two years. That on March 21, 1883, John Campbell sold his half interest in said lode to Geo. W. and C. W. Reardon, and that a few days thereafter Wm. Beardsly and others took possession of said Stanislaus Lode and called it the Northwestern, and their alleged location covers all of said Stanislaus Lode as located by said Campbells, except one hundred and fifty feet of the northeast end thereof, the lines being identical for 1350 feet in length thereof. That the right of possession of said claim was then in litigation before a State court of competent jurisdiction.

It further appears that some months prior to the application of Beardsly for patent, an action to determine the right of possession for so much of said Northwestern Lode claim as was in conflict with the Stanislaus, had been commenced in the county court of the proper county, and judgment being in favor of the owners of the Stanislaus Lode, appeal

was taken to the district court, upon the trial of which judgment was again rendered for the owners of the Stanislaus Lode. On April 9, 1885, the owners of the Northwestern Lode appealed the case to the supreme court of Colorado and that appeal was still pending when application was made for patent, notice published, and the protest of the Stanislaus claimants filed with the local officers.

It further appears that on May 14, 1886, said appeal was dismissed by the supreme court of Colorado because of the failure of the appellants to prosecute the same, and the cause was remanded to the district court of "Boulder county" for such further proceedings according to law as shall be necessary to the final execution of the judgment of the said district court.

On this record you held that the entryman is not entitled to patent for so much of said entry as the court had decided entryman not to be entitled to the possession of.

In this decision I concur.

While the proceedings in court were not initiated under section 2326 of the Revised Statutes, there was pending at the time application was made to enter the Northwestern Lode, an action before the same tribunal and for the same purpose as the action contemplated in said section, therefore it was not necessary for the adverse claimant to commence another action within thirty days after filing his affidavit and the local officers should have suspended the proceedings in accordance with the spirit of said section pending the decision of the court.

The method pointed out in the said section is not necessary to give the State court jurisdiction, and if the original locaters preferred to commence action at once without waiting until the other party made application for a patent they had a right to do so. When a court had acquired jurisdiction of the subject matter in controversy, all proceedings before the local office should be stayed until the court has determined the matter. Owens, *et al*, *v.* Stephens, *et al* (2 L. D., 699); Miner *v.* Mariott, *et al* (2 L. D., 709).

Said section 2326, recognizes that patent shall issue only to the party entitled to possession of the claim and for only such portion of the claim as "the applicant shall appear from the decision of the court, to rightly possess."

In the absence of a clear showing of a possessory right an application for patent must be denied. Montana Mining Company (6 L. D., 261).

A patent may issue for such portion of the claim as the party applying for patent may rightfully possess. Gustavus Hagland (1 L. D., 593).

Under the evidence the Northwestern Company should have patent for one hundred and fifty feet of the north-east end of the lode claim; upon a showing as required in said letter, that "a vein or lode has been discovered within that portion of the claim."

Your said decision is accordingly affirmed.

MINING CLAIM—PROTESTANT-APPEAL.

DOTSON ET AL. *v.* ARNOLD.

A protestant who sets up no claim, either present or prospective, that is recognized under the law, is not entitled to the right of appeal.

Secretary Noble to Commissioner Stockslager, April 28, 1889.

Oliver Dotson *et al.*, filed a protest against the issuance of patent to James Arnold on mining entry No. 115, made July 27, 1882, for Placer Mining Claim No. 17, above discovery on Whitewood creek, in Whitewood mining district, Lawrence county, Dakota, alleging that the land covered by this claim was non-mineral in character; that the entry was made for the purpose of obtaining possession of the improvements thereon and that the claimant had not expended or caused to be expended the required amount in labor or improvements.

Your office held that the points raised by the first and second allegations had been decided by the decision of this department, of December 19, 1881, in the matter of the Townsite of Deadwood, (8 C. L. O., 153) and ordered a hearing to determine the truth of the third allegation.

The hearing was duly had before the local officers, who decided in favor of the mineral claimant. This decision was affirmed by your office October 19, 1887, and the protestants filed an appeal from the decision.

The attorney for the claimant filed a motion to dismiss said appeal upon the ground that these parties being protestants had no such interest as entitled them to the right of appeal. Your office transmitted all the papers in the case by letter of December 22, 1887.

The protestants here do not make any claim to the land under the mineral laws but state that all the land embraced by said mineral claim "is embraced in streets, blocks, lots and alleys of the said city of Deadwood as surveyed and platted and occupied and used continuously since the month of August or September, 1876" each of the protestants having claimed, occupied and improved some part of said land as thus laid out into city lots at the time of the location of said mineral claim, and that the persons owning the improvements upon these various lots have paid large prices for the said premises in addition to the amounts expended for the improvements upon the same and "that this property has been continuously treated, used and occupied and sold and transferred by various occupants as town lots and town property from the year 1876, until the present time."

The question presented by the motion to dismiss the appeal is—Have these protestants in view of the fact that the decision above cited held that the land involved was mineral land and that title thereto could not be acquired under the townsite laws such an interest as would entitle them to appeal from the decision of your office? I think this ques-

tion must be answered in the negative. They have no claim to this land recognized by the laws nor is it shown that they have any prospective claim thereto, such as would under the rule laid down in the case of Bright *et al.*, *v.* The Elkhorn Mining Company (8 L. D., 122) decided January 23, 1889, where the rights of protestants in this class of cases are quite fully discussed, give them the right of appeal.

Said motion is allowed and the appeal is dismissed.

* * * * * * *

PRACTICE—CONFLICTING MINERAL AND AGRICULTURAL CLAIMS.

CRESWELL MINING CO. *v.* JOHNSON.

Concurring decisions of the local officers and General Land Office on questions of fact will not be disturbed by the Department unless clearly against the weight of evidence.

In a contest between a mineral and agricultural claimant for land returned as agricultural it rests with the former to show as a present fact that the character of the land is such as to warrant the conclusion that mineral can be obtained therefrom, in such quantity and value as to make the land more valuable for mining than agriculture.

In such a case where a portion of the land is shown to be mineral in character, and a segregation survey is ordered, it will be at the expense of the mineral claimant.

Secretary Vilas to Commissioner Stockslager, January 3, 1889.

This is a motion for review of departmental decision of October 3, 1887, filed by John Johnson, the homestead claimant, upon alleged grounds of error in said decision both of law and fact, which are set forth specifically in said motion.

The questions in issue, are (1), the character of the land in the N. $\frac{1}{2}$ SE. $\frac{1}{4}$, and N. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 28, T. 4 S., R. 71 W., Central City, Colorado (that is: whether mineral or non-mineral), for which final certificate on homestead entry has issued; and (2), whether said land was known to be mineral by the homestead claimant when final certificate was issued.

Johnson made settlement upon said tract November 3, 1880, and filed declaratory statement on the same day, and on August 2, 1883, transmuted said filing to a homestead entry upon which final proof was made November 7, 1885, and final certificate issued.

On March 18, 1886, a protest was filed by the Creswell Mining Company against the allowance of said entry, alleging the existence of valuable mineral bearing veins or lodes on said land, and that said company had located several claims thereon.

Upon the filing of said protest a hearing was ordered to determine the character of the land, and upon the evidence submitted at said hearing the register and receiver held, that said lands were mineral in character.

Your office by letter of April 5, 1887, considering that the sole question involved in this case is, "What is the character of the land?" held that said land was returned by the U. S. surveyor general in 1867 as agricultural land; that the Lucky, Gold King No. 2 and Great West lode claims are located on the eastern portion of the land covered by said entry; that a shaft, ten feet deep, has been sunk on each, the Lucky and Great West, and one seventy-five feet deep on the Gold King No. 2; that the witnesses for protestant testified, that 4600 lbs. of ore from one of said shafts had been shipped to Denver, Colorado, and sold for a silver brick worth about $50; that several assays of samples of ore from said shafts were made, which ran from $3 to $28 per ton.

Upon such findings of fact, your office modified the decision of the local officers, and directed a segregation survey of said land.

The decision of your office as to the character of the land was affirmed by the Department, evidently for the reason that concurring decisions of the local officers and the General Land Office upon questions of fact will not be disturbed by the Department, unless such finding or decision is strongly and decidedly against the weight of the evidence.

The Department also held, that it was unnecessary to consider the question as to whether the discovery of mineral subsequent to the issuance of final certificate can defeat the entry, for the reason that it is quite clear that the existence of mineral on the land was known to claimant prior to the issuance of final certificate, as shown by the final proof.

It is contended by applicant that the finding of fact as stated in the decision of your office, and affirmed by the Department, is not warranted by the testimony submitted in the case.

* * * * * * *

The question to be determined from this testimony is not whether the land is mineral in character, but whether the mineral character is such as to make the land more valuable for mining than for agricultural purposes, or whether the mineral character is shown to be such as to warrant the conclusion that the minerals might be obtained with the aid of known means and appliances in sufficient quantities and of such values as to make it more profitable for mining than for agriculture.

It can not be questioned that the land contains minerals and that the assays of the ores taken from said mines have shown sufficient value to indicate that said land would be valuable for mining, provided ore of that value can be obtained in sufficient quantities, and extracted and worked at a sufficiently low figures. But, as already indicated, evidence on these points is wholly wanting.

It is contended by the protestant that mining operations on said lands can be made more profitable than agriculture by further development, and the application of proper machinery. The opinion of witnesses to this effect seems to be based solely upon the assay of ores taken from said mines, and not upon practical results shown by working them.

On the other hand, it is contended by claimant that the land is valuable for agriculture, as shown by the aforesaid results of agricultural operations, and that said land does not contain minerals of sufficient value and in such quantities as to make it profitable for mining operations. Said opinion being based on the above stated fact that prospecting on said land for a number of years past has proved unproductive, and that no mines have been found in that vicinity that have paid for working, although the presence of mineral has been well known.

In the decision of your office of April 5, 1887, it is stated:

> This land was returned by the surveyor general in 1867 as follows: Land hilly, soil second rate. Timber scattering pine. The deputy surveyor in his report adds the following note: "Considerable interest has been taken at different times by parties in search of mineral, traces of which can be found in several places in the township, but that a thorough examination of the best localities has convinced both practical and scientific men, who had examined them, that no copper or other metal, except in very minute quantities, can be found or exists in the township," thus *prima facie* establishing the character of said tracts as agricultural land, thereby throwing the burden of proof upon the mineral affiant.

In the case of Cleghorn *v.* Bird (4 L. D., 478) the Department said:

> It has been repeatedly held by the Department that it must appear, not that neighboring or adjoining lands are mineral in character, or that that in dispute may hereafter by possibility develop minerals in such quantity as will establish its mineral rather than its agricultural character, but that as a present fact it is mineral in character.

The burden of proof being on the protestants they were required to show by a preponderance of testimony that the land is more valuable for mining than for agricultural purposes as a present fact; not that it might possibly hereafter develop minerals in such quantity, and of such a character, as to establish its mineral value.

While I am satisfied that the protestants have failed to sustain their protest, so far as to show that any one of the legal subdivisions embraced in Johnson's entry should be canceled in its entirety, yet I think it is sufficiently established by the testimony that the land immediately surrounding the location of the several lode claims involved in the controversy, to wit: the Great West, Lucky and Gold King No. 2, is more valuable for mining than for agricultural purposes. The weight of the testimony shows that the land in the immediate proximity of said lode claims is not adapted to agriculture, and I can see no reason why a survey should not be made, so as to allow the mineral claimants to make entries of the land embracing said lode claims, to the amount allowed by law authorizing the disposition of mineral lands; and that Johnson's entry for the remainder of said tract be approved for patent, if he has in all respects otherwise complied with the homestead laws. But I modify your said decision, to the extent that the mineral applicants shall be required to have said mineral claims surveyed, so as to mark the boundaries, distances and courses of the same, as required by the mining laws, instead of having a segregation survey of the homestead entry at the expense of the homestead claimant, as required by your de-

cision; and that such survey shall be made within sixty days after notice of this decision, and that no more shall be excepted from the patent to said Johnson than shall be so surveyed under this decision, within the time limited; the residue to be patented to said Johnson.

Besides, although the decision of your office as to the value of said property for mining purposes is not clearly sustained by the evidence, yet I am not disposed to disturb the findings of the local officers, of your office, and of the Department, unless I was satisfied that said findings were strongly and decidedly against the weight of evidence.

The motion is denied.

SAME, ON PETITION FOR RE-REVIEW.

A petition for the re-review of a decision will be denied if it does not present some material question of law or fact not previously considered, or suggest any reason that would warrant the exercise of supervisory authority.

A segregation survey may be ordered, when it is found necessary to set apart the mineral from the agricultural land in any forty acre tract.

Secretary Noble to Commissioner Stockslager, March 11, 1889.

I have considered the petition of John Johnson, defendant in the above case, asking for a re-review of the decision of this Department of January 3, 1889, affirming the action of your office in directing a segregation survey of the mineral claim of the Creswell Mining and Milling Company, but modifying the decision of the Department of October 3, 1888, and the decision of your office, to the extent of requiring said segregation to be made by the mineral claimant.

This petition is filed in accordance with the rule laid down in the case of Neff *v.* Cowhick, decided by the Department January 22, 1889 (8 L. D., 111), in which it is said:

If the defeated party is able to present any suggestions of fact or points of law not previously discussed or involved in the case, it may be done by petition, which shall contain all the facts and arguments. On the filing of such petition if it appears important, the Secretary will make such order for recalling the case from the General Land Office and such direction for further hearing as may be necessary.

No suggestion of fact or point of law not previously discussed or involved in the case is presented by this petition that was not fully considered by the decision of the Department on the motion for review, nor does it suggest any extraordinary ground that should invoke the supervisory jurisdiction of the Department in said case.

In the decision of January 3, the Department held that all of said tract, except the land in the immediate vicinity of the lode claims, had been shown to be more valuable for agricultural than for mining purposes, but that the evidence as to the agricultural character of the land in the immediate vicinity of the lodes was not shown by the testimony, while there was some evidence as to its mineral character. Hence a segregation survey of that particular tract was allowed in accordance with mining laws and regulations. This is provided for by the circular

of instructions of the Department allowing a segregation survey to set apart the mineral from the agricultural lands in any *forty acre* tract in all cases where such survey is necessary.

The petition is denied and the papers returned to your office for file.

PRACTICE—HEARINGS—APPEAL—CERTIORARI—SECOND CONTEST.

REEVES *v.* EMBLEN.

The question as to whether a hearing should be granted rests in the sound discretion of the Commissioner, and an appeal will not lie from a decision ordering a hearing.

The Department will not interfere with the exercise of the Commissioner's authority in such matters unless it is clearly shown that there has been an abuse of his discretionary power.

A second contest should not be allowed on issues involved in the first, and finally disposed of on appeal to the Department.

Secretary Noble to Commissioner Stockslager, April 27, 1889.

By letter of January 14, 1889, you ordered a hearing upon the application of David W. Reeves to contest the commuted homestead entry of Geo. F. Emblen. From this action Emblen appealed, which you declined to transmit upon the ground that an appeal does not lie from an order for a hearing. Upon the refusal to transmit said appeal Emblen filed an application for certiorari under rules 83 and 84 of Rules of Practice, which is now before me for consideration.

It appears that a contest was filed against this entry by one Frank McCue, upon which a hearing was ordered, but the grounds of said contest are not stated. It appears, however, that in the appeal of McCue from the action of the local officers dismissing his contest, he alleged the following specifications of error:

First: Because he (Emblen) has not complied with the law by building on and cultivating said tract sufficiently to show good faith.

Second: Because his proofs were not made according to law.

Third: Because there was a prior entry on the tract in question—that of Frank McCue.

Fourth: Because there is evidence of a conspiracy on Emblen's part, with J. R. Phelan's man Oberger and with Frank Gorman, one of his final proof men, and with Will. A. Clute, the leader of his so called mob, to acquire title to the land in question by trickery and fraud.

The finding of the local officers was adverse to the contestant, and your office sustained their decision which was finally affirmed by the Department September 15, 1888 (not reported).

On October 29, 1888, David W. Reeves applied to contest said entry upon the following grounds:

First: The entry was made for the purpose of gaining the land for townsite purposes and that he might divide it into lots and sell it on speculation, and not for the purpose of gaining a home.

Second. Final proof was false and fraudulent, and Emblen caused himself to be driven off the land in order the sooner to obtain title.

Third: Emblen never improved said entry (land) nor cultivated—nor built a house—but bought one from a former occupant.

Fourth: He did not attempt to improve it since he left it in March 1886, nor has he resided on it since that time, nor has he ever resided on it in good faith.

Upon the filing of this application to contest, you ordered a hearing, from which action Emblen appealed alleging that in the prior contest of McCue *v.* Emblen each and every charge now made by Reeves was considered and a decision thereon rendered in favor of Emblen, which was finally approved by the Department.

The question as to whether a hearing should be granted is a matter resting in the sound discretion of the Commissioner, and an appeal will not lie from the decision of your office ordering a hearing. The Commissioner's discretion in such matters will not be disturbed unless there is a clear and satisfactory showing of an abuse of it.

The gravamen of this complaint is that a second hearing has been ordered to determine the truth of charges that had previously been in issue in the case and been passed upon by the Deparment. If this is true, it is evident that the claimant should not be required to defend against these charges a second time. Parker *v.* Gamble (3 L. D., 390).

You denied the applicant's motion for review of your decision upon the ground that this case differs from the case of Parker *v.* Gamble in this, that the material allegations in Reeves complaint is "fraud and collusion," but it does not appear from the application of Reeves in what the fraud consisted, or with whom the conspiracy was formed. Whereas it does appear that in the case of McCue *v.* Emblen, there was a charge of conspiracy with certain persons therein named, to acquire the land by fraud and trickery.

It does not clearly appear that the charges contained in the contest of McCue cover all the grounds alleged in Reeves contest, but as the applicant alleges that in the case of McCue *v.* Emblen "Emblen met and overcame each and every charge that is now made by Reeves," and as proof might have been offered in said case upon all issues presented in Reeves' contest, I direct that the record in this case and also the papers in the case of McCue *v.* Emblen be transmitted to the Department for consideration.

PRE-EMPTION—SECOND FILING—EQUITABLE ADJUDICATION.

PRESTON B. JACKSON.

A pre-emption entry allowed on a second filing may be sent to the Board of Equitable Adjudication, where the fact of the first filing was disclosed at the time of entry, and the excuse furnished for the abandonment thereof was found satisfactory by the local office.

First Assistant Secretary Chandler to Commissioner Stockslager, May 2, 1889.

April 15, 1885, Preston B. Jackson made pre-emption cash entry for the SE. ¼ of the SE. ¼ section 1, T. 14 S., R. 62 W., and the S.½ and the

NE ¼ of the SW. ¼ Sec. 6, T. 14 S. R. 61 W., Pueblo land district Colorado.

November 30, 1887, your office held Jackson's entry for cancellation "on the ground of his having made a prior filing." From this decision Jackson appeals and asks that the matter be submitted to the Board of Equitable Adjudication and his entry allowed to stand. As authority for this action he cites the case of Thomas Ervine (4 L. D., 420).

At the time of making proof, in answer to the question—"Have you ever made a pre-emption filing or entry for land other than that you now seek to enter?" He answered—"Yes, I once made a pre-emption filing for land which I believe was the W. ½ SW. ¼ section 28, and W. ½ NW. ¼ section 33, T. 11 S., R. 64 W. This was about nine or ten years ago. I relinquished the said filing believing that I had, if released, the right to make a second and legal filing. I made the said relinquishment and the filing in good faith."

On appeal appellant states,

> That he filed on the first tract with the bona fide intention of making the land embraced therein his home, built a comfortable house on the same and endeavored to obtain water for domestic use by digging a well, but the effort proved fruitless; that he was unable to obtain water for domestic use or sufficient for stock purposes; that his house soon afterwards accidentally caught fire and was entirely destroyed. Whereupon he became discouraged and decided to abandon the claim; and having informed the register of the land office of all the circumstances he was advised that he could legally file again.

He further states that he never derived any benefit from his first filing.

Appellant, so far as can be discovered from the record, appears to have acted in this matter in good faith, and to have dealt openly and frankly with the local land officers. His excuse for abandoning his former claim was to them satisfactory. He paid for the described tract of land April 15, 1885, more than two and a half years before his entry was suspended and now over four years ago. Under the facts and circumstances shown by the record I think the entry should be permitted to stand. You will therefore please to submit it, as asked, to the Board of Equitable Adjudication for final action.

The decision of your office is modified accordingly.

PRACTICE—AFFIDAVIT OF CONTEST—AMENDMENT.

FARMER *v.* MORELAND ET AL.

The local officers are justified in rejecting an affidavit of contest if it is not corroborated as required by the rules of practice.

The privilege of amending a defective affidavit of contest cannot be accorded in the presence of an intervening adverse right.

First Assistant Secretary Chandler to Commissioner Stockslager, May 4, 1889.

I have considered the case of Charles D. Farmer *v.* Jesse M. Moreland and Narcissus E. Bridges, on appeal by the former from your office

decision of November 11, 1887, holding his application to contest the homestead entry of Moreland for the SE. ¼ of Sec. 24, T. 30 S., R. 42 W., Garden City, Kansas land district, subject to the final disposition of Bridge's contest against the same entry.

Moreland made homestead entry for said land January 15, 1887. On July 19, 1887, Farmer presented at the local office his affidavit of contest against said entry alleging that the said "Moreland has wholly abandoned said tract; that he has never established his residence thereon since making said entry; that said tract is not settled upon and cultivated by said party as required by law and said default now exists," This affidavit was marked "presented and rejected this 19th day of July, 1887, because affidavit of contest is not corroborated 30 days for appeal. (Signed) C. F. M. Niles, Reg."

On July 27, Bridges presented her affidavit of contest against said entry which affidavit was received by the local officers. On August 12, Farmer again presented his affidavit with the corroborating affidavit of E. L. Muir, sworn to August 10, on the back thereof. His application was refused because of the contest of Bridges, but the register offered to accept this affidavit as a second contest, subject to the final determination of Bridges' contest. This the applicant refused and appealed. In your office the decision of the local officers was affirmed.

It is urged on the part of the apellant that he should have been given an opportunity to amend his affidavit and that the local officers had not authority to receive a second contest within the thirty days allowed him for appeal. When Farmer's affidavit was presented it was not in the form prescribed by the rules and the local officers were justified in rejecting it. If Farmer had then asked for leave to amend his affidavit a question materially different from the one now here would have been presented. Even if Farmer's affidavit had been accepted the local officers might have received a second contest and held it subject to the final determination of the prior. This being true there can be no doubt about their authority to receive a second affidavit within the time allowed for Farmer to appeal and hold it subject to the exercise of his right of appeal and to the determination of his appeal if he exercised that right. Farmer did not however, appeal from the decision rejecting his affidavit because it was not corroborated but acknowledged the correctness of that decision and sought to remedy the defect in his affidavit. This, however, was not done until after Bridges' contest affidavit had been received against the acceptance of which, there was at the time of its presentation, no barrier. By failing to corroborate his affidavit as required by rule 3, he to all intents and purposes abandoned the contest as against the claim of Bridges. Bridges' rights having intervened between the time of the filing of the affidavit in the first instance, and the time of Farmer's application to amend the same, it would be manifest injustice to Bridges to sustain Farmer's application

to amend his original affidavit. Under such circumstances, Farmer is in no position to insist upon the same.

After a careful consideration of this case I concur in the conclusion reached in your office that the action of the local officers refusing to accept Farmer's affidavit, as amended, as prior to Bridges' contest, was in accordance with the rules applicable to such cases and the decision appealed from is therefore affirmed.

CHITWOOD *v.* HICKOK.

Motion for the review of departmental decision rendered August 31, 1888 (7 L. D., 277), denied by Secretary Noble, May 4, 1889.

ALABAMA LANDS—ACTS OF MAY 14, 1880, AND MARCH 3, 1883.

E. S. NEWMAN.

A homestead entry on mineral land initiated by settlement prior to the passage of the act of March 3, 1883, though not protected by an entry of record at such date, is within the intent of said act, and may be passed to patent thereunder.

The fact that homestead settlement is made upon land covered by the entry of another will not deprive the settler of the benefit of the act of May 14, 1880, where good faith is apparent and no adverse claim exists.

The case of James A. Jones overruled.

Secretary Noble to Commissioner Stockslager, May 4, 1889.

By decision of May 18, 1888, your office held for cancellation the homestead entry made by E. S. Newman, March 10, 1887, for the N. ½ of NW. ¼ and NW. ¼ of NE. ¼ Sec. 34, T. 15 S., R. 1 W., Montgomery district, Alabama, predicating said action upon the act of March 3, 1883 (22 Stat., 487), entitled, "An act to exclude the public lands in Alabama from the operation of the laws relating to mineral lands"—which act is as follows:

That within the State of Alabama all public lands, whether mineral or otherwise, shall be subject to disposal only as agricultural lands: *Provided, however,* that all lands which have heretofore been reported to the General Land Office as containing coal and iron shall first be offered at public sale: *And provided further,* That any *bona fide* entry under the provisions of the homestead law of lands within said State heretofore made may be patented without reference to an act approved May 10, 1872, entitled "An act to promote the development of the mining resources of the United States," in cases where the persons making application for such patents have in all other respects complied with the homestead law relating thereto.

It appears, as stated in your office decision, that said lands embraced in Newman's entry had been reported as "iron limonite," and had not been "offered at public sale," as required by the first proviso of said act.

Newman appeals to this Department from said decision, and accompanies said appeal with his affidavit, to the effect, that, August 29, 1882, one T. H. Strother, made homestead entry, No. 11,992, for said land, and during said year he (Newman) purchased from Strother his improvements on said land and procured his relinquishment of his entry thereon, for the sum of $350; that thereupon, he (Newman) took possession of said land, and has ever since resided thereon with his family, consisting of a wife and seven children, and has continued the improvement of said land and raised crops thereon each year for "six successive years," but he did not file said relinquishment of Strother or make entry of said land until March 10, 1887, when the Land Office sent Strother notice to make proof, because he (Newman) "was told that he must not file his application until said notice was received by Strother;" that said land is situated on the west side of Red Mountain range, where "it is well known all over that country there is no iron or mineral" of any kind and where "iron buyers refuse to buy any land . . . . . giving as their reason, that there is no iron on that side of the mountain," and that said land (embraced in his entry) in fact contains no mineral, but is agricultural land. He asks in conclusion that if his entry can not be otherwise sustained, he be allowed "to show by civil engineers, that said land contains no mineral." This affidavit of Newman is corroborated by that of said T. H. Strother, the original entryman referred to therein.

The last proviso of the act of March 3, 1883, provides for the patenting of "any *bona fide* entry under the provisions of the homestead law of lands" in Alabama, which, prior to said act, had been subject to entry only under the mineral laws—in other words, it validates, by authorizing the issuance of patents thereon, prior homestead entries, which before the passage of said act were invalid because made on mineral lands.

At the date of the passage of the act of March 3, 1883, a homestead claim to land might under section three of the act of May 14, 1880 (21 Stat., 140), be initiated by settlement as well as by formal application and entry of record under section 2289, *et seq.*, of the Revised Statutes. Tobias Beckner (6 L. D., 134); Prestina B. Howard (8 L. D., 286). Said section of the act of May 14, 1880, is as follows:

That any settler who has settled, or who shall hereafter settle, on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry . . . . . as is now allowed to settlers under the pre-emption laws to put their claims on record, and his right shall *relate back to the date of settlement*, the same as if he settled under the pre-emption laws.

Two leading questions are presented in this case:

1. Is a homestead right or entry initiated by settlement under the above section of the act of May 14, 1880, embraced within the meaning of the proviso of the act of March 3, 1883, authorizing the issuance of

patents on "*bona fide* homestead entries" of mineral lands in Alabama? 2. If so, do Newman's settlement and entry, under the facts disclosed by the record, fall within the operation of said act of 1880?

As to the first of these questions, it is to be observed, that, said proviso of the act of 1883 operates upon homestead entries on lands not subject to such entry, but which entries are otherwise, in the language of said proviso, "*bona fide* entries under the provisions of the homestead law." The act of 1880 was a part of the "provisions of the homestead law," when the act of 1883 became a law. The act of 1880 speaks of the settlement thereunder as the "original entry," and provides, that the right acquired by such settlement "shall relate back to the date of settlement," and under said act, "the settlement" is equivalent to the entry of record under the general homestead law, and is practically, if not technically, an "entry." A homestead entry on mineral lands initiated by settlement under the act of 1880, falls within the scope and reason, if not strictly within the letter, of the act of 1883, and I see no reason why such an entry, if otherwise within the provision of the latter act, should not be passed to patent thereunder.

It being determined, that an entry under section three of the act of 1880 falls within the operation of the last proviso of the act of 1883, the second question stated above presents itself: Are Newman's settlement and entry, under the facts disclosed by the record, covered by said section three of the act of 1880?

That Newman settled upon the land in good faith, "with the intention of claiming the same under the homestead law," is clear from his long continued occupancy of it with his family, as a home, and his improvements and cultivation, and appears inferentially from that part of his affidavit giving the cause of his delay in making homestead entry. The limitation in the statute as to the time of filing application, is intended (as in pre-emption cases) for the protection of the settler against intervening adverse claims, and is not enforced by the government against the settler in a case like the present, where there is no such adverse claim and nothing to impeach the settler's good faith.

But the act of 1880 is for the "relief of settlers on public lands" of the United States, and it appears, that at the date of Newman's settlement in 1882 and up to 1887, when he filed Strother's relinquishment, the land was segregated from the public domain by the uncanceled entry of said Strother, and therefore was not, strictly speaking, "*public land* of the United States." The general rule is well settled, "that, while an entry stands uncanceled upon the record, settlers upon the land covered thereby, acquire no rights as against the record entryman or the United States" Geer *v.* Farrington (4 L. D., 410). "The reason of this rule undoubtedly lies in the fact, that it is unwise and illegal to allow one party to initiate settlement rights to a tract of land while the same is in the possession and under the control of another . . . . .; for to allow a claim to be initiated" under such circumstances "would be (in

the language of Atherton *v.* Fowler, 96 U. S , 513), 'to invite forcible invasion of the premises of another, in order to confer the gratuitous right of preference of purchase on the invader.'" Falconer *v.* Hunt *et al.* (6 L. D., 516). Such being the reason of the rule, it does not apply to a case like the present, where there was no forcible intrusion upon the premises or invasion of the rights of another, but the settler, deferring to the rights of the record entryman, "paid for his improvements on the land, and, assuming peaceable possession, began the performance of such acts of settlement as were necessary to the establishment of a permanent home." Geer *v.* Farrington, and Falconer *v.* Hunt (*supra*). Accordingly, it has been held by this Department, that a desert land entry on land embraced in an abandoned timber culture entry of record, should, upon the cancellation of the latter, in the absence of an adverse claim, take effect from the day it was actually made (Owen D. Downey, 6 L. D., 23); and in consideration of the valuable improvements and residence of a 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 (Meyers *v.* Smith ib., 526); and, there being no adverse claim, a homestead entryman is allowed credit for a period of residence preceding his entry and while he held the land under a timber culture entry (Adam S. Harris, 8. L. D., 45. Falconer *v.* Hunt *et al.*, (*supra*); and, a homestead entry having been allowed on land covered by a prior intact homestead entry, on the cancellation of said prior entry, was permitted to stand, the claimant's good faith being manifest and there being no adverse claim. Schrotberger *v.* Arnold (6 L. D., 425).

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 cancellation by your office, as well as giving them . . . . the right to regard settlement as a pre-emption in homestead cases (Frazer *v.* Ringgold, 3 L. D., 69). Being remedial, the statute should be liberally construed to advance the remedy proposed, and so construing it, it is said by this Department in the case of Falconer *v.* Hunt *et al* (*supra*), "What is evidently meant by the phrase 'public lands' as used in this statute, is 'public' in the sense that no other party had any claim thereto."

I am of the opinion, that under the facts of this case, the land involved herein was "public land" within the meaning of section three of the act of 1880, when settled upon by Newman, notwithstanding the prior entry of Strother was then uncanceled. Newman's settlement and entry, therefore, are within the purview of said section three, except as to the *character* of the land covered thereby, and, as hereinbefore shown, this objection is removed by the last proviso of said act of 1883, which embraces and makes valid prior homestead entries on mineral lands, initiated by settlement under said section three as well as those initiated by entry of record under the general homestead law.

It appears from Newman's corroborated affidavit, that his settlement was made in 1882, prior to the act of 1883, and that he has, as required by the last proviso of said act of 1883, "in all other respects" (except as to character of land) "complied with the homestead law."

In construing this requirement of the last or second proviso of the act of 1883, this Department in the case of Nancy Ann Caste (3 L. D., 174), says:

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 (last) 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.

You are directed to allow his entry to remain intact, subject to future showing by final proof of compliance with the law, and the decision of your office holding said entry for cancellation is reversed.

The departmental decision in the case of James A. Jones (3 L. D., 176), in so far as it holds, that the last proviso of the act of 1883 only embraces entries of record made prior to said act, and not entries initiated by settlement prior thereto, is hereby overruled.

TIMBER CULTURE CONTEST—NOTICE—DEVISEE.

BONE *v.* DICKERSON'S HEIRS.

In contesting the claim of a deceased entryman due diligence should be exercised to ascertain the names and last known addresses of the heirs or legal representatives of the decedent, and, if ascertained, the notice should be to them by name, and served personally if possible.

The affidavit required as the basis of an order for publication is a condition precedent to such form of service, and in the absence of such affidavit no jurisdiction is acquired by publication of the notice.

The sole devisee of a deceased timber culture entryman is entitled to notice of a contest against the entry of the deceased, as the "legal representative" of the entryman.

Secretary Noble to Commissioner Stockslager, May 4, 1889.

I have considered the case of William Bone *v.* the heirs of J. Frank Dickerson, on appeal by Ernest C. Dickerson from the decision of your office of November 17, 1886, holding for cancellation the timber-culture entry, of said J. Frank Dickerson, made October 8, 1880, on the NE. $\frac{1}{4}$ of Sec. 10, T. 125 N., R. 48 W., 5th P. M., Fergus Falls district, Minnesota.

The entryman, J. Frank Dickerson, died leaving a will, dated January 19, 1883, which was duly probated in the probate court of Traverse

county, Minnesota, February 7, 1885, and filed for record therein February 9, of said year. The first item of said will is as follows:

After the payment of my just debts and funeral expenses, I give, devise, and bequeath unto my brother, Ernest C. Dickerson, of Traverse City, Territory of Dakota, all and every part of my estate, both real and personal, wherever the same may be situated—said real estate being situated in the township of Arthur, county of Traverse, and State of Minnesota.

The lands above described as embraced in said entry are located in said county of Traverse and are doubtless the real estate referred to in said will, and devised therein to the appellant, said Ernest C. Dickerson, who is a brother of the testator.

William L. Dickerson, the father of the testator and of appellant, and who (the testator being a single man and childless) in the absence of said will would have been entitled to the property disposed of therein as heir under the laws of Minnesota is nominated as executor. He is exempted by the will from giving bond, is given no interest in the testator's property, real or personal, and it does not appear that he has ever taken out letters testamentary and qualified as such executor, or in any way accepted said executorship or entered upon the discharge of any of the duties thereof.

July 20, 1885, William Bone, the appellee, filed an affidavit of contest, alleging that "J. Frank Dickerson has failed and his heirs or legal representatives have failed to plant or cause to be planted five acres of trees, tree seeds, or cuttings upon said tract during the fourth year after making said entry; that there are no trees or cuttings now growing or being cultivated on said tract, and that the present condition of said tract is wild prairie, and that the said J. Frank Dickerson has been dead for at least two years last past."

A hearing was ordered for September 28, 1885, and notice thereof to "the heirs of J. Frank Dickerson" was personally served on said William L. Dickerson as heir under the laws of Minnesota. This notice was also published, but there was no affidavit made or other evidence offered, as required by Rule of Practice 11 showing "that due diligence has been used and that personal service can not be made."

At the time set for the hearing, there was no appearance by or in behalf of said William L. Dickerson, either as heir or executor, but one J. H. Allen appeared specially as attorney for the appellant, Ernest C. Dickerson, and moved the dismissal of said contest, because no notice had been served on his client personally or by publication. The local officers overruled the motion, and, thereupon, said attorney, declining to appear further for the appellant, the testimony in behalf of the contestant was submitted *ex parte*. On this testimony the local officers decided in favor of the contestant. Your office, on appeal, in said letter of November 17, 1886, sustained the action of the local officers on said motion, holding "that the notice by publication was sufficient, he (appellant) being a non-resident of the State of Minnesota;" and also

concurred in the finding of the local officers on the facts, and held said entry for cancellation. From this decision, the present appeal is taken.

If the appellant was entitled to notice, it is clear that the notice by publication (the only notice claimed as to appellant) was insufficient because there was no affidavit as required by Rule 11 of Practice, showing "that due diligence had been used and that personal service could not be made." This affidavit is held to be a condition precedent to notice by publication. Allen *v.* Leet (6 L. D., 669).

But the question arises, was the appellant, as sole legatee and devisee of the entryman, entitled to notice? There is no statute, or rule of this Department prescribing upon whom notice shall be served in such cases. As a general rule, all parties in interest are entitled to notice, and, in the absence of notice, judicial proceedings are as to them *res inter alios acta* and of no binding force. Notice is an essential element of "due process of law," without which no man in this country can be deprived of "life, liberty or property." The timber culture act provides, that in case of the death of the entryman, the "heirs or legal representatives" may make proof that the entryman or they, the heirs or legal representatives, have complied with the requirements of the law, and that on making such proof, they (the heirs or legal representatives) shall receive patent for the land. Section two, act of June 14, 1878 (20 Stat., 113).

As this statute (under the familiar rule of construction, "*expressio unius, exclusio alterius*") limits the right to carry out the requirements of the law and perfect the entry on the death of the entryman before final certificate, to his *heirs* or *legal representatives*, and authorizes the issuance of patent to them alone, and as section four of said act provides, "That no land acquired under the provisions of this act shall, in any event, become liable to the satisfaction of any debt or debts contracted prior to the issuing of the final certificate," it follows, that the "heirs or legal representatives" are, in such cases, the only parties in interest and they alone are entitled to notice of contest.

The inquiry in this case, then, is limited to the question, is the appellant, as sole devisee and legatee of the entryman, his "heir or legal representative" within the meaning of these words as employed in the statute?

By the will in this case, the father, the heir at law, is displaced and the appellant is substituted in his stead. In the civil law, the party so substituted is called the "heir testamentary, to distinguish him from the legal heir, who is called to the succession by the law." (Bouvier's Law Dic.) At common law, however, he is called, where land is disposed of, a devisee, and in case of a bequest of personalty a legatee, and is not embraced within the common law meaning of the word "heir." In acts of Congress, unless the contrary expressly appears, words are used in their common-law signification.

Not being an "heir" then, within the meaning of the statute, is he a "legal representative?" I am of the opinion that he is. In the first place, the term "legal representatives" as used in the acts of Congress is not confined to administrators and executors. In the third section of the act of June 2, 1858 (11 Stat., 294), it is provided, that certain private land claims, shall be confirmed and a certificate of location issue "to the claimant or his legal representatives," and it is held by this Department, that under said act the "legal representative" of the claimant is he, "who, under the local law, is the owner of the claim," and that a purchaser at a succession sale of the estate of the claimant or confirmee was such "legal representative" (John Shafer, 5 L. D., 283); and the supreme court of the United States has held, in a case where Congress, by special act, passed after the death of the original claimant, directed a patent to issue on a Spanish claim to such original claimant, or his legal representatives, that such patent inures to the benefit of the claimant's grantee as his legal representative. Morrison *v.* Jackson (92 U. S., 654; 6 Stat., 854). In the case of Daniel Clark (1 C. L. L., 494), this Department held in cases where patents for private land claims were authorized to be issued to the confirmee or his "legal representatives" that "this formula embraces representatives by contract as well as by operation of law, and that patents so issued would inure to the benefit of heirs, devisees or assignees." (See also Hogan *v.* Page, 2 Wall., 605.)

In the next place, this view derives support from the provision of the timber-culture act, that in such cases the heirs or legal representatives shall receive patent.

The only cases where the statute uses the words, "administrator" and "executor," and expressly clothes them as such with any power or authority in reference to the unconsummated claim of a deceased claimant, are that of a pre-emptor dying before "filing in due time all the papers essential to the establishment" of his claim, and that of a homestead entry, where both parents are dead leaving an infant child or children; and in both of these cases, it is expressly provided, that the title by patent shall be made and enure to others than the administrator or executor. (Secs. 2269 and 2292, R. S.,). The vesting of the legal title to realty in an administrator or executor would seem to be an anomaly in the law and without any sound basis in reason. At common law, an administrator takes no interest in the real estate of the deceased; nor does an executor unless by force of the provisions of the will. Lands not being liable at common law for the payment of debts, they are made liable by statute if there be a deficiency of personal estate, and where so made liable, the authority of the administrator or executor derived from the statute is a "naked authority to sell on license," and they are not thereby vested with the title. Williams on Executors (Vol. 1, p. 717, note d,). But section four (above quoted) of the timber-culture act expressly exempts the land from liability for

the debts of the entryman in a case like the present and the will gives the executor no interest in the realty or personalty of the testator. To direct the title by patent to issue to an administrator or executor under such circumstances, would be the requirement ot an act, wholly useless and contrary to all the analogies of the law in similar cases. This Congress can not be held to have intended.

Personal service of notice upon the father, William L. Dickerson, the executor nominated in the will and who (as before stated) but for the will would have inherited the property of the entryman as his heir, was not sufficient. Having been displaced as heir by the will, he was no longer the heir of the entryman within the meaning and spirit of the statute.

As before stated, it does not appear that he ever qualified and became executor in fact, but if he had done so, and if as executor he was in one sense of the term a legal representative, he was not the only legal representative. The appellant was the sole party in interest under the will, and, in my opinion, was a legal representative within the meaning of the law. Notice to one of several legal representatives or parties in interest, can not be held to conclude the rights of those not legally notified. The necessity and justice of this position is illustrated in this case, where the party notified had no interest involved in the contest and failed to appear at the hearing in person or by attorney. Denny *v.* Taylor's heirs (2 L. D., 227).

The will of the entryman gives the post-office address of the appellant, and was probated and recorded in the county in which the land covered by the entry was located; the notice was published in the same county, and the father of the entryman and of appellant resided in said county and near the land. It would appear, then, to have been an easy matter for the contestant to have ascertained the name and address of the legal representative of the entryman. This, however, was not done, and the published notice is to "the heirs and legal representatives of J. Frank Dickerson," without naming them, and a copy of the notice was not mailed by registered letter to the last known address of the appellant as required by Rule of Practice 14. In cases of contest after the death of the entryman, due diligence should be exercised to ascertain the names and last known addresses of the heirs or legal representatives of the deceased entryman, and where their names and such addresses can be ascertained, the notice should be to them by name, and is not complete without mailing the notice as required by Rule 14 of Practice. Whenever possible, the notice must be personally served.

The decision of your office, holding the entry for cancellation, is reversed, and you are instructed to direct the local officers to allow the contestant, within thirty days after notification hereof, to proceed with his contest after due notice to the appellant in conformity to law.

PRATT *v.* AVERY ET AL.

Motion for the review of departmental decision rendered December 19, 1888 (7 L. D., 554) denied by Secretary Noble, May 4, 1889.

SECOND HOMESTEAD ENTRY—ACT OF MARCH 2, 1889.

GEORGE W. MASON.

The privilege of making application for a second homestead entry under the act of March 2, 1889, may be accorded as a preference right in a case pending at the passage of said act.

First Assistant Secretary Chandler to Commissioner Stockslager, May 4, 1889.

I have considered the appeal of George W. Mason, from the decision of your office dated June 14, 1886, rejecting his application to make a second homestead entry for the S. ½ SE. ¼, and S. ½ SW. ¼, Sec. 25, T. 5 N., R. 72 W., Denver land district, Colorado.

Your office letter of June 14, 1886, fairly sets forth the facts in the case and your said decision was in accord with the law and rulings of this department at the time the same was rendered. The case now, however, seems to come within the provisions of the act of Congress approved March 2, 1889, entitled "An act to withdraw certain public lands from private entry and for other purposes," and due opportunity should be given the claimant for an application thereunder. To this end he should be notified that if within sixty days after notice hereof he shall make such application in accordance with said act, and the regulations thereunder, it will receive due consideration, and that in the meantime final action herein will remain suspended, but that if he fails to make such application within the time specified, his claim will be finally rejected.

Your decision is accordingly modified.

MINING CLAIM—PUBLICATION—POSTING—EQUITABLE ADJUDICATION.

MIMBRES MINING COMPANY.

If the published notice of application is not as explicit in the matter of description as the notice posted on the claim, such defect is properly chargeable to the register, and may be cured by a reference to the Board of Equitable Adjudication.

It is the duty of the register to furnish proof of posting in the local office, and in the absence of such proof the applicant may be permitted to furnish satisfactory evidence as to the fact of posting.

Secretary Noble to Commissioner Stockslager, May 4, 1889.

I have considered the appeal of the Mimbres Mining Company from the decision of your office, dated May 26, 1888, declining to modify your

office decision, dated September 17, 1886, refusing to re-instate mineral entries, Nos. 63, 64 and 66, La Messila, New Mexico, series, made September 27, 1882, by the Mimbres Mining Company, for the Glamorgan and Lucas lode claims and the McNulty lode and Mill-site claims, or to allow said company to make new entries of said claims upon the record as presented.

The record shows that said claims were surveyed in June, July and October, 1881, and the decision appealed from finds from the field notes that they lie in Tp. 17 S., R. 11 W., surveyed prior to the survey of said claims; that the claims were not connected with any established corner of the public surveys, or with any United States mineral monument, as required by the regulations of this Department, but they were connected by broken lines about nineteen hundred feet in length, with "Willow Spring," alleged to be the most accessible natural object with which to connect them; that, on June 8, 1882, applications for patents for said claim were filed and publication of notices given from June 17, 1882, to and including August 5th, same year, and entries were allowed on September 27, 1882; that your office, on February 12, 1883, advised the local officers that the published notice was defective, in that there were but eight publications of the notice, whereas the "law and official regulations positively require ten."

On June 21, 1883, your office advised the local officers that, as there had been no appeal from said decision of February 12, 1883, said entries were canceled; that

As to the notices required by the statute, applicant will be required to publish anew its notices of intention to apply for patent in the newspaper nearest the claims for sixty days, and also to post notices on the different claims and in the local office for the same period. Proof of such publication and posting must be made in accordance with the provisions of circular of this office of October 31, 1881.

On December 12, 1885, your office acknowledged the receipt from the local office of certain papers, including—

the articles and certificate, designating the company's place of business and agent in the Territory, copy of notice of location, and an abstract of title, agreement with the publisher, affidavit of the publisher, affidavit that plats and notices were posted and remained posted, affidavits of $500 improvements, and a certificate that no suit is pending.

Your office also advised the local officers, that, by your office decision of June 21, 1883, the applicant was allowed to commence proceedings anew for patents, and upon showing due compliance with law and the regulations of the Department, if they should allow the applicant to make final entry of said claims, the entire record should then be transmitted to your office. Said papers were accordingly returned, for the action of the local office.

* * * * * * *

On August 20, 1886, the local office transmitted the record, as directed by your office on the second of the same month.

On September 17, 1886, your office considered the record, and, after reciting the facts substantially as aforesaid, found that new notices were published in all of said cases from June 6th to and including August 22, 1885, and that copies of the plats and notices remained posted on the claims for the same time; that there was no evidence that tended to show that copies of said notices were posted in the local land office, covering the second period of publication; that said notices correctly described the exterior boundaries of said claims, and referred to the adjoining mining claims, but in none of the notices was any reference to any line connecting them with a corner of the public surveys, a mineral monument, or with a permanent object, that "the locus of said claims could not from the descriptions in the published notices be ascertained at the time by parties who might have desired to protect interests of their own by filing adverse claims."

Your office, therefore, declined to re-instate said canceled entries, and refused to direct the local officers to allow new entries upon the record as then presented. Thereupon, said company appealed, and alleged error, (1) in holding that said claims were not properly connected as required by law, (2) in holding that new entries must be made upon second payments for said claims, (3) in holding that omission of proof of posting of notice in the local land office was fatal, when such proof might still be supplied, and (4) error in holding that "Willow Spring," with which the surveys were connected, was not a permanent natural object, satisfying the law in that regard.

* * * * * * *

The main objection, as stated in your office decision, is, that the published notice is not sufficiently full and definite to enable adverse claimants to be advised of their location. But it is to be observed, that by section 2325 of the U. S. Revised Statutes, "The register of the land office, upon the filing of such application, plat, field notes, notices, and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim; and he shall also post such notice in his office for the same period."

On October 29, 1881, your office issued a general circular, approved by Secretary Kirkwood, on October 31, same year, containing a compilation of the mining laws and the regulations thereunder, and paragraph 28 thereof requires that an applicant for a lode claim must, in the first place, have a correct survey of his claim duly made, which shall accurately show the exterior surface boundaries of the claim, distinctly marked by monuments on the ground. Paragraph 29 of said regulation requires the claimant

To post a copy of the plat of such survey in a conspicuous place upon the claim, together with notice of his intention to apply for a patent therefor, which notice will give the date of posting, the name of the claimant, the name of the claim, mine, or lode; the mining district and county, whether the location is of record, and, if so,

where the record may be found, the number of feet claimed along the vein and the presumed direction thereof; the number of feet claimed on the lode in each direction from the point of discovery, or other well defined place on the claim; the name or names of adjoining claimants on the same or other lodes; or, if none adjoin, the names of the nearest claims, etc.

Paragraph 30 provides, for the proof of posting of plat and notice, and by the 34th paragraph of the regulations provision is made, that the register shall duly publish the notice and post a copy of the same in his office.

In the case at bar, if the published notices were not as full as those posted on the claims, it was the fault of the register, whose duty it was to publish the same. Besides, when your office first examined the papers, no question was made to the sufficiency of the description in the published notice, the only objection was to the length of time that it was published. Moreover, upon the information of the local officers that it would be only necessary to supply a sound link in lieu of a broken one, the applicant made new publication for the full time required, and, although more than six years have elapsed since the local officers accepted the proof and received payment for said entries, yet, so far as the record shows, there has been no protest or adverse claim filed, and the good faith of the applicant is unquestioned.

In the case of John W. Bailey *et al.* and Grand View Mining & Smelting Company (3 L. D., 386), my predecessor, Secretary Teller, held that, "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."

This ruling was modified by the Department in the case of the New York Lode & Mill-Site claim (5 L. D., 513), and the entry in that case was allowed to be submitted to the Board of Equitable Adjudication for its consideration, the notice not having been posted on the mill-site portion of the claim, and there being no adverse claim. See also Newport Lode (6 L. D., 546); Buena Vista Lode (idem., 646); Cornell Lode (idem., 717); Veta Grande Lode (idem., 719); Rowena Lode (7 L. D., 477).

It is the duty of the register to furnish proof of the posting of the notices in his office, and the applicant should be allowed to procure satisfactory evidence of such posting, and, upon furnishing the same, within sixty days from notice hereof, said entries will be re-instated and referred to the Board of Equitable Adjudication for its action.

The decision of your office is modified accordingly.

TIMBER CULTURE ENTRY—SETTLEMENT RIGHTS.

MAYFIELD *v.* LEE.

One who settles upon and files for a tract of land under the pre-emption law, can not hold another at the same time by virtue of a previous settlement under the homestead law; the later settlement is in contemplation of law an abandonment of all rights acquired under the first.

A timber culture entry held for cancellation on account of conflict with the prior settlement right of another, may be allowed to stand, on the subsequent abandonment of the settlement claim.

Secretary Noble to Commissioner Stockslager, May 4, 1889.

By decision of October 19, 1888, in the above stated case the Department affirmed the action of your office holding for cancellation the timber culture entry of Lee for the SW ¼ Section 8 T. 7 N., R. 25 W., North Platte, Nebraska, upon the ground of the prior right of Mayfield by virtue of his settlement upon said claim.

Lee made timber-culture entry of the tract July 3, 1884, and on July 24, 1884, Mayfield contested said entry upon the ground that said tract was not subject to the timber culture entry of Lee for the reason that Mayfield had, prior thereto broke a furrow around said claim to mark boundaries and had put monuments thereon with a view to making homestead entry ot said tract.

The sole question determined by the Department was that the act of settlement made by Mayfield in marking the boundaries of his claim was sufficient to defeat the entry of Lee so far as it conflicted with the prior settlement right of Mayfield.

A motion has been filed by Lee asking for a reconsideration of said decision of October 19, 1888, upon the ground namely—that Mayfield has abandoned his settlement upon the tract, and has never since the contest established a residence upon the tract, and that claimant having knowledge of said abandonment, and acting in good faith, proceeded to comply with the timber-culture laws and has placed improvements upon said tract of great value.

In view of the fact that the sole question passed upon by the Department was as to the prior right of Mayfield by virtue of his alleged prior settlement—the only ground upon which his timber-culture entry was held for cancellation—and having shown that Mayfield has abandoned the claim, he asks that the decision of the Department of October 19th, be so modified as to suspend the judgment of cancellation and to order a hearing to determine the truth of these charges.

In reply to this motion the contestant makes the following admission:

While it is true that contestant has filed on a pre-emption in Colorado he has never abandoned the land in controversy—always expecting after he filed said pre-emption to enter the land in controversy as a timber claim.

The long delay in awaiting a final decision in said case is one reason contestant filed a pre-emption in Colorado.

Claimant placed all the improvements he has on the land since the initiation of the contest upon the land in question and certainly did so at his peril.

Mayfield's contest did not question the integrity of the entry of Lee, but was predicated solely upon the ground of his prior right by virtue of settlement. So long as he continued to claim the tract by virtue of that right, the entry of Lee could not avail as against him; but if he afterwards abandoned it, Lee would have the right to perfect his timber-culture entry.

It is true that Mayfield claims that he never abandoned the land in controversy, always expecting after he made his pre-emption filing to enter the land in controversy as a timber claim. But as the claim of Mayfield to the tract was by virtue of his settlement right, and the settlement laws will not permit two settlement claims to exist at the same time, the settlement upon and filing of his declaratory statement for another tract of land while his rights under his alleged settlement upon the tract in controversy was pending before the Department, was, in contemplation of law, an abandonment of all rights to said tract by virtue of his settlement, and although he might have intended to take said tract subsequently under the timber-culture law, his claim thereunder could only attach from the date of entry under that law.

He does not pretend that he intends to take the land under the settlement laws—the sole ground upon which his rights to the tract were recognized—but asks that the timber culture entry of Lee be canceled in order to allow him to make entry of the land under the same law.

In view of all the facts in the case as shown by the affidavits filed with this motion, and the admission of the contestant, I am satisfied that the right of Lee is superior to that of Mayfield, and I therefore revoke the decision of the Department of October 19, 1888, and direct that the entry of Lee remain intact.

REPAYMENT.

AMBROSE W. GIVENS.

The Department is not clothed with power to allow repayment, when the money has been paid into the Treasury, unless specially authorized by statute.

There is no authority for the allowance of repayment if the entry can be confirmed.

First Assistant Secretary Muldrow to Commissioner Stockslager, March 8, 1889.

I have considered the appeal of Ambrose W. Givens from your office decision of February 11, 1888, rejecting his application for the cancellation of his cash entry for the S. E. $\frac{1}{4}$ of Sec. 10, T. 23 S., R. 19 W., Larned land district, Kansas, and for the return of the purchase money for the said tract.

The facts are fully stated in your office letter of the said date. I concur in the conclusion therein expressed.

There is another reason why your action in the case should not be disturbed. This Department is not clothed with power to make repay-

ment where the money has been paid into the Treasury, unless specially authorized by statute so to do. Sarah D. Smith (7 L. D., 295); Joseph Brown (5 idem., 316).

The existing legislation on the subject is as follows:

Section 2362 of the Revised Statutes provides for repayment in cases where a tract of land "has been erroneously sold by the United States so that from any cause the sale can not be confirmed."

The act of June 16, 1880 (21 Stat., 287), provides that repayment may be made of fees and commissions and excess payments upon the location of claims under section 2306, where said claims were after said location found to be fraudulent and void, and the entries or locations made thereon canceled, or where entries are canceled for conflict, "or, where from any cause the entry has been erroneously allowed and *can not be confirmed*," or where double minimum price has been paid for lands afterwards found not to be within the limits of a railroad grant, the excess, $1.25 per acre, may be returned.

After the dismissal of the contest, no obstacle remains to the confirmation of Givens' cash entry, though it should be held that the same, pending his appeal, was erroneous under Rule 53 of the Rules of Practice.

By the initiation of the contest Givens' right to purchase was suspended until the final disposition of the contest. Freise *v.* Hobson, 4 L. D., 580. The contestant being out of the case, Givens' cash entry can now be confirmed; it follows that the application for the repayment of the money paid for the purchase of the said lands is not authorized by any of the provisions of the statutes above referred to, and must, therefore, be denied.

Your office decision is accordingly affirmed.

RES JUDICATA—PRIVATE CLAIM—ACT OF JUNE 2, 1858.

JOHN MCDONOGH SCHOOL FUND.

Whether the Commissioner of the General Land Office has authority to revoke a decision of his predecessor or not, such action will not preclude the Department from exercising full jurisdiction over the matters involved when the case comes up for final disposition.

The surveyor general's action in issuing certificates of location, under the act of June 2, 1858, is subject to the supervision and control of the General Land Office, under the direction of the Secretary of the Interior.

Indemnity under section 2 of said act will only issue to the owner of the claim to which title has failed; and if the applicant has parted with a portion of the land, alleged as a basis therefor, he can only receive indemnity for that portion of the claim which he yet owns, and to which title has failed.

Secretary Noble to Commissioner Stockslager, May 4, 1889.

By applications, dated July 7, 10, and September 3, 1883, the "Board of commissioners John McDonogh school fund of the city of New

Orleans," claiming as legatee under the will of John McDonogh, deceased, applied through its designated attorney for the issue of certain indemnity warrants of location, agreeably to the third section of the act of June 2, 1858, in satisfaction of three private land claims duly confirmed to said McDonogh, and more particularly described as B 20 and B 21, American State Papers (Gale and Seaton's edition), Vol. 6, p. 675, and C 86, Id., Vol. 8, p. 370. The claims first named were duly confirmed by the act of March 3, 1835 (4 Stat., 779). The latter by the act of July, 1836 (6 Stat., 682), and located in townships 14 and 15 S., R. 23 E., and 15 S., R. 24 E., west of the Mississippi river. These claims as located conflicted with superior confirmations and also with one another, except as to about 104.81 acres.

Claim B 20 is for a tract of land situate on the bayou des Familles, in the parish of Jefferson, district of Barataria, containing twenty arpens, front on said bayou by the ordinary depth of forty arpens, bounded, etc.

Claim B 21 is for a tract of land situate on the left bank of the said bayou des Familles, containing twelve arpens front on the said bayou by the ordinary depth of forty arpens, and bounded, etc.

Claim C 86 is for a tract situate on the bank of the bayou Ouachas in the said parish of Jefferson, containing about thirty arpens, front on said bayou by a depth of about one hundred and ten arpens.

The surveyor general at New Orleans rendered his decision September 15, 1884. After stating that "agreeably to custom, this office referred these various conflicts to the register and receiver of the United States land office here for decision under section 6 of the act of March 3,1831, and in due course these officers made and transmitted two decisions, one of November 7, 1883, and the other of June 16, 1884," the said official, following the decisions named, found—

1st. That the claim C 86 is a "confirmed located private land claim, totally unsatisfied by reasons founding the right under the 3d section of the act of June 2, 1858, to indemnity lands for the whole area embraced in its location."

2d. That claim B 20 is entitled to patent as to section 55, containing 63.61 acres, T. 15 S., R. 23 E., and to indemnity lands as to the residue of its location."

3d. That claim B 21 is entitled to patent as to section 51, T. 15 S., R. 23, containing 41.20 acres, and to indemnity lands as to the residue of its location; and

4th. That these rights to indemnity lands are to be enjoyed by those parties who are under the laws of Louisiana the true owners in law and equity of the land in place, to the extent of the interest of each, and not by the city of New Orleans, or the Trustees of the McDonogh School Fund, admitted by their counsel to have long since sold all the land involved.

September 27, 1884, the said attorney appealed from the said decision adverse "to the right of the applicants to such indemnity warrants."

December 6, 1884, the Commissioner of the General Land Office considered said appeal, and found 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; and said:

But in view of and controlled by the Toups case (2 L. D., 431), I think they are entitled to indemnity to the extent represented by the several conflicts between the three McDonogh claims.

The surveyor-general was instructed to ascertain the quantity of land by which the area of the McDonogh claims have 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 as with the amount sold will 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 survey. See 3 L. D., 238.

February 10, 1885, the surveyor-general transmitted, in pursuance of the foregoing, certificates of location for 1,526.26 acres.

By letter, dated October 22, 1885, your office directed the surveyor-general to require the applicants for said certificates to show in whom the title to said lands now rests.

July 20, 1886, your office held that—

The trustees of the McDonogh school fund having conveyed all the land with full warranty and subrogation, without reference to their claim under any particular confirmation, conveyed any and all right they may have had, whether acquired under one confirmation or three confirmations, and hence they are not entitled to any indemnity under the act of June 2, 1858, in my opinion—

and by the same decision declined to authenticate and deliver the said certificates of location, and held the same for cancellation.

The applicants on appeal from the foregoing claim error

1st. In assuming jurisdiction of the issue of scrip.

2d. In re-opening without new evidence a question already decided.

3d. In holding that deeds from the applicants under valid grants passed to the grantees named in said deeds, all right of recovery against the United States growing out of invalid grants and confirmations of the same land.

The appellant's first specification of error is disposed of adversely to him in the decision of this Department in the case of Stephen Sweayze (5 L. D., 570), wherein it was held after a thorough discussion, that the act of 1858 (*supra*), when considered *in pari materia* with the general laws on the same subject, clearly contemplates that the surveyor-general's action in issuing certificates of location is subject to the supervision and control of the Commissioner of the General Land Office, under the direction of the Secretary of the Interior.

As to his second allegation of error, it is sufficient to say that, waiving the question whether or not the Commissioner of the General Land Office had authority to set aside and revoke the decision of his predecessor, involving the same matter, yet the question being now here, the Secretary of the Interior by virtue of "that just supervision which

the law vests in him over all proceedings instituted to acquire portions of the public lands," has jurisdiction to consider the matter, and render such decision as in his opinion shall be meet and proper under the circumstances. This general rule was distinctly announced in the case of Charles W. Filkins (5 L. D., 49), and has since been followed by the Department. See also Adolph Peterson *et al.* (6 L. D., 371.)

The remaining questions to be answered are, whether the present applicants are entitled to any scrip at all in the premises., and, if so, to what amount?

By the decision hereinbefore referred to, your office has held, for the reasons therein given, that no scrip could lawfully issue to them.

I am not favorably impressed with this view of the case. Had there been no sales made by the city of New Orleans, legatee, etc., there can be no doubt that the city would have been entitled to scrip under the act of 1858, for the total number of acres called for by the said three claims less the amount of land it actually received as aforesaid under the claims, to wit, 104.81 acres.

It is shown by the record that the city of New Orleans, legatee, etc., has sold to various parties a considerable amount of land within the out-boundaries of these claims as located. Consequently, the city will not be entitled to indemnity for the land thus sold. Any indemnity in lieu of this land must be applied for by the purchaser or purchasers, in case their title should fail. Elias Blunt (5 L. D., 617). As to the remaining part of the indemnity due under the act of 1858, in satisfaction of these several claims, I am clearly of the opinion that the city of New Orleans, devisee, etc., is the proper applicant.

The sales made by the city of New Orleans, devisee, etc., purported to convey a certain amount of land only, situated within the out-boundaries of the several claims as located, and did not purport to convey the whole interest of the city in said claims. The purchasers from the city purchased only so many acres of land. Having purchased but a limited number of acres of land, confessedly a much smaller number than are contained in the total area of the several claims, it will not do to hold that such purchasers are entitled to indemnity for a much greater number of acres than they ever purchased or pretended to own. They will be entitled to indemnity, if at all, for the number of acres for which their title may fail.

It having been found that there is due from the United States an amount of scrip equal to the total number of acres called for by the said three claims, less 104.81 acres, the amount for which the register and receiver and the surveyor-general find that patent should be issued, and it having also been found that the purchasers of the land sold as aforesaid are the proper applicants for scrip as indemnity for that land in case their titles fail, it must necessarily result that the city of New Orleans, legatee, etc., the present applicant herein, is entitled to an amount of scrip equal to the difference between the total amount neces-

sary to satisfy all the claims, and the amount the aforesaid purchaser will be entitled to claim as above set forth.

This amount can best be determined by your office. When so determined, if found to agree with the amount for which the surveyor-general has issued scrip, I see no objections to the authentication and approval of the same. If found not to agree with such amount, then the surveyor-general should be directed to issue scrip in satisfaction of these several claims thus correctly determined.

The decision appealed from is reversed, and you will be governed in the disposition of this case by the foregoing.

TIMBER CULTURE ENTRY—"DEVOID OF TIMBER."

JAMES HAIR.

The phrase "devoid of timber" should be construed as meaning land practically so; and in determining whether land falls within such description no arbitrary rule can be formulated for the government of every case.

An entry should not be allowed where the returns show timber in the section; but a hearing may be ordered, if the correctness of the return is questioned, to determine whether the land is in fact subject to timber culture entry.

Secretary Noble to Commissioner Stockslager, May 6, 1889.

December 2, 1887, James Hair presented at the land office at Kirwin, Kansas, an application to enter under the timber culture act the NW. ¼ of section 29, T. 1 R. 18 W., at the same time tendering fees and commissions. Said application was rejected by the register because the township plat showed that there was timber in the section.

Mr. Hair appealed and filed a corroborated affidavit setting forth that "there are two cottonwood trees in said section, one of which is about eighteen inches in diameter, and there are also four cottonwood sprouts about two inches in diameter, and that the said trees and sprouts are all the timber of any kind that there is in said section." A. A. Burdick and W. A. Buckley, the corroborating witnesses, swear that they are well acquainted with said section and that it is exclusively prairie land and entirely devoid of timber with the exception of two cottonwood trees.

The joint affidavit of Jacob Cobb and six others, which was filed in the local office, sets forth that each of them had made a personal examination of said section for the purpose of learning the amount of natural forest timber standing and growing on said section, and each of them states that on January 2, 1888, there were standing on said section the following trees, viz:

> Fifty-one cottonwood trees from one to eleven inches in diameter and from five to thirty feet in height, and forty six hackberry trees from one to ten inches in diameter and from five to twenty feet high, and seven cottonwood trees from one foot to two feet seven inches in diameter, and from twenty to forty feet high, and three elm trees from two to four inches in diameter and from ten to fifteen feet high, and twenty nine stumps.

April 9, 1888, after considering said affidavit, you affirmed the action of the local officers in rejecting Hair's application to enter said tract and base your opinion on the ground that the evidence presented failed to show that the said section is composed exclusively of prairie or other land naturally devoid of timber.

Hair appealed.

The statute providing for timber culture entries (20 Stat., 113) provides, among other things, that the applicant in his affidavit shall make oath—"That the section of land specified in my said application is composed exclusively of prairie lands or other lands devoid of timber."

In construing these words the decisions of the Department in my judgment, go to extremes in both directions.

In the case of Bleukner *v.* Sloggy (2 L. D., 267) it was held that the land was devoid of timber although there were growing on the section about five hundred trees of natural growth, varying in diameter from six inches to two feet or more, consisting of ash, oak, elm and some underbrush.

In the case of Box *v.* Ulstein (3 L. D., 143) the principles enunciated in the case just cited are tacitly endorsed, but the claim of Ulstein was rejected on the ground that there were ten acres of trees naturally growing on the tract in controversy.

In the case of Bartch *v.* Kennedy (3 L. D., 437) it was held that where there were five or 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 in diameter and located mostly on the river bank, where the land is subject to overflow, entry could be made under the timber culture act.

These are the cases which take one extreme. On the other hand, in the case of James Spencer (6 L. D., 217) where it was shown that there were about fifty scrubby elm and cottonwood trees on the section, ranging from an average of eight to twenty inches in diameter, the action of your office in rejecting the application was reversed on the ground that under the ruling of this Department in force when the application of Spencer was made, it should have been allowed, in that decision it is said: "Now while the application herein is allowed because made when the departmental ruling permitted its allowance, I am clearly of the opinion that said former ruling is entirely too liberal and is not in harmony with the statute." It is further stated therein that "devoid of timber" necessarily means: "without timber" or "destitute of timber," and that "the former ruling on this subject will not be allowed to prevail longer."

In the case of L. W. Willis (6 L. D., 772) it was held that the application was properly rejected for the reason that the township plat of survey on file in the local office showed that said section had timber thereon, and the evidence failed to show that the section was composed exclusively of prairie land or other lands naturally devoid of timber. The decision goes on to say:

I cannot follow the case of Spencer, however, in holding that because at the time the application to enter was made at the local office, another opinion was held at the Department, therefore this entry should now be allowed. * * * On this point the Spencer case cannot be supported hereafter.

The interpretation given in the Spencer case to the words "devoid of timber" is illiberal, technical, and too *literal* to conform to the spirit of the act which ought not to be defeated by "sticking in the bark."

No arbitrary rule can be established for the government of every case. It should be the desire of the Department to ascertain what the intent and purpose of Congress was in the passage of the act. Clearly it was to encourage the artificial growth of timber in a prairie country. It is within the experience of all mankind living in prairie regions that in draws and ravines a few scattering trees are to be found thereon, and it would not seem that Congress intended to exclude every tract of that kind from the timber culture act. It stands to reason that it was not the purpose to deprive the occupants of the vast prairies of the west of the benefits of the act if there happened to be a single tree upon the section. I take it, that the words "prairie land or land devoid of timber" within the spirit of this act, means land *practically* so. To give the act the construction placed upon it by the last decisions just cited, according to their legitimate deductions and fair conclusions, would prevent an entry of any prairie land that had timber of any kind or character upon it, standing, fallen or otherwise. This is certainly too narrow a view to take of the act and perhaps goes as far to one extreme as one of the cases first cited does to the other, wherein it is held that where there are twelve hundred trees on the section the tract is still subject to entry as a timber culture claim.

The equities in the case are strong in favor of Hair and the matter is solely between him and the government, there being no adverse claimant. He invested $800 in buying a relinquishment, apparently exercised due care in examining the tract and seems to have acted in good faith. I am, therefore, of the opinion, on the plaintiff's showing, that the section in which the tract in controversy is situate is in reason, taking into consideration the object of the act, keeping in mind its purpose, spirit and intent, subject to entry under the timber culture act. But as the affidavits differ very widely as to the number of trees growing on the section, and it has been returned as timber land, entry thereon should not be allowed until the correctness of the return of the government survey has been overcome. Such is the rule where land has been returned as mineral or as swamp. Kane et al. *v.* Devine (7 L. D., 532); Lachance *v.* Minnesota (4 L. D., 479). The returns being *prima facie* valid the application to enter was, for that reason, properly rejected by the local officers; but as the applicant alleges that there are but two trees on the section, a number not sufficient to defeat the application, you will order a hearing, under the rules and regulations of your office, for the purpose of determining whether or not the section

is "devoid of timber" as those words are construed herein. In the meantime, Hair's application will stand suspended. If, on the hearing, the testimony discloses the fact that practically the tract is prairie land or devoid of timber, Hair's application to enter thereon should be entertained.

Your decision is modified accordingly.

PRACTICE—REVIEW APPEAL.

BEALL *v.* ENGLE.

Objection to the sufficiency of an appeal from the General Land Office will not be considered, when raised for the first time on motion for review.

Secretary Noble to Commissioner Stockslager, May 6, 1889.

This is a motion filed by James R. Beall, asking that the decision of the Department of August 4, 1888, be reconsidered, and that the case be declared closed, as required by rule 90 of the Rules of Practice, where no appeal from your decision has been taken in accordance with said rule.

The grounds upon which said motion is based are as follows:

First. That no appeal was ever taken from the decision of the Hon. Commissioner in said case, holding the defendant's entry for cancellation, and it was therefore error on the part of your honor to consider the case, and reverse said decision.

Second. That no specification of errors were filed as provided under rules 88 and 90 of the Rules of Practice.

Third. That if an appeal, specification or errors and argument were filed, that same were not served upon the opposing party, as provided under rule 93 of the Rules of Practice.

Fourth. That in considering and rendering a decision in the case your honor abrogated Rule 88 and 90 of the Rules of Practice, and existing departmental decisions.

Fifth. Your honor erred in rendering a decision upon the merits of the case, as no specification of errors were filed within the time required under the rules of practice.

Sixth. Your honor erred in not closing the case under rule 90 of the Rules of Practice, for failure on part of defendant to file specification of errors within the time required under the Rules of Practice.

From the foregoing it will be seen that no error is alleged in the decision of the Department, but said motion is based upon the grounds solely that the claimant did not file specification of errors within the time prescribed by the rules, and have the same served upon the opposing party.

The record of said case shows, that within the time allowed for appeal from your said decision, Nathan Engle, the claimant, filed the following notice:

TOWER CITY, D. T., 4—5—1887.

MRS. JANE R. BEALL:

I hereby notify you that I appeal from the decision of W. A. J. Sparks, in regard to my tree claim entry, No. 3618, made at Fargo, for the NE. ¼ of Sec. 24, T. 138 N., R. 56 W., to the Hon. L. Q. C. Lamar, Secretary of the Interior, for a final decision in the matter.

NATHAN ENGLE.

This notice was served upon the contestant, Mrs. Jane R. Beall, on the 7th day of April, 1887, as shown by the return registry receipt. Service of the notice is not denied by contestant, and instead of taking exceptions to the failure of the claimant to file an appeal, as required by law, prior to the rendering of the decision by the Department, or at the time when it was considered by the Department, he now asks, after the Department has decided the case upon its merits, that the sufficiency of said appeal be now considered.

Rule 82 of Rules of Practice provides, that where the Commissioner considers an appeal defective, he shall give notice to the party of said defect, who shall be required to cure said defect within the time therein prescribed, and upon failure to do so, said appeal will be dismissed by the Department. As no notice was given the Commissioner of said defect, and the contestant having failed to take exceptions thereto after notice that appeal had been filed, I see no reason why the case should now be re-opened to pass upon a defect that should have been taken advantage of while the case was pending before the Department.

RAILROAD GRANT—CERTIFICATION.

PATRICK DALY.

The title to land within the grant of July 4, 1866, passes by certification to the State, and such action on the part of the Department exhausts its jurisdiction over the land.

Secretary Noble to Commissioner Stockslager, May 6, 1889.

I have considered the appeal of Patrick Daly from your office decision of June 26, 1886, rejecting his application to enter NW. ¼, Sec. 17, T. 102 N., R. 28 W., 5th P. M., Worthington, Minnesota, land district.

It appears from the record that the land in controversy is within the twenty-mile granted limits of the Southern Minnesota Railroad, and was certified to the State of Minnesota, for the benefit of said road November 14, 1868, under the acts of July 4, and 13, 1866.

Appellant claims that one Sullivan had homestead entry on the tract at the time of the grant to said road, which was a grant *in præsenti*, and that therefore said tract did not pass under the grant.

Whatever weight might be given to the facts alleged on appeal, if this Department had now jurisdiction of the disposal of the said land, no consideration whatever can now be given them for the reason that the record of your office shows that said tract was included in the list of selections presented by said Southern Minnesota R. R. Co., July 8, 1868, and was approved to the State of Minnesota for the benefit of said company November 14, 1868.

Under the rule in The Southern Minnesota Railway Extension Co. *v.* Kufner (2 L. D., 492) title has vested in the said company by the grant and approval to the State, and the Department can not disturb the same.

Your said decision is accordingly affirmed.

RAILROAD GRANT—INDEMNITY—ACT OF JUNE 22, 1874.

SOUTHERN MINNESOTA R. R. CO., ET AL.

Selections under the act of June 22, 1874, are not authorized on relinquishment of indemnity lands to which the right of the company had not attached.

The acceptance of the relinquishment by the local office, does not amount to an approval of the selections based thereon.

Secretary Noble to Commissioner Stockslager, May 6, 1889.

I have before me the case of Southern Minnesota R. R. Co., *et al*, on appeal from your office decision of January 20, 1887, which held for cancellation the following list of selections made by the said railroad company under the act of June 22, 1874, viz: W. ½ SE. ¼, Sec. 6, Lot 7, Sec. 8, E. ½ SW. ¼ and SE. ¼, Sec. 30, in T. 106 N., R. 38 W., and Lot 4, Sec. 18 T. 109 N., R. 45 W., of 5th P. M., Tracy, Minnesota land district—the list of said selections having been filed in the local office May 1, 1877.

These selections were all claimed under the act of June 22, 1874, and the alleged basis on account of which they were claimed, was the relinquishment by said company attached to said list, for the following described lands lying wholly within the indemnity limits of said road, viz: E. ½ NE. ¼ and NE. ¼ SE. ¼ and lots 2 and 3 in Sec. 3 and SE. ¼ NE. ¼ and NW. ¼ SE. ¼ and lots 5 and 6, in Sec. 5—and lots 3 and 4 and SE. ¼ NW. ½, and S. ½ NE. ¼ Sec. 7, all in T. 109 N.. R. 45 W., also SW. ¼ SW. ¼ and lot 4 in Sec. 35, T. 110 N., R. 45 W., 5th P. M., in same district; said relinquishment being in favor of certain parties therein named and alleged to be actual settlers thereon.

The act of June 22, 1874 (18 Stat., 194) provides as follows:

That in the adjustment of all railroad grants, whether made directly to any railroad company or to any State for railroad purposes, if any of the lands granted be found in the possession of an actual settler whose entry or filing has been allowed under the pre-emption or homestead laws of the United States subsequent to the time at which, by the decision of the land office, the right of said railroad was declared to have attached to said lands, the grantees, upon a proper relinquishment of the lands so entered or filed for, shall be entitled to select an equal quantity of other lands, in lieu thereof, from any of the public lands, not mineral and within the limits of the grant, not otherwise appropriated at the date of selection, to which they shall receive title the same as though originally granted. And any such entries and filings thus relieved from conflict may be perfected into complete title as if such lands had not been granted: *Provided*, That nothing herein contained shall in any manner be so construed as to enlarge or extend any grant to any such railroad or to extend to any

lands reserved in any land grant made for railroad purposes: *And provided further*, That this act shall not be construed so as in any manner to confirm or legalize any decision or ruling of the Interior Department under which lands have been certified to any railroad company when such lands have been entered by a pre-emption or homestead settler after the location of the line of the road and prior to the notice to the local land office of the withdrawal of such lands from market.

On March 19, 1886, August Jahnke made application to make timber culture entry for E. ½ SW. ¼ and W. ½ SE. ¼ Sec. 30, T. 106 N., R. 38, and on the same day Adolph Grams made application to make homestead entry for E. ½ SE. ¼ of said Sec. 30, which applications were refused by the local officers, and in regard to these applications you say in said letter of January 20, 1887—

Should the railroad selections be canceled, and the parties named at that time be found in possession of the lands, no adverse claims existing, I see no reason why they may not be permitted to make the entries applied for though they have acquired no right to the tracts by virtue of the presentation of their applications at a time when the lands were not subject to entry.

The lands relinquished are not within the *granted* limits of the grant to said road but are within the indemnity limits only, and they had never made selection of said lands in lieu of granted land sold by the United States or to which the rights of pre-emption had attached as specified in the grant, and the rights of the company could not attach to specific tracts within the indemnity limits prior to such selection. The said company, therefore, had no claim as against said relinquished tracts, such as contemplated in the act of June 22, 1874. Dubuque & Sioux City R. R. Co. (2 L. D., 542).

It does not even appear that the lands relinquished would be necessary to satisfy the grant to said company. Its right had not in any sense attached to said lands. Hastings & Dakota R. R. Co. (2 L. D., 527).

Unless the company was entitled to the lands relinquished there was no basis for the relinquishment and hence there could be none for the lieu selection. Whitcher *v.* Southern Pacific R. R. Co. (3 L. D., 459).

A railroad company is not authorized under the act of June 22, 1874, to relinquish unselected lands lying within the indemnity limits of the grant and select other lands in lieu thereof. St. Paul, M. & M. R. R. Co. (4 L. D., 127).

It is only when the lands relinquished are in such condition as to warrant a relinquishment that lieu selections thereof can be made under the act of June 22, 1874. Hastings & Dakota R. R. Co. (6 L. D., 716).

It is claimed by counsel for the railroad company in their argument both in the case at bar and in the case of the Chicago, Milwaukee & St. Paul R. R. Co., on appeal from the Commissioner's decision of October 1, 1886, and the argument in which is specially referred to and made part of the argument in this case, that because the local officers accepted the list containing the relinquishments and selections in 1877, and no objection was made thereto until your said letter of January 20, 1887,

the whole matter was definitely determined in 1877, and your office has now no jurisdiction to re-open and re-try the case. And further that having accepted the relinquishment and marked the same restored to the public domain on the plat and tract books the said action amounted to an approval of selections also. This does not follow; on the contrary in Peninsular R. R. Co. *v.* Carlton (2 L. D., 534) where the relinquishments specifically reserved the right to indemnity under the act of 1874, it was held that the relinquishment was unconditional.

In the Chicago, Milwaukee and St. Paul R. R. Co., case above referred to, which was decided by this Department on appeal July 9, 1888, the selections were not allowed.

Your said decision is accordingly affirmed.

ADDITIONAL HOMESTEAD ENTRY—ACT OF MARCH 2, 1889.

JOHN SCHNABELIN.

The right to apply for an additional entry under the act of March 2, 1889, may be treated as a preferred right, in the case of an application for amendment, covering tracts adjoining the land included in the original entry, and pending at the passage of said act.

Secretary Noble to Commissioner Stockslager, May 8, 1889.

I have considered the appeal of John Schnabelin, from your office decision of January 18, 1888, rejecting his application to so amend his homestead entry made September 20, 1887, for SW. ¼, SE. ¼, Sec. 24, T. 45 N., R. 6 E., as to include with the above land the SE. ¼, SE. ¼, Sec. 24, and NE. ¼, NE. ¼, section 25, same township and range, Del Norte, Colorado, land district.

With his application, which was made October 5, 1887, but two weeks after his said entry, applicant files an affidavit in which he sets forth, substantially, that at the time he made his said entry he was informed that the land which he now desires to have included in his entry was not vacant but was patented to or claimed by others and as the same was under fence and he had no official plat at command, he believed the same to be true and made entry for forty acres, but had he known as he now does that the eighty acres described in his present application were vacant he would gladly have availed himself of the opportunity to have included the same in his entry. He says further that he considers the homestead right one of great value and is reluctant to lose eighty acres of valuable land which he might have included in his original entry, and if he had known at the time of his entry that he could just as well have had eighty acres more, he would certainly have taken it. He says he used ordinary diligence and that any ordinary man would have believed the "current talk" that said land was already patented or occupied land. He further states that he is a German and that his means and his knowledge of English are both limited.

In the conclusion reached in your said decision I can not concur as the law now stands.

In section 5, of the act of March 2, 1889, it is provided:

That any homestead settler who has heretofore entered less than one-quarter section of land may enter other and additional land lying contiguous to the original entry, which shall not, with the land first entered and occupied exceed in the aggregate one hundred and sixty acres, without proof of residence upon and cultivation of the additional entry; and if final proof of settlement and cultivation had been made for the original entry, when the additional entry is made, then the patent shall issue without further proof:

Provided, That this section shall not apply to or for the benefit of any person who at the date of making application for entry hereunder does not own and occupy the lands covered by his original entry: and *provided*, that if the original entry shall fail for any reason prior to patent or should appear to be illegal or fraudulent, the additional entry shall not be permitted, or, if having been initiated, shall be canceled."

On March 5, 1889, a circular was promulgated by you and approved by the Department providing for the carrying into effect of said act.

The entryman will, therefore, be allowed the preference right for ninety days after notice of this decision to make application for the said land under section five of said act in the manner prescribed in said circular.

Your decision is modified accordingly.

FINAL PROOF PROCEEDINGS—PROOF OF NON-ALIENATION.

WENZEL PAOURS.

Proof of non-alienation between the date of making final proof and the issuance of certificate should not be required, if such proof was sufficient when made, and the claimant had at that time duly complied with the requirements of the law.

A defect in final proof, caused by the substitution of a witness, may be cured by new publication, and the proof accepted as made in the absence of protest.

First Assistant Secretary Chandler to Commissioner Stockslager, May 8, 1889.

I have considered the appeal of Wenzel Paours from the decision of your office dated February 6, 1889, requiring new proof and new publication in support of his pre-emption cash entry No. 10777 of the SW. ¼ of Sec. 21, T. 156 N., R. 58 W., Grand Forks, Dakota, land district.

The record shows that on August 13, 1884, the register gave notice of claimants intention to make final proof in support of his claim before J. H. McCullough, a notary public at Park River, in said Territory on October 3, 1884. On the day, and before the officer designated, came the claimant and one of the witnesses named in the notice. The others being absent a witness not named in the notice was substituted. The proof shows that the claimant was duly qualified; that the land was subject to settlement and entry, and that the claimant had complied with the requirements of the pre-emption laws and the regula

tions thereunder relative to inhabitancy and improvement. The local officers accepted the proof, received payment, and issued final certificate for the land.

On May 10, 1887, your office suspended said entry for the reason that one of the witnesses was not named in the published notice, and claimant was required to make new publication and furnish "new testimony by one of the witnesses named in the new notice to cover such defective testimony."

On June 18, 1888, the register gave new notice of claimant's intention to make final proof in support of his claim, giving the names of the witnesses upon whose testimony said entry was allowed.

On September 3, 1888, the local officers transmitted proof of new publication, and also their certificate that no protest was filed together with the corroborated affidavit of the claimant that he continued to reside upon the land up to the date of his entry. On February 6, 1889, your office refused to accept the proof for the reason that the claimant did not furnish any new testimony that he had not alienated said land prior to the date of entry.

The final proof was taken on October 3, 1884, and the final certificate was issued on October 27th same year. The claimant's final proof shows that he had not "made any agreement or contract, in any way or manner, with any person or persons," to convey said land or any part thereof to any other person, and in the absence of any indication of bad faith, in my judgment the proof of non-alienation is sufficient. Again, this technical defect in substituting the witness has been cured by the new publication, and the claimant should not now be put to the unnecessary expense of making new proof and new publication.

In the case of Amos E. Smith (8 L. D., 204) the Department held that the claimant must make re-publication, where the name of one of the witnesses was not properly designated in the published notice; and that after re-publication, if there is no protest, the proof already made may be accepted. In the case before me there have been two publications and no protest or adverse claim was filed. In my judgment the irregularity in the substitution of said witness may very properly be considered as cured by the subsequent publication of the names of the witnesses whose testimony was accepted by the local officers.

It is the policy of the government as between it and the entryman to deal justly and equitably where the facts disclose an honest effort to comply with the law and the rules and regulations of the Department, and if it is to operate harshly with him, where no one is prejudiced, to give literal construction thereto and technically enforce the rules, the equity side of the Department will be invoked, and the cold rule of the law forced to yield its grasp to substantial justice and equitable principles. Mere irregularities, not affecting the substantial rights of either the government or the entryman, ought not to intervene, making him

unnecessary expense merely to observe the forms of the law. The government with a lavish hand has placed the public domain within the reach of its citizens. Has invited them to partake of its bounty. Given them certain rules of law and practice to be observed, and when substantially followed, the spirit of the law is satisfied, and a mere irregularity, which is prejudicial to none, will not be permitted to block the entryman's pathway, strew it with difficulties and formal objections, to the loss of his rights and the cancellation of his entry.

Therefore the decision of your office is accordingly modified, and said entry will be approved for patent.

PRACTICE—NOTICE OF CANCELLATION.

JOHNSON *v.* MILLER.

Notice of cancellation to the successful contestant is not sufficient if sent through the mail by unregistered letter.

First Assistant Secretary Chandler to Commissioner Stockslager, May 8, 1889.

August 17, 1885, Samuel C. Johnson, filed an affidavit of contest against the timber culture entry of John W. Neff, for the SW.¼ of Section 8, T. 16 S., R. 26 W., Wa Keeney, Kansas, upon which hearing was ordered and had October 15, 1885. Neff did not appear; the contestant submitted testimony, and, February 11, 1886, the local officers recommended the cancellation of the entry. Neff was notified of their decision and did not appeal. The papers in the case were forwarded to your office in accordance with the rules. Before the case was reached by you for consideration viz: On March 9, 1886, Neff filed a relinquishment of his entry in the local office and on April 2, following, James L. Miller made timber culture entry of the tract in controversy. June 17, 1886, Johnson applied to enter the said tract under the timber culture law but his application was rejected by the local officers because of the prior entry of Miller. Johnson appealed and filed affidavits setting forth that he had not been notified by the local officers of the cancellation of Neff's entry; that as soon as he learned of it he presented his application and that the rejection of the same deprived him of his preference right to enter said land as successful contestant.

By letter of July 21, 1887, the local officers were called upon for a report as to the manner in which the contestant, Johnson, was notified of the cancellation of Neff's entry; and in reply they stated "that notice was served on said Johnson by mail, letter not registered, and sent to the post office given on our docket viz: Utica, Kansas."

By letter of August 29, 1887, you sustained the appeal of Johnson and held that he was entitled to a right, superior to that of Miller, to enter said land for two reasons: 1. Because when he instituted contest

against the entry of Neff he, at the same time, filed application to enter the tract under the timber culture law, and a legal application to enter is, while pending, equivalent to actual entry, so far as the applicant's rights are concerned, and withdraws the land embraced therein from any other disposition, until final action thereon—Pfaff *v.* Williams *et al.*, 4 L. D., 455—, and 2. Because the right of the successful contestant was not defeated by the failure of the local officers to give him proper notice of the cancellation of Neff's entry. You allowed Miller's entry to stand subject to Johnson's right.

Johnson was notified of your said office decision and on September 29, 1887, perfected entry of the tract; and upon being advised of the fact, by letter of November 10, 1887, you held Miller's entry for cancellation.

From your said decision Miller appealed. The decision appealed from carried into effect the decision of August 29, 1887, and upon a review of the whole record I see no reason to disturb the judgments rendered by you. The application to enter the tract in controversy which, you state, was made by Johnson when he instituted the contest is not in the record before me so that I am unable to say whether it was a "legal application and within the ruling made in the case of Pfaff *v.* Williams, *supra;* but there is no doubt that the second reason given for your decision of August 29, 1887, is a sufficient one. The relinquishment made by Neff must be regarded as resulting from the contest brought by Johnson and the latter was consequently entitled to notice of the cancellation that was the result of it. Rule 17 provides:

Notice of interlocutory motions, proceedings, orders, and decisions shall be in writing, and may be served personally or by registered letter through the mail to the last known address of the party.

In this case it appears from the statement of the local officers that notice of the cancellation of Neff's entry was sent to Johnson by a letter which was not registered, which was not sufficient notice under said rule. English *v.* Noteboom (7 L. D., 335); Churchill *v.* Seeley (4 L. D., 589).

Your decision is, therefore, affirmed.

TIMBER CULTURE ENTRY—PRELIMINARY AFFIDAVIT.

GRIFFITH W. MCMILLAN.

The execution of the preliminary affidavit outside of the State wherein the land is situated renders the entry voidable; but such defect may be cured, where good faith appears and no adverse claim exists, by amendment which will relate back to the date of the original entry.

Secretary Noble to Commissioner Stockslager, May 8, 1889.

I have considered the case of Griffith W. McMillan on his appeal from your office decision of January 25, 1887, holding for cancellation his timber culture entry made June 26, 1886, for SE. $\frac{1}{4}$, Sec. 24, T. 10 S., R. 43 W., Denver, Colorado, land district.

It appears from the record that this and some other timber culture entries were held for cancellation by your said office letter "P", of January 25, 1887, upon the report of a special agent that the entrymen had "executed the affidavits accompanying their applications, outside the State, knowing such action to be illegal."

In your said decision McMillan was allowed sixty days to apply for a hearing to show cause why his entry should not be canceled, and on June 10, 1887, he filed his own affidavit stating substantially that he had made the entry in good faith with the intention of cultivating said land in forest trees, and that he has since plowed seven acres upon the said tract for that purpose.

He says he does not desire a hearing but admits the fact that he made the affidavit accompanying his application to enter while outside of the State of Colorado, but protests that he was not then aware that he was committing any irregularity or that his application would be thereby rendered illegal, and asks that he be allowed to make new entry for the same tract in lieu of the entry held to be erroneous, which first entry he says he "voluntarily relinquishes," and in said affidavit he prays that the said decision be reconsidered by your office.

Upon the receipt of such affidavit and petition your office by letter "P", of April 11, 1888, said,—

I am of the opinion that the defects in this case cannot be cured by filing supplemental affidavits, and also that as the illegality is one which was entirely within the power of the entryman to prevent, a new entry of the tract is precluded. Upon claimant's admission of the facts I, therefore, adhere to office decision of January 25, 1887.

In Ferguson *v.* Hoff (4 L. D., 491) in which case it was alleged by the contestant that "Hoff effected said entry by fraud, in this he was not in the Territory at the time of making said timber culture affidavit, but it was made out by a notary public, located at Cavour, Dakota, while he was in the State of Minnesota; that said tract was not entered as required by law."

The contest in said Hoff case was instituted April 20, 1883, hearing thereon was set for March 20, 1884, and continued until May 21, 1884, for the purpose of service. On May 5, 1884, Hoff filed in the local office his application to be allowed to make another entry of the same tract. He also makes affidavit to the fact of his ignorance of the requirement that the affidavit should be made within the district in which the land is situated, and of his good faith and subsequent cultivation of the tract to timber as in the case at bar.

It was said by this Department on appeal that "the only serious question involved is, whether the contestant had acquired such a right as would bar the entryman's application to make a new entry."

As the record in said cause did not show notice of the contest to have been legally given to Hoff prior to his application to amend, amendment was allowed.

In Lewis Holmes (6 L. D., 762) it was held that—

The execution of the application and preliminary affidavit outside of the Territory in which the land is situated rendered a timber culture entry voidable, but not void, and when good faith appears, the applicant may be permitted in the absence of an adverse claim, to file a new application and affidavit executed according to law.

See also Albert D. Boal (7 L. D., 50).

The entryman appears to have been acting in good faith and to have made the affidavit in ignorance of the requirements of the law, and there is no adverse claimant. He may be allowed to amend his entry in accordance with the new papers dated June 10, 1887, and said amendment will relate back to the date of his original entry.

Your said decision is accordingly reversed.

SCHOOL SELECTIONS—ACT OF JULY 23, 1866.

DELANEY *v.* WATTS ET AL. AND MILLER *v.* SILVA.

Section one of the act of July 23, 1866, confirmed irregular school selections for lands that had been, prior to the passage of said act, and in the absence of adverse claims, sold by the State to purchasers in good faith.

The title acquired to land by a valid school selection will not be impaired in the hands of the State's grantee by a subsequent duplication of the basis used for such selection.

Secretary Noble to Commissioner Stockslager, May 8, 1889.

I have considered the consolidated cases of Delaney *v.* Watts and Miller *v.* Silva, on appeals of the several defendants from your office decision of January 20, 1888, involving the title to lots 1, 2, 3, 4, 5 and 6, and S. ½, NE. ¼ and E. ½, SW. ¼, Sec. 25, and lots 1, 2, 3 and SE. ¼, NE. ¼, and NE. ¼, SW. ¼, Sec. 26, T. 3, R. 13 E., M. D. M., Stockton, California, land district.

It appears from the record that on June 22, 1861, Duncan Beaumont locating agent of the State, filed in the local office at Stockton, California, a list of selections in lieu of school lands being all of Sec. 16, T. 2, S., R. 10 E., in said land district, lost to the State by reason of being included in a grant known as the Thompson Ranch which had been patented to the claimant by the United States, May 18, 1858.

Among other selections included in said list were the tracts above described.

Samuel Miller purchased from the State of California, lots 1 and 2, of said Sec. 25, and lots 1 and 2, and SE. ¼ NE. ¼, NW. ¼ SE. ¼, and NE. ¼ SW. ¼, of said Sec. 26, his application to purchase the same having been made under the State law on May 8, 1861, and made his first payment to the State March 18, 1862, and on November 20, 1868, he paid for said land in full, as shown by a certified copy of his certificate of purchase.

In a similar manner one Calvin Cooke, made application to the State

locating agent on May 8, 1861, to purchase lots 3, 4, 5, and 6, and S. ½ NE. ¼, and E. ½ SW. ¼, Sec. 25, and lot 3, in said Sec. 26, which was included in the same list of selections as the land purchased by Miller.

Cooke bought this land from the State on said application and he and his grantees have ever since paid to the State the interest accruing on the unpaid portion of the purchase price.

On November 28, 1868, said Calvin W. Cooke conveyed the land above described to the claimant P. H. Delaney by deed.

That ever since about the time of their purchasing said lands from the State the said Miller and Cooke and their grantees have had open, notorious and exclusive possession of said land, occupying, fencing, cultivating and using the same as their own, except that recently the appellants or some of them, have taken possession of a portion thereof under the claim that they are public lands of the United States and as such subject to settlement under the homestead and pre-emption laws.

John Watts, Nicanor Watts, and Frank A. Silva, made applications to make homestead entry of certain tracts including in whole or in part, the lands in controversy, and on June 26, 1884, your office decided to admit their applications which was accordingly done at the local office, July 7, 1884.

On appeal by the State it was held by this Department by letter of July 22, 1885, that the proceedings of your office in regard to the cancellation of the State's selections were *ex parte* and had without notice to the State, and a hearing was ordered thereon.

At this hearing in addition to the facts already recited it appears that after the State locating agent had made his selections by list, date June 22, 1861, and based upon the loss of said section 16, T. 2 S., R. 10 E., some person by erasure changed the original application made to the locating agent and by him filed in the office of the State surveyor general, by drawing a pen through and writing over the description of the base in lieu of which the land in said list had been selected, so that the same now reads, "E. ½ Sec. 36, T. 12 S., R. 34 E., Reserved for Indians," instead of "E. ½ Sec. 16, T. 2 S., R. 10 E., on the Thompson Grant."

The original list, however, filed June 22, 1861, and which is before me, was not changed and nothing appears upon the books of either the general or local land office to indicate that any change of basis was ever made or attempted.

It further appears that in preparing the said list of selections dated June 22, 1861, the State locating agent used a blank prepared for use in selecting lands under the act of September 4, 1841, but said list was accepted by the local officers as properly made. However, your office by letter of July 3, 1862, notified the local officers that on account of the wrong form having been used, said selection "will be canceled," but the records do not show that any notice of said letter was given to the State or its grantees, and no final action was taken by your office until February 16, 1884, when the local office was notified of the cancellation of

said selections, because of the rejection of the list and because the bases of the selections had been used in making other selections which had been approved to the State, but it does not appear that this decision ever reached the local office or that any notice thereof was given the State or its grantees.

On June 23, 1884, this decision was declared final for want of appeal, but this last letter coming to the notice of the claimants under the State, appeal was taken and this Department ordered the hearing before mentioned.

It also appears that on June 1, 1872, Secretary Delano approved a list of indemnity selections among which appears indemnity for W. ½ Sec. 16, T. 2 S., R. 10 E., that the lands selected as indemnity therefor have long since been patented to the parties who purchased the same from the State, but in the view I take of the case at bar, this fact is wholly immaterial, and I am constrained to take that view of the case from the conclusion which I have reached, viz: if the selection made by the State agent in the list dated June 22, 1861, was a valid selection, and the State about the same time sold the land so selected, then no subsequent errors or duplication of base could in the least invalidate the titles of the State's grantees and such duplication as between the government and the State must be arranged upon the final adjustment of the grants of school lands made to the State.

After the hearing ordered by this Department upon the appeal aforesaid, your office by letter "C" of January 20, 1888, decided in favor of Miller and Delaney, grantees of the State, and the applicants for homestead entry appeal.

After a careful examination of the record, which is voluminous, I have concluded that as the basis of the said selections, viz, Sec. 16, T. 2 S., R. 10 E., was a good basis at the time the original list was filed, June 22, 1861, and as it does not appear that the State or its grantees had notice of the objection of your office to the blank or form used, and as said lands were purchased in good faith by the grantees of the State prior to the passage of the act of July 23, 1866 (14 Stat., 218), and as no adverse pre-emption, homestead or other right had attached at that date, the title to said land was quieted and confirmed by the first section of said act.

Your said decision "that the selections were a bar to homestead appropriation of lands covered thereby, and therefore the selections are hereby held for re-instatement and the entries of the homesteaders for cancellation," is affirmed. See Elias Rowe (7 L. D., 397).

PLATT ET AL *v.* GRAHAM.

Motion for review of departmental decision of August 22, 1888 (7 L. D., 249) denied by Secretary Noble, May 8, 1889.

FINAL PROOF PROCEEDINGS--EQUITABLE ADJUDICATION.

SYLVESTER GARDNER.

In publishing notice of intention to make final proof it is the fault of the register if the proper officer, before whom such proof will be taken, is not designated therein.

An entry allowed on final proof taken before an officer not authorized by the statute or regulations to take such proof, may be referred to the Board of Equitable Adjudication, if the proof is in other respects regular, and shows due compliance with law.

The case of Eden Merryman cited and followed.

First-Assistant Secretary Chandler to Commissioner Stockslager, May 9, 1889.

I have considered the case of the United States *v.* Sylvester Gardner, as presented by the appeal of the latter from the decision of your office dated February 27, 1889.

The record shows that said Gardner, on July 16, 1886, made homestead entry of the E. ½ of the SW. ¼, the NW. ¼ of the SE¼ and the SW. ¼ of the NE. ½ of Sec. 15, T. 23 south, of range No. 13 east, Mount Diablo Meridian, San Francisco, California land district.

On January 11, 1887, the register of said office gave notice by publication of claimant's intention to make final proof in support of his claim before the superior judge of Monterey county in said State, at the county seat, on Thursday, March 1, 1887. The final proof was made before the judge of said court on the day and at the place advertised, and shows that the claimant was duly qualified to make homestead entry; that the land was subject to settlement and entry at the date thereof; that the claimant had complied with the requirements of the law and the regulations thereunder relative to residence, cultivation and improvement, the latter being valued at $650. It was also shown by the certificate of the officer before whom the proof was taken, that no protest or objection of any kind against said proof had been filed by any person. The local officers certify that they carefully examined said proof and approved the same. They therefore accepted payment and issued final certificate for the land. Your office, on February 27, 1889, rejected said proof, "for the reason that it was advertised to be taken before a superior judge, an officer not authorized to take commuted proof, and was taken before said officer," citing circular of March 30, 1886. (4 L. D. 473).

On April 3, 1889 claimant by his attorney, filed in your office a motion for review of said decision for the reason that under the ruling of the department in the case of Eden Merryman (8 L. D., 406) said entry should be referred to the Board of Equitable Adjudication for its consideration. On April 11, 1889, your office refused said motion for the reason that "all the points raised by said motion were carefully considered before the above decision was rendered, but this office did not feel

warranted in submitting these cases to the Board of Equitable Adjudication, the proof in each case being both *advertised* and *taken* before an officer not authorized to take the same."

Counsel for appellant insists that under the ruling in the Merryman case (*supra*) the entry should be referred to said Board.

The second section of the circular of March 30, 1886 (*supra*) provides that "such final proof shall be taken only before the following officers: the register or receiver of the proper land district, or the clerk of the county court, or of any court of record of the county and State, or district and Territory in which the land is situated, or before such clerk in some adjacent county, in case the land lies in an unorganized county." The third section of the circular provides that where notices of intention shall have been given under the former practice prior to the promulgation of said circular, the cases shall not be affected by said regulations.

The act of Congress approved June 9, 1880 (21 Stat. 169), provides

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.

By act of Congress approved March 3, 1877 (19 Stat. 403), it is provided that proof required in homestead entries (Sec. 2291 R. S.),

May be made before the judge, or in his absence, before the clerk of any court of record of the county and state, or district and Territory in which the lands are situated, etc.

The act of Congress approved March 3, 1879 (20 Stat., 472), provides that claimants under the pre-emption and homestead laws,

Shall file with the register of the proper land office a notice of his or her intention to make such proof. . . . . Upon the filing of such notice the register shall publish a notice that such application has been made, etc.

It thus appears that by said act the register is charged with the duty of making publication of claimant's intention to make final proof, and, if he fails to designate the proper officer, it is the fault of the officer and not of the claimant.

In the Merryman case (*supra*) your office rejected claimaint's commutation proof for the reason that it was taken before the judge of the superior court of Fresno county, whereas it was advertised to be taken before the clerk of the superior court of said county. But Mr. Secretary Vilas, modified the ruling of your office, and directed the entry to be referred to the Board of Equitable Adjudication, for the reason that the proof being satisfactory as to residence and improvement, the irregularity not being material, and there being no adverse claim, it would be a serious hardship to require the claimant to make new proof. There does not seem to be any good reason, in my judgment, why the principle enunciated in the Merryman case should not be applied to the case at

bar. The final proof shows compliance with the requirement of the law and regulations as to inhabitancy, cultivation and improvement; there is no adverse claim, and the proof was made on the day, and before the officer named in the advertisement.

The local officers having accepted the proof and payment for the land, and there being no indication of bad faith on the part of the claimant, in my opinion new proof should not be required, but the entry should be submitted to the Board of Equitable Adjudication for consideration. Let such reference be made.

The decision of your office is modified accordingly.

PRACTICE—CERTIORARI—TRANSFEREE—APPEAL.

PETER O. SATRUM.

Certiorari will not lie where the petitioner has not suffered any material injury, or where he fails to show error in the decision complained of.

A transferee, with notice of a decision adverse to the entryman, is required to file his appeal within the time prescribed by the rules of practice.

Secretary Noble to Commissioner Stockslager, May 9, 1889.

George L. Beckett, as attorney for Peter O. Satrum, has filed an application praying that the record in the case of Peter O. Satrum, involving his cash entry for the SE.$\frac{1}{4}$ of Sec. 2, T. 110 N., R. 68 W., Huron, Dakota, be certified to the Secretary under Rules 83 and 84 of Practice, upon the grounds contained in the affidavit of said George L. Beckett, attached to said application.

Said affidavit is substantially as follows: to wit, that he (Beckett) is the attorney of said Satrum, and was engaged by one Peter Nash, the present owner of said tract, to take steps to have the entry relieved from suspension; that he at once took active steps to ascertain the address of Peter O. Satrum, with a view of taking action in the same, and that as soon as he was informed of the address he received authority to act and so did, by appealing the case to the Secretary of the Interior; that he could not have filed said appeal sooner than August 30, 1887, and that he used his utmost endeavor to have the same filed within the time required by the departmental rules.

This is the sole ground upon which his application is based. He does not attach a copy of the decision, or state upon what ground the entry is held for cancellation, or allege any ground of error in said decision.

A certiorari will not lie where the petitioner has not suffered any material injury, or wherein the petitioner fails to show error in the decision complained of. Northern Pac. R. R. Co. *v.* Schoebe (3 L. D., 183); Henry J. Redmond (4 L. D., 559).

Besides it does not appear that the transferee did not have notice of said decision, and as he was entitled as transferee to appeal from said

decision, and to defend in the name of the entryman and show that he complied with the law,—he was also required to file his appeal within the time prescribed by the rules.

This application is denied, and the papers are herewith returned. But you will notify the party that if an application is presented, accompanied by the decision of the Commissioner, clearly setting forth the errors complained of, and showing that the transferee did not have notice of the decision, it will be considered.

FINAL PROOF PROCEEDINGS—TRANSFEREE—EQUITABLE ADJUDICATION.

CHARLES LEHMAN.

If the pre-emptor has in fact complied with the law up to the time of making proof, and can, at that time, truthfully make the requisite final affidavit, a sale thereafter, without such affidavit having been made, and prior to the issuance of final certificate, will not of necessity defeat the right to a patent.

Equitable consideration will be given to evidence that may be submitted by a transferee, where the testimony of the entryman can not be secured, showing that the entryman had complied with the law during the time covered by his final proof, and had not prior to the submission thereof, disqualified himself for the execution of the necessary proof of non-alienation.

First Assistant Secretary Chandler to Commissioner Stockslager, May 9, 1889.

In the matter of the pre-emption cash entry made by William W. De Witt for the S. ½ of NE. ¼ and lots No. 2 and 3 Sec. 1 T. 14 N., R. 17 E., Helena land district Montana, appealed by Charles Lehman from the decision of your office dated February 15, 1888, in which the decision of your office of March 21, 1887, holding said entry for cancellation is adhered to, the record discloses the following material facts affecting the questions involved.

October 20, 1883, De Witt filed his declaratory statement for the land above described, alleging settlement thereon September 1st, same year, and subsequently he gave due notice of his intention to make final proof in support of his claim before Edward Brassey a notary public in and for Meagher county, Montana at Brassey in said county on April 14, 1884. The testimony of his two witnesses was taken at the time and place, and before the officer named in said notice, but his own testimony was taken before the register of the land office at Helena Montana on April 21, 1884. The testimony so taken, if true, shows De Witt to be a single man forty-six years of age, a native born citizen of the United States, a qualified pre-emptor, and that he had resided continuously on the described tract of land from September 1, 1883, up to the date of making proof in April 1884. It further shows, if true, that there were improvements on the land at the time De Witt settled

thereon owned by one Thomas E. Pounds, and that De Witt purchased the same; that the improvements on the land at the date proof was made consisted of a store and dwelling, blacksmith-shop, stable, corral, granary, irrigating ditch and fencing—all valued by De Witt's two witnesses at seven thousand dollars; and that about five acres of ground had been broken and cultivated. De Witt in his testimony says:—"I am now breaking ten acres to be sown in oats, wheat and vegetables." The non-mineral affidavit made by De Witt described the land entered as the "N. ½" of the NE. ¼ instead of the "S. ½" of the NE. ¼ of said section 1. The final affidavit required of pre-emptors by section 2262 Revised Statutes was not made by De Witt. Said section provides, among other things as follows:

Before any person claiming the benefit of this chapter is allowed to enter lands, he shall make oath that he has never had the benefit of any right of pre-emption under section 2259; that he is not the owner of three hundred and twenty acres of land in any State or Territory; that he has not settled upon and improved such land to sell the same on speculation, but in good faith to appropriate it to his own exclusive use; and that he has not, directly or indirectly made any agreement or contract, in any way or manner, with any person whatever, by which the title which he might acquire from the government of the United States should inure in whole or in part to the benefit of any person except himself.

The same day De Witt's testimony was given in support of his claim, to wit, April 21, 1884, he deeded the described tract of land to the appellant, Charles Lehman, as appears from a certified copy of said deed marked by appellant "Exhibit A" and sworn to by him to be "a correct copy of the deed executed by the said De Witt to affiant with the endorsements thereon. This instrument appears to have been signed, sealed and delivered in the presence of Harvey R. Comly, and to have been duly recorded April 24, 1884; and afterwards, to wit April 21, 1886, to have been duly acknowledged before Harvey R. Comly notary public etc. The consideration expressed in said instrument is eight hundred dollars. Nearly two months after said deed was executed and recorded as stated, to wit, on June 18, 1884, the register and receiver of the local office, on the proof made as aforesaid and in the absence of said final preemption affidavit, permitted De Witt to make pre-emption cash entry for said tract of land.

By letter "G" of October 21, 1886, De Witt's entry was suspended by your office and he was required to give a new notice of his intention to make pre-emption proof, but in the absence of protest or objection to his entry, the local officers were directed to allow him to supplement the proof already made with the necessary non-mineral and pre-emption affidavit.

On December 21, 1886, Charles Lehman made affidavit that he had purchased from De Witt the land entered by him;

That during the last two weeks while absent from home, he first became acquainted with the suspension of said entry and immediately took the necessary steps to secure the compliance of his said grantor with the instructions of the Hon. Commissioner's letter "G" dated October 21, 1886, but that the said De Witt designing as affiant be-

lieves to defraud him refuses to take any steps in the matter, or to make the necessary proofs; that the annexed "Exhibit A" is a correct copy of the deed executed by the said De Witt to affiant together with the endorsements thereon; that ever since the execution of the said deed affiant has been in possession of said described tract of land and has not alienated the same, and has erected improvements thereon amounting to the sum of twenty thousand dollars.

Based upon this affidavit Lehman preferred a request to the local officers to be allowed to give and furnish the required notice and proof which request was granted, and thereupon notice was given by the register that final proof would be made in support of De Witt's said pre-emption at Helena Montana on February 10, 1887—"proof to be made by Charles Lehman as successor in interest." In pursuance of this notice the required non-mineral affidavit was duly made by Lehman, and the affidavit required of the pre-emption claimant was also duly sworn to by him "to the best knowledge and belief of affiant." In relation to this notice and proof the register certified "that no protest or adverse claim was filed during the period of publication nor upon the day set for making proof."

By office letter "G" of March 21, 1887, the local officers were advised "that the supplemental proof made by the assignee cannot be accepted," and De Witt's pre-emption cash entry was held by said office letter for cancellation. A reconsideration of this decision, it seems, was asked by Lehman, "and that a patent issue to De Witt on the proofs presented or, if that is incompatible with the law and practice of the Department, that he (Lehman) may be permitted to make such other proof as will show De Witt's compliance with the law up to the date of entry."

S. W. Langhorn, register of the land office at Helena, Montana in a letter to Commissioner Sparks dated July 13, 1887, earnestly seconds this request and says that it is preferred by Lehman "in the hopes that some way may be devised by which patent may issue on the entry and thereby save him (Lehman) irreparable loss." He further says, "that the proof made by De Witt in the first instance was made as directed by the then register of the land office, he holding that the testimony of claimant must be made before the register and receiver . . . . as the final affidavit could not be executed before a notary public, ... and that the omission of the signature to the final affidavit was a clerical mistake or oversight on the part of the officer taking proof for which the claimant should not be held responsible." The register also transmitted in his said letter a report by special agent J. A. Gunn, in which he says, "I made a personal investigation of the land June 29, 1887, and I am certain there has been a strict compliance with the law on the part of the claimant. Some relief should be granted to Mr. Lehman.—He purchased the land in good faith from the claimant and he has since improved the property to the extent of twenty thousand dollars. I make this recommendation as a matter of justice toward an innocent purchaser." In your letter of February 15, 1888, to the register and

receiver you say,—"While Mr. Lehman appears to have acted in entire good faith on his part, yet I do not feel justified in reversing my decision and the same is adhered to."

The reason given for adhering to said former decision is that "the law and rules thereunder, allow the pre-emptor only (if living) to make publication of notice, or pre-emption affidavit."

From said decision Lehman appeals and the case is now before me for consideration.

I do not concur in the opinion above expressed that the law and the rules of the Department necessarily require, in all cases where the pre-emptor is living, that the notice of intention to make proof must be given and that proof must be made by the pre-emptor only.

De Witt's pre-emption cash entry, it appears was suspended October 21, 1886, two years and six months after he made the proof on which final certificate issued, and the same length of time after he had transferred his interest in the land entered to Lehman. Said entry still stands suspended. Sections 2450 to 2457 Revised Statutes, both inclusive, provide for the adjudication of suspended entries, by the Board of Equitable Adjudication—

> Upon principles of equity and justice, as recognized in courts of equity, . . . where the law has been substantially complied with and the error or informality arose from ignorance, accident, or mistake; and where the rights of no other claimant or pre-emptor are prejudiced, or where there is no adverse claim.

There is nothing appearing in this case which shows that Lehman has not equities which may be fully protected under the statute cited, and if he can satisfactorily establish the fact of such equities by showing the validity of De Witt's entry, it should not be canceled. He may be unable to procure the usual final pre-emption affidavit, and yet be able to satisfactorily show that De Witt settled upon said tract intending "in good faith to appropriate it to his own exclusive use," and not with the intention of selling the same on speculation; and that up to the time of making final proof he had not "directly or indirectly made any agreement or contract, in any way or manner, with any person whatever, by which the title which he might acquire from the government of the United States should inure in whole or in part to the benefit of any person except himself." These facts are peculiarly within the knowledge of the settler and his testimony in relation thereto is very desirable in all cases, but where it cannot be obtained, as in cases of death or insanity, other testimony of necessity is resorted to; and, in my opinion other testimony may be resorted to where the settler through perverseness and a desire to injure the real party in interest refuses to testify. No greater necessity exists in cases of death or insanity for allowing the facts which are usually shown by the entryman's final affidavit to be shown by other evidence, than exists in the case at bar if the allegations made by appellant be true. He should therefore, be allowed an opportunity to fully show the facts affecting the validity of

Sec. 2450-2457 R.S.

over

said entry and that De Witt refuses to testify in the case solely through ill will and a desire to defraud and injure him, and not because he could not have conscientiously made the usual affidavit on making final proof. It is clear that De Witt could not have made the statutory affidavit as of the date the entry was actually made, because nearly two months before that time he had sold the land to Lehman. But if he had in fact complied with the pre-emption law up to the time of making proof, and could truthfully have made the usual affidavit at that time, a sale subsequently made, though prior to the issuance of a final certificate of entry, would not of necessity defeat his right to a patent for the land. (Magalia Gold Mining Co. *v.* Ferguson (6 L. D. 218), and Orr *v.* Breach (7 L. D. 292).

Therefore if Lehman can satisfactorily show compliance in good faith with the pre-emption law by De Witt up to the time of final proof, and that the described tract is subject to entry, he should be permitted to do so notwithstanding he purchased De Witt's right to said land the same day proof was made, and nearly two months before final certificate issued.

There are facts, however, connected with this case which throw doubt not only upon De Witt's good faith, but on the good faith of Lehman, and on the question as to whether this land was not at the time of entry, and is not now, occupied for purposes of trade and business rather than for agricultural purposes. There should be, therefore, a hearing in this case before the local land officers; and it is desirable that a special agent of your office should be present at such hearing to the end that all questions affecting the validity of said entry may be thoroughly investigated. The following observations and inquiries seem to me proper in this connection

Only about five acres of the land embraced in this entry were broken and cultivated at the time final proof was made, and yet the testimony shows it was then worth seven thousand dollars, and, by implication, that general trade and business were carried on in the store and blacksmith shop situated thereon. How long was this land occupied by Pounds,—the man who sold to De Witt—and what business did he carry on while in possession? What was the character of his improvements, and their value? What improvements did De Witt make, and what business did he follow during the seven months he was in possession? What do the improvements of Lehman, valued at $20,000 consist of? And if De Witt settled on this land for agricultural purposes and with the *bona fide* intention of making it his home to the exclusion of a home elsewhere, how does Lehman explain the fact that suddenly and without any previous understanding or agreement De-Witt, on the very day he made final proof, sold his home worth seven thousand dollars, for eight hundred?

If practicable De Witt's presence should be secured as a witness at the hearing. If he in fact was sworn to the final pre-emption affida-

vit at the time he made proof, and the omission of his signature thereto "was a clerical mistake or oversight on the part of the officer taking proof," as stated by Mr. Langhorn, it is important that the fact be shown. Mr. Langhorn was not register at the time De Witt's final proof was made and probably has no personal knowledge that said omission was in fact a clerical mistake. Mr. E. Ballou was the officer who certified to De Witt's testimony, and he was at that time the receiver of said office but was superceded it seems between the times final proof and entry were made in this case. Z. T. Burton received payment for the land as appears from the receiver's receipt found in the record and dated June 18, 1884.

In accordance with the views above expressed, and to the end that the validity of said entry may be fully inquired into, you will, at appellant's request, cause a hearing to be had herein before the local land officers at any time within ninety days after the date appellant shall be notified of this decision, and the evidence, together with the opinion of the register and receiver, returned to your office.

The decision of your office is modified accordingly.

REPAYMENT—DESERT LAND ENTRY.

NAPHTALI INGLET.

A desert land entry allowed by the local office on insufficient evidence as to reclamation is an entry "erroneously allowed;" and if subsequently relinquished, on account of inability to show actual reclamation, repayment may be allowed in the absence of bad faith.

First Assistant Secretary Chandler to Commissioner Stockslager, May 11, 1889.

In the matter of the application of Naphtali Inglet, for the repayment of the purchase money paid by him on his desert land entry, for the E. ½ of NE. ¼ of Sec. 20, and the E. ½ of SE. ¼ of Sec. 17, T. 16 S., R. 39 E., Oxford land district, Idaho, before me on appeal from the decision of your office, dated June 11, 1888, the record shows the following facts:

November 10, 1883, Inglet offered such evidence of the reclamation of the described tract of land as satisfied the local land officers of his compliance with law, and thereupon he made final payment for said tract.

The evidence showed, that only fifty of the one hundred and sixty acres had been irrigated, and on January 6, 1888, you instructed the local officers to call on the entryman, "to make supplemental proof within sixty days, showing the reclamation of his entire tract, and the number, location and dimension of his lateral ditches."

February 18, 1888, said entry was canceled, on the following relin-

quishment duly signed and acknowledged by Inglet, to wit: "For the reason that I have failed to procure sufficient water to irrigate more than about seventy-five acres of my desert land claim of one hundred and sixty acres, and reclaim the same, I hereby relinquish to the United States all my right, title and claim to the within described land,"—describing the land entered.

In an affidavit, accompanying his application for repayment, appellant says, that there is a triangular shaped hill running through two forties of his entry and into a third forty, which is too high to be irrigated, and which covers twenty-five or thirty acres; "that he made his final proof after he had bought a water right, which he fully believed would be sufficient to water all of his claim, except said twenty-five or thirty acres," and that he owns enough water to irrigate and reclaim about seventy-five acres; that when recently notified, "that he must furnish water sufficient to irrigate and reclaim the whole of said land," and make proof of its reclamation, he "found that it would be impossible to do so at present," and therefore he relinquished his claim, etc.

Acting Commissioner Anderson, in denying the application, says:

> If Inglet had complied with the law under which he made his entry, the United States could and would have confirmed the same, but the laches were on the part of the claimant in not complying with the law. The law governing repayments does not provide for the return of the purchase money in such cases.

The second section of the act of June 16, 1880 (21 Stat., 287), provides for the repayment of purchase money, "where from any cause the entry has been erroneously allowed, and can not be confirmed." In this case the entry was erroneously allowed by the local officers on insufficient testimony. The entryman is chargeable with a degree of negligence in not securing water in sufficient quantity to reclaim the entire tract, but his negligence is not so gross as to amount to bad faith, or to warrant the inference of fraudulent intent. His final proof shows that at the time his entry was allowed he had conducted only a sufficient quantity of water on his claim to irrigate fifty acres. He testified that he was then the owner of a sufficient quantity of water to irrigate the entire tract, but in this it seems that he was mistaken, and when called upon over four years afterwards to show within sixty days that he had reclaimed his entire tract, he found it impracticable to do so, and consequently relinquished his claim. The presumption is, that he acted in good faith in attempting to reclaim this tract and he ought not to be required to perform impossibilities. If a portion of the tract is so elevated that it is impracticable to irrigate it or he, without his fault, is unable to obtain a sufficient supply of water to satisfy the law's demand, and for that reason surrenders his labor and improvements to the government, it is certainly an arbitrary rule which will not yield him his money. The government cannot afford to deal thus harshly and inequitably with the claimant, who has apparently put forth an honest effort to observe the law. His entry has been canceled and cannot now

be confirmed. The applicant, in my opinion, has brought himself within the statute. Repayment of the purchase money will therefore be allowed.

The decision of your office is accordingly reversed.

CONTEST PROCEEDINGS—COSTS.

PIKE *v.* THOMAS.

Proceedings initiated against an entry by one claiming a superior right to the land covered thereby are in the nature of a contest, and must be governed by the rules provided therefor.

In a contest the local officers may properly require a deposit to cover the cost of taking testimony.

First Assistant Secretary Chandler to Commissioner Stockslager, May 17, 1889.

I have considered the appeal of Genevieve Pike, as guardian of William C. Pike, an insane person, from your action of November 15, 1886, directing the register and receiver of Watertown, Dakota, to dismiss a hearing then pending before them, wherein the said Genevieve Pike, as guardian, etc., was the complainant, and David C. Thomas, homestead entryman, for the N. ½ of SW. ¼, and N. ½ of SE. ¼, Sec. 25, T. 117, R. 53, Watertown, Dakota, was defendant.

* * * * * * *

Pursuant to your office instructions, a hearing was commenced before the local officers November 11, 1886, at which the parties, their counsel and witnesses appeared. This hearing continued until the 13th, when it was adjourned over to the 16th, on which day it was resumed, and a demand made upon the said Genevieve Pike for a deposit sufficient to cover the expense of taking her testimony, in accordance with the rules of practice. She refused to comply with this demand, on the ground of her poverty and lack of means.

It also appears from the record that defendant tendered the local officers the funds wherewith to pay the expenses of taking his testimony and cross-examination. He also offered to loan Mrs. Pike an amount sufficient to cover the expenses of taking her testimony and that of her witnesses. This she declined to accept and claimant then asked that the hearing proceed.

November 15, 1886, the local officers telegraphed to your office, "in the hearing of Pike *versus* Thomas, ordered by letter of July 6th, the protestant Genevieve Pike refuses to pay or deposit for the expense of her testimony in the case, What course shall we pursue?" To this inquiry your office, on the same date, telegraphed as follows: "Dismiss contest of Genevieve Pike, unless deposit is made as required by rules of practice."

In accordance with this instruction, the case was dismissed, and from this action of dismissal Genevieve Pike appealed directly to the Department.

Although this proceeding is somewhat irregular, inasmuch, however, as the case is here it will be duly considered.

The facts in this case show that the proceedings initiated by Genevieve Pike were directly against the homesteader's entry and not against the proof offered in support of that entry. This is apparent from the notice, in which the grounds of contest are alleged to be that Thomas had already exhausted his homestead right by a prior entry, and that Pike had entered a timber claim on said land prior to the entry of Thomas. Besides, Mrs. Pike and her attorneys treated the proceedings as a contest, until she was asked to deposit the necessary expenses of taking her testimony.

It should also be observed that Special Agent Bevans was, at the request of Mrs. Pike's counsel, directed to investigate the entry of Thomas and report to your office the facts elicited. Mrs. Pike complained of Bevans's conduct in the case prior to the hearing, and Bevans was instructed to take no further part in the proceedings, unless summoned as a witness by either party. Mrs. Pike did not, therefore, appear as a witness for the government, but in support of her contest duly initiated, and anything Bevans did in the matter was at the request and suggestion of her counsel. The proceedings were clearly in the nature of a contest, and should be governed by the rules regulating contest cases.

Rule 54 of the rules of practice prescribes that, "parties contesting pre-emption, homestead, or timber culture entries, and claiming preference rights of entry under the second section of the act of May 14, 1880, must pay the costs of contest."

Rule 55 prescribes that, "in other contested cases each party must pay the costs of taking testimony upon his own direct and cross-examination."

And Rule 58 directs "that registers and receivers may require the party liable thereto to give security, in advance of trial, by deposit or otherwise, in a reasonable sum or sums, for payment of the costs of transcribing the testimony."

The question here presented is one *in limine*, and it is therefore not material to its determination to consider at this stage of the case the question as to Mrs. Pike's authority to act in behalf of her husband in the premises; for whether the contest was initiated by her in an individual or representative character, she was primarily amenable to the rule, and required to make the demanded deposit.

The action, therefore, of the register and receiver was authorized, and your decision is accordingly affirmed.

WYOMING SCHOOL LANDS—ACT OF AUGUST 9, 1888.

THOMAS F. TALBOT.

A settlement upon a school section, made prior to and existing at date of survey, excepts the land covered thereby from the operation of the school grant, and the State is entitled to select other land in lieu thereof so long as the claim of the settler exists; but if the settler subsequently abandons the land, before indemnity has been taken therefor, the title of the State attaches to the specific section as of the date of survey, and the right of the State to select land in lieu thereof is extinguished.

An act reserving land for school purposes in a Territory, so far as it affects the reservation of the land, has the same force and effect as a school grant to a State.

A purchase, after survey, of the possessory right and improvements of one who settled on school land prior to survey, does not carry with it any right to the land as against the grant.

The right of the Territory to have sections sixteen and thirty-six held in reservation is statutory, and the Secretary of the Interior is not authorized by the act of August 9, 1888, to recognize settlement claims therefor, acquired since survey, and require the Territory to select indemnity in lieu thereof.

The case of Nivens *v.* The State of California cited and distinguished.

Secretary Noble to Commissioner Stockslager, May 17, 1889.

This case comes before the Department upon the appeal of Thomas F. Talbot, from the decision of your office of December 16, 1887, affirming the action of the local office in rejecting his application to make homestead entry of lots 5, 6, 7 and 8, in Sec. 36, T. 14 N., R. 67 W., Cheyenne, Wyoming, for the reason that said lots are in a section reserved for school purposes by the act of July 25, 1868. (15 Stat., 178).

The fourteenth section of said act provided—

That sections numbered sixteen and thirty-six in each township in said Territory shall be, and the same are hereby reserved for the purpose of being applied to public schools in the State or States hereafter to be erected out of the same.

No provision was made by this act for the selection of other lands in lieu of such parts of sections sixteen and thirty-six settled upon at date of survey, but the sixteenth section of said act provides

That the Constitution and all laws of the United States which are not locally inapplicable, shall have the same force and effect within the said Territory of Wyoming as elsewhere within the United States.

At the date of this act, the act of February 26, 1859 (11 Stat., 358), providing for indemnity school selections applicable to all the States and Territories (except Washington Territory), was in force, which is as follows:—

Where settlements, with a view to pre-emption, have been made before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the pre-emption claim of such settler; and if they, or either of them, 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 appropriated in lieu of such as may be patented by pre-emptors.

The Territory of Wyoming was entitled to exercise the right of selection of other lands in lieu of school sections settled upon at date of survey under the provisions of that act until the act of August 9, 1888, (25 Stat., 393), entitled "An act to authorize the leasing of school and University lands in the Territory of Wyoming and for other purposes."

The sixth section of said act provides:

That where lands in the sixteenth and thirty-sixth sections, in the Territory of Wyoming, are found upon survey to be in the occupancy, and covered by the improvements of an actual pre-emption or homestead settler, or where either of them are fractional in quantity, in whole or in part, or wanting because the townships are fractional or have been or shall hereafter be reserved for public purposes, or found to be mineral in character, other lands may be selected by an agent appointed by the governor of the Territory in lieu thereof, from the surveyed public lands within the Territory not otherwise legally claimed or appropriated at the time of selection, in accordance with the principles of adjustment prescribed by section twenty-two hundred and seventy-six of the Revised Statutes of the United States, and upon a determination by the Interior Department that a portion of the smallest legal subdivision in a section numbered sixteen or thirty-six, in Wyoming, is mineral land, such smallest legal subdivision shall be excepted from the reservation for schools, and indemnity allowed for it in its entirety, any such subdivisions, or the portions of them remaining after segregation of the mineral lands or claims, shall be treated as other public lands of the United States.

From affidavits which are a part of the record in the case, it appears that one Nicholas Conlan settled on the tract in controversy about the year 1868, "with the intention of making it his home and acquiring title to the same under the land laws of the United States." One J. C. Abney filed pre-emption declaratory statement for the tract February 28, 1871, alleging settlement June 22, 1869; but he afterwards abandoned it, leaving it in possession of Conlan. The survey of this township was made September 9, 1870, and the plat of survey was received in the local office December 2, 1870. Conlan, having built a house, and plowed, fenced, and cultivated a garden, lived continuously upon the tract, with his family, from 1868 until 1873. Then, his health becoming very poor, he left for the east, selling all his right, title and interest on the tract and the improvements thereon to Talbot, the claimant in this case. Your office decision holds that "Conlan, by reason of his settlement prior to survey, was the only person who could secure title to said tract as against its reservation for school purposes, and he could not transfer his right to a third party."

There can be no question that the settlement of Abney or Conlan upon the tract in controversy, existing at the date of survey, excepted the lands from the reservation for school purposes created by the act of July 25, 1868, so far as it conflicted with their rights by virtue of settlement and occupancy at date of survey, and either Abney or Conlan as against the rights of the Territory, could have perfected a claim to the land under the homestead or pre-emption law under the act of February 26, 1859. But it is contended by counsel for claimant that, as the Territory has the right under the act of August 9, 1888, to select indemnity

for such portions of sections sixteen and thirty-six as are found upon survey to be in the occupancy and covered by the improvements of an actual pre-emption or homestead settler, the Secretary, under said act has the discretion and power to dispose of lands settled upon and improved at date of survey to actual settlers, whether the applicant was or was not the settler found in the occupancy of the land at date of survey, insisting that the provisions of the act of February 26, 1859, protecting the rights of settlers, are enlarged by the act of August 9, 1888.

The effect of the construction of the sixth section of the act of August 9, 1888, as contended for by counsel for claimant, is to deprive the Territory of all right to sections sixteen and thirty-six, or such portions thereof as may be found upon survey to be in the occupancy and covered by the improvements of an actual pre-emption or homestead settler; or in other words, that such settlement or occupancy at date of survey excepts said tracts from the operation of the reservation for all time and the Territory is required to select indemnity to be held in reservation in lieu thereof.

The act of March 2, 1853, (10 Stat., 172), establishing a territorial government for Washington Territory, and the general school indemnity act approved February 26, 1859, (11 Stat., 385), contain provisions similar to the sixth section of the act of August 9, 1888, providing for the leasing of school lands in Wyoming Territory; and while these several acts differ in phraseology, they all seem to have the same general object, to wit: to protect the inchoate right of a settler who went upon the land prior to survey without notice that the land settled upon was school lands.

The question as to the right of the Territory to sections sixteen and thirty-six when such sections were found at date of survey to be covered by settlement, and afterwards abandoned by such settler, came before the Department in the case of Thomas E. Watson on review (6 L. D., 71) involving the construction of the indemnity provision of the act of March 2, 1853, establishing a territorial government for Washington Territory. It was contended in that case that there is a difference between the act relating to Washington Territory (March 2, 1853), and the general act (February 26, 1859) relating to school lands in other Territories; and that while the rulings of the Department, that the settler upon unsurveyed land which upon survey is found to be a school section, is the only person who can defeat the reservation for school purposes, might be correct as a general rule, it was not applicable to Washington Territory; but the Secretary said—

While the act reserving the school sections in Washington Territory differs in phraseology from the general law relating to school lands in the other Territories, and provides for the manner and by whom other sections may be reserved in lieu of sections sixteen and thirty-six, where either of said sections may be occupied by actual settlers prior to survey, yet I think it is apparent that the main purpose and object of both acts is to protect the inchoate rights of a settler who went upon the land prior to survey and is found in possession at the date of survey, and not for the

benefit of a settler who went upon the land after survey with full knowledge of the fact that the settlement is made upon lands reserved to the Territory for school purposes.

The rights of a settler on school lands prior to survey are protected because his settlement is made without notice that the land settled upon and improved is within the specified sections, but a settler upon school lands after survey has full notice of the identical lands reserved, and there can be no reason or purpose in protecting such settlement against the reservation for school purposes.—(6 L. D., 74): John Johansen (5 L. D., 408).

A provision similar to that contained in the sixth section of the act relating to school lands in Wyoming Territory, is also found in the seventh section of the act of March 3, 1853 (10 Stat. 244), providing for selection of school lands by the State of California in lieu of lands occupied by settlers prior to survey, which is as follows:

That where any settlement by the erection of a dwelling house or the cultivation of any portion of the land shall be made upon the sixteenth and thirty-sixth sections, before the same shall be surveyed . . . other land shall be selected by the proper authorities of the State in lieu thereof.

The act of August 9, 1888, provides that "where lands in the sixteenth and thirty-sixth sections of Wyoming Territory are found upon survey to be in the occupancy and covered by the improvements of an actual pre-emption or homestead settler . . . . other lands *may* be selected . . . . in lieu thereof." Now if the object of this provision was to except absolutely from the reservation for school purposes lands so occupied and settled upon, and to subject them to disposal under the settlement laws upon the application of any settler—whether the applicant was or was not found in the occupancy at the date of survey—surely the seventh section of the act of March 3, 1853, relating to school lands in California, which provides "that where any settlement by the erection of a dwelling house or the cultivation of any portion of the land shall be made upon the sixteenth or thirty-sixth section before the same shall be surveyed . . . . other lands *shall* be selected by the proper authorities of the State in lieu thereof," will admit of the same construction. But the supreme court in the case of Water and Mining Company *v.* Bugbey (96 U. S., 165) construing this section say:

In Sherman *v.* Buick (93 U. S. 209), it was decided that the State of California took no title to sections sixteen and thirty-six, under the act of 1853, as against an a tual settler before the survey, claiming the benefit of the pre-emption laws, who perfected his claim by a patent from the United States. In such a case, the State must look for its indemnity to the provisions of section 7 of the act. As against all the world, except the pre-emption settler, the title of the United States passed to the State upon the completion of the surveys; and if the settler failed to assert his claim, or to make it good, the rights of the State became absolute. The language of the court is (p. 214): "These things (settlement and improvement under the law) being found to exist when the survey ascertained their location on a school section, the c'aim 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."

But while the court said that the claim of the State to that particular piece of land was at an end, and in lieu of it she had acquired the right to select other land, it clearly did not mean that the right of the State was absolutely extinguished, but only so far as it conflicted with the rights of the settler whose acts of settlement were made prior to and were existing at date of survey, because the court continuing says:

The settler, however, was under no obligation to assert his claim, and he having abandoned it, the title of the State became absolute as of May 19, 1866, when the surveys were completed.

So therefore the effect of a settlement upon a school, section made prior to and existing at date of survey, is to except the tract settled upon from the operation of the school grant, and the State is entitled to select other land in lieu thereof so long as the claim of the settler exists; but if the settler afterward abandons the land before the State makes selection in lieu thereof, the title of the State immediately attaches to the specific section as of the date of survey, and the right of the State to make selection in lieu of said tract is thereafter extinguished. This was the ruling of the Department in the case of the State of California (7 L. D. 270), known as the McEvoy case, and said ruling is not in conflict with the ruling of the Department in the case of Nivens *v.* The State of California (6 L. D., 439), as contended by counsel. In both cases the principle was distinctly announced that the title to school sections settled upon at the date of survey and subsequently abandoned, vest in the State as of the date of survey; but in the Nivens case it was held that a selection made by the State in lieu of the school section settled upon at date of survey and afterwards abandoned was illegal; whereas in the McEvoy case it was held that by the act of selection of lieu land, the title of the State became vested in the tract so selected, and all right to the basis was by said act completely divested so that the title could not thereafter vest in the State although the settler may have failed to make good his claim. But the distinction to be observed is this: In the Nivens case (although the facts are not fully stated in the decision), the township plat was filed June 4, 1875, and at that date the part of the school section used as a basis for the selection was occupied by a pre-emption settler, who failed to file his declaratory statement until September 1, 1877. The State made selection of the lieu land November 21, 1877. Hence having "failed to assert his claim or to make it good" within three months after the filing of the township plat, the State's title to the basis had vested at the date of the selection, and there was no right of selection of lieu land; but in the McEvoy case, the State made selection of lieu land while the rights of the settler to the school land existed, and having exercised the right of selection by which her title vested in the lieu land, her right to the basis was forever gone although the settler afterwards abandoned it. This principle was also announced in the Watson case, *supra*, in which it was held that the reservation for the benefit of schools

would, by the act of selection legally exercised, be transferred from the specific section reserved by the act to other lands as indemnity therefor, and after stating that the Territory is not bound to make selection of lands in lieu of school sections settled upon at date of survey, but may await the action of the settler, the Secretary says:—

> And if he (the settler) fails to prove up or abandons his claim, the right of the Territory to have such lands held in reservation would attach immediately upon the extinguishment of the claim of such settler, and no right as against the Territory can intervene by subsequent settlement based upon the rights of a settler prior to survey or the purchase of improvements thereof.

The mere fact that the claimant in this case purchased the improvements of a settler who had the right to perfect his claim to the land does not confer upon him as against the right of the Territory any better claim than he might have obtained by settlement without such purchase, because his right to the land can only be acquired by settlement which is a personal act and can only date from the time he went upon the land. The purchase of a prior settler's improvements does not transfer any right which the prior settler may have had by virtue of his settlement, nor cause the purchasers' to relate back to the date of the vendor's settlement. Knight *v.* Haucke (2 L. D., 188); Pruitt *v.* Chadbourne (3 L. D., 100); Cleveland *v.* Dunlevy (4 L. D., 121); Howell *v.* Bishop (6 L. D., 608); Wachter *et al.*, *v.* Sutherland (7 L. D., 165).

It may be urged, however that the rule applicable to States does not apply to the Territories for the reason that the State claims under a grant which attaches from date of survey, and no grant is made to the Territories, but simply a reservation in contemplation of a future grant. It has, however, been held that the act reserving land for school purposes in the Territories so far as it affects the reservation of the land, has the same force and effect as a grant to a State. John W. Bailey *et al* (5 L. D., 216).

The right of the Territory to have these lands held in reservation for school purposes is a right given by the act and the Secretary has no power or authority to impair that right by disposing of them to settlers and requiring the Territories to select lands in lieu of such sixteenth and thirty-sixth section to which the right of the Territory is clearly shown.

Your decision is affirmed.

ADDITIONAL HOMESTEAD ENTRY—ACT OF MARCH 2, 1889.

PHILOMAN D. GILBERT.

An additional entry under the act of March 2, 1889, may be allowed to include a tract of adjacent land intended to be covered by the original entry on which patent has issued.

Secretary Noble to Commissioner Stockslager, May 17, 1889.

I am in receipt of your communication of the 19th instant, relative to the homestead entry of Philoman D. Gilbert, for lot 4, Sec. 2, T. 15 N., R. 15 W., in Oceana county, Michigan.

It appears from said communication, that in locating his homestead on said lot 4, he supposed that said lot was bordered by the shore of a lake, and acting under this impression, he erected his house at a certain point on lot 4, as he supposed, near the lake, but which is now shown to be upon lot 6. It also appears that lot 4 was patented to Gilbert June 20, 1870, represented on the official plat as extending to the lake, when in reality its north boundary is the old meander line of said boundary shown by exhibit "B," submitted with your communication.

In consideration of the long continued residence of Gilbert on the land now known officially as lot 6, you suggest the following plan for his relief:

1st. That Mr. Gilbert be requested to surrender his patent for lot 4, said patent having been issued under misapprehension as above stated.

2nd. That Mr. Gilbert be advised to amend his description of homestead entry, and make it apply to, and include lots 4 and 6, which contain a total of 127.22 acres. He can probably make the entry, and prove up his claim in one day.

3rd. That patent be issued to him for lots 4 and 6 and that he be protected by this office in all his rights to homestead this tract, whilst complying with the formalities necessary to secure a clear title to the land upon which he has made his home for the last twenty-five years.

Inasmuch as patent was issued to Mr. Gilbert upon his homestead entry made for lot No. 4, I do not see how he can now amend his entry at this date to include lot No. 6; nor do I see from the papers before me, that the patent was issued under a misapprehension, but on the contrary it seems to have been issued in conformity with the entry. If there was any misapprehension it was in the entry and not in the issuance of patent thereon. But after a careful consideration of this case, I am of the opinion that the rights of this party can be fully protected under the 6th section of the act of March 2, 1889, which provides as follows:

That every person entitled, under the provisions of the homestead laws, to enter a homestead, who has heretofore complied with or who shall hereafter comply with the conditions of said laws, and who shall have made his final proof thereunder for a quantity of land less than one hundred and sixty acres and received the receiver's final receipt therefor, shall be entitled under said laws to enter as a personal right, and not assignable, by legal subdivisions of the public lands of the United States subject to homestead entry, so much additional land as added to the quantity previously so entered by him shall not exceed one hundred and sixty acres: *Provided* That in no case shall patent issue for the land covered by such additional entry until the person making such additional entry shall have actually and in conformity with the homestead laws resided upon and cultivated the lands so additionally entered and otherwise fully complied with such laws.

It appearing that the total acreage of lots 4 and 6 is only 127.22 acres, Gilbert having resided upon said lot for a long period, upon which he has placed valuable improvements and is still residing thereon, I see no reason why he may not make entry of said tract, and why patent may not issue to him upon making proof of compliance with the requirements of said act of March 2, 1889. You will so advise him.

PRE-EMPTION—RESIDENCE—SECTION 2260 R. S.

DAVID LEE.

The inhibition contained in the second clause of section 2260, R. S., is against one who quits or abandons residence on his own land "to reside" on the public land, and does not apply to a case where the pre-emptor had, in good faith, sold the land on which he formerly resided before establishing actual residence on the pre-emption claim.

The validity of a deed made in good faith from husband to wife is recognized by the Department, if such deed is valid under the laws of the State or Territory in which the land conveyed is located.

Secretary Noble to Commissioner Stockslager, May 17, 1889.

July 8, 1884, David Lee, the appellant, filed declaratory statement, No. 5810, for the N. ½ of NW. ¼ of Sec. 4, T. 19 S., and E. ½ of SW. ¼ of Sec. 33, T. 18 S., R. 27 W., Wa Keeney district, Kansas, alleging settlement thereon July 5, 1884. Your office, by decision of November 15, 1887, held said filing for cancellation as illegal under the second clause of Section 2260 of the Revised Statutes, which prohibits the acquisition of any right of pre-emption under the provisions of the pre-emption laws by any person, "who quits or abandons his residence on his own land to reside on the public land in the same State or Territory." The present appeal is taken from said decision.

It appears, that Lee had received final certificate on his homestead entry of another tract, June 10, 1884, and this homestead tract is the "land of his own," his residence on which you hold he "abandoned" to reside on said land covered by his pre-emption filing. He claims, that said homestead tract was not "his own land," within the meaning of the statute, at the time he abandoned residence thereon, because of the following facts, set forth by him in an affidavit called for by your office and filed in support of his present claim, viz:

That in the month of May, 1884, his wife, Emiline M. Lee, received from the sale of property belonging to her, in the State of Ohio, previous to her marriage with affiant, the sum of $200.00, which she loaned affiant and which he invested in cattle; that after submitting said final proof [homestead] on June 10, 1884, and some time between June 15 and July 1, 1884, affiant entered into a contract with his wife for the sale of said homestead, the terms being that he should convey said land to her for the purpose of remunerating her for the $200.00 he had received in May previous, and for the sum of $650 more, which she was to receive as the balance of the proceeds of aforesaid property, in the month of October following, and which she did receive, and in pursuance of said agreement turn over to affiant, and all of which money was invested by affiant in livestock; that Lane county, Kansas, in which said land is situated was at that time very sparsely settled, and there was no notary public or other officer qualified by law to take acknowledgments of conveyances, within twelve miles from affiant, ... he therefore delayed making said conveyance until a later date, although the contract was thoroughly understood between him and his wife and talked over in the presence of M. S. Ketch, a neighbor, as a witness, [who] at a later date received a commission to act as notary public in said county, and was called in to take acknowledgment of said conveyance; that by advice of

parties claiming to know the law on such matters, affiant and his wife then joined in a conveyance of said land to Margaret Rice, his mother-in-law, who on same day and at the same time conveyed said land to said Emiline M. Lee, wife of affiant, the conveyance to Margaret Rice being made merely for the purpose of avoiding direct transfer from affiant to his wife, which at that time he supposed was a legal necessity in order to vest the title securely in his wife in accordance with their contract, entered into in the latter part of June, 1884.

This affidavit was corroborated by the affidavit of said M. S. Ketch, mentioned therein as the notary public before whom the conveyances were acknowledged and as the neighbor who witnessed the original agreement for the conveyance from Lee to his wife, and, also, by the affidavit of the wife, said Emiline M. Lee; and attached to said affidavit was the original deed from Lee to Margaret Rice, dated and acknowledged February 5, 1886, and marked "filed for record," July 19, 1887, and also "an abstract of title," showing conveyance from said Margaret Rice to said Emiline M. Lee, dated, acknowledged and "filed for record" on the same days as said first conveyance.

Your office in said decision of November 15, 1887 (from which the present appeal is taken), held on these facts, that, at the date, July 5, 1884, when Lee claimed to have initiated his pre-emption claim by settlement, "he was the actual owner of his homestead claim, by virtue of title acquired June 10 previous . . . . . and must, therefore, be regarded as having removed from land of his own to make settlement as a pre-emptor."

The contract of Lee for the conveyance of the homestead tract claimed to have been made by him prior to the date of his alleged settlement on the pre-emption tract, being for the sale of land, was covered by section six of the Kansas Statute of Frauds and Perjuries (Com. Laws of Kansas, p. 464), and being in parol, was not enforceable. Your office was, therefore, correct in holding that at the date of his alleged settlement, July 5, 1884, he was still "the actual owner of his homestead claim." It appears, however, from his proof in support of his pre-emption claim (submitted, November 22, 1886), that while he claims to have made settlement at said date (July 5, 1884), by "commencing to dig a dug out," he did not move his family to the land and commence *actual residence* thereon until April 20, 1886, about two months and a half after he had made and acknowledged his conveyance of the homestead tract.

There is a recognized distinction in the pre-emption law between "settlement" and "residence." "The terms 'settlement' and 'inhabits' are both used in section 2259 in the order given, and the language clearly shows the distinction between the terms actual settler and resident, as contemplated in the pre-emption law." Samuel M. Frank (2 L. D., 628.) "An actual settler is one who goes upon the public land with the intention of making it his home under the settlement laws and does some act in execution of such intention sufficient to give notice thereof to the public," United States *et al. v.* Atterberry

et al. (8 L. D., 176), and cases cited therein, but this "act of settlement, unless followed by actual residence, does not entitle a party to make entry." Elmer *v.* Bowen (4 L. D., 339). It is true, if the act of settlement be followed in proper time by actual residence, the settler is held to have established constructive residence from the date of settlement. But the disqualification under the second clause of section 2260 of the Revised Statutes is of a "person who quits or abandons his residence on his own land *to reside* on the public land in the same State or Territory." To constitute abandonment of residence, the act and intent must concur, and it seems clear, that the statute contemplated an actual change of residence by the pre-emptor from land of his own and the establishment of such residence on the land sought to be secured under the pre-emption law. This view is in accord with the reason, as well as the letter of the law, and seems to be recognized in the decision of Secretary Teller, in the case of Martinson *v.* Rhude, cited by Secretary Lamar in Hunt *v.* Lavin (3 L. D., 499). In that case Martinson protested against the acceptance of Rhude's proof, on the ground that the latter had moved from land of his own to reside upon the tract in question, but Secretary Teller sustained the claim of Rhude, saying:

> 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. (3 L. D., 500).

If, therefore, Lee's conveyance of his homestead tract, which was executed and acknowledged by him, February 5, 1886, was effective to divest him of his title thereto, he had not been the owner thereof for two months and a half before he established actual residence on the pre-emption claim, and at the time he established such residence, April 20, 1886, he was not within the said statutory disqualification.

The validity of a deed made in good faith from husband to wife is recognized by this Department, where such deed is valid under the laws of the State or Territory in which the land conveyed is located. Hatch *v.* Van Doren (4 L. D., 358.) Under the statute law of Kansas, "a wife may hold property separate from her husband, and may bargain, sell, convey, contract, sue and be sued, and carry on business in the same manner that a married man may" (Gen. Stat., 562), and it is held by the supreme court of that State, that "a wife may, through the intervention of a trustee or third person, buy from her husband, or sell to him, or contract with him, to the same extent, that she may buy from, sell to, or contract with, any other person." Going *v.* Orns (8 Kan., 87). If, therefore, said conveyance by Lee was *bona fide* and not resorted to as a mere expedient for evading the law, it was effective to devest him of his title to the land embraced therein.

As was said by this Department in the case of Davidson *v.* Kokojan (7 L. D., 436), "The relationship between the grantor and the grantee is a . . . . . suspicious circumstance, but not of itself sufficient

to justify an affirmative finding of fraud." The other circumstances of this case are consistent with good faith, and due consideration must be given to the presumption that attends the exercise of legal rights. Murdock *v.* Higgason (6 L. D., 35).

It is shown by Lee's proof, that he with his family (a wife and two children) have resided continuously on the pre-emption tract, since they established residence thereon, April 20, 1886, and his improvements consist of a stone house, sixteen by twenty-four feet, well furnished, a stable fourteen by eighteen feet, two wells and breaking—all of the value of $250.00.

I am of the opinion, that Lee, under the facts disclosed by the record, is not disqualified under the second clause of section 2260 of the Revised Statutes, and there being no other objection, it is directed, that his proof be accepted and entry allowed and passed to patent. The decision of your office holding his filing for cancellation is reversed.

DANIEL MATHER.

On application for reconsideration of the departmental decision rendered May 10, 1887 (5 L. D , 632), a hearing is directed before the local office by order of Secretary Noble, May 17, 1889.

MINING CIRCULAR.*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 24, 1887.

To Registers and Receivers and Surveyors General:

GENTLEMEN: 1. For reasons stated in decision dated October 31, 1885, in the case of the Good Return Placer Mine, (4 L. D. 221), the Hon. Secretary of the Interior holds that the "circular instructions of 9th December, 1882, and the first requirement of the circular of 8th June, 1883, are erroneous, and the same are accordingly overruled."

2. Said decision also holds—

That the annual expenditure to the amount of $100, required by section 2324, Revised Statutes, must be made upon placer claims as well as lode claims.

"3. That compliance 'with the terms of this chapter,' as a condition for the making of application for patent according to section 2325, requires the preliminary showing of work or expenditure upon each location, either by showing the full amount sufficient to the maintenance of possession under section 2324 for the pending year; or, if there has

*Omitted from Volume V.

been failure, it should be shown that work has been resumed so as to prevent relocation by adverse parties after abandonment.

"'The pending year' means the calendar year in which application is made. And you will observe that the paragraph has no reference to a showing of work at date of the final entry."*

4. "That as section 2325 only directs proof of expenditure to the amount of five hundred dollars by certificate of the surveyor general on the claim embraced in the application for patent, it must be error to hold that it further requires that amount on each individual original location, in lieu of the amount already provided for by section 2324."

5. Registers will, therefore, before receiving any application or permitting entry upon applications already made, require a satisfactory preliminary showing of work or expenditure, under paragraph 3 hereof, upon or for the benefit of each location embraced in the claim, which may, where the matter is unquestioned, consist of the affidavit of the applicant, clearly and specifically setting out all the *facts* constituting the compliance with the law by himself or grantors. Where application is made by an incorporated company, or where an applicant satisfactorily shows by affidavit that he is not personally acquainted with the facts, the applicant's affidavit may be made by the duly authorized agent who has such knowledge, but whether made by principal or agent it must be specifically and fully corroborated by the affidavits of at least two disinterested and credible witnesses familiar with the facts. This showing must include the year in which the application for patent is filed. The evidence specified in paragraph 32 of circular N of October 31, 1881, will still be required. Where the abstract of title is dated prior to the date of filing the application for patent, a continuation of the abstract to and including such date must be filed before the applicant is allowed to make entry.

6. Where an application for patent embraces several locations or claims *held in common*, constituting one entire claim, whether lode or placer, an expenditure of five hundred dollars, under section 2325, R. S., upon such entire claim embraced in the application will be sufficient and need not be shown upon each of the locations included therein.

You will observe carefully the modification of the practice and regulations as above indicated.

WM. A. J. SPARKS,
Commissioner.

Approved March 24, 1887.
H. L. MULDROW,
Acting Secretary.

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* See case of John Kinkaid, 5 L. D., 25.

SECOND HOMESTEAD ENTRY—APPLICATION.

EDWARD C. DAVIS.

A second entry may be allowed where the first covered land that is not habitable, and the reasons therefor were not discoverable, by the exercise of ordinary diligence, at the time of making entry.

On relinquishment of the former entry the applicant should state under oath that he has not received any valuable consideration, or promise thereof, for abandoning said land, and that his relinquishment is not intended to benefit any other person.

First Assistant Secretary Chandler to Commissioner Stockslager, May 20, 1889.

I have considered the appeal of Edward C. Davis from the decision of your office Jan. 19, 1888, refusing his application to make homestead entry for the W. ½ of the NE. ¼ of Sec. 30, and the W. ½ of the SE. ¼ of Sec. 19, T. 35 N., R. 54 W., Chadron, Nebraska, land district.

On March 6, 1886, Davis made homestead entry for the NW. ¼ of Sec. 29 T. 35 N., R. 51 W. In June 1887, he filed in the local office his application "to amend" said entry to cover the land first above descibed. In this application which is sworn to by the applicant and corroborated by one witness it is stated that he had lived on the land embraced in his entry since making the same and had improved the tract by building thereon a frame house fourteen by sixteen feet in size, by planting fruit and shade trees, to the number of six hundred and had dug a well; that the water obtained in that well was poisonous and could not be used by any living creature and that no water could "be got in that section that man or beast could use", and he asks that a special agent be sent to examine said tract in order that his statements might be verified. He also states that after examination he could not find a tract that was free and upon which he could make a farm nearer to that embraced in his entry than the one he now applies for. The local officers forwarded this application stating that the land applied for was vacant as shown by the records of their offices. Your office held that there was not sufficient reason given for a change of entry and refused the application.

This application is in effect and should be treated as an application to make a second entry. This entryman by his expenditure upon the land embraced in his original entry and by his efforts to establish a home there, has sufficiently shown his good faith in making that entry. The cause he now assigns for his inability to live upon the tract then selected is one that was not apparent upon the face of the land and could not be ascertained even after a careful examination of the land for the purpose of determining its fitness for a home and farm. I am of the opinion that one who has made an entry for land which is unfit for a home and for farming purposes because of the water to be ob-

tained on said tract being unfit for use by reason of its poisonous qualities, that being a fact that in the nature of things could not be by ordinary diligence ascertained prior to entry should not in justice be held to have thereby exhausted his homestead right. In the case under consideration the applicant should file a formal relinquishment of the former entry and that relinquishment should be accompanied by his affidavit stating that he has not received money or other valuable consideration or the promise of such consideration for abandoning said land and that said relinquishment is not intended to operate to the benefit of any other person or corporation. Upon compliance with these requirements, his application to make new homestead entry for the land described therein will be allowed. This course is authorized by the second section of the act of Congress, approved March 2, 1889.

The decision appealed from is modified accordingly.

PRE-EMPTION ENTRY—RESIDENCE—GOOD FAITH.

EDWARD C. BALLEW.

A change of circumstances after settlement and before proof may be such as to render the submission of final proof at a particular time, in order to leave the land, entirely compatible with good faith.

Secretary Noble to Commissioner Stockslager, May 20, 1889.

I have before me the application filed by Edward C. Ballew to have his case re-opened and further consideration given in the matter of his pre-emption claim covering the SW. ¼ of Sec. 24, T. 2 N., R. 52 W., Denver land district, Colorado.

The applicant filed his declaratory statement No. 18,988, for said tract, November 30, 1885, with allegation of settlement November 23, 1885. After due notice by publication he offered final proof August 28, 1886, which was rejected by the local officers, on the ground that it was not satisfactory as to residence, cultivation or improvements.

On appeal, your office found the proof as to residence deficient and as failing to show that claimant "designs to make of the tract a permanent home." Further, that it was "evidently his desire to acquire title, by the least possible compliance with law, to one hundred and sixty acres, rather than to make a home thereon," it being admitted by him that it was his intention to remove his family as soon as he should have made final proof. So finding, your office decision affirmed that of the local office, and on appeal the Department affirmed your office decision.

* * * * * * *

The improvements and cultivation, though somewhat limited, are such, taking into consideration the want of means on the part of claimant, as to indicate good faith. His personal absences, his family remaining on the tract, are on the reasons stated excusable.

Did, then, his statement before completing his entry, in regard to taking his family away from the land immediately after proof and payment invalidate his proof, (in itself showing sufficient inhabitancy and improvement) or show such want of good faith as warranted its rejection?

Under the circumstances, I think not. He swore that he took the land for a home, and that he has no other home. His official employment was entered upon after settlement, and is temporary in character. He desires to have his family with him where he is employed. Having made such compliance with the pre-emption law as to enable him to make the necessary proof, pay for the land and receive final certificate, he offers that proof after due notice to the public, one object being to put himself in a position to leave the land with his family without incurring forfeiture because of absence. Had he been less frank or truthful, that purpose would not have been disclosed and he would without question have been entitled on the proofs to final certificate.

I do not think in view of what has been said that that one circumstance, when considered in connection with the reasons assigned, furnishes a sufficient ground for the rejection of the proof. Had the reasons arisen prior to settlement—that is had the claimant been, prior to settlement, so engaged as to prevent his going with his family to the claim—the case might have been different, for such action would be suggestive of want of good faith. But a change of circumstances after settlement and before proof may be such as to render the making of the final proof at a particular time in order to go away from the land entirely compatible with good faith.

No one appeared to object to the proof; no adverse claim has intervened; claimant still insists upon his rightful claim to the land and to certificate therefor; he has never disposed of, nor attempted to dispose of his interest therein. Upon full and careful consideration of the case in all its aspects, I am convinced that his proof as made, which is much fuller and more detailed than that usually offered, should be accepted and final certificate issued upon payment for the land. Such being my judgment the departmental decision of June 18, 1888, is hereby revoked and you will give direction in accordance with the above conclusion.

FINAL HOMESTEAD PROOF—JUDICIAL DISTRICT.

JOHN McCABE.

Final homestead proof may be made before the proper officer of any court of record in the judicial district within which the land is situated.

Secretary Noble to Commissioner Stockslager, May 20, 1889.

I have considered the appeal of John McCabe from the decision of your office dated May 11, 1888, affirming the action of the register in

refusing to sign an order for the final proof in support of his homestead entry for the NE. ¼ of Sec. 8, T. 132 N., R. 60 W., Fargo, Dakota, land district, to be made before an officer of a county other than that in which said land is situated.

McCabe made homestead entry for said land April 10, 1883, and on April 21, 1888, filed with the register for the land office at Fargo, notice of his intention to make final proof under said entry before the judge or in his absence, the clerk of the district court in and for the county of La Moure, and Territory of Dakota. The register refused to sign an order for the proof to be made in La Moure county, holding that said proof should be made in Dickey county, in which the land is situated. Upon appeal to your office the action of the register was approved.

This case involves the construction of the term "district" as used in the act of March 3, 1877 (19 Stat., 403) and the act of June 9, 1880 (21 Stat., 169). In a letter of April 1, 1885, to W. J. Mooney (12 C. L. O., 51), Commissioner Sparks said:

> You are advised that the word "district" used in the acts of March 3, 1877, and June 9, 1880, of which the former allows final homestead proof, and the latter pre-emption and homestead affidavits of claimants to be taken "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" refers to the judicial district and not to the land district; and where such judicial district is composed of two or more counties, the clerk of any court of record in the district may take the proof of pre-emption and homestead settlers, whose claims embrace lands situated in any other county in the district.

In the case of Henry D. Fruit, decided by this department, September 9, 1887 (6 L. D., 138), it was said in regard to this letter,—

> I see no objection to the letter of the Commissioner, because considering the language and purpose of the act, it will admit of no other construction. The act provides that such proof may be made "before the judge or in his absence, before the clerk of any court of record, of the county and State, or district and Territory, in which the lands are situated."

Afterwards in the same decision, it was said,—

> The purpose of the act is to permit a person to make proof either before the register and receiver of the proper land office, or before the judge or in his absence before the clerk of *any* court of record of the county or district in which the land is situated. The fact that the land may be embraced within several judicial districts does not affect the question, because the proof may be made before the judge or in his absence the clerk of the court for either of the districts: Provided that it be made in the county in which the lands are situated, or if that be an unorganized county, then in the county next adjacent.

The decision appealed from here seems to be based upon the statement contained in the proviso above quoted, it being held that under that statement the final proof must in all cases be made in the county wherein the land is situated, unless that county be unorganized. To thus limit the rule would be in effect to overrule the letter of the Commissioner which in the first part of said decision is in express terms approved. This effect was clearly not intended by said decision.

I am of the opinion that the proper practice in such cases is to allow final proof to be made before any court of record in the judicial district within which the land is situated and that if the county of La Moure, is within the same judicial district with this land the register should sign the order for taking proof as requested, provided no other reason exists for refusing to do so.

The decision appealed from is modified accordingly.

TIMBER CULTURE CONTEST—CHARACTER OF LAND.

SAMPSON *v.* LAWRENCE.

In a contest against a timber culture entry, non-compliance with the law will not be excused on the plea that the land is too wet for the successful cultivation of trees, where it appears that the character of the land was known at the time of entry, and that no effort was subsequently made to reclaim or properly prepare it for the growth of trees.

First Assistant Secretary Chandler to Commissioner Stockslager, May 20, 1889.

I have considered the case of Joseph D. Sampson *v.* Carrie E. Lawrence, upon the appeal of the former from your office decision of December 11, 1885, holding for cancellation her timber culture entry for the NE. ¼ of section 25, T. 94 N., R. 54 W., Yankton land district, Dakota.

The claimant made timber culture entry for the said land March 24, 1881, Sampson filed his contest affidavit September 13, 1884. It charged that the claimant had not broken any part of the said land, that there was about five acres of old breaking which had not been cultivated, nor had she planted any trees. Hearing was had November 25, 1884, both parties being personally present and represented by their respective attorneys.

The local officers rendered their decision January 15, 1885, in favor of the contestant; upon appeal your office affirmed their action and held claimant's entry for cancellation.

Lawrence appealed to this department and the case is now before me for consideration.

The testimony establishes these facts: About ten acres of the said land had been broken by a former entryman; these ten acres were re-plowed in the fall of 1882, by the claimant. This was the extent of her breaking and cultivation; no trees were planted except that the father of the claimant in her behalf made an experiment of planting sixty or seventy cuttings in the spring of 1883, about May 20, on the broken part of the claim. None of them lived. The excuse given by claimant for her non-compliance with the law is, that the land is bottom land too low and during the whole period of her entry too wet for cultivation and the successful planting of trees. This character of the land is borne out by the weight of the evidence. The testimony on the part of the

claimant clearly shows that the land undrained is wholly unfit for the planting and growing of trees; but can this be pleaded in excuse for failing to comply with the requirements of the timber culture law? I think not.

The object of the law is "to encourage the growth of timber," and an entry under this law for lands, wholly unfit to serve the expressed purposes of the law, seems to me can not be upheld. If trees will not grow on this land, it is absurd to sustain an entry, which is based upon the obligation of the entryman to plant and cultivate trees there. The statement alone proves the correctness of this proposition. The claimant gives no assurance that there will be a change in the condition of the land at any time, at any future period; what good purpose can it then serve to keep the entry alive?

True, the witness van Antwerp, a surveyor, speaks of a ditch that will, he thinks, eventually be dug through this land. Such ditch had been surveyed to commence two miles east of this land, and, it is calculated, will extend to about half a mile west of it. He is the only witness who makes mention of the ditch; it is not shown when it would be made through this land and what effect the completion would have upon the qualifications of this land for the growth of trees. Neither is it shown, that the ditch is to be dug wholly or partially under the auspices of the claimant, or that she, in any manner, has interested herself about it. This statement of the witness van Antwerp then, seems to me, is entirely too uncertain to base a judgment thereon.

It being established by the evidence that the claimant has failed to comply with the requirements of the law, her entry, in the face of the contest, must be canceled; the natural unfitness of the land for the growth of timber cannot be accepted as an excuse, it appearing that she was cognizant of the character of the land at the time of her entry.

There being no effort on her part to reclaim the tract by drainage, or in any other way fit it for the cultivation and growth of timber in keeping with the intent and spirit of the act your said office decision is therefore affirmed.

FINAL PROOF PROCEEDINGS—CROSS-EXAMINATION.

LOVIA A. SHORT.

The regularity of final proof should be determined under the regulations in effect at the date of its submission.

A certificate of the officer before whom the final proof was taken, that the claimant and witnesses were duly cross-examined, may be accepted under the regulations of December 15, 1885, where such examination was not reduced to writing.

First Assistant Secretary Chandler to Commissioner Stockslager, May 20, 1889.

The pre-emption proof made by Lovia A. Short before the probate judge for Ness county at Ness City, Kansas, September 25, 1886, in sup-

port of her declaratory statement filed September 11th, alleging settlement September 9, 1885, upon NW. ¼ Sec. 27, T. 17 S., R. 26 W., Wa Keeney, Kansas, was presented October 28, 1886, and same day rejected by the local officers for the reason that it was "not accompanied with cross examination of said claimant and her witnesses as required by Department circular of September 23, 1886."

Upon appeal by the claimant wherein it was alleged that her proof was made before the receipt of the said circular at the local office and that being "almost blind and very infirm . . . . it would work a great hardship to comply with said requirement" the stated action below was sustained by your office decision of July 1, 1887.

The claimant again appeals and contends that her proof was "regularly made according to the rulings . . . . supposed to be in force at that time."

The said circular approved September 23, 1886 (5 L. D. 178), after calling the attention of registers and receivers to the circular approved December 15, 1885 (4 L. D. 297), set out that "claimants and witnesses must be cross examined in all cases of final proof; and you are instructed to reject all proofs not accompanied with the required cross examination."

Section 3 of the said circular approved December 15, 1885 (4 L. D. 298), is in the words following:

> Officers taking affidavits and proofs must test the accuracy and reliability of the statements of applicants and claimants and the credibility and means of information of witnesses by a thorough cross examination. Questions and answers in such cross examinations will be reduced to writing and the cost thereof included in the cost of writing out the proofs.

Section 8 of the same circular required registers and receivers to thoroughly scrutinize all proofs taken before officers other than themselves and to "see that all papers are complete and perfect before an entry is allowed or the papers transmitted."

It seems to be admitted by your office, and I have deemed it safe to assume that on September 25, 1886, when the claimant made proof as stated, the said circular approved the 23d instant or two days before had not been received at the local office.

As the proof in question should be governed by the rulings that were known to prevail in the land district when the same was made, I have considered the case at bar with reference to circular of December 15, 1885, *supra*. The circular last mentioned, while providing that the required cross examination be reduced to writing and that the papers be complete, does not, like the circular of September 23, 1886, upon which the local officers based their action, expressly direct the rejection of final proof unaccompanied by such cross examination.

The manifest purpose of the circular under consideration in providing for the cross examination of claimants and witnesses by officers other than the local officers, was to "test the accuracy and reliability" of their

statements. That this purpose was accomplished is shown by the certificate accompanying the proof in question and of even date therewith, whereby the probate judge, before whom the same was made certifies that he "made a thorough cross examination of the claimant and witnesses, but the same was not reduced to writing for the reason that no statements contradictory to the examination in chief were elicited."

Your office also found the claimant's proof to be unsatisfactory and required her to submit an additional and corroborative affidavit showing the cause and duration of her absences from the land. This action is in my opinion without warrant.

There is nothing in the proof submitted to show that the claimant was at any time after establishing her residence on the land absent therefrom, while both herself and witnesses swear that such residence for almost a year was continuous.

It is shown by the proof mentioned that the claimant—a single woman seventy-eight years of age—made settlement on the land September 9, 1885, by building a house; that she established actual residence thereon October 8th following, and continued the same; that her improvements, valued at $200, consist of two houses, sixteen by twenty-two and fourteen by eighteen, one mile of wire fence, a well, and fourteen acres cultivated.

The claimant's proof, aside from the irregularity hereinbefore referred to, is to my mind satisfactory and convinces me that she has rendered a substantial compliance with the pre-emption law and the regulations of the Department. I am, therefore, of the opinion that in the absence of an intervening claim, the proof submitted should be accepted and the entry allowed.

Your decision is reversed.

PRIVATE ENTRY—ACT OF JULY 4, 1876.

WILLIS A. ERSKINS.

Public lands affected by the repeal of section 2303, R. S., are not subject to private entry until they have been offered at public sale.

A private cash entry, though illegally allowed, is, while of record, a bar to the allowance of a homestead entry for the land included therein.

First Assistant Secretary Chandler to Commissioner Stockslager, May 21, 1889.

I have considered the appeal of Willis A. Erskins, *v.* The United States, from the decision of your office dated February 24, 1888, rejecting his application to make homestead entry for the SW. $\frac{1}{4}$, of SE. $\frac{1}{4}$, N. $\frac{1}{2}$, of SE. $\frac{1}{4}$, SW. $\frac{1}{4}$, of NE. $\frac{1}{4}$, Sec. 34, T. 13 N., R. 1 W., New Orleans, land district, La.

The record shows that on May 5, 1887, one Attwood Violett, made private cash entry No. 10,474, for the S. $\frac{1}{2}$ of NE. $\frac{1}{4}$, and NW. $\frac{1}{4}$, of NE. $\frac{1}{4}$, and SW. $\frac{1}{4}$, Sec. 34, T. 13 N., R 1 W., and on May 20th, same year,

he made private cash entry No. 10,545, for the SE. 1/4 and NW. 1/4, Sec. 34, T. 13 N., R. 1 W., in said land district.

On or about October 28, 1887, Erskins applied to make homestead entry for the land first herein described, alleging that he with his family had resided thereon since February 10, 1883, and that he had improvements there, consisting of a log dwelling house, a corn crib and twenty-eight acres fenced and under cultivation, of the value of $160. This application was refused by the local officers because of the existence of Violett's cash entries.

Erskins appealed from the adverse action of the local office and therein alleges that the private cash entryman Attwood Violett, resides in the city of New Orleans, that he made no settlement on the tract in controversy or cultivated or improved the same while he, Erskins, and his family have resided thereon continuously ever since February 10, 1883. That he purchased and made *bona fide* improvement on the land "with the firm intention of making it his home and securing to himself the benefits of the homestead law;" that he has no other home and there are no other vacant lands fit for cultivation near said tract, and asked that the action of the local office be overruled and that his homestead application be allowed.

On February 24, 1888, your office by letter "C" addressed to the register and receiver at New Orleans, La., affirmed the rejection of Erskins' homestead application, and therein cited the case of Watts *v.* Forsyth (6 L. D., 306), as authority for so doing.

In due time Erskins as homestead applicant appealed to this Department and the case is now before me.

The land included in Violett's entries was offered at public sale in 1839, and not having been sold became subject to private cash entry and so remained until the passage of the act of Congress approved June 21, 1866, section one of which act provides:

That from and after the passage of this act all the public lands in the States of Alabama, Mississippi, Louisiana, Arkansas and Florida, shall be disposed of according to the stipulations of the homestead law of twentieth May, eighteen hundred and sixty-two, (14 Stat., 66 and Sec. 2303, R. S.).

By an act of Congress approved July 4, 1876, the foregoing provisions of section 1, of the act of June 21, 1866, were repealed; but at the same time it further declared,—"And provided that the public lands affected by this act, shall be offered at public sale as soon as practicable from time to time, and according to the provisions of existing law, and shall not be subject to private entry, until they are so offered." (19 Stat., 73).

The records of your office fail to show that any of this land has been offered at public sale in accordance with the provisions of said act of July 4, 1876, and was not, therefore, at the date of Violett's entry subject thereto. While said entry remained of record, however, the land covered thereby was not subject to disposal under the homestead law

and the local officers were justified in refusing to allow Erskins to make entry according to his application.

Violett's entries being, according to the records of your office, invalid and illegal, are hereby held for cancellation and you are directed to give him notice that he will be allowed ninety days from service of such notice within which to show cause why said entries should not be canceled. If he shall, within the time specified, present anything in support of said entries, you will consider the same and determine his rights thereunder. If nothing shall be submitted by the cash entryman you will at the expiration of said period, cancel said cash entries. Erskins' application to make homestead entry should be held subject to the final disposition of Violett's entries and if those entries be finally canceled, that application should be allowed unless something not presented by the record now before me, prevents such action.

The decision appealed from is accordingly modified.

MINING CLAIM—IRREGULAR PROOF.

INSTRUCTIONS.

Non-compliance with paragraph 5, circular of December 14, 1885, may be waived, if the proof is substantially in accordance with prior regulations. If such proof does not, in some form, show the requisite work or expenditure the discrepancy may be supplied by supplemental affidavit.

First Assistant Secretary Chandler to Commissioner Stockslager, May 21, 1889.

I have considered the matter submitted with your letter of May 7, 1889, relative to the proof in certain mining claims now pending in your office.

If the proof in these cases is substantially in accordance with the mining regulations existing prior to the issuance of the circulars of December 14, 1885, and March 24, 1887, and shows "the facts" constituting compliance with such regulations, I can see no objection to the issuance of patent thereon. If such proof however, does not in some form show the requisite work or expenditure, the discrepancy may be supplied by supplemental affidavit showing that due compliance with the law in such matter had been observed at the time of application.

With the modifications indicated the course suggested in your letter meets the approval of the Department.

Commissioner Stockslager to Secretary Noble, May 7, 1889.

I have the honor to make the following statement, and to ask that I may be instructed in the matter therein referred to.

This office has now reached for examination, in the regular order, *ex parte* mineral entries which were made in December, 1886. As such examination proceeds, it is found that the registers have to a great extent ignored the instructions contained in paragraph 5, circular "N" of this office approved December 14, 1885 * (circular, in other respects only, modified by circular "N" approved March 24, 1887*), copies herewith enclosed.

In about twenty per cent of the cases examined the "satisfactory preliminary showing of work or expenditure" required in said circular has not been made.

It is purposed by this office to call the attention of the local officers to their dereliction in this matter and to direct that a more strict compliance with said circular instructions approved March 24, 1887, be observed by them in the future.

As to the cases (entries) now in this office in which the evidence referred to is wanting:

Where the applicant has made a sworn statement, see paragraph 31, of the mining circular, copy inclosed, that he is the owner, and in possession, of the claim by virtue of compliance with the law and regulations, and where the claim has stood the test of due notice of application for patent and no adverse claims have been filed, or if filed, they have been regularly disposed of, and has remained in this office more than two years, made necessary by reason of the arrears of work, before reached for examination, without any protest there against being filed, I think that it may be assumed that no adverse interests exist, and, that, all else being regular, a patent may be properly issued.

If the foregoing meet with your approval the work on mining claims in this office would be facilitated.

COMMUTATION PROOF—CULTIVATION—RESIDENCE.

JOHN W. ALDERSON.†

In commutation cases breaking may be accepted as sufficient proof of cultivation, if compliance with the law is in other respects satisfactorily shown.

After the establishment of residence, temporary absences, for the purpose of earning a livelihood, do not authorize a presumption of abandonment.

Secretary Vilas to Commissioner Stockslager, May 18, 1888.

I have considered the appeal of John W. Alderson from the decision of your office of July 9, 1886, rejecting his final proof and holding for cancellation his homestead entry, No. 2663, and cash entry No. 5135, on the S. ½ SE. ¼ Sec. 30, S. ½ SW. ¼ Sec. 29, T. 111 N., R. 65 W., Huron district, Dakota Territory

* See 4 L. D., 374, and this volume page 505. † Omitted from Vol. VI.

Alderson's homestead entry upon the land was made March 29, 1883, and on October 24, 1883, he commuted his homestead to a cash entry and made final proof, which was approved by the local officers and payment for the land accepted.

It appears from the proof, that Alderson established actual residence upon the land April 16, 1883, and remained thereon, with the exception of absences aggregating about five weeks, until the date of the final proof, October 24, 1883, a period of six months and eight days; and that his absences were necessary in order to enable him to make a living. His improvements, which cost $175.00, consisted of a two-story house, ten by twelve feet, with shingle roof, and a well and five acres of land broken.

In obedience to the requirement of your office, Alderson furnished, December 3, 1885, a corroborated supplemental affidavit, setting forth that his absences were from June 5, to June 8, and from July 16, to August 16, and from September 4, to September 6, 1883; that on October 24, 1883 (the date of his final proof), he removed from the land to Wisconsin, where he has since lived; "that he did not settle on and improve said land to sell the same on speculation, but in good faith to appropriate it to his own use and always did and does still intend to use said land as his homestead; and that the land has been leased out by him for two years (1884–5) and cultivated each year, and has been assessed to him and he has annually paid the taxes thereon."

Your office, July 9, 1886, rejected the proof as thus supplemented and held for cancellation his original and cash entries. Alderson appealed from said decision and attached to his notice of appeal an affidavit, dated August 13, 1886, that "about April 10, 1886, he broke or caused to be broken twenty acres of the land and that previous to that time he had broken five acres, thus making twenty-five acres under cultivation, and that said twenty-five acres were all in crop in 1886, and said five acres were in crop during the years 1884 and 1885."

In the decision of your office, stress is laid upon the fact that the five acres broken were not put in crop the first year—1883. This was not necessary; the breaking was a sufficient cultivation in this case. John E. Tyrl (3 L. D., 49); Clark S. Kathan (5 L. D., 94).

Residence was established April 16, 1883, more than six months before final proof was offered, and the temporary absences for the purpose of making a living shown during that time, do not authorize the presumption of abandonment.

I am of the opinion that the departmental rule requiring "six months actual residence and improvement of the tract" has been substantially complied with. Though absent after the proof was accepted, he still continued to use the land for his own benefit and had more land broken and put in crop, and this is corroborated in his affidavit "that he always did and does still intend to use said land as his homestead." The six months residence in pre-emption and commutation cases is required

by the Department rule as an evidence of good faith, and where it is complied with, as in this case, if not conclusive evidence of good faith, it raises a strong presumption of such good faith and shifts the burden of proof from the claimant. The evidence in this case, in my opinion, is not sufficient to rebut the presumption thus raised by the claimant's compliance with the rule.

The decision of your office is accordingly reversed and the entry will be passed to patent.

FINAL PROOF PROCEEDINGS—EQUITABLE ADJUDICATION.

NELLIE N. DORMAN.

An entry may be referred to the Board of Equitable Adjudication, where the testimony of the final proof witnesses was taken at the time and place designated, but before an officer not named in the notice, and such action is satisfactorily explained.

First Assistant Secretary Muldrow to Commissioner Stockslager, February 14, 1889.

I have considered the appeal of Nellie N. Dorman from the decision of your office dated April 6, 1887, requiring new publication and new proof in support of pre-emption cash entry No. 10,022 of the S. W. ¼ Sec. 18 W. N. R. 74 W. made by her, before her marriage in the name of Nellie N. Brokau, at the Huron land office in Dakota Territory on August 15, 1884.

The record shows that the register, on April 30, 1884, gave notice of claimant's intention to make final proof in support of her claim, before the judge of the probate court in and for Potter county, at Forest City on July 29th, 1884, and that the testimony of the witnesses would be taken before Audren C. Brink, a notary public, at Gettysburg D. T., on July 28, 1884. The testimony of the witnesses was taken before a different notary, on the day advertised, and the testimony of the claimant was taken on the day and before the officer as advertised. With the final proof was filed the affidavit of claimant, in which, she swears that said Brink was not in the county of Potter on the day advertised for taking said testimony, but had gone to Illinois. On August 12, 1884, the claimant filed with the local officers an explanation of the delay in forwarding the purchase money, and prayed that they would accept the final proof, receive payment and issue certificate for the land, which was accordingly done.

On appeal, the claimant has filed another affidavit dated July 30, 1887, in which she swears that since making said final proof on July 29, 1884, she married Jackson Dorman on January 16, 1886, and is now living with him in another county: that she lived on said land about ten months after making final proof: that at the time she made final proof, she could not find the notary public, advertised to take the

testimony of her witnesses: that she made diligent inquiry to ascertain his whereabouts and learned that he was absent from said Territory: that said absence was without her procurement or consent: that she then procured another notary, who swore her witnesses at the time and place advertised: and that there was no protest against the allowance of said proof. The final proof shows compliance with the requirements of the pre-emption laws and the regulations of the Department relative to inhabitancy, improvement, and cultivation. The explanation given for the change in notaries and the delay in forwarding the purchase money was satisfactory to the local officers, and the same appears in the entry papers.

In my opinion the technical defect should be considered by the Board of Equitable Adjudication. You will please refer said entry to said Board, under the appropriate rule.

The decision of your office is modified accordingly.

RAILROAD GRANT—CONFLICTING SETTLEMENT CLAIM.

ODGERS *v.* CENTRAL PAC. R. R. CO.

The statement of a settler as to the time when he filed his declaration of intention to become a citizen, though unsupported by record evidence, will be accepted in the absence of anything tending to impeach the truthfulness thereof.

A claim resting on settlement, residence, and improvement, covering the dates of withdrawal on general route and definite location, is sufficient to except the land covered thereby from the operation of the grant.

Secretary Noble to Commissioner Stockslager, May 27, 1889.

The Central Pacific Railroad Company appeals from your office decision, dated April 14, 1887, in the case of Henry Odgers against said company, rejecting the latter's claim, under its grant of July 1, 1862 (12 Stat., 498), to the S. ½ of the NW. ¼, and the N. ½ of the SW. ¼, Sec. 19, T. 16 N., R. 9 E., Sacramento, California.

The land in question lay within the limits of the withdrawal made for the benefit of said company, on map designating the general route of its road, notice of which was received at the local office October 3, 1864, and falls within the granted limits of the company's road, as designated by map of the definite location thereof, filed October 27, 1866.

The record shows, that on March 16, 1886; Odgers made application to enter the tract under the homestead law, accompanied by his affidavit to the effect that he was then an actual *bona fide* settler on the land, and a qualified homesteader; that the tract had not passed to the company under its grant, but was excepted therefrom by reason of the settlement claim of one Thomas Doyle, a qualified pre-emptor, who was, at the date of the definite location of the company's road, residing on and claiming the same, and who, as soon as the township plat was re-

turned to and filed in the local office, filed his pre-emption declaratory statement therefor.

The application was further supported by the affidavit of said Doyle, in which he states, in effect, that he settled on the land in question with the intention to pre-empt the same, about July 1, 1862, and resided thereon from that date until June, 1875; that he was then sixty-four years of age; that he had, prior to September 30, 1865, duly declared his intention to become a citizen of the United States, in a proper court, and was, on September 30, 1868, regularly naturalized in the district court of the 14th district of California; that in other respects he was a qualified pre-emptor, and had substantial improvements on the land, such as a house, about twelve by twelve feet in size, a stable, and about an acre cultivated to vegetables; and that on June 20, 1868, he filed his declaratory statement for the land, claiming the same under the pre-emption law.

On the application thus presented, a hearing was ordered by the local officers, to determine the issues raised by the affidavits filed therewith, which, after a number of continuances, by mutual consent of the parties, finally took place on July 21, 1886. Both parties were represented at the hearing by attorney. The testimony taken is that of Odgers, the homestead applicant, and four witnesses introduced in his behalf.

The local officers found in favor of Odgers, and recommended that his application to enter the tract be allowed. On appeal by the company, this finding was affirmed by your office, April 14, 1887. The company, in its appeal from this latter decision, alleges error, (1) in finding that Doyle settled on the land as a pre-emptor in 1862, or at any other time; (2) in finding that Doyle was a qualified pre-emptor prior to the withdrawal for the company, or the definite location of its road, and (3) in not recognizing the rights of the company under its grant.

The records of your office show, that the plat of the survey of said township 16 was filed in the local office, March 21, 1868, and that on June 20, 1868, Thomas Doyle filed his pre-emption declaratory statement for the tract in question, describing it as lots 2 and 3, and SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, Sec. 19, of said township and range, alleging settlement July 1, 1862.

By the testimony in the case, it is shown that Doyle settled on the land in the summer or fall of 1862, and that he resided continuously thereon, claiming the same, until several years after the date of filing his pre-emption declaratory statement therefor; that, finally, without ever having made proof under his said filing, he sold his improvements to Odgers and left the premises; that his improvements consisted of a small log cabin, about twelve by fourteen feet in size, situated on the northwest forty of the tract, and two enclosures, of about three acres and fifteen acres respectively, covering portions of each of the three other forties; and that he cultivated a part of the smaller enclosure to

garden vegetables, the larger being used for grazing purposes, and the raising of grain and hay.

Upon the question of his citizenship, Doyle testified at the hearing, that he took out his first naturalization papers in the State of Indiana, in 1855, and that he moved to California in 1859, and took out his second papers in Nevada City, of the latter State; and it is shown by documentary evidence filed in the record, that said Doyle completed his acts of naturalization and became a citizen of the United States, September 30, 1868, in the district court of the 14th judicial district of California. His statement, as to the time he took out his first naturalization papers, in Indiana, which, as a matter of course, must have been based upon his declaration of intention to become a citizen, though not supported by any record evidence of the date of the filing of such declaration, is not contradicted, nor is there anything in this record tending to impeach the truthfulness thereof. Such statement must, therefore, be taken as true, and it thus appears that at the date when he initiated his claim to the tract in question, and before the rights of the railroad company attached under its grant, Doyle was a qualified pre-emptor; which disposes of the second error assigned by the appellant.

But did Doyle settle on the land *as a pre-emptor*, in 1862 or at any other date? Upon this question a persistent effort was made by the attorney for the company, in his cross-examination of the witnesses at the hearing, to show that Doyle was living on the land simply as a miner, and that when he filed his pre-emption declaratory statement therefor, in 1868, he did so with a view to acquiring title to the land for mineral, and not for agricultural purposes. As a witness at the hearing Doyle's testimony on this subject is vague and unsatisfactory, and in many respects his answers are evasive and his statements conflicting; while in his affidavit, made March 16, 1886, and filed in support of the present application to enter, as aforesaid, he is emphatic and unequivocal in his statements that he settled on the land in 1862, "with the intent to pre-empt the same," and that in 1868, he filed his declaratory statement for the tract, claiming it "as a pre-emption." In addition to this, his improvements, as testified to by all the other witnesses in the case, are of an agricultural character, and not such as are usually made for mining purposes.

It is shown, too, that Doyle was induced to attend the trial as a witness, and his expenses thereat were paid by one Joe Thomas, who appears to have made a contract with the railroad company in reference to the land in question, with a view to acquiring the same from the company, and was trying to secure the defeat of Odgers's claim thereto; and who had agreed with Doyle to give him a portion of the land, if the hearing should result in a decision in favor of the railroad company. Doyle's manifest attempt to color his testimony in favor of the company, though introduced as a witness in behalf of the homestead applicant, and notwithstanding the statement in his said affidavit, which

was sworn to before he made the said agreement with Thomas, is thus explained.

Moreover, lands known to be mineral in character have never been subject to entry under the pre-emption law, but have always been expressly excepted from such entry, and this fact, which must have been known to Doyle when he filed his pre-emption declaratory statement for this land, when considered in connection with the apparent motives which prompted his testimony at the hearing, utterly discredits his statements then made, to the effect that he filed for the land with the intention of obtaining title thereto for mineral purposes. I think, therefore, there can be no question that the statements of Doyle in his affidavit of March 16, 1886, to the effect that he settled on the land in 1862, as a pre-emptor, and that when he filed his declaratory statement in 1868, he was claiming the land as a pre-emption are true, and this view is supported by the testimony of the other witnesses in the case. This disposes of appellant's first assignment of error.

The only remaining question to be determined is, whether the claim of Doyle was sufficient to except the land from the grant to the railroad company.

This grant is of every alternate odd numbered section of public land, not mineral, within certain prescribed limits, "not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached," at the time the line of the company's road is definitely fixed. A withdrawal for the benefit of the company, embracing the tract in question, was made, as we have seen, October 3, 1864, and the line of its road opposite thereto was definitely fixed, October 27, 1866.

It is seen from the foregoing, that the settlement claim of Doyle had attached to the land prior to the date of said withdrawal, and that such claim was continued by occupancy, residence and improvement until after the definite location of the road, and was followed up by the filing of his pre-emption declaratory statement for the land within three months after the township plat was filed in the local office.

This, in my judgment, was such a pre-emption claim as comes clearly within the excepting clause of the statute. A claim resting on settlement, residence and improvement, covering the dates of withdrawal on general route and definite location of its road, is sufficient to except lands covered thereby from the operation of the grant to the railroad company. Southern Pacific Railroad Company *v.* Lopez (3 L. D., 130); Central Pacific R. R. Co. *v.* Wolford (id., 264); Brown *v.* Central Pacific R. R. Co. (6 L. D., 151). Such was the claim of Doyle to the land in question, and I am clearly of the opinion that, by reason thereof, the land was excepted from the grant to the railroad company. Your office decision to this effect is accordingly affirmed.

The evidence further shows that Odgers is in all respects qualified to make homestead entry; that he and his family, consisting of his

wife and seven children, have resided on the land ever since 1875, and that his improvements thereon are worth from $1,500 to $2,000. There is no reason, therefore, why his application to make homestead entry should not be allowed.

PRACTICE—NOTICE—PRE-EMPTION—INNOCENT PURCHASER.

WILLIAM R. STONE.

The defendant will not be heard to plead insufficient notice, after obtaining, on his own motion, a continuance of the case to a day certain.

One who purchases land covered by a pre-emption entry, prior to issuance of patent therefor, takes but an equity, and subject to the subsequent action of the Land Department.

A pre-emption entry found to be fraudulent in character, and based on false final proof must be canceled.

First-Assistant Secretary Muldrow to Commissioner Stockslager, April 1, 1888.

I have considered the case arising upon the appeal of William R. Stone from your office decision of February 8, 1887, holding for cancellation the following [seventeen] pre-emption cash entries in the Duluth land district, Minnesota:

* * * * * * *

The final proofs in these cases were made in November and December, 1881. In said proofs the entrymen alleged that they settled on the lands in May and June, 1881; that they resided thereon continuously until making final proof; and that, in each case, the improvements consisted of a good log house, one and a half or two acres cleared, and half an acre to an acre cultivated to vegetables.

The entries above named were examined by William R. Marshall, a special agent of your office, and reported fraudulent. Thereupon your office ordered a hearing.

* * * * * * *

At the above hearing the entryman defaulted; but Messrs. Ensign and Cash appeared specially, as attorneys for one William R. Stone, an alleged *bona fide* purchaser of the land in question, for a valuable consideration. At their request, with consent of the government, the hearing was continued until November 23, 1882.

At the date last named, Stone, the transferee, submitted testimony—which was in substance, that he was a wholesale grocer residing in Duluth; that he bought the lands in good faith; that he never saw the lands or the entryman, but paid the money to one Bassett, a land explorer (or Thompson, Bassett's attorney); that he never had any talk about buying the land until about "November 15, 1881," and that he made the purchase some time after that; and that he had transferred said lands to other parties, whose names he refused to divulge.

A comparison of dates will show that Stone acknowledges having conversation with Bassett about the purchase of the tracts entered before proof was made in any of the cases. The entrymen are witnesses for each other, except where Bassett is a witness; in other words, the only witness to any of the final proofs are parties who are also implicated in the frauds if the entry be fraudulent. In each case the tract was transferred to Stone on the same day the entry was made.

The numerous assignments of error alleged by counsel for the defense may be summed up as follows: "Insufficient notice, in that no copy of the notice of the hearing was posted on the tract."

The Secretary of the Interior, by letter of September 15, 1882, directed that, in view of the notoriously-known fact that no person lived upon or within many miles of the tracts in controversy, the requirement of Rule 14 of Practice with respect to posting notices upon the land might be waived. Whether or not he had authority to do this, certainly when counsel for the defendant appeared October 25, 1882, and upon his own motion obtained a continuance of the hearing until November 23, he can not claim that at the last-named date he had not sufficient notice of the hearing. It is further alleged that your office erred:

In giving any consideration whatever to the testimony offered in behalf of the United States; in holding that the testimony offered is sufficient to overcome the final proof of the entryman; in holding, in the absence of any direct testimony whatever of persons having knowledge of the facts covered by the final proof, that the same was false and fraudulent; in inferring fraud from mere general statements of witness who admittedly had no personal knowledge of the facts shown by the final proof.

When the final proof alleged that on each of the seventeen described tracts there was a log house, a clearing of from one to two acres, and other improvements, in December, 1881, and within four months later not a vestige of a habitation could be found, not a tree cut, not an indication that any human being had ever before been (much less lived) on any one of these seventeen tracts, this alone (to say nothing of corroborating circumstances above set forth) was *prima facie* evidence of the falsity of the final proofs in said cases, sufficient to justify the conclusion of fraud, in the absence of any evidence in rebuttal. No such evidence on the part of defendant having been offered, and the testimony on part of the government remaining uncontradicted, your office was justified in holding that such final proof was false, and the entry fraudulent.

Finally, the defendant alleges that your office erred—

In denying to the appellant the relief and pretection afforded him by the law as an innocent purchaser of the land.

This Department decided, in the case of R. M. Chrisinger (4 L. D., 347)—followed by hundreds of other cases since:

Conceding the right of sale after the issuance of final certificate and prior to patent, the purchaser takes no better claim for title than the entryman has to confer; and whatever right is thus acquired is subject to the subsequent action of the land department. Again: the Department must deal directly with its own vendees—with

the persons with whom it contracts. It can not undertake to follow the transfers of the grantees, and to settle questions that may arise upon such transfers, but must leave such matters for determination in the courts.

Your decision in these cases is therefore affirmed.

PROCEEDINGS ON SPECIAL AGENT'S REPORT—TRANSFEREE.

JOHN A. MCKAY.

On the application of a transferee, who alleges want of notice of a decision cancelling the entry, a hearing may be ordered to determine whether the entryman did in fact comply with the law, although the transfer was not of record, and the entryman had due notice of the proceedings against the entry.

In proceeding against an entry the burden of proof is upon the government.

A homestead entry of land chiefly valuable for the timber thereon should be carefully scrutinized in order to ascertain whether the entryman is in fact a *bona fide* settler.

First Assistant Secretary Muldrow to Commissioner Stockslager, April 3, 1889.

I have considered the appeal of John A. McKay, transferee of Charles V. Marsh, from your office decision of December 20, 1887, denying his application for a hearing to determine the validity of the commuted homestead cash entry made by said Marsh for the SE. ¼ of section 11, T. 11 N., R. 1 E., Humboldt land district, California.

The entry was made July 8, 1884, and, after proper publication of notice, commutation proof was offered April 7, 1885, and cash certificate issued the same day.

* * * * * * *

May 18, 1886, special agent Bergen visited the tract and reported that it was very rough, mountainous land, densely covered with redwood timber and unfit for cultivation; that final certificate issued April 7, 1885, and that there was no transfer of record; that there were no improvements whatsoever excepting a shanty ten by ten, without floor, fire-place or window, with brush growing inside, no fencing and no land in cultivation; that the entryman never resided on the land and that the fraud was willful. He recommended the cancellation of the entry. The report is accompanied by the affidavits of Edward Dickey and James B. Watkins. The former swears—

"that to his own personal knowledge the said Marsh never lived on said claim" and the latter "that the said Marsh does not now and never did live in said house or on said land excepting while he was building said shanty and that the said land is heavily timbered with redwood and that it would cost five hundred dollars per acre more than the said land is worth to remove the timber therefrom.

Upon the report of said special agent you based your letter of November 20, 1886, in which you held the entry for cancellation and directed

the local officers to give claimant due notice of your action, to inform him of the nature and substance of the special agent's report and to advise him that he will be allowed sixty days in which to apply for a hearing to show cause why his entry should be sustained, in accordance with circular instructions of July 31, 1885, as amended by the circular of May 24, 1886, and that if he fails to apply for a hearing to show cause why his entry should be sustained the same will be finally canceled.

By letters of February 18, and March 8, 1887, the local officers reported that the claimant had been duly notified of the action of your office and that the time had expired without his taking any action in the matter. The return registry receipt signed by Marsh was forwarded with the register's letter. March 25, 1887, your predecessor canceled the entry.

August 20, 1887, the local officers transmitted the application of John A. McKay for a hearing in the matter of the cash entry of Marsh. Said application is accompanied by an affidavit in which McKay sets forth that—

> Between the dates of said entry by said Charles V. Marsh and the cancellation thereof by said Commissioner of the General Land Office this affiant became the owner, by purchase, through mesne conveyances, in good faith, for a valuable consideration, all of the right, title, and interest of the said Charles V. Marsh in and to said lands and premises; that this affiant is now the owner therof; . . . . . that this affiant is informed and verily believes the said Charles V. Marsh duly complied with the laws of the United States relative to settlement, improvement and cultivation . . . . ; that the records . . . . show that a notice of said cancellation was delivered to said Charles V. Marsh on November 23, 1886, but as to whether the same was received by him this affiant has no knowledge, information or belief other than what said records show; that this affiant only knew of said cancellation within a few days last past and then learned it by mere accident in searching the records of said land office relative to other matters; that said Charles V. Marsh although he well knew who the owner of said lands and premises was did not at any time inform the affiant of said cancellation or of said notice thereof or of any proceedings relative thereto;

wherefore McKay asks that the cancellation of the entry be set aside and a hearing be ordered at which he may be allowed to prove, as he is willing and ready to do, that Marsh complied with all the requirements of law.

December 20, 1887, you denied the application for a hearing for the reason that at the date of the cancellation of the entry there was nothing of record to show that any one other than the entryman had any interest in the entry; that the entryman had acknowledged receipt of notice of your letter holding the entry for cancellation and had not availed himself of the permission granted therein of showing cause why such action should not be taken, and that he was the only party upon whom notice was required to be served.

From your said decision McKay appeals.

In view of the statements of the transferee that he had no notice of the action of your office in holding the entry for cancellation and of the opportunity afforded for the submission of testimony showing that the

law had been complied with and the cash entry properly allowed, and that the failure of the entryman to notify him of the action of your office deprived him, to his serious injury, of the opportunity of defending the entry, I see no objection to allowing the hearing asked for. Case of David Y. Bradford (8 L. D., 283).

I therefore, re-instate the entry and direct that a hearing be had to determine the validity thereof, at which the burden of proof will be upon the government. As this land is said to be densely covered with redwood and chiefly valuable therefor, all the facts and circumstances connected with Marsh's settlement and residence should be most carefully scrutinized so that it may be determined whether he was in fact a *bona fide* settler who made the land his home or whether his settlement was a pretended, or at most a colorable settlement made with the view of securing the timber thereon. Porter *v.* Throop (6 L. D., 691); Wright *v.* Larson (7 L. D., 555).

The record before me discloses no adverse claim to the tract. If one has attached, its rights will also be determined at the hearing.

Your decision is modified accordingly.

PRE-EMPTION—SECOND ENTRY.

JAMES A. FORWARD.

A pre-emption filing should not be received for land included within an existing homestead entry.

If a pre-emptor applies to file a declaratory statement for land embraced within an entry of record, alleging settlement prior to the date of such entry, a hearing should be ordered to determine the respective rights of the parties.

A second filing is permissible where the first was for land not subject thereto, and the pre-emptor, in good faith, abandoned the same on discovery of such fact.

Secretary Noble to Commissioner Stockslager, May 27, 1889.

I have considered the appeal of James A. Forward from the decision of your office of October 31, 1885, holding for cancellation his pre-emption cash entry No. 1433, for the SW. ¼ of Sec. 28, T. 26 N., R. 33 E., Spokane Falls district, Washington Territory.

Forward's declaratory statement for said land was filed April 26, 1883, and alleged settlement the 24th of that month, and it appears that he had a few days before, on the 20th of said month, filed a declaratory statement for another tract, namely,—the SE. ¼ of said Sec. 28, alleging settlement thereon on the 14th of said month.

The action of your office in holding his said pre-emption cash entry for cancellation was upon the ground that he had "exhausted his right to make a pre-emption filing" by said prior filing.

Forward made proof, December 3, 1883, on his second filing now under consideration, showing compliance with the law as to residence on and improvement and cultivation of, the land covered by said filing,

and said proof was approved by the local officers, who on January 2, 1884, received payment for said land ($400.) and issued to Forward final receipt and certificate. He accompanied his proof with an affidavit setting forth the facts as to his said prior filing, and from said affidavit and another attached to his appeal to this Department, it appears that "being sixty miles away from the land office, he made application to make his first filing at Cheney, Washington Territory, before the clerk of the county court; that sometime afterwards he was informed by said clerk that a homestead entry (No. 3124) had already been made on the land embraced in said filing " and that his application (to file thereon) would undoubtedly be returned to him as he could not file over a homestead;" and "relying upon said information," he afterwards went to the land office at Colorado and made said second filing now under consideration.

It is stated in your office decision that the records of your office show that said homestead entry, No. 3124, referred to by Forward in said affidavits, was made by one, James W. McCord, April 16, 1883, on said land covered by Forward's first filing. While Forward's first declaratory statement alleged settlement, April 14, 1883, two days prior to said homestead entry it was not filed until April 20, 1883, four days subsequent to said homestead entry. At the time said declaratory statement was filed, therefore, the land had been segregated by said entry of record, and said filing should not have been allowed by the local officers while said entry remained intact. (Grove *v.* Crooks 7 L. D. 140).

Where a pre-emptor applies to file a declaratory statement for land embraced in an entry of record, alleging settlement prior to the date of such entry, the proper practice is to order a hearing to determine the respective rights of the parties. (James *et al. v.* Nolan, 5 L. D., 526).

On such hearing, the homestead claimant might sustain his entry as against a party claiming a prior pre-emptive right, by showing settlement under section 3, of the act of May 14, 1880 (21 Stat., 140), before the alleged settlement of the pre-emption claimant and within the time prescribed in said act, or by showing that the alleged settlement of the pre-emption claimant was not in fact made or if made, that it was not made at the time alleged and was subsequent to the homestead entry. If, however, none of these facts appeared and the pre-emption claimant's right was proven to be superior, then the homestead entry would be held for cancellation, subject to appeal in due order to your office and to this Department. If the entry was finally canceled, then, and not until then would the land be subject to the pre-emption filing.

Forward had a right to assume, that the local officers had acted in accordance with the law, and had not allowed a filing on land not subject thereto, and hence that said filing had not in fact been placed of record and, they not having ordered a hearing to determine the respective rights of himself and the homestead entryman, it was not compulsory on him to demand such hearing and enter into a contest, which

might be not only prolonged and expensive, but of doubtful issue. There being nothing to indicate collusion for the purpose of evading the law or fraud in any particular, the government looks with favor upon the adjustment without contest of conflicting claims to the public domain.

Forward made a full disclosure to the local officers of the facts as to his first filing at the time of his entry on the land embraced in his second filing, and there is nothing in the record inconsistent with entire good faith on his part; the land embraced in his first filing was not in fact "open to such filing," and in making his second filing, he acted upon the idea, that the local officers had observed the law and that said first filing had not been allowed. Under all the circumstances of the case, even if the placing of record a declaratory statement for land already appropriated and hence not open to filing, can in law be held to be a filing, he can not be charged with culpable negligence and should not be held to have "exhausted his pre-emptive right." Hannah M. Brown (4 L. D., 9).

The decision of your office holding said pre-emption cash entry for cancellation because of said prior filing, is reversed, and, there being no other objection thereto, said entry will be passed to patent.

DOUBLE MINIMUM LANDS—REPAYMENT.

TEXAS PACIFIC GRANT.

All lands subject to entry within the limits of the forfeited Texas Pacific grant were double minimum in price from the date of withdrawal on general route to the passage of the act of March 2, 1889; hence such price was properly charged in case of entries prior to said act, and there is no authority for the repayment of any part thereof.

Secretary Noble to Commissioner Stockslager, May 29, 1889.

I am in receipt of your communication of the 20th instant, submitting a memorandum of authorities upon the question of repayment of the excess of $1.25, paid upon lands within the limits of forfeited railroad grants.

With reference to lands within the limits of the forfeited grant to the Texas Pacific Railroad company, you say that but for a recent decision of Secretary Vilas in the case of Thomas Kearney (7 L. D., 29), you would not hesitate to say that no repayment of the excess of $1.25 paid for lands within the limits of this grant could be allowed; but that if it is my opinion that the decision in the Kearney case is good law and will be followed, it is possible that payment would be authorized in cases of lands within the grant of the Texas Pacific Railroad company under the principle decided in that case.

I have examined the decision referred to, and am of opinion that it is not authority for repayment of the excess where double minimum has

been paid for lands within the limits of the forfeited grant to the Texas Pacific Railroad Company prior to the act of March 2, 1889, (25 Stat., 854).

In the Kearney case the grant to the railroad company was declared forfeited by the act of January 31, 1885, and the lands embraced therein were "restored to the public domain and made subject to disposal under the general land laws of the United States as though said grant had never been made." The act of forfeiture also contained the proviso—

That the price of the even numbered sections within the limits of said grant and adjacent to and coterminous with the uncompleted portions of said road, and not embraced within the limits of said grant for the completed portions of said road, is hereby reduced to $1.25 per acre.

On October 14, 1885, more than eight months after the forfeiture of the grant and of the restoration of these lands to the public domain *as if no grant* had been made, and of the declaration by Congress that the price of the even numbered sections within the limits of the uncompleted portion of said grant should be $1.25 per acre, Kearney made pre-emption cash entry of a tract of land in an even numbered section within said limits and paid therefor the double minimum price, to wit, $2.50 per acre. The Department properly held that at the date of his purchase the land was not within the limits of a railroad grant, and as by the act of forfeiture the land that had formerly been raised to $2.50 per acre was reduced to $1.25 per acre, he was entitled to repayment of the excess of $1.25 per acre under the act of June 16, 1880 (21 Stat., 287) providing that—

In all cases where parties have paid double-minimum price for land which has afterwards been found not to be within the limits of a railroad land grant, the excess of one dollar and twenty-five cents per acre shall in like manner be repaid to the purchaser thereof, or his heirs or assigns.

The interpretation given to said act by Secretary Vilas in the decision above referred to is that where a purchaser has been erroneously charged the double minimum price for lands supposed to be subject to said price by reason of being within the limits of a railroad grant, and it is subsequently determined that at the date of the purchase the lands were not subject to the double minimum, that it is the same as if the lands were supposed at date of purchase to be within the limits of said grants but were afterwards found to be outside of said limits. I think this is a fair and reasonable interpretation of said act, the spirit and intent of the act evidently being that in all cases where the double minimum was erroneously charged repayment should be allowed.

But I do not see how the ruling in that case can be invoked in support of a claim for repayment of any part of the purchase money paid for lands within the limits of the forfeited grant to the Texas Pacific Railroad Company prior to the act of March 2, 1889. The grant to this

company was forfeited by the act of February 28, 1885 (23 Stat., 337), which declared—

That all lands granted to the Texas Pacific Railroad Company under the act of Congress entitled "An act to incorporate the Texas Pacific Railroad Company and to aid in the construction of its road, and for other purposes," approved March third, eighteen hundred and seventy-one, and acts amendatory thereof or supplemental thereto, be, and they are hereby, declared forfeited, and the whole of said lands restored to the public domain and made subject to disposal under the general laws of the United States, as though said grant had never been made: *Provided,* That the price of the lands so forfeited and restored shall be the same as heretofore fixed for the even sections within said grant.

By the very terms of the act the even sections which had been raised to double minimum on the filing of the map of general route remained at that price, and the price of the sections declared forfeited and restored to the public domain was also declared to be "the same as heretofore fixed for the even sections within said grant," that is, double minimum. So that the even sections from the date of withdrawal upon the map of general route and the odd sections from the date of their restoration by the act of forfeiture, were fixed at double minimum and so continued until the act of March 2, 1889 (25 Stat., 854), fixing the price of all public lands within the limits of railroad lands which have been, or may hereafter be forfeited, at the price of $1.25 per acre. George T. Clark (6 L. D., 157).

Therefore as all lands subject to entry within the limits of this grant were double minimum in price, since the date of withdrawal on general route to the date of the act of March 2, 1889, such price was properly charged and there is no authority for repayment of any part of said amount under the act of June 16, 1880, or any other act.

ALABAMA LANDS—ACTS OF JUNE 15, 1880, AND MARCH 3, 1883.

NATHANIEL BANKS. (ON REVIEW.)

A purchase under section 2, act of June 15, 1880, is not a consummation of the original homestead entry, operating by relation from the date of such entry, but a private entry, operative from the date thereof.

An entry under said section of land reported valuable for coal prior to the passage of the act of March 3, 1883, is not permissible until after public offering thereof.

An application under said section to purchase land in such a condition, may be received and held suspended, pending an offering of the land at public sale, when, if the land is not sold, the application may be considered as of the date originally made.

Query: If the land was not subject to the original homestead entry on account of its known mineral character, and hence not purchasable under the act of 1880, has the act of 1883 removed said objection to such purchase?

Secretary Noble to Commissioner Stockslager, May 29, 1889.

This is a motion for review by Columbus E. and Thomas F. Rice of the departmental decision of December 12, 1888, in the case of Nathan-

iel Banks (7 L. D., 512), and involves the W. ½ of SW. ¼ of Sec. 7, T. 18 S., R. 9 W., Montgomery district, Alabama.

Banks made homestead entry of said land, November 16, 1869, which was canceled March 5, 1879, because final proof had not been made. Said Columbus E. and Thomas F. Rice, in July, 1887, filed a petition praying, among other things, that they be allowed to enter said tract under the second section of the act of June 15, 1880 (21 Stat., 236), as assignees of Lewis Phillips, who in 1871 had purchased of the entryman Banks his claim to the land.

The land had been reported in 1879 as valuable for coal, and by the first proviso of the act of March 3, 1883, entitled "An act to exclude the public lands in Alabama from the operation of the laws relating to mineral lands" (22 Stat., 487), all lands which had theretofore "been reported to the General Land Office as containing coal and iron" were required to be "first offered at public sale." Under said act, it was held in said departmental decision, that the land involved "could not be entered until it had been first offered at public sale" and the decision of your office sustaining the local officers in denying the petition of the Rices to purchase under the act of 1880 was affirmed.

The second proviso of the act of 1883 is as follows:

And provided further, That any bona fide entry under the provisions of the homestead law of lands within said State heretofore made may be patented without reference to an act approved May 10, 1872, entitled "An act to promote the development of the mining resources of the United States," in cases where the persons making application for such patents have in all other respects complied with the homestead laws relating thereto.

This second proviso is a limitation upon the first (Nancy Ann Caste, 3 L. D., 174), but it is manifest that it does not protect from the operation of the first proviso the application of the Rices to purchase under the second section of the act of 1880. In the first place, it (the second proviso of the act of 1883) only embraces cases of persons who "have in all other respects" (except as to character of land) "complied with the hometead law." The Rices make no claim of having themselves complied with the homestead law, and assert right as assignees of an entryman whose entry was canceled because of his failure to comply with the requirements of that law. In the next place, said second proviso only relates to applications for patent on the original homestead entry, and provides that said "entry . . . . . may be patented. . . . ."

It seems to be claimed by counsel in the motion for review, that a purchase under the act of 1880 is not a new or original entry, but a re-instatement and consummation of the homestead entry, operating by relation from the date of such entry. The act, however, by protecting "all vested rights that might intervene prior to application to purchase" (George S. Bishop, 1 L. D., 69), expressly deprives the purchase of any operation by relation as to such rights, and there is nothing in the language or reason of the law, to sustain the position contended

for or to indicate that anything more was intended than the conferring upon a particular class of persons the right of private cash entry of certain lands, operative from the date of such entry.

The application of the Rices having been made in 1887 after the passage of the act of 1883, was properly denied. Said application may, however, be held suspended pending the offering of the land at public sale, and, if the same be not sold upon such offer, then the application may be considered and passed upon as of the date when originally offered. If, on the hearing of such application, it shall be made to appear, that the land was not subject to homestead entry at the date of Bank's entry in 1869, and hence was not purchasable under the second section of the act of 1880, because of its *known* mineral character when entered, then the question will arise, whether the act of 1883 has obviated this or other objections founded on the *mineral* character of the land, by making all public lands in Alabama, "whether mineral or otherwise, subject to disposal only as agricultural lands."

The departmental decision in this case of December 12, 1888, is modified, so as to authorize the suspension of the application as above indicated.

PRACTICE—DEPOSITIONS—TIMBER CULTURE CONTEST.

SPARKS *v.* GALVIN.

An objection to the officer appointed to take the testimony comes too late when made after the testimony is submitted.

In appointing a commissioner to take evidence, the local officers should avoid the selection of an officer open to the charge of bias or prejudice on account of his relation to the parties litigant.

A scanty growth of brush and small trees, lining the banks of a stream that passes through the section, is not sufficient to exclude the land from timber culture entry.

First-Assistant Secretary Chandler to Commissioner Stockslager, May 31, 1889.

I have considered the appeal of William Sparks from the decision of your office dated April 14, 1888, in the contest case of said Sparks *v.* John P. Galvin, dismissing the contest against the timber culture entry, No. 4,634, of said Galvin for the SW. ¼, Sec. 12, T. 1 N., R. 21 W., Bloomington land district, Nebraska.

While in disposing of this case it is not necessary to pass upon the defendant's motion to quash all proceedings on the ground that the commissioner appointed to take the testimony therein was a partner of W. F. Seaver, contestant's attorney, and while the motion came too late after the testimony was all in (the objection should have been made before trial) yet I cannot let this occasion pass without suggesting that had the contestant succeeded, it would have laid the ground for severely criticising the acts of the register and receiver in thus appointing the partner of the plaintiff's attorney to act as commissioner. While I have

no doubt that he faithfully and honestly discharged his duties, free from favoritism, bias, or prejudice, yet a delicate sense of the possible criticism of both the acts of the register and receiver in making the appointment and the commissioner in accepting the same, would suggest the impropriety of such action. Let the actions of the department be free from even the suspicion or semblance of favoritism, so that all litigants approaching the same shall have the consciousness of fair and impartial treatment in the consideration of their cases. As to the merits of the case, it appears that there is a small small stream flowing through the land in controversy, and along its banks is a growth of underbrush and small trees, consisting of ash, elm and willow, some three or four hundred in number.

It is contended by the plaintiff that on account thereof, this tract is "neither prairie land" nor "devoid of timber," hence it is not subject to entry under the timber culture act.

Upon this question the decisions of the department are not uniform. In the case of Blenkner *v.* Sloggy, 2 L. D., 267, there were five hundred trees of natural growth upon the tract and it was held subject to entry, and in the case of Bartch *v.* Kennedy, 3 L. D., 437, there were twelve hundred trees on the land and the same conclusion was reached, while in the case of James Spencer, 6 L. D., 217, where there were fifty trees growing upon the claim it was held that the tract was not devoid of timber, yet the entry was allowed to stand as being within the ruling of the department in force at the time of the entry.

In the late case of James Hair (8 L. D., 467), all these cases are reviewed and the conclusion reached that "no arbitrary rule can be formulated for the government of every case."

I am inclined to hold within the rule laid down in the Hair case (*supra*) that the fact that the banks of this little stream are lined with brush and a growth of small trees does not except this tract from the operation of the timber culture act, and that this entry must be allowed as in accordance with the departmental rulings in force at the time it was made. Candido *v.* Fargo, 7 L. D., 75, and William L. Drew, 8 L. D., 399.

Your decision is therefore affirmed.

TIMBER CULTURE CONTEST—GROWTH OF TREES.

BARKER *v.* CARBERRY.

That the trees have not attained a particular height or size will not warrant cancellation of the entry on contest, if the entryman has used reasonable efforts to encourage their growth.

First Assistant Secretary Chandler to Commissioner Stockslager, May 21, 1889.

I have considered the appeal of S. Barker, from the decision of your office dated March 20, 1888, affirming the action of the local office in

dismissing the contest of said Barker against the timber culture entry No. 288, of John Carberry, for the NW. ¼, Sec. 32, T. 30 N., R. 14 W., Niobrara land district, Nebraska.

Counsel for the plaintiff, who appeals from your decision, does not clearly set out in his brief what he claims to be the failure of the defendant to comply with the timber culture act, except to refer generally to the testimony and leaves it for the department to fish out therefrom the acts of the defendant upon the tract tending to establish a non-compliance with the law. From a careful examination of the testimony, I am satisfied that the defendant has the requisite number of trees growing on the premises, and while they are small, yet I think the entryman used reasonable efforts, considering what he had to contend with to encourage their growth. It has repeatedly been held by this department, that where trees are not dwarfed by the negligence of the entryman to properly cultivate them, there is no provision in the timber culture law requiring that the trees should attain any particular height or size before certificate and patent can issue. Robert M. Winslow, 8 L. D., 191; Henry Hooper, 6 L. D., 624; and Frohne *v.* Sanborn, 6 L. D., 491.

I have no reason for disturbing your decision and the same is accordingly affirmed and the contest of the plaintiff dismissed.

SETTLEMENT PRIOR TO SURVEY—JOINT ENTRY.

LORD *v.* PERRIN.

A settler must be located on the land prior to the survey thereof in the field, to entitle him to make joint entry with another under the provisions of section 2274, R. S.

A settlement made prior to survey in the field by an alien who subsequently, and before approval of the survey, files his declaration of intention to become a citizen, is such as to entitle him to the right of joint entry.

Conflicting settlement rights for the same tract, acquired prior to survey, may be adjusted by allowing either party to enter the entire tract on condition that he tenders to the other a written agreement to convey to him that portion of the land rightfully covered by his occupation.

If both parties fail or refuse to make entry on the conditions thus specified, joint entry may be allowed in accordance with the statute.

Secretary Noble to the Commissioner of the General Land Office, June 1, 1889.

I have considered the case of Frank D. Lord *v.* Joseph Perrin, involving lot 2, Sec. 13, T. 161 N., R. 74 W., Devils Lake land district, Dakota, now before me on the appeal of Perrin from the decision of your office, on May 4, 1886, rejecting his final proof as to said lot and awarding priority of right thereto to Lord.

The survey of the township, in which said lot is situate, was made in

the field during October, 1884, the plat thereof was approved December, 1884, and filed in the local office January 7, 1885.

On January 22, 1885, Joseph Perrin filed declaratory statement for lots 2 and 3, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$ and SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 13, said township and range, alleging settlement August 20, 1884.

On February 16, 1885, Frank D. Lord filed declaratory statement for lots 1 and "2," Sec. 13, lot 5, Sec. 12, lot 5, Sec. 11, and NE. $\frac{1}{4}$ NE. $\frac{1}{4}$ of Sec. 14, same town and range.

It will be seen that the two claims conflict as to lot 2, Sec. 13.

On May 30, 1885, Perrin offered final proof and Lord protested against the same so far as lot 2 was involved. A hearing was had in June, and the local officers sustained the protest of Lord; and on appeal your office affirmed their judgment.

A small diagram forwarded by the local officers with their decision and hereto attached shows, that all the tracts claimed by Lord are located along the south side of Devils Lake, and are all made fractional by the meanders of the lake, except the NE. $\frac{1}{4}$ NE. $\frac{1}{4}$ of Sec. 14. Lot 2, the land in controversy, as platted, contains forty-eight acres.

At the hearing quite a number of witnesses testified, and there is apparently considerable conflict in their evidence on certain points, whilst in other respects the testimony is clear of difficulty.

It is thus made to appear that Lord was about the first settler upon the banks of Devils Lake in that particular locality, arriving there in April, 1883. The lands thereabouts were then unsurveyed, and he, in company with one White, first measured off on the banks of the lake what they supposed to be a half mile square. In a few days he changed this location and made as he says one in the shape of an L, running with the lake for "three forties long and one forty north of the west forty." This verbal description is not very accurate and does not correspond entirely with the location of his present claim as shown on the diagram. He says that after making this location he ran a furrow to mark it. The testimony on this subject is so conflicting as to be irreconcilable, and I am not satisfied that at that time Lord intended to or did claim any part of what is now lot 2. It is certain he then camped upon the land adjoining it on the west, now lot 1, Sec. 13, erected thereon his first home and dug the cellar for what was intended to be a much larger house, and hauled logs to commence the erection of the same. Subsequently, however, he seems to have changed his mind, hauled the logs further to the east and late in the fall of 1883 he erected his house and other buildings upon that part of what is now lot 2, which is immediately upon the banks of the lake and which if the sub-divisional lines of Sec. 13 had been run across, would have been a lot immediately north of the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said section; and there he has lived since, and has improvements worth $1,200 all of which, up to the time of contest, were within the eight acres nearest the lake. All this took place prior to the acquisition of any rights of Perrin.

Shortly after Lord, other settlers were located in the vicinage and from measurements or private surveys made by them, an impression prevailed that a fraction of about eight acres would be laid off, on survey, where Lord's house and improvements were and would not include the forty acres south of that. Lord also seems to have entertained this belief and at that time not to have intended to claim more than the fraction containing his improvements; for after he removed from his first house or shack, having sold it to one Marlett, about April, 1884, it was moved upon said lot 2, where it was set up in plain sight of Lord's house. Marlett claimed the southern forty of said tract and forty acres adjoining on the east, and the claim seems to have been acquiesced in by Lord. It is claimed that Marlett purchased the possessory right to the southern forty of lot 2 from Lord. He, however, emphatically denies that he sold anything but the house; and admits he acquiesced in Marlett's claim to the southern part of that lot, but only recognized it outside of forty acres southward from the Lake. But Miller, one of the witnesses for Perrin, states most positively that both Lord and Marlett told him that Marlett had bought, with the "shack" from Lord the latter's possessory right to all of the now lot 2, except that portion covered by Lord's improvements. The character of this witness Miller is not assailed. He is without interest in the result of the case and his testimony clear, positive and detailed, must be accepted as conclusive on this point. It is in fact corroborated by the acts of Marlett and Lord and by the circumstances of the case, as will further appear.

Marlett continued to occupy the shack located as above, on lot 2 until May 10, 1884, when he sold the same, together with the possessory right to the said tract to Henry Perrin, a son of the present claimant. Gagnon, another disinterested witness, testifies that after this sale, in company with Henry Perrin, the claim was measured, marked off and stakes driven; that whilst engaged in doing this Lord came up and inquired what they were about, and was told they were running the line of Perrin's claim, and were going to chain across the north side of the claim and it would run very near Lord's house. He said he thought not. He stepped it out to his house, and said it would not run so close as thought. The north line was then established by driving a picket about eight or nine rods south of Lord's house, who was present and did not object. Henry Perrin cultivated a portion of the land that year and the year afterwards, without objection from Lord. This Henry Perrin was, if not a minor, at that time, an alien, who had made no declaration of his intention to become a citizen. He states that his purchase, settlement, etc., were all intended for the benefit of his father, who subsequently arrived and entered into possession of the claim so initiated, and erected his house and other buildings upon what is now lot 3 of said Sec. 13.

Joseph Perrin, the father, when he arrived, on August 20, 1884, was unnaturalized, but declared his intention to become a citizen of the United States on November 3, 1884; and it is claimed his rights as a

settler upon the public lands, if he has any, can only date from that day.

As further confirmatory of the view, that Lord did not at the time intend to include within his claim more of lot 2 than was covered by his improvements on the northern part thereof, it is a fact beyond dispute that Lord who acted as a land locator in the neighborhood actually made out for Perrin, the declaratory statement of the latter after the township plat was filed in the local office. For this work Lord was paid, and forwarded the paper to the local office. In this declaratory statement was included the land in controversy, and it is inconceivable that Lord would have made out such a document, unless he then recognized the claim of Perrin to the said land. It is true, Lord afterwards filed declaratory statement embracing the same tract, but this is not necessarily inconsistent with the recognition of Perrin's claim to the south forty acres, but was done by Lord, doubtless to protect his improvements on lot 2, and which he then thought could not be otherwise protected than by filing a claim to the whole of said lot 2.

I am satisfied that Perrin and Lord made settlement upon said lot 2, and had improvements thereon, "prior to the survey thereof," and that said settlements were open and notorious, and acquiesced in by both parties.

The register and receiver seem to have come to the same conclusion for they say in their opinion,—

In view of the peculiar case, resulting from a platting of the land so unexpected, a joint entry, under R. S., 2274 would seem to have a basis of equity, did the law in the case render such adjustment practicable. It is, however, precluded, under the statute, as Joseph Perrin's interest does not attach until after the land had been surveyed.

Provisions relating to the adjustment by the local officers of the conflicting claims of settlers upon lands prior to survey were enacted into law as early as 1808. But existing law, now embodied in section 2274 R. S., was enacted by the act of March 3, 1873 (17 Stat., 609). This law is—

When settlements have been made upon agricultural public lands . . . . prior to the survey thereof, and it has been or shall be ascertained, after the public surveys have been extended over such lands, that two or more settlers have improvements upon the same legal sub-division, it shall be lawful for such settlers to make joint entry of their lands at the local land office, etc.

Shortly after the passage of said act, the Commissioner of the General Land Office on March 31, 1873, issued a circular of instructions in relation to the provisions of that law, wherein it was said:—

When the survey in the field finds two or more settlers with improvements on the same legal sub-division, a joint entry thereof will be allowed as heretofore. (1 C. L. L., 301).

This circular so far as I have been able to ascertain is yet in force, not having been modified or changed by any other circular or by ruling of the Department.

Ordinarily, the public lands are not deemed to be surveyed, in con-

templation of law, until the survey is approved and becomes a record in the district land office. Barnard *v.* Ashley's heirs, 18 How., 46; California *v.* Townsend, 2 C. L. L., 1117; Foster's case, ib., 1125. But, in view of the manifest purpose entertained by Congress in enacting the legislation referred to, I am inclined to believe that the construction placed thereon by your office is the correct one, and that the settler must have been located on the land "prior to the survey thereof" in the field to entitle him to make joint entry with another under the provisions of said act. Were it otherwise, instead of the law affording protection to those who had improved and were in the occupation of public lands prior to and at the time of survey, it would open the door wide to fraud and enable those, who, ascertaining where the subdivisional lines of the survey in the fields run, would, prior to the approving and recording thereof, locate upon and improve the already improved lands of prior settlers, to claim the right to make joint entry thereof because they were settlers upon the public lands "prior to the survey thereof."

If such a strict construction of the law is to prevail, it would clearly cover Perrin's case. For, though the survey of said township was made in the field in October, 1884, inasmuch as the plat thereof was not approved and filed in the local office until January 7, 1885, prior to which time Perrin, who had become qualified, by virtue of his declaration of intention of November 3, 1884, to acquire rights under the pre-emption laws, had settled upon the tract in controversy, which was also partly occupied by Lord, it would seem that the former was within the letter of the statute and, strictly speaking, a settler on said tract "prior to the survey thereof," and that joint entry would be proper under the circumstances. But, as I read the law, a mere compliance with its technical provisions, ignoring the obvious and substantial purposes for which it was enacted, will not alone confer rights. Nor, on the other hand, would the failure to comply with any of the literal and technical requirements necessarily defeat the enjoyment of the benefits of the law by one who obviously came within the scope of its purposes, and was acting in good faith. The statute is remedial in its character; it aims to prevent vexatious litigation, and give repose to those persons seeking to acquire title to the public lands under the settlement laws, who have in good faith established themselves on a tract prior to survey, and afterwards found that unintentionally they had located upon a legal subdivision occupied by another. Such a statute in the interest of peace should meet with a fair and liberal construction by the Department, and, if possible, be made effective to accomplish its beneficent purposes.

The case under consideration seems to me to be a meritorious one, and clearly within the purview of the statute, adopting the constructions put thereon by your office circular referred to. Perrin, though not naturalized, settled upon this tract personally on August 20, 1884, nearly two months before the survey in the field was made. He could

not then have made entry of the tract had he been naturalized. However, he made declaration of his intention to become naturalized, November 3, 1884, prior to the return, approval and filing of the survey, or before the land was open to filing or entry. Had he not settled upon the tract until after the survey in the field had been made, when by inquiring he could have ascertained the lines or proposed lines of survey, I should have held that he was acting in bad faith and not entitled to consideration. But, as it is, I must hold that he comes within both the letter and spirit of the law.

It has been suggested that, in arriving at this conclusion, the Department necessarily holds, that Perrin, an alien, who had not declared his intention to become a citizen of the United States, was such a "settler" as could obtain rights under the pre-emption laws, and that such holding conflicts with the views of the supreme court, in the case of Deffeback *v.* Hawke, 115 U. S., 407, where it is said:

there can be no such thing as good faith in an adverse holding, where the party knows that he has no title, and that under the law, which he is presumed to know, he can acquire none by his occupation.

The language here quoted was used in reference to the particular case then being considered, and is immediately followed by the statement, that the defendant knew that—

the lands were mineral, and were claimed as such by the plaintiff, and that title to them could be acquired only under the laws providing for the sale of lands of that character.

The facts of the case now under examination are so different from those in the one quoted, that there is scarcely any appositeness in the reference; for Perrin was seeking by his occupation to obtain land, under the pre-emption law, which he knew it was in his power to obtain, when the two required conditions of his qualification, as to citizenship, by making a declaration of intention to become such, and the filing of the plat of survey, concurred. One of the conditions it was in his power to bring about, and he did so; the other remained for the government to perform. When that action was taken, he was ready and the two conditions concurring, his filing being made, related back to the time of his settlement, and legalized the same, if it were illegal before. Osterman *v.* Baldwin, 6 Wall., 116–22; Mann *v.* Huk, 3 L. D., 452. Neither Perrin, nor Lord, had acquired or could acquire any legal title to or vested interest in the land in question, prior to the return of the township plat, Buxton *v.* Traver, 130 U. S., 232, and, therefore, neither can be considered strictly as an adverse claimant against the other prior to that time. And surely Perrin's equities are equal to, if not superior to, those of Lord.

It does not appear that Lord had made, or offered to make final proof for said tract; you will therefore notify him, that he will be allowed sixty days, after notice, in which to make such proof, and, in default of compliance, his filing, as to said lot 2, will be canceled, and Perrin al-

lowed to make cash entry according to his filing. But, if said final proof is made, then Perrin will be permitted to make entry of the entire tract, upon condition that he tenders to Lord an agreement in writing to convey to him that part of the tract rightfully claimed by him south of the lake; and, if Perrin declines to enter into such agreement, then Lord may make entry of the entire tract, upon condition that he tenders to Perrin a similar agreement to convey to the latter that portion of the tract rightfully claimed by him south of Lord's tract. If both parties fail to make entry upon these terms and conditions, then they will be allowed to make joint entry, in accordance with section 2274 of the Revised Statutes. See Coleman *v.* Winfield, 6 L. D., 826; Doyle's case, 7 L. D., 3.

The decision of your office is modified in accordance herewith.

RAILROAD GRANT—SETTLEMENT RIGHTS.

NORTHERN PAC. R. R. CO. *v.* FLAHERTY.

A pre-emption filing made the same day the map of general route was filed, and of record when the order of withdrawal was made thereon, excepts the land included therein from the operation of such withdrawal.

The subsequent abandonment of such pre-emption claim will not affect the status of the land under said withdrawal.

Land covered by the settlement and possession of a *prima facie* qualified homesteader, at date of definite location, is excepted from the operation of the grant.

Secretary Noble to Acting Commissioner Stone, June 4, 1889.

I have considered the case of Northern Pacific R. R. Co., *v.* John Flaherty, on appeal by the former from your office decision of June 29, 1887, rejecting its claim to the E. ½ of the NE. ¼, of Sec. 31 T. 3 N., R. 2 W., Bozeman, Montana land district.

This tract is within the granted limits of the grant of July 2, 1864 (13 Stat., 365) to said company as shown by the map of general route filed February 21, 1872, upon which a withdrawal was ordered April 22, 1872. It is also within said limits as shown by map of definite location filed July 6, 1882.

One Mandemus Clark filed pre-emption declaratory statement for the NE. ¼ of said section, February 21, 1872.

On June 29, 1885, John Flaherty applied to make homestead entry for the E. ½ of the SE. ¼, of Sec. 30 and the E. ½ of the NE. ¼ of Sec. 31, said town and range, filing therewith the affidavit of himself and one William Flaherty, setting up that Clark lived on the NE. ¼ of said section from sometime in the fall of 1871, until the summer of 1872; that at the time he filed his declaratory statement he had there a house and corral; that John Flaherty "fenced fifty or sixty acres of the tract in 1880, having since then used it mainly for pasture; that he has cut hay

on it and was so in possession in 1880, 1881, 1882 and to date hereof." In his homestead affidavit the applicant said:

I am a citizen of the United States by declaration and naturalization of my father; over twenty-one and head of a family. That not having record of father's naturalization, I shall make personal application.

This application was rejected by the local officers because a part of the land was within the grant to the Northern Pacific Railroad Company. Flaherty appealed to your office.

On January 12, 1886, the said company applied to list the tract in the odd numbered section per Bozeman list No. 8.

On June 29, 1887, your office decided that the settlement of Clark excepted this tract from the withdrawal on filing map of general route; that the possession of Flaherty excepted it from the attachment of the company's claim on filing map of definite location, rejected said company's claim and directed the allowance of Flaherty's application.

The filing of Clark made the same day the map of general route was filed, and remaining of record at the date the order of withdrawal was made was sufficient to except the tracts covered thereby from the operation of that withdrawal. The fact that this pre-emptor afterwards abandoned said filing does not alter the status of the land at the date the withdrawal was made. It is also satisfactorily shown that the present applicant was in possession of said land at the date of the filing of the map of definite location. In fact this is not seriously denied by the railroad company. The said company does, however, strenuously insist that Flaherty was not at that time a citizen of the United States and that, therefore, his possession and settlement could not operate to defeat its claim. The applicant in his original affidavit states that he was then a citizen of the United States and the position assumed by the company is not supported by any testimony presented by it, but rests entirely upon the action of the applicant himself, in filing on July 3, 1885, a declaration of his intention to become a citizen. He had not the proof of his father's citizenship and seems to have adopted this course of action because it offered a speedier and possibly less expensive method of establishing his qualifications to make entry for the land. With his answer to the appeal in this case, Flaherty filed his own affidavit and that of William Flaherty setting out more in detail the facts as to his citizenship. It seems, he came to this country with his father in 1852, being then five years of age and that his father was naturalized at Hillsboro, Montgomery County, Illinois, in 1854 or 1855.

I am of the opinion that Flaherty's claim was sufficient to except the tract covered thereby from the operation of the grant to the appellant company, and the decision appealed from is affirmed.

PRACTICE—TIMBER CULTURE ENTRY.

PALMER *v.* CARTER.

An unperfected appeal is no bar to a hearing on the subsequent application of the appellant.

Though the land applied for has but few trees thereon, and is the only public land in the section, it is not subject to timber culture entry if the section is not devoid of timber within the meaning of the statute.

First Assistant Secretary Chandler to Acting Commissioner Stone, June 4, 1889.

I have considered the case of Laura B. Palmer against Joseph S. Carter, upon the appeal of the latter from your decision of March 4, 1887, holding for cancellation his timber culture entry for the E. ½ of the NW. ¼ and NE. ¼ of SW. ¼, Sec. 33, T. 25 S., R. 12 E., M. D. M., San Francisco, California.

The record shows that the tract involved was selected by the State of California, December 31, 1869, as indemnity for the SW. ¼, Sec. 36, T. 11 N., R. 7 W., M. D. M.

By your office letter of February 28, 1885, this selection was canceled, but the local officers received no official notice of the same until July 8, 1886.

December 4, 1885, Carter applied to make timber culture entry of said tract. The local officers rejected the application, because of the State selection aforesaid.

April 17, 1886, Laura B. Palmer applied to file a declaratory statement, for the same tract, alleging settlement 26th of March previous. Accompanying her declaratory statement she filed affidavits, setting forth that the tract applied for had a natural growth of timber thereon, and that the entire section contained some 2,500 trees.

The local officers also rejected this application, on the ground of Carter's prior application to make timber culture entry, and on the further ground that they had not yet received official notice of your decision canceling the aforesaid selection, made by the State of California.

From this rejection Palmer filed an appeal, of which, however, no notice was given to the opposite party and which was never prosecuted. She subsequently applied for a hearing to determine the character of the land, Carter having in the meantime made timber culture entry, September 13, 1886.

On the day appointed, Palmer appeared in person and by counsel, and submitted the testimony of a number of witnesses. Carter and his counsel also appeared, but submitted no evidence. The testimony shows, that there were between 1500 and 2000 trees of various sizes growing on the entire section, and between ten and fifteen trees on the tract in dispute.

* * * * * * *

October 18, 1886, the local officers rendered a decision, recommending that Carter's timber-culture entry be canceled, and that Palmer's declaratory statement be allowed as of the date of its presentation. From this action Carter duly appealed.

March 4, 1887, your predecessor affirmed the action of the local officers, and from this decision Carter appealed to the Department.

Carter, in his appeal, lays special stress upon the fact, that the hearing was ordered pending Palmer's appeal from the decision of the local officers, refusing to allow her to file a declaratory statement for the tract in question. This objection does not seem to be well taken, as said appeal was never perfected, no notice was given the opposite party, and the same was abandoned before the petition for the hearing was filed.

It appears from the record, that Carter applied to make timber culture entry of said tract December 4, 1885. This application, as already stated, was rejected because of the aforesaid selection by the State of California. He, however, made timber culture entry of said tract on September 13, 1886, in accordance with your office letter of July 8, 1886, allowing him to file for the same.

Section two of the act of June 14, 1878 (20 Stat., 113), provides, that a person applying for the benefits of that act shall make affidavit, "that the section of land specified in my said application is composed exclusively of prairie lands, or other lands devoid of timber."

Section one of the same act provides, "that not more than one quarter of any section shall be thus granted."

There is, therefore, no force in the contention of Carter's attorney, "that the land in contest being within an enclosure and the only public land in section 33 undisposed of, it is immaterial how many trees there may be on section 33, outside of the land in contest."

Timber culture entries have, however, been allowed in some cases, wherein it was shown that there was a natural growth of timber upon the tract, but in none of these instances was the quantity of timber near so large as that shown to exist upon the land in question. In the case at bar, there were on the section between 1500 and 3000 trees, of a natural growth, varying in size from six to thirty inches in diameter. Nature, therefore, seems to have substantially done for that section what the timber culture law was intended to do. The case might have been different had there been but a few trees, as so small a growth would not necessarily interfere with the spirit of the timber culture act.

Nor can the entryman complain that the local officers, by allowing him to make entry, encouraged him to expend money and labor in complying with the provisions of the timber culture law. The entry was made September 13, 1886, the hearing had the same day, the local officers on October 6th following recommended the cancellation of Carter's entry, and on March 4, 1887, your predecessor affirmed their action. Thus, within less than six months from the date of said entry,

both the local officers and your office rendered decisions adversely to Carter. They, at the same time, recommended that Laura B. Palmer's declaratory statement be allowed as of the date of its presentation.

For the foregoing reasons, your decision is affirmed.

RAILROAD GRANT—EXPIRED FILING.

CHICAGO BURLINGTON AND QUINCY R. R. CO.

Land included within an expired filing is not excepted from the grant of May 15, 1856, in the absence of a pre-emption right at date of definite location.

Secretary Noble to Acting Commissioner Stone, June 4, 1889.

By letter of July 28, 1888, you transmitted the testimony taken at a hearing had in pursuance of the directions in departmental decision of March 20, 1888, in the matter of the Chicago, Burlington & Quincy R. R. Co., for certification of the SW. ¼ of the SE. ¼ of Sec. 7, T. 71 N., R. 28 W., and the NE. ¼ of the SW. ¼ of Sec. 11, T. 73 N., R. 30 W., Des Moines, Iowa, land district.

These tracts were offered for sale in 1850. On November 23, 1854, one Jeremiah Shephard filed pre-emption declaratory statement for the SW. ¼ of the SE. ¼ of Sec. 7, T. 71 N., R. 28 W., together with other lands. On October 4, 1854, one Daniel Strickland filed pre-emption declaratory statement for the NE. ¼ of the SW. ¼ of Sec. 11, T. 73 N., R. 30 W. Final proof has never been offered under either of these filings but they both remain uncanceled of record.

The Chicago, Burlington & Quincy R. R. Co., as successor of the Burlington & Missouri River R. R. Co., claims these tracts under the grant of May 15, 1856 (11 Stat., 9), to the State of Iowa, and on December 17, 1878, applied to have them certified. These lands fall within the granted limits of said road as shown by map of definite location April 7, 1857.

In passing upon the company's application it was said in your office letter of July 21, 1884, "the company must prove that these pre-emption claims were abandoned prior to the definite location of its road before the tracts can be approved for its benefit they being within the six mile limits of its grant." Said company thereupon furnished affidavits apparently to meet this requirement. On March 11, 1886, it was decided in your office that these tracts could not, under the rulings of your office, "be conveyed to your company notwithstanding the evidence furnished of abandonment, by the parties making the filings, prior to the railroad grant."

Upon appeal to this department, it was held that the proof then submitted of the abandonment of the pre-emption claims was not satisfactory, but that the company should be given an opportunity to show the truth of its allegations that these tracts were not excepted from said

grant and a hearing was ordered for that purpose. In your letter of transmittal of July 28, 1888, it is said

As the proof of abandonment prior to the definite location of the company's road is in each case satisfactory to this office, I recommend that instructions be issued that the tracts be listed and submitted for approval under the railroad grant.

The testimony adduced at the hearing shows that neither Shephard or Strickland ever improved or resided upon the tract covered by pre-emption filing in his name, that they both resided upon and claimed other land in that county about the time these filings were made; that Strickland had left the county before the definite location of the Burlington & Missouri River railroad, that both tracts were at the date of the definite location of said road unimproved and were afterwards improved by parties who purchased from the railroad company.

The act under which these tracts are claimed granted "every alternate section of land, designated by odd numbers, for six sections in width on each side of each said roads" and provided for indemnity when "it shall appear that the United States have, when the lines or routes of said roads are definitely fixed, sold any sections or any parts thereof, granted as aforesaid, or that the right of pre-emption has attached to the same." (11 Stat., 9).

The tracts here involved were at the dates of the respective pre-emption filings subject to private entry and proof in support of such filings should, under the law, have been submitted within twelve months after settlement. This period had, however, in each instance expired long before the definite location of the road. Under these circumstances the company was, under the practice then existing, required as a condition precedent to the passing of title to it, to show that no pre-emption right to said tracts existed at the date of the definite location of its road. This has been done to the entire satisfaction of your office and of this Department, and the company's application should be allowed and said list should be submitted for approval as soon as practicable.

HOMESTEAD ENTRY—RESIDENCE—NEW FINAL PROOF.

EDSON O. PARKER.

A homestead entry made before the circular regulations of December 15, 1882, will not be held illegal though the entryman had previously filed a soldiers' declaratory statement for another tract.

A settler who makes scrip location of the sub-division on which his house is situated, and then removes to the other part of the land embraced within his original settlement and makes homestead entry thereof, will not be entitled to credit for residence on the tract covered by his scrip location.

Regular homestead proof may be made under section 2291, R. S., where commutation proof has been rejected and permission to submit new proof is accorded.

First Assistant Secretary Chandler to Acting Commissioner Stone, June 4, 1889.

I have considered the appeal of Edson O. Parker from your office decisions of June 11, and October 1, 1887, holding for cancellation his

homestead entry for the W. ½ of the SE. ¼ and the SE. ¼ of the SE. ¼ of Sec. 11 T. 112 N., R. 72 W., Huron Dakota land district. (Mitchell series).

The plat of this township was filed in the Mitchell land office September 19, 1882.

On June 9, 1882 Parker applied to file Valentine scrip certificate E–215 on forty acres of land described by metes and bounds, and also as the NE. ¼ of the SE. ¼ of Sec. 11 T. 112 N., R. 72 W., said description being based upon a survey made by the county surveyor of the county in which said land was situated. Final certificate was issued on this location September 20, 1882.

On the last named day Parker made homestead entry for the W. ½ of the SE. ¼ and the SE. ¼ of the SE. ¼ of said section. On the same day Mrs. Lucinda A. E. Robinson applied to file pre-emption declaratory statement for the SE. ¼ of said section, alleging settlement May 24, 1882. This application was refused by the local officers because the NE. ¼ of the said SE. ¼ was embraced in Parker's Valentine scrip location. Mrs. Robinson appealed from the decision of the local officers, and the papers were transmitted to your office December 22, 1882.

In your office decision of April 9, 1883, the local officers were directed to accept Mrs. Robinson's declaratory statement, it being said in that decision —"she will be allowed to file for the land claimed, the right of Parker under his Valentine scrip location and homestead entry to be subject to whatever right was vested in her by virtue of her settlement on said tract."

In the meantime Parker had given notice of his intention to submit final proof under his homestead entry on November 29, 1882. Against the acceptance of such final proof Mrs. Robinson protested because of the pendency of her appeal from the action of the local officers refusing to accept her declaratory statement. Afterwards various affidavits were filed by each party attacking the validity of the claims of the other and various orders were made by the local officers. During the summer of 1883 a hearing was finally had at which a large amount of testimony was submitted by each party. The local officers seem to have retained this testimony and the record of the case in their office for a long time.

On May 20, 1884, a paper was filed in this case which reads as follows:

An amicable settlement having been made in the above entitled cause, I hereby withdraw my protest against said Parker's proof, file herewith my relinquishment under my D. S, No. 4075 for said tract and withdraw all claim to same.

(Signed) LUCINDA A. E. ROBINSON.

The local officers finally transmitted the record in the case June 10, 1886, as a defaulted contest.

In the decision of your office of June 11, 1887, it was said:

It only becomes under the circumstances necessary to dismiss the contest as far as Robinson's rights are concerned and to declare her case as closed and consider the record so far as the facts bear upon the validity of Edson O. Parker's final homestead entry.

After considering the case it was found that Parker's entry was invalid, his final proof fraudulent, and said entry was held for cancellation. From that decision and the denial October 1, 1887, of your office of his motion for a review of said decision, Parker appealed. The only questions now before me for determination are as to the validity of Parker's homestead entry and the sufficiency of his final proof thereunder. In the determination of these questions it is proper to consider the testimony adduced at the hearing heretofore mentioned.

It was claimed by Robinson, and held in your office that Parker's entry was illegal because he had exhausted his homestead right by the filing of a soldier's declaratory statement for other land prior to the date of said entry.

In 1880, before going to Dakota, Parker filed a soldier's declaratory statement for other land, believing as he says, from the circulars of your office and the advice of attorneys that even if he did not conclude to enter said land, that such filing would not affect his homestead right but only his right to file another homestead declaratory statement. He visited the land in November, 1880, and being pleased with it concluded to make homestead entry therefor; made arrangements to have a house built, and made out the papers for his entry, said papers being sworn to before the clerk of the district court. He then went after his family and household goods, but was prevented by the severe weather and snow blockades from returning until the following June. About this time he learned that his application to make homestead entry had been rejected because not sworn to before the local officers. He afterwards filed pre-emption declaratory statement for said land, and in due time made final proof and entry thereof under the pre-emption law.

It was formerly the practice to allow one who had filed a soldier's declaratory statement to make entry for the land thus filed for or for other land in his discretion. Circular of September 14, 1876 (2 C. L. L., 472); and this practice seems to have continued until the issuance of the circular of December 15, 1882, (1 L. D., 648) wherein it was specifically said "a soldier will be held to have exhausted his homestead right by the filing of his declaratory statement." See also Stephens *v.* Ray (5 L. D., 133). In view of these facts I am not inclined to cancel this entry which was made prior to the circular of December 15, 1882.

In the final proof taken December 1, 1882, Parker testified that his house was built on this land February 10, 1882, that he commenced actual residence there March 24, 1882; that his improvements consisting of a one-story frame house, twenty-one by twenty-four feet in size, a cellar eight by ten feet, a coal house four by six feet, a stable sixteen by sixteen feet, a well and five and one half acres of breaking, were of the value of $200.00; that he had resided on said land continuously since establishing his residence there, and that his family consisting of his wife and two children had resided there continuously since May 30,

1882; that he had never been absent; that he had broken five and one half acres and had never made any other homestead entry.

When this proof was submitted it was with the purpose on Parker's part of commuting said homestead entry. When, however, the consideration of said final proof had by the protest of Mrs. Robinson, been so long delayed, the entryman on May 20, 1884, the day said protest was withdrawn, filed his affidavit saying—" having lived on the land a sufficient length of time added to his service in the army to make five years, he desires the benefit of his service in the army under Revised Statutes 2305."

It seems the local officers approved his proof, and on the same day, May 20, 1884, issued homestead final certificate It is shown by the information furnished to your office by the War Department that Parker was on August 21, 1862 enrolled in Company "F" 10th regiment New York Heavy Artillery Volunteers to serve three years or during the war, and was mustered out May 27, 1865. Parker afterwards filed his affidavit dated February 19, 1886, and duly corroborated, setting forth that he established actual residence on said tract on or about March 24, 1882, "that he and his family still reside upon said tract; that said residence has been continuous since first establishing actual residence thereon as stated above; that he has since continued to improve and cultivate said tract."

The testimony adduced at the hearing shows that Parker visited the SE. ¼ of said section 11, about February 10, 1882, commenced a house and put up a notice that the land was claimed by him as a homestead. This house which was on the NE. ¼ of the SE. ¼ of said Sec. 11, was finished March 24, at which time Parker claims to have moved into it although his family did not reach there until May 30th following. On June 9th of that year he filed Valentine scrip for the NE. ¼ of the SE. ¼ of said section, the tract upon which his house stood. On June 12th he moved his house onto the SE. ¼ of the SE. ¼ of said section and immediately upon the filing of the township plat made his homestead entry for said last named tract and the W. ½ of the SE. ¼ of said section. Parker laid off into town lots the tract upon which he filed the scrip and commenced selling such lots at once, but I do not find that the evidence justifies the conclusion reached in your office that such sales were "not confined to the lands he scripped but embraced a portion of the land described in his homestead entry."

This claimant cannot be allowed credit for residence on the tracts to which he seeks title under the homestead law prior to June 12, 1882, the date on which he removed thereto from the tract for which he had filed Valentine scrip. Although he may have gone on the land with the intention of claiming it under the homestead law yet he by his subsequent action in taking under another law the tract upon which his dwelling house was until that time situated, and upon which the most if not all of his improvements had been made, must be held to have

abandoned that intention. His proof made December 1, 1882, failed to show the period of residence required by law, and was therefore prematurely made. Parker now asks to be allowed to make proof under section 2291 and receive credit for his service in the army. He not having commuted said entry, I can see no good reason for refusing to approve the action of the local officers issuing to him regular homestead final certificate provided the proofs heretofore submitted satisfactorily show a compliance with the requirements of the homestead law. Killin *v.* Suydam (6 L. D., 324); James Jenks (8 L. D., 85).

Upon examination, however, said proofs are not found satisfactory. The affidavits which furnish the only information as to Parker's connection with the land subsequently to December 1, 1882, are general in their terms and make no statements as to the kind or value of the improvements or the character of his residence on the land. The entryman will be allowed to give new notice and submit new final proof showing compliance with the law up to the date of the final certificate heretofore issued.

The decision appealed from is modified in accordance with the views herein expressed.

COMMUTATION PROOF—CULTIVATION.

T. H. QUIGLEY.

Breaking may be accepted as satisfactory proof of cultivation, if good faith appears, and the proof is sufficient in other respects.

First Assistant Secretary Chandler to Acting Commissioner Stone, June 4, 1889.

I have considered the case of T. H. Quigley, upon the appeal of Sarah A. Paige, mortgagee, from your office decision of December 16, 1887, rejecting the proof and suspending the entry of said Quigley for N. ½ NE. ¼ and N. ½ NW. ¼, section 6, T. 154 N., R. 56 W., Grand Forks, Dakota, land district.

It appears from the record that Quigley made entry for said land March 26, 1883, and on October 13, 1883, after due notice, he presented his final proof in commutation, and paid for said land receiving final certificate October 19, 1883.

On final proof it appeared that Quigley was unmarried; that he made settlement on said land March 1, 1883, by erecting thereon a one-story frame house twelve by fourteen feet valued at $100, in which he had continuously resided until time of final proof, a period of seven months and nineteen days, except that he had been absent to earn a living a few weeks at a time, not to exceed thirty-five or forty days in all. It also appeared in the proof that he had broken five or six acres but had not raised a crop thereon.

This proof was made in October, 1883, but did not reach your office until December, 1887; considering it you rejected the same as insufficient. From this ruling the mortgagee appeals.

No specific reason for the rejection of his proofs is given in your said decision nor does it state wherein entryman failed to comply with the law, but after reciting the facts above stated in regard to improvements and residence, says—

The proof is not satisfactory not being conclusive to this office of good faith on the part of the claimant. The proof is rejected and you will inform Quigley that his original entry and cash certificate will remain suspended during the life-time of the entry and he will be allowed to make new proof when he can show full compliance with the law.

* * * * * * *

Just why this proof does not satisfy you of the entryman's good faith does not very fully appear in your opinion. The evidence shows that he went upon the tract in March, lived thereon continuously for more than six months, in the meantime built a house twelve by fourteen feet, valued at $100, and broke up five or six acres of prairie sod. He could not be expected to raise much of a crop in six months on new breaking, taking into consideration that it was probably broken after seeding time. Wherein did he not comply with the law? It appears to me taking into consideration the presumption of good faith, coupled with the facts corroborating the same, and the final proof of the entryman, that there are no circumstances to predicate bad faith upon, hence in my judgment the entry should stand. Your decision is, therefore reversed.

TIMBER CULTURE CONTEST—EVIDENCE.

ST. JOHN *v.* RAFF.

A timber culture contest must fail if the default charged is made good before service of notice.

In considering evidence as to compliance with the law between the dates of filing the affidavit of contest and service of notice, good faith is an important if not a controlling element.

The case of Seitz *v.* Wallace cited and followed.

First Assistant Secretary Chandler to Acting Commissioner Stone, June 4, 1889.

I have considered the case of W. R. St. John *v.* S. F. Raff on appeal by the former from your office decision of January 28, 1888, dismissing his contest against Raff's timber culture entry for the SE. ¼, Sec. 12, T. 25 S., R. 6 W., Wichita, Kansas.

Raff made said entry June 20, 1883, and contest affidavit was filed November 5, 1884, alleging failure to break five acres during the first year, and up to date of said affidavit.

Hearing was had March 9, 1885, both parties being present with witnesses.

From the evidence submitted the local officers found that the required amount had been broken prior to service of notice, and accordingly, recommended the dismissal of the contest. Your office affirmed that decision, and St. John appealed.

It appears from the evidence that the entryman, who lives some distance from the tract, employed an agent to do the necessary plowing, who sub-let the contract to a farmer living near the claim, the breaking to be completed before June 20, 1884; that the farmer after breaking a little over three acres reported to the agent that he had broken six acres, and collected from him the sum agreed on for that amount of breaking; that the deception was not discovered by the entryman or his agent until about November 1, 1884, when they proceeded to break seven acres more, completing the same between November 10, and 25, 1884.

Notice of contest was not served until December 13, following. It does not appear that Raff had any intimation of the attack on his entry prior to that date. Bad faith on the part of entryman is not shown, on the contrary, he proceeded immediately on discovering the failure, to remedy it.

It is insisted by appellant that the entry must be canceled because the five acres had not been broken when the contest affidavit was filed.

I am unable to concur in this view. In the case of Farnsworth *v.* Hudson (5 L. D., 315), evidence of cultivation between the date of the filing of contest and that of the service of notice was held to be admissible. In Seitz *v.* Wallace (6 L. D., 299), it was said, "Under the decisions of the Department an entryman may show compliance with the law after the affidavit is filed, but before notice is served upon him."

But it is claimed that these cases are in effect overruled by the cases of Eddy *v.* England, Bolster *v.* Barlow, and Waters *v.* Sheldon.

In said first mentioned case one Bennett brought contest against England's timber culture entry alleging failure to comply with the law. On the same day, but at a later hour Eddy offered a contest on like grounds. The local officers declined to receive the later contest on account of the pendency of Bennett's. Eddy then attached an affidavit charging that Bennett's contest was fraudulent and speculative, and procured by England to enable him to hold the land without compliance with law, and to bar the initiation of a *bona fide* contest. Eddy's contest was then received and filed. Bennett failed to appear on the day set for hearing in his case, and thereupon notice was served in Eddy's contest and a hearing subsequently had. Prior to the service of notice, however, it appears England had completed the necessary breaking. It was held nevertheless, that Eddy's contest related back to the date when it was offered and should have been received. But this ruling has no relevancy to the case at bar. The facts are essentially different. Bennett's con-

test was found to be collusive and fraudulent as alleged. The ruling was based on the established rule of the Department, that, "no rights are acquired by fraudulent and speculative contests." To hold otherwise would violate the established legal maxim, that no one is allowed to take advantage of his own wrong. Had the collusive contest not been commenced, notice in Eddy's case would have issued prior to the curing of the default. and it was therefore, held that such contest could not postpone Eddy's rights. (6 L. D., 530.)

In Bolster *v.* Barlow (idem., 825), the record failed to disclose the date of the initiation of the contest, and it was, therefore, held that the contest papers must "be deemed to have been accepted by the local officers on the date when the notice of contest was issued." As the entryman had cured his laches prior to that date the contest was dismissed. This case simply followed the established ruling in the case of Galloway *v.* Winston (1 L D., 142), dismissing a contest initiated after the failure under the timber culture law has been cured, and does not conflict with the ruling in the case at bar.

In Waters *v.* Sheldon (7 L. D., 346), John E. Gilbert, on May 3, 1886, brought contest for abandonment against the homestead entry of Sheldon made October 30, 1885. The affidavit of contest was dated May 1, 1886. The local officers and the Commissioner decided that the contest was "prematurely brought", and dismissed the contest. This conclusion was evidently based on the assumption that the contest was initiated on May 1, the date of the affidavit. The Department held, however, that "Gilbert's contest was not initiated until his affidavit of contest was received, and accepted by the local office, May 3, 1886." It was, therefore, held to be not premature (six months from date of entry having elapsed) and was sustained. The ruling was undoubtedly correct in determining the date of the initiation of contest, but in no manner involves the point in issue in this case. The question of notice was not involved.

I conclude, therefore, that these cases have not changed the general rule announced in Seitz *v.* Wallace and other cases, *supra.* In the determination of such questions, however, good faith is always an important it not a controlling element.

Finally, the case of Stayton *v.* Carroll (7 L. D., 198), clearly announces the rule that a contest charging failure to establish residence, and abandonment, must fail where, prior to legal service of notice thereof, the entryman had cured his laches. See also Hunter *v.* Haynes. (ib., 8).

The decision appealed from is accordingly affirmed.

SWAMP LAND—HOMESTEAD CLAIM—FIELD NOTES.

STATE OF WISCONSIN *v.* WOLF.

The finding of a commission, mutually agreed upon between the State and the government, that a particular tract is of the character granted, does not preclude the Department from reviewing such finding, or resorting to other evidence in order to determine the true character of the land.

In a hearing ordered to determine the character of land, the burden of proof is upon the State if the field notes of survey do not, *prima facie*, show the swampy character of the tract.

In order to sustain its claim to any particular forty acres of a quarter section, the State is required to show that the greater part of such forty was swamp and overflowed land at the date of the grant.

Secretary Noble to Acting Commissioner Stone, June 4, 1889.

April 15, 1880, Andrew Wolf made homestead entry for the SW. ¼ of Sec. 11, T. 29 N., R. 12 E., Menesha land district, Wisconsin.

August 13, 1881—as appears from the decision of your office of August, 27, 1886—the State of Wisconsin filed a claim for the same tract, under the provisions of the swamp land grant of September 28, 1850 (9 Stat., 519), which claim has not been approved.

May 28, 1886, in pursuance of a general notice of his intention so to do, and without special notice to the State of Wisconsin, Wolf made final homestead proof, which, on June 30th following, was duly approved by the local land officers, and final certificate No. 1158 was thereupon issued to Wolf.

August 27, 1886, your office found, on re-examination, "that the field notes of survey do not show that any of the subdivisions of said SW. ¼ are swamp lands within the meaning of the grant of September 28, 1850," and the claim of the State was held for rejection.

Upon being notified of this action of your office, the State appealed, and asks that said decision "be reversed and the title of the State to said tract remain intact." The appeal is accompanied with an affidavit made by C. F. Fricke. the chief clerk of the Commissioners of Public Lands for the State of Wisconsin, in which he says:

That on the 13th day of August A. D. 1881, by a commission appointed by the Commissioner of the General Land Office of the United States and the governor of the State of Wisconsin, under an agreement made by the Secretary of the Interior and the governor, to make a final settlement and adjustment of the swamp lands under the act of Congress approved September 28, 1850, I find that the SW. ¼, Sec. 11, T. 29 N., R. 12 E., of the 4th principal meridian, State of Wisconsin, was decided by said commission to be swamp land within the meaning of said act, and the record of which is now on file in Division 'K' of the General Land Office, at Washington, D. C., and that said decision was final; and upon further examination of the plats and field notes of the original government survey, I verily believe said decision to be correct, and that the State is legally entitled to said tract under said settlement.

I find, also, among the papers in the case, a copy of the field notes of survey and a plat of said section eleven, taken from the records and furnished by your office.

Soon after the passage of the swamp land act, the State of Wisconsin elected to take the field notes of survey as a basis for determining what land passed to the State under the grant, and it was in this manner that the land in question was selected. The mode adopted by mutual understanding, or agreement, between the national and state authorities for ascertaining the lands granted, was convenient and economical, and doubtless generally led to correct results, but this Department does not understand that the government is irrevocably bound by selections made on behalf of the State, in pursuance of such understanding or agreement, especially where the rights, or supposed rights, of a private citizen are involved. The field notes are *prima facie* evidence of the character of the land, and by mutual understanding they are generally accepted as full proof by this Department, but it does not follow that the finding of a commission, mutually agreed upon, that a particular tract is swamp and passed to the State, precludes the Department from reviewing such finding, or from resorting to other evidence, in order to ascertain the true character of the land, and in order to determine whether, in fact, it did pass to the State under the grant.

The State is not entitled to lands not granted, nor can the Secretary of the Interior by agreement enlarge its grant. It is his duty to finally determine what lands passed to the State of Wisconsin, as well as to other States, under and by virtue of the swamp land act, and though he may adopt certain general methods for identifying these lands, yet the adoption of such methods does not deprive him of the right, or relieve him of the duty of resorting in certain cases to other and different methods. Nor is the adoption of any such general method of adjustment, though by agreement between the officers of the respective governments a contract binding on the general government. The Secretary of the Interior, notwithstanding such agreement, may at his discretion, any time before swamp lands are certified to the State, adopt such methods, resort to such means, and employ such agencies as in his judgment are best calculated to enable him to reach a correct conclusion as to the real character of any particular tract of land claimed under the swamp land act.

The views above expressed result from the nature of the duties devolved by law on the Secretary of the Interior, and are sustained by numerous rulings of the Department. Lachance *v.* The State of Minnesota (4 L. D., 479); State of Oregon (5 L. D., 31); Hardin County (ib., 236); State of Michigan (7 L. D., 514).

Even after selections have been approved and certified to the State as swamp and overflowed lands—which is a stronger case than the one here—the Secretary may, in certain cases, recall and revoke his approval,

and on a proper showing refuse patents for lands included in approved lists, and may cause such lists to be canceled. State of Oregon (*supra*); State of Minnesota (6 L. D., 37); State of Oregon (7 L. D.,572); State of Michigan (*supra*). Therefore the position taken by the State on appeal can not be sustained, to wit: the position that the decision of said commission was final, or was to be final and is therefore obligatory on the government.

From an inspection of the field notes of survey and the accompanying plat, I do not find that they show the greater part of the quarter-section in controversy, or any legal subdivision of the same, to have been swamp and overflowed land at the time said survey was made. On the contrary, they show, it seems to me, with reasonable certainty that the greater part of each legal subdivision of said tract was at the time of survey (1854), and presumably at the date of the grant, dry and cultivable. Said commission probably classed said tract as swamp and overflowed through inadvertence. At all events, the field notes do not, in my opinion, warrant such a classification.

The field notes of survey gave Wolf no notice that said tract was claimed by the State, nor was the State's claim asserted thereto till some months after Wolf had established his residence on said tract, nor till more than thirty years after the grant was made under which it is now claimed. These facts, however, do not necessarily constitute a bar to the claim of the State, and since said tract was in August, 1881, awarded to the State by said commission, its claim should not be finally rejected and said selection canceled, until it has had a full opportunity to be heard in the matter, if such hearing be desired.

Wolf's entry will, therefore, be suspended, and the State allowed sixty days after receipt of notice of this decision within which to institute the usual proceedings for a hearing herein before the local land officers. The field notes failing to show *prima facie* the swampy character of said tract, the burden of proof will be on the State. The swamp land act grants to the States only such legal subdivisions of the public lands the greater part of which was wet and unfit for cultivation at the date of the grant, and in order to sustain its claim to any particular forty of said quarter section, the State will be required to show that the greater part of such forty was of the description of lands granted, to wit: "swamp and overflowed lands, made unfit thereby for cultivation." Should an application for a hearing be made by the State within the time designated, the entryman will be duly notified thereof and afforded full opportunity to be heard in defense; and in default of such application, the claim of the State will stand rejected, and Wolf's entry will be passed to patent, in the regular course of business in your office.

The decision of your office is modified accordingly.

PRACTICE—NOTICE BY PUBLICATION—EVIDENCE.

BONDURANT *v.* CONKLING.

Mailing a copy of the notice by registered letter, to the last known address of the defendant, thirty days before date of hearing, is an essential in service of notice by publication.

Evidence submitted on defective notice of contest may be accepted after new notice, if the defendant does not respond thereto.

First-Assistant Secretary Chandler to Acting Commissioner Stone, June 4, 1889.

I have considered the appeal of Fremont Bondurant from your office decision of February 10, 1888, directing that a rehearing be had in the case of his contest against the homestead entry of George D. Conkling upon the SW. ¼ of Sec. 25, T. 152 N., R. 59 W., Grand Forks, Dakota.

The record shows that Conkling made homestead entry of above tract on February 8, 1883, and that Bondurant initiated contest against the same on March 18, 1887. A copy of the notice of contest was mailed by registered letter to the entryman at his last known address on April 21, 1887, and the hearing was fixed for May 17th following. On that day the contestant appeared and testified, that he resided within two miles of the tract in question, and was acquainted with it since April, 1884; that he knew "from personal observation, that the said defendant, George D. Conkling, has not fenced, cultivated, built, or resided upon, or in any way improved said tract since October, 1885; that said George D. Conkling broke out of jail and left the country over six months ago, and has wholly abandoned his homestead; that the present condition of said tract is wild, uncultivated and uninhabited, and that the present residence of defendant is unknown."

John M. Lamb corroborated the testimony of contestant. The defendant did not appear at the hearing, and on May 26th following the local officers recommended the cancellation of Conkling's entry.

February 10, 1888, your office reversed the decision of the local officers, on the ground that a copy of the notice of contest was not mailed to the last known address of the defendant thirty days before the date of hearing. You, at the same time, returned the affidavit of contest as the basis of a rehearing to be had after due notice. From this decision contestant appealed to the Department.

As already stated, a copy of the notice of contest was not mailed until April 21, 1887, whereas the hearing was to take place on May 17, following. But twenty-six days therefore intervened between the date of mailing and the day fixed for hearing.

Rule 14 of the Rules of Practice provides,

> Where notice is given by publication, a copy of the notice shall be mailed by registered letter to the last known address of each person to be notified thirty days before date of hearing.

In the case of Parker *v.* Castle (4 L. D., 84), this Department held,

The proper basis for an order of publication, the publication by advertisement, the sending of a copy by registered letter, and the posting of a copy on the land, are all constituent and essential parts of "notice by publication," and the absence of any one of these essentials makes inoperative the efficacy of the others if the defect be not waived. . . . . That these rules have in effect the force of statute.

The same doctrine is laid down in the case of Wallace *v.* Schooley (3 L. D., 326).

It is clear that contestant has not complied with the Rules of Practice in the matter of mailing a copy of notice of contest to the defendant at his last known address thirty days before the date of hearing.

In view, however, of the facts in this case and of the expenses incident to making new proof, I am of opinion that contestant should give new notice, and, if the entryman does not then respond, his entry will be canceled upon the testimony already submitted.

Your decision is modified accordingly.

PRACTICE—APPEAL—JURISDICTION—APPLICATION.

IDDINGS *v.* BURNS (ON REVIEW).

The local office has no jurisdiction over a case, or the land involved therein, during the pendency of an appeal from its action thereon.

After the local officers have rendered a decision in a case they can take no further action affecting the disposal of the land in controversy until instructed by the Commissioner.

On the relinquishment of an entry, a pending application to enter will take precedence over an application filed with the relinquishment.

Secretary Noble to Acting Commissioner Stone, June 5, 1889.

February 18, 1889, Secretary Vilas decided the case of William T. Iddings *v.* Mary Burns (8 L. D., 224), and affirmed the decision of your office dismissing the application of the former to make homestead entry of the SW. ¼ of section 29, T. 25 S., R. 17 W., Larned land district, Kansas, on the ground that the prior entry of Burns operated to prevent the allowance of the application of Iddings. The record shows that Iddings made application to enter said tract January 26, 1886, and the same was "held in abeyance" by the local office pending the final pre-emption proof advertised to be made February 17, 1886, (by Patrick Sweeney, for said tract; that Sweeney failed to make proof and that Iddings again presented his homestead application which was rejected by the local officers February 17, 1886, because of the existence of the homestead entry for said tract made February 13, 1886, by Mary Burns.

The case came up on appeal and was decided in favor of the entry made by Burns for the reason that the application of Iddings which was prior in point of time was defective in that it was not accompanied either by the payment or the tender of the fees required by law.

My attention has been called to the fact, that subsequent to the date of the letter of your office transmitting the record in the case, on appeal

by Iddings, there were filed in the local office a relinquishment of Mary Burns, date October 19, 1887, of her homestead entry of said tract and an application of John A. Ary to make homestead entry of said land. Ary tendered the entry fee with his application. The local officers canceled the entry of Burns, October 22, 1887, and rejected the application of Ary because the application of Iddings was pending, on appeal, before the Department. These papers were forwarded without action upon your part. One of them is Ary's appeal from the action of the local officers.

It has been held that when an appeal is taken from your decision your office loses jurisdiction over the case. John M. Walker (5 L. D., 504) and also over the land involved therein. Esler *v.* Townsite of Cooke (4 L. D., 212), Stroud *v.* De Wolf (id., 394). The same rule governs cases on appeal from the local office. The authorities cited sustain the action of the local officers in rejecting Ary's application. Moreover, the proceedings in this case were in the nature of a contest and after the local officers have rendered a decision on a contest they can take no further action affecting the disposal of the land in controversy until instructed by the Commissioner. Rule 53; Wade *v.* Sweeney (6 L. D., 234).

The equities in the case are in favor of Iddings, who was the first applicant and whose application was rejected by the local officers when first presented to them. He has ever since earnestly insisted on his right to enter the tract in question. Burns having relinquished, the tract is now free from any entry of record and in the record before me I perceive no reason why the homestead application of Iddings made January 26, 1886, should not be placed of record upon payment of the fees required by law.

You will notify Ary hereof and inform him that he will be allowed thirty days from notice to show cause, if any he have different from the questions presented by this record, why his application should not be finally rejected; and in the meantime, you will suspend action and also give Iddings due notice of this decision. Should Ary fail to show such cause his application will be finally rejected and that of Iddings allowed in accordance with this opinion.

SCHOOL LAND—BOIS BLANC ISLAND.

STATE OF MICHIGAN.

Irregularity in the form and place of section sixteen, arising from the survey of the township, will not defeat the operation of the school grant.

An executive order setting apart section sixteen as a military reservation, will not defeat a prior legislative reservation of the land for school purposes, or impair the subsequent grant to the State.

Secretary Noble to the Commissioner of the General Land Office, June 5, 1889.

I have before me the appeal of the State of Michigan from your decision of November 16, 1887, holding that "section sixteen on Bois

Blanc Island," in said State, was not included among the lands granted to said State for school purposes, and that "therefore the reservation for military purposes (in 1827) took effect upon it, and it (said section sixteen, is properly listed for sale under the act of July 5, 1884, the reservation having been turned over to this Department under the latter act for disposal."

Your reasons for so holding you set forth as follows:

In 1827, long prior to the grant of the sixteenth section in every township of the 'public lands' in the State for school purposes, made by the act of June 23, 1836 (5 Stat., p. 59), the President reserved said section with other sections of land on the island for military purposes; the reservation existed at the date of the school grant; and the section is not in such a section as is comprehended in the school grant, that is, a sixteenth section 'in place' according to the regular system of numbering sections or square miles in townships from one up to thirty-six. The island was surveyed independently of any established base or meridian; only one section on the island is numbered sixteen, and that section is not 'in place' according to the regular system of the public surveys.

This obviously raises two distinct questions, namely,—1. Independently of the effect of the executive reservation for military purposes, in 1827, would the "section sixteen" in question be covered by the school-land grant of 1836? 2. If otherwise within the description of lands granted for school purposes, was the tract referred to *excepted* from the grant of such lands by the circumstances of its being, at the date of that grant, covered by an executive reservation for military purposes?

I.

Upon the former question I cannot see my way to a concurrence in your view, either by way of original construction of the statute or in the light of the authorities to which you refer.

1. As a question of original construction, I do not read the school-land grant of 1836 as covering *only* "a sixteenth section 'in place' according to the regular system of numbering sections or square miles in townships from one to thirty-six." The first section of the act of June 23, 1836, is the enactment containing the grant in question, and that enactment reads as follows:

That section numbered sixteen in every township of the public lands, and where such section has been sold or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to the State for the use of schools.

This "proposition," having been "accepted" by a duly authorized legislature of Michigan, became (in the language of the act) "obligatory upon the United States." The lands granted for the use of schools are thus, by the terms of the grant itself, described as "section numbered sixteen in every township of the public lands." On the face of the matter, at least, I see no good reason for assuming that the land constituting Bois Blanc Island was not at the date of this grant "public land," or for holding that that island did not constitute a "township," within the meaning of the description in the grant. It was not

a part of any other "township;" in quantity it but slightly exceeded the standard township, approximating the usual size quite as nearly as numbers of townships admittedly such, upon the main land; and, finally the survey, though not directly continuous with others in the neighborhood, evidently went upon the idea that the island constituted a township, and accordingly divided it into thirty six "sections," numbered in regular order (except one covered by a private title) and averaging about six hundred and forty acres each, though owing to the configuration of the township as a whole these "sections" are arranged in two rows instead of six, and are almost all rectangular but not square. The survey, as thus made, having been accepted and allowed to stand, I see no *prima facie* reason for doubting that Bois Blanc Island is a "township of public land," or therefore, that the "section numbered sixteen" therein would fall within the school-land grant unless excepted therefrom by its having been otherwise disposed of when the grant took effect. Nor, on the the other hand, does it seem to me that the authorities on which you rely must really be deemed to contravene the *prima facie* view just now set forth.

The first of those authorities is the "circular of December 16, 1832 (2 Public Lands, Laws, Inst., and Ops., 472), to the land officers at Mount Salus, Opelousas, and Ouachita;" as to which you say:

In this circular it was directed in respect to townships in which the sections were not regularly numbered, that such sections as cover the ground which No. 16 would have covered, had the township been regularly numbered as will make the complement of six hundred and forty acres, should also be reserved from sale.

"The whole scope of this circular", you proceed to say,

Is to the effect that lands in the place where section sixteen would fall according to the regular system of surveys should be set apart for schools when found practicable, and that other lands near by should be also set apart where it was found impracticable to set apart a sufficient quantity for the purpose within the defined place limits of section sixteen, according to the regular system of surveying the public lands.

An examination of the whole circular, however, shows that this view exactly reverses the real effect of its provisions, in their bearing upon the point at issue. These provisions read as follows:

Where number sixteen happens to fall on one of the small lots on the water courses, or on a section containing less than the proportional quantity of school land to which the township, or fractional township, is entitled under the act (of May 20, 1826), such lot number sixteen, should be reported by you in the printed blank abstract of proposed selections, and, in addition thereto, so much of the section (whatever its number may be) as covers the ground which number sixteen *would* have covered *had the township been regularly numbered*, as will make the complement of school land to which such township or fractional township is entitled.

This unquestionably directs the taking, as school lands, in the first instance, "lot number sixteen" itself, even when it "happens to fall on one of the small lots on the water courses," the taking of "lands in the place where section sixteen would fall according to the regular system of surveys", being directed only to supplement the section numbered

"sixteen" and "make the complement of school land" due to the township. The passage quoted in your said letter is only the latter, and subordinate or incidental portion of the direction, which taken as a whole, primarily provides for the taking of "lot number sixteen," wherever it appears, and only then proceeds to say that, "in addition" to such lot number sixteen, other lands may be taken, to make up the required quantity, and shall be so taken in the place where section sixteen would have fallen in a regular survey.

In connection with this, I have carefully considered the argument made in your letter of transmittal, that the circular in question "had reference to lieu selections under the act of May 20, 1826;" that "therein the land officers were instructed that the sixteenth section, if irregularly surveyed, or land falling in a township irregularly surveyed in the place where the sixteenth section would fall were the township regularly surveyed, should be selected as indemnity;" that "therefore the point raised that these circulars recognized a right in the State to the radiating, anomalous, or irregular sections numbered sixteen, is not well taken; the circulars merely prescribed what land should be taken as indemnity under said act."

Were such the fact, however it would follow that the circular could have no relevancy or weight upon the question with reference to which your office cited it inasmuch as that question was not at all as to "what land should be taken as indemnity under said act," but the very different one, whether the "section numbered sixteen" primarily granted for the use of schools, must necessarily be a section with that number, in the middle of a square township. Certainly, a circular under a special act, and to the effect that, "as indemnity," a "lot number sixteen", though not in any sense "in place", must first be taken, and only its deficiency made up by "lands in place", can hardly be deemed an authority for an affirmative answer to this last stated question. But, furthermore, I do not concur in the view that "selections" authorized by the act of May 20, 1826 (4 Stat., 179), are in any sense "lieu" or "indemnity" selections. That statute made an original, though a "floating" grant. It did not, like the "indemnity" clause of a ordinary grant, provide compensation for "losses" out of a grant in place, but itself originally authorizes and directs the reservation and appropriation, "for the use of schools in each township for which no land has been heretofore appropriated or granted for that purpose," of certain quantities of land. The "selection" authorized is only the method provided, instead of the customary specification by numbers, for *identifying* the lands thus originally granted. This substitution of the one method for the other, in the identification of the land granted, in no way implies that it is "indemnity" that is being provided, though no doubt indemnity lands are usually left to be selected instead of being pointed out by numbers in the granting statute.

It seems clear, in any event, that the circulars referred to are not

authority for the position that a "section number sixteen" cannot pass under the school-land grant unless it is situated in the middle of a township of the usual form.

The other authorities cited in your letter are these: A decision of the Secretary of the Interior in July, 1860, in the case of Noel Haydel (unreported); and three decisions of the Louisiana courts, reported respectively in 19 La. Repts., 510; 33 La., 424, and 37 La., 736. In all these cases, however, the lands in question, and to which alone the decisions could properly apply, were (in the language of the first-named of said decisions) "lots numbered sixteen in those townships, in which that system of peculiar surveys, prescribed by the second section of the act of Congress of the 3d March, 1811 (2 Stat., 662), has been applied." The townships answering this description were only those "in the Territory of Orleans, adjacent to any river, lake, creek, bayou, or water-course;" for to them only did "the act of Congress of the 3d March, 1811," apply the "peculiar system of surveys" mentioned. As to these lands there is a ground for holding that they were not reserved for schools which does not apply to lands not covered by said act. That ground is thus stated in the Haydel case: "There is no provision in that law (of 1811), or any subsequent act of Congress, expressly reserving number sixteen, of such lots, for schools or any other purpose. They appear to have been made liable to sale under the 6th section of the act of 1811, although therein the section sixteen of the lands surveyed in the ordinary way, is again excepted from sale, in pursuance of the reservation thereof made by previous acts." It is expressly as "the result of these laws" that the decision makes, "as to the Territory of Orleans," the ruling which you cite.

The explanation made in your letter of transmittal has been considered, but does not seem to me to affect this view. It is plain matter of fact that the law of 1811, applying only to the "Territory of Orleans," provided for the sale of the *regularly* surveyed lands in January, 1812, and for the sale of the lands *irregularly* surveyed (under Sec. 2, of said act), in February of the same year; and that while it expressly reserved section sixteen, in lands of the first class, it ordered the sale of the second class of lands without making as to them, any similar exception. A decision, under such legislation, that a lot number sixteen, in an irregular township in Louisiana, was not reserved for schools, is in no sense authority for holding that in a region not affected by this or any similar enactment a grant of "section sixteen, in every township" would not cover any "section sixteen" not situate in the middle of a square township. You argue that "the law of 1811, did not require entire townships in which irregular lots or sections had been surveyed, to be offered on February 1, 1812, but merely that such lots or sections should then be offered." "There was no occasion to except section sixteen, from the sales of the water lots, for none of them were granted for schools." But the text of the statute shows that what was

to be "offered on February 1, 1812," was: "Such of the public lands, which from the nature of the country cannot be surveyed in the ordinary way, and are embraced by the provision of the second section of this act, as shall have been advertised, etc." On the other hand, if the statement that "none of the water lots were granted for schools," is made in view of the effect of this act of 1811 upon the question, it is precisely what is contended on behalf of the State, and shows the irrelevancy of the authorities cited in the present case if, on the contrary, what the statement means is, that, independently of these provisions of the Louisiana act, "water lots" must be held excluded from the grant of "section sixteen in every township" then such statement simply assumes the very point at issue, and cannot be held to form any part of its proof. In view of the foregoing, I conclude that, unless excepted by the military reservation of 1827, the "section sixteen" in question was covered by the school-land grant of 1836.

II.

We are thus brought to the second question in the case, to wit,—Was the tract referred to excepted from the grant in question by the circumstance of its being, at the date of such grant, covered by the executive reservation for military purposes?

As to this the attorneys for the State insist—

That the withdrawal (military reservation) of 1827 was inoperative and of no effect as to this section, because prior to that date the section had been reserved by Congress, and set apart for specific purpose, which legislative reservation could not be affected, nor the specific appropriation of the land, defeated, by an executive order.

By section 5, of the act of March 20, 1804, (5 Stat., 596), Congress—repeating or renewing older enactments to the same effect,—provided that in the "Indiana Territory," of which Bois Blanc Island was then a part, "the section numbered sixteen shall be reserved in each township for the support of schools within the same."

The particular tract here in question was identified as a "section sixteen," by survey approved October 5, 1827. Upon this identification of the land the reservation ordered attached thereto and became effective (Cooper *v.* Roberts, 18 How., 173). A legislative reservation of this "section sixteen" thus went into effect at least as early as October 5, 1827. Accordingly, the merely executive order of November 8, 1827, could make no disposal of the section incompatible with the full effect of the reservation ordered by Congress over a month before. It is not necessary to decide whether the occupation and use of the tract for military purposes, might have been successfully objected to on behalf of the State; such occupation and use have been discontinued, and the only question now is whether the legislative reservation, made applicable to this section by the survey of October, 1827, could be so far nullified by the executive order of November, 1827, as that the final school grant of 1836, could not take effect upon the section, owing to the

latter's being, by such order, embraced with the lands in a military reservation. This question, it seems to me, ought clearly to be answered in the negative.

The decision appealed from is accordingly reversed.

HOMESTEAD ENTRY—COMMUTATION—RESIDENCE.

FRANK W. HEWIT (ON REVIEW).

The law as construed by the Department requires that actual residence must be established upon land covered by a homestead entry within six months from date thereof; and failure to comply with such requirement is considered a defect in the entry which requires explanation.

The commutation of a homestead entry is the consummation of the homestead right, and as the claimant in such cases is required to show compliance with the homestead law up to the date of commutation, failure to establish residence within the required period must be treated as though the entry was made under section 2291, R. S.

If the good faith of the entryman is manifest, a commuted entry may be referred to the Board of Equitable Adjudication, where residence was not commenced within six months from date of entry, provided no protest or objection is made to the allowance of the entry.

Commuted entries allowed by the local officers since the date of the McKay decision (December 31, 1881), and in accordance therewith, may be submitted to the Board without calling for an explanation from the entryman.

The case of Lambert *v.* Fairchild cited and distinguished.

Secretary Noble to the Commissioner of the General Land Office, June 6, 1889.

I am in receipt of your communication of the 11th ult., submitting for my consideration the question "whether or not the departmental decision of December 3, 1888, in the case of Frank W. Hewit (7 L. D., 488) shall in future be followed as the accepted rule of the Department in regard to homestead entries commuted under section 2301 Revised Statutes, where the entrymen have failed to establish their residence on the lands within six months from date of their original entries." You state that your office, on December 31, 1881, "In the case of John J. McKay (2 C. L. L., 454) held, after a re-consideration of the question, that it was not necessary to submit a commuted homestead entry to the Board of Equitable Adjudication on account of failure to establish a residence on the land within six months from date of entry." You also call my attention to the case of Lambert *v.* Fairchild (5 L. D., 675) wherein Acting Secretary Muldrow, under date of March 17, 1887, affirmed the decision of your office holding "that Fairchild was entitled to purchase under section 2301 Revised Statutes, although he had not established his residence within six months from entry: it was further stated in said decision that this had been the uniform ruling of the Department. You further suggest that "should the rule in the Hewit

case be followed, a great deal of extra correspondence would be necessary in order to prepare entries for submission to the Board of Equitable Adjudication, to say nothing of the labor and delay involved in such submission."

Section 2301 R. S. (Sec. 8 of the act of May 20, 1862), provides that—

Nothing contained in this chapter shall be so construed as to prevent any person who has availed himself of the benefits of section 2289 from paying the minimum price for the quantity of land so entered, at any time before the expiration of the five years, and obtaining patent therefor from the government, as in other cases directed by law, on making proof of settlement and cultivation as provided by law, granting pre-emption rights. (12 Stat., 392).

Your office held in the case of McKay (*supra*) "that the failure to establish residence upon the land within six months from date of homestead entry," did not create a defect in said entry; that as the law—

Only required in commutation cases that the party shall make proof of settlement and cultivation as required by pre-emption law, ... it is immaterial whether he shall have complied with the homestead law in respect to time of making settlement upon the land, provided no adverse claim for the tract appears of record, as it is expressly provided that "nothing in this chapter shall be so construed as to prevent" him from making the payment and receiving patent.

Commissioner Wilson, in his report for 1866, held:

It has been ruled that where a party legally entitled makes an entry under the homestead law of May 20, 1862, and thereafter, at any time before the expiration of five years shall come forward, make satisfactory proof of his actual settlement and cultivation to a given day, and then pay for the tract, the proceedings merely consummate his homestead right as the act allows; the payment being a legal substitution for the continuous labor the law would otherwise exact at his hands. A claim of this character is not a pre-emption but a homestead.

This ruling, although temporarily suspended by your immediate predecessor, has been uniformly followed by this Department. See James Brittin (4 L. D., 441); Cotton *v.* Struthers (6 L. D., 288); Ball *v.* Graham (*idem.* 407).

In the case of Calvin L. Wilson (10 C. L. O., 343) (decided January 4, 1884) the Department held that the claimant, under said section 2301, must show cultivation as required by the homestead law. On July 29, 1884, in the case of John E. Tyrl (3 L. D. 49) the Department held that the clearing of land for the purpose of planting is cultivation within the meaning of section 2301 R. S., but no reference was made to the case of Wilson (*supra*). The case of Engen *v.* Sustad (11 C. L. O., 215) referred to the cases of Wilson and Tyrl (*supra*) and stated that in Wilson's case "the question as to what constitutes cultivation was not raised, nor was it passed upon in that decision. The entryman expressly denied making any cultivation and gave no reason for his laches."

In *ex parte* John E. Tyrl (3 L. D., 49), it was decided that his commuted homestead cash entry should not be canceled, because the evidence showed good faith, continuous residence, and that the entryman had cleared for the purpose of cultivation about one-half an acre, and gave as an excuse for not breaking and cultivating to crop any part of the

land, that he "settled too late." These cases were cited in the case of Adelphi Allen (6 L. D. 420) decided by the Department on Dec. 15, 1887. In the case of Samuel H. Vandivoort (7 L. D., 87) decided on July 30, 1888, the Department held that "the right of commutation depends upon prior compliance with the homestead law. If the cash entry fails, the homestead entry falls therewith," citing Greenwood *v.* Peters (4 L. D. 237), and Oscar T. Roberts (5 *id.*, 392).

In the case of Louis W. Bunnell (7 L. D. 231), the Department held that the payment of the purchase price, and compliance with the requirements of the law as to residence, cultivation and improvement, are the matters of substance which authorize commutation of a homestead entry, citing the case of Noah Herrell (6 L. D. 573) wherein it was held that "Where good faith is clearly apparent, and a substantial compliance with the regulations is shown, an exception may be justified especially under those requirements which govern the manner of the proof, but do not affect its quality."

On May 8, 1877, additional rules under section 2450 R. S. were established, and No. 24 thereof provides for the submission to the Board of Equitable Adjudication "all homestead entries in which the party failed to settle on the land within the time required by law by reason of physical disability, and where good faith is shown. In the letter of transmittal Commissioner Williamson states, "Special cases not covered by these rules, in which equitable relief should be afforded will probably arise. Such cases will be submitted as special, with letters of explanation." Prior to the case of McKay (*supra*) I am advised that it was the practice of your office to submit commuted homestead entries to the Board of Equitable Adjudication for consideration, where the settlement and residence was not established within six months from the date of entry, upon the same grounds as other homestead entries.

The law as construed by the Department, requires that actual residence must be established upon land covered by a homestead entry within six months from date thereof, and hence, failure to comply with such requirement must be considered a defect in the entry and requires explanation from the entrymen. Since the commutation of the homestead entry is but the consummation of the homestead right, and since the claimant must show compliance with the requirements of the homestead law up to the date of his application to commute, I am unable to see any substantial reason for making a distinction between homestead entries consummated under section 2291 R. S., and those completed under the provisions of section 2301. In the case of William Martin (7 L. D. 351) the Department held that where the failure to establish residence within six months from date of original entry is caused by circumstances beyond the control of the entryman, and good faith is shown the entry may be submitted to the Board of Equitable Adjudication. Nor does the case of Lambert *v.* Fairchild (*supra*) necessarily conflict with the ruling in the case of Hewit: In the

former case, Lambert contested Fairchild's homestead entry and the Department held that "There being no contest filed against Fairchild's entry until after he had offered commutation proof, it was held by the Commissioner that he was not required to show compliance as to residence *beyond the time* required by the pre-emption law, and this has been the uniform ruling of the Department." The last clause evidently refers to the time residence is required to be shown, namely six months, under the rulings of the Department. It was not intended to rule in said decision that a homestead claimant had the right of purchase under section 2301 by making "proof of settlement and cultivation as provided by law granting pre-emption rights." The evidence showed that Fairchild had very valuable improvements upon his homestead, and that he established his actual residence on the land long prior to the initiation of Lambert's contest, and hence the defect, so far as the contestant was concerned was cured. This ruling is in harmony with the case of Brassfield *v.* Eshom (8 L. D. 1) wherein it was held (see page 2 of opinion),

It has not been considered that a contest where the contestant does not allege a settlement or improvement on the tract, or of some other adverse right than the preference right of entry, that he may acquire by a cancellation of said claim, is such an adverse right as would prevent the claimant from curing the defect, by filing the supplemental affidavit, as ruled in the case of Roe *v.* Schang (5 L. D. 394) the good faith of the entryman being manifest; and the entryman having made settlement and residence on the land prior to the initiation of contest.

In the case of Gottlieb Bosch (8 L. D. 45) decided May 11, 1888, the Department without referring to any of its former decisions, held that the claimant—

may have acted in good faith believing that his acts constituted a compliance with the law . . . . The proof submitted is, by reason of claimant's apparent good faith and his continuous residence in the latter year, ample to authorize the purchase of the tract by him under Sec. 2301 of the Revised Statutes, if he so elect. Otherwise the proof offered must be rejected, and the case be left to such further proof as the claimant may make.

No reference is made in said case to the former decisions of the Department, nor was the question considered whether the entry, if made under section 2301 should be submitted to the Board of Equitable Adjudication for consideration. Besides the final proof in commutation cases is required to be made on the same blanks (Form 4—369 Gen. Circular, March 1, 1884 p. 86) and differs only in respect to the final affidavit.

I have, therefore, to advise you that the rule laid down in the Hewit case (*supra*) will in the future be followed as the accepted rule of the Department.

Where the good faith of the entryman is manifest, the commuted entry will be submitted to the Board of Equitable Adjudication, although actual residence was not commenced within six months from date of entry, provided no protest or objection was made to the allowance of

the entry. Commuted entries allowed by the local officers since the McKay decision (*supra*) and in accordance therewith, should be submitted to the Board of Equitable Adjudication without calling for explanation from the entryman.

Such procedure will, in a great measure, obviate the objection made by you on account of the delay and increased correspondence necessary to execute the foregoing directions.

RAILROAD GRANT—PROCEEDINGS UNDER THE ACT OF MARCH 3, 1887.

CALDWELL *v.* MISSOURI KANSAS AND TEXAS RY CO., ET AL.

An expired pre-emption filing, in the absence of a settlement right claimed thereunder, will not except the land covered thereby from the operation of a withdrawal.

Absence in military service will not defeat the right of pre-emption if actual settlement has been theretofore established, and proper proof of such service is furnished.

A homestead entry of land covered by an existing withdrawal is invalid as against the grant.

In order to sustain a suit under the act of March 3, 1887, it is necessary to show that the land has been erroneously certified [or patented] under the grant.

Section four of said act gives to the purchaser in good faith from the company a preference right in lands erroneously certified, and the right to patent on proper proof.

The provision in section two, act of March 3, 1863, with respect to settlement rights "on any of the reserved sections," does not refer to the granted sections, but to the even numbered sections reserved from the grant.

Secretary Noble to Acting Commissioner Stone, June 7, 1889.

By letter of January 16, 1889, your office recommended that suit be instituted to cancel the certification to the State of Kansas of the NE. $\frac{1}{4}$, Sec. 29, T. 23 S., R. 18 E., in said State.

It appears the tract lies within the ten-mile common granted limits of the grants for the Missouri, Kansas and Texas railway (14 Stat., 289) and the Leavenworth, Lawrence and Galveston (12 Stats., 772) railroad companies, the withdrawal for the latter of which is stated by your office to have taken effect May 5, 1863, and for the former, on April 3, 1867.

The records show that on December 17, 1860, one Dennis Kelley filed pre-emption declaratory statement for the tract alleging settlement the same day. At that date the land had been "offered," Subsequently, on April 4, 1865, Kelley made homestead entry for the tract, which entry was on December 12, 1872, canceled by your office for expiration of the time allowed for making proof and payment and for conflict with the grants.

On July 29, 1874, said companies jointly listed the tract and on February 11, 1875, it was certified to said State for their benefit.

On July 31, 1888, your office cited said companies to show cause why action should not be taken under the act approved March 3, 1887, to set aside said certification.

In answer the companies show that on March 9, 1888, the tract was transferred to the Southern Kansas Ry. Co., successor to the Leavenworth Lawrence and Galveston R. R. Co., and by that company, on May 1, 1888, by warranty deed, to one C. P. Walker.

The companies contend that Kelley, the original claimant, can take no advantage under the adjustment act for the reason that he voluntarily abandoned his entry, that no third party can acquire any rights in the premises, and that suit to vacate the railroad title can accomplish no practical results inasmuch as the purchaser from the company is protected by said act even if the railroad title should fail. They deny that Kelley had any right of pre-emption in the tract, and state that the company has paid taxes on the same for fourteen years—from 1873 to 1887. They say that a party without color of right is now in possession of the tract. Presumably they refer to one D. K. Caldwell, as an abstract furnished shows a suit pending between the company's grantee and Caldwell, for the possession of the same.

Said act of March 3, 1887 (24 Stat., 556), requires, that in case lands have been from any cause erroneously certified or patented by the United State to or for the use of any company claiming by, through or under grant from the United States to aid in the construction of a railroad, suit shall be brought to cancel such patent or certification, after refusal by such company, on demand, to restore the title of such land to the United States.

The question arises, therefore, was this land erroneously certified?

If excepted from said grants it was by virtue of the rights of Kelley.

The exception from said grants was of lands to which "the right of pre-emption or homestead settlement has attached" at date of definite location.

The Leavenworth Lawrence and Galveston road was definitely located November 28, 1866; the Missouri Kansas and Texas December 3, 1866.

Your said letter states that,

> Kelley was a soldier in the 9th Kans., Cav. Vols., and in the service when the withdrawal of 1863 took effect, but returned to the land and made his homestead entry for the same soon after his muster out. It seems that his declaratory statement filing could not expire during his temporary absence in the army, and when the withdrawal of 1867 was ordered the land was included in his homestead entry which was subsisting at the time of the definite location of the roads of both companies.

It is not shown in the record that Kelley, "returned to the land," indeed, it is not shown that he *ever* settled upon the tract. His pre-emption filing was for offered land and in ordinary course would have expired in one year from date of alleged settlement, to wit, on April 17, 1861, prior to the first withdrawal (sec. 2264, R. S.).

In the case of Chicago Milwaukee and St. Paul Ry. Co., *v.* Amundson (8 L. D., 291) it was said:

In the case of Bright *v.* Northern Pacific R. R. Co. (6 L. D., 613), the Department held that an expired pre-emption filing at the date of the company's application to select land as indemnity, does not bar the selection unless it be shown that the pre-emptor had not in fact abandoned his claim.

This principle applies equally to the withdrawal. The filing, therefore, was no bar to the operation of the withdrawal.

It is true the time of his service in the army would not have run against him had he made actual settlement, then been called away into such service, and made proper proof that he was so in the service; and his right in that case might have excepted the tract from the withdrawal of 1863; for section 2268 R. S., provides:

Where a pre-emptor has taken the initiatory steps required by law in regard to actual settlement, and is called away from such settlement by being engaged in the military or naval service of the United States, and by reason of such absence is unable to appear at the district land-office to make before the register or receiver the affidavit, proof, and payment, respectively, required by the preceding provisions of this chapter, the time for filing such affidavit and making final proof and entry or location shall be extended six months after the expiration of his term of service, upon satisfactory proof by affidavit, or the testimony of witnesses, that such pre-emptor is so in the service, being filed with the register of the land-office for the district in which his settlement is made.

But the proof of his actual settlement is wanting. It does not appear therefore that he had a pre-emption right in the tract at the date of the first withdrawal. It would seem from this record that the land was at that date vacant. The order of withdrawal found the land in that condition and reserved it from sale and pre-emption and homestead entry. The withdrawal was never revoked. It follows that no right could be acquired under an entry made subsequent to the date when the order became effective. Julius A. Barnes (6 L. D., 522), and numerous other cases. In your letter of December 12, 1872, cancelling the homestead entry, you found affirmatively that Kelley's filing had expired prior to the making of the entry.

The homestead entry of Kelley, therefore, made April 4, 1863, after the withdrawal of the land, was erroneously allowed, as far as shown by this record. Kelley is not asserting any claim to the tract.

In order to sustain this suit under said act it would be necessary to show to the court that this land has been "erroneously certified." I am of opinion this showing can not be made on the present record. The entry was allowed subsequent to the order of withdrawal and in violation of its terms. No settlement is shown. Had the validity of the entry been put in issue, immediately after its allowance the law would have declared its cancellation. The withdrawal was a matter of record equally with the entry and was prior in time. As the land was reserved the entry was invalid. At the date of certification no adverse claim appeared of record for the tract and Kelley had long since abandoned

his claim. I, therefore, conclude that the suit as recommended could not be sustained.

In any event, it would seem the right of the purchaser is paramount. Section 4, of said act of 1887, gives to the purchaser in good faith from the company, the preference right in lands so erroneously certified, and the right to patent upon proper proof.

It does not seem that Caldwell could profit by such suit. Furthermore, it is not shown that he has settled on the tract, nor has he applied to enter.

The attorneys for Caldwell urge that the act of 1863, excepts from the grant lands covered by "pre-emption or homestead settlements." While this may be true the settlement of Kelley is not shown and would be a necessary element in the proposed suit. They further urge the provision of the grant "that settlers on any of the reserved sections" who "comply with the several conditions and requirements of said act, (homestead,) shall be entitled to patents for an amount not exceeding eighty acres each, anything in this act to the contrary notwithstanding." This provision is found in section two of the grant of 1863. But it refers to the *reserved* sections, or *even numbered* sections. This grant was of *odd* numbered sections. Said provision has, therefore, no relevancy to the case.

In conclusion, I am of opinion that no sufficient basis for suit is furnished.

DESERT LAND ENTRY—EQUITABLE ADJUDICATION—CONTEST.

GEORGE F. STEARNS.

Substantial proof of reclamation through actual irrigation of the land is the essential requisite of final proof under the desert land act.

In the absence of conclusive evidence of laches in the matter of reclamation, an entryman whose proof was submitted after the statutory period provided therefor, and found insufficient, may make new proof, if no adverse claim has attached to any part of the land, and if such proof is found satisfactory, and the delay in its submission is duly explained, the entry may be sent to the Board of Equitable Adjudication.

An application to contest an entry should not be allowed, pending proceedings instituted against the same by the government.

First Assistant Secretary Chandler to Acting Commissioner Stone, June 7, 1889.

In the case of George A. Stearns, before me on appeal from the decision of your office dated April 28, 1888, the record discloses the following facts:

February 16, 1884, George A. Stearns, filed in the Visalia California land office, his declaration of intention to reclaim section 32 T. 25 S., R. 25 E., Mount Diablo meridian, and at the same time showed, to the satisfaction of the register and receiver of said office that the described

tract was desert land, and then paid to the receiver one hundred and sixty dollars, being at the rate of twenty-five cents per acre on said tract.

February 28, 1887, Stearns was notified by the local land officers to show cause within ninety days why his claim should not be declared forfeited, and his entry canceled for non-compliance with the provision of the desert land act requiring proof of reclamation of the land and final payment to be made within three years from date of entry.

May 13, 1887, Stearns made proof of what he had done towards reclaiming said tract from its alleged desert condition, and asked to be allowed to make final entry thereof. The evidence tendered was unsatisfactory and final entry was refused by the local officers. On appeal the action of said officers was sustained by your office, and appellant's original filing, or entry, was held for cancellation.

Appellant insists that this decision is erroneous, and that great injustice will be done him if it is permitted to stand; and he also asks, should the proof offered be deemed insufficient by the Department, that he be allowed to present further proof.

Reference is hereby made to the decision of your office for the material facts shown by the proof already offered. These facts are clearly insufficient to show a compliance with the requirements of the desert land act (19 Stat. 377), as said act is construed by the Department. See Wallace *v.* Boyce (1 L. D., 26); Miller *v.* Noble (3 L. D., 9); Secretary Teller to Commissioner McFarland (id., 385); George Ramsey (5 L. D., 120); Charles H. Schick (ib., 151); Adam Schindler (7 L. D., 253). The described section of land is not shown to have been reclaimed by irrigation as contemplated by the statute, and the rejection of appellant's proof by the local land office and by your office is fully concurred in by the Department.

The remaining question presented by the record for determination is, can appellant legally be permitted to make new proof in support of his claim. The desert land act (*supra*) allows a party who has filed his declaration of intention to reclaim a tract of desert land, and made the preliminary payment of twenty-five cents per acre, three years within which to make proof of reclamation, and to pay the additional one dollar per acre. This period expired nearly three months before proof was offered in this case. Rule 30 of the rules established for submitting certain entries to the Board of Equitable Adjudication is as follows:

> All desert land entries in which neither the reclamation nor the proof and payment were made within three years from date of entry, but where the entryman was duly qualified, the land properly subject to entry under the statute, the legal requirements as to reclamation complied with, and the failure to do so in time was the result of ignorance, accident or mistake, or obstacle which he could not control, and where there is no adverse claim. (6 L. D., 799).

If appellant can bring himself within this rule by making new proof to the satisfaction of your office, he may do so, and then have his entry submitted to the Board of Equitable Adjudication. Is there anything

in this record which conclusively shows that appellant can not bring himself within this rule? If not, it was error to hold his entry for cancellation on the proof offered. The evidence tends strongly to show that appellant has been guilty of laches in the reclamation of this land, but such fact is not conclusively shown, and if no legal adverse claim has attached to said section, or any part of it, he should be allowed to make new proof.

Bearing on the question of an adverse claim or claims, the record shows the following facts: June 20, 1887, Thomas Kelly and Henry Hamilton each filed their separate affidavits in the local land office, in which they say that Stearns has not irrigated and reclaimed said tract of land; that they do not believe it to be desert land, or that it was at the time of Stearns' entry; that they have each settled on said tract, and have resided thereon since May 4, 1887, and that they seek to enter the same as actual settlers. At the same time Kelly and Hamilton filed a formal protest, directed to the Commissioner of the General Land Office, against the acceptance of the proof offered by Stearns.

February 17, 1888, Henry Hamilton made a second affidavit in which he says, that in April, 1887, there was growing on said section of land a fine crop of "filaree" (a native grass), which would have made a good crop of hay had it not been eaten down by the sheep; that there was then, February 1888, a fine growth of grass on said section and that it was fine agricultural land; and that said land had not been irrigated up to that time. This affidavit is strongly corroborated by that of A. J. Monroe, who says that:

The said section 32 has produced good crops of native grasses each year since 1879, which would have made good crops of hay if cut. It is good agricultural land and would have produced good crops of wheat or barley during that time if it had been sown and properly cultivated.

These affidavits were made before John P. Gallagher, a notary public, and Hamilton, in his affidavit, asks that a day be set for a hearing in the matter, and that Stearns be notified.

On February 28, 1888, before the same office, Thomas Hamilton and P. H. Fogarty, or Hogarty, made oath to their certain complaint or petition to the Commissioner of the General Land Office, wherein they allege, among other things, that said Sec. 32 has not been reclaimed by Stearns, and the same is not desert land, as they believe, and they ask that Stearns' entry may be canceled, or that a hearing in the matter may be had, etc.

September 27, 1888, Mary V. Creasey made application to contest said entry, and to enter, under the homestead law, the SW. $\frac{1}{4}$ of said section. This application was refused by the local officers, because said desert land entry was then before the Secretary of the Interior on appeal, and because the government had initiated steps to secure the cancellation of said entry.

October 13, 1888, William B. Crawford asked to file his pre-emption

declaratory statement for the NE. ¼ of said section and to contest said entry, which request was also refused by the local officers, on the ground above stated.

From this ruling Creasey and Crawford each appealed.

As you held Stearns' entry for cancellation, it seems you did not deem it necessary to pass on the question raised by these appeals, and, consequently, they are not, in strict practice, before me. It may be proper to say, however, that the action of the local office in refusing these applications is in conformity with the practice of the Department. (Gage *v.* Lemieux (8 L. D., 139, and cases cited).

In view of the premises, you will please direct a hearing to be had in this matter before the local officers, with notice to all parties in interest, to the end that the questions involved may be fully adjudicated. At such hearing Stearns will be permitted to make further proof in support of his claim, and to show the desert character of said tract, and that he has complied with the provisions of the desert land law.

The decision of your office is modified accordingly.

HOMESTEAD CONTEST—RESIDENCE.

WEST *v.* OWEN.

Residence is an essential requirement of the homestead law, and is neither acquired nor maintained without inhabitancy of the land, either actual or constructive, and that to the exclusion of a home elsewhere.

First Assistant Secretary Chandler to Acting Commissioner Stone, June 7, 1889.

This case involves the SW. ¼ Sec. 14 T. 105 N., R. 61 W., Mitchell, Dakota and comes here on the appeal of George B. Owen from your office decision of January 12, 1888, affirming the local office and holding for cancellation his cash entry for the tract named.

Owen made homestead entry for the said tract on April 21, 1882, which he commuted to cash entry on November 25th of the same year.

On January 29, 1883, Eugene H. West initiated contest against said entry alleging that the claimant Owen had neither established or maintained a residence on the land as required by law, but for the past six years continued to live with his family at Marion, Iowa, and that during the existence of the said homestead entry, one H. S. Deland was in sole possession of the land as tenant of Owen and that the latter had entered the land for the purpose of speculation.

A hearing being ordered on said contest by your office the contestant West offered evidence in support of his allegations. This evidence comprised certain depositions taken before the clerk of the district court for Linn county, Iowa, on August 9, 1883, and testimony submitted at the local office on August 29, 1883.

The claimant offered no evidence in his own behalf but moved a dismissal of the contest on the ground that the evidence offered failed to sustain the allegations upon which it is based.

The local office sustained said motion and dismissed the contest, and upon appeal their action was affirmed by your office November 28, 1884.

The contestant appealed and on March 3, 1886, the Department reversed the stated action of your office but in view of the fact that "the sustaining of the claimant's motion to dismiss obviated the necessity of his submitting any evidence in support of his claim" directed the hearing on the contest to be continued. West *v.* Owen (4 L. D., 412).

Thereupon on May 12, 1886, both parties appeared with counsel at the local office when the claimant testified in his own behalf, no other witness being examined.

The local officers found that "the evidence of the claimant does not change or modify the facts as found in the Hon. Secretary's (Lamar) opinion" and held that the claimant's entry should be canceled.

On appeal by the claimant your office as hereinbefore stated sustained the finding below.

In February 1882, the claimant purchased the relinquishment of a prior claimant, and in March following, at Marion, Iowa (where for several years he had resided with his family) he made a contract with one H. S. Deland to bring the latter with his family to Dakota, and to provide them with a house and stable. Deland in return to break a part of the tract involved. Claimant then built a house on the land into which during the latter part of April 1882, Deland and family moved. The claimant at this time remained with Deland for one night and two days, and thereafter until he made proof visited the claim at intervals of from three to four weeks, remaining two or three days at a time, and in the aggregate about fifteen nights.

When he visited the land he took provisions with him, but appears to have taken his meals with Deland. He left his household effects at Marion, and had a cot and some blankets in the house mentioned. But no particular part of this house was reserved for his use. With the exception of his married son who had a claim in the neighborhood, no member of the claimant's family visited the land during the existence of his homestead entry. His wife and daughter spent the summer of 1882 in the east, but continued their residence at Marion. Since about 1875, and during 1882, the claimant was in his father's employ and engaged in looking after the latter's property valued at $125,000 to $150,000 and located in different parts of the county. The claimant, to some extent explains his absence from the land by stating that he had charge of the construction of four stores at Marion, that his father (in May 1882, after the entry) had arranged to build. He also states that his wife refused to live in Dakota, and that in 1882, he voted in the county adjoining the one containing the tract involved.

The improvements on the land, as shown by the claimant's proof, are valued at $340 and comprise a frame house twelve by sixteen feet with an "L" eight by ten feet, a stable, well, twenty acres broken and five cultivated. The claimant, however, only knew of such cultivation as informed by Deland. He states, however that his total expenditures on the land are in excess of its value.

It further appears that after making his proof, the claimant, during the winter of 1882 and 1883, visited the claim several times, and in March 1883, he leased the same to Deland, who continued to ocuupy it until the spring of 1884.

Counsel assert that the claimant's proof was made under the advice of the local officers. But the claimant on cross-examination admits that he was not "officially" informed that he had complied with the law, but got information from "general conversation with the officials and clerks of the land office."

The evidence, in my opinion, shows beyond a doubt that the claimant never established or intended to establish a bona fide residence upon the land, and that he has at no time been other than a visitor thereto. Residence is an essential requirement of the homestead law, and it is neither acquired nor maintained by occasional visits to the land. Fagan *v.* Jiran (4 L. D., 141).

A claim of residence is not consistent with the substantial maintenance of a home elsewhere. Van Gordon *v.* Ems (6 L. D., 422).

A settler who goes upon public land with the intention of remaining just long enough to receive title by colorable compliance with the law, and then return to his former home where his family has in the meantime resided and a greater part of his personal property remained, does not establish or maintain the residence required by the homestead law. Van Ostrum *v.* Young (6 L. D., 25).

To constitute residence there must be inhabitancy either actual or constructive; and such inhabitancy must exist in good faith and be exercised to the exclusion of a home elsewhere. Elliott *v.* Lee (4 L. D., 301); Crosby *v.* Dall (13 C. L. O., 210). "Mere visits to land to keep alive the fiction of a residence do not constitute compliance with the law." Strawn *v.* Maher (4 L. D., 235).

The decision appealed from is accordingly affirmed.

PRACTICE—NOTICE—INTERVENOR—CONTEST—ACT OF JUNE 15, 1880.

UNITED STATES *v.* SCOTT RHEA.

The record must show affirmatively all matters of notice requisite to confer jurisdiction.

In the service of notice by publication posting on the land is an essential, without which jurisdiction is not acquired.

A stranger to the record is not entitled to be heard as an intervenor without first disclosing under oath the nature of his interest.

An application to contest an entry filed pending proceedings against the same by the government, should be received and held subject to the final determination of such proceedings.

If such proceedings fail the contestant is entitled to proceed against the entry, his right taking effect by relation as the date when the contest was filed.

The right of purchase under section 2, act of June 15, 1880, is suspended by an application to contest the original entry until the final disposition thereof.

First Assistant Secretary Chandler to Acting Commissioner Stone, June 7, 1889.

I have considered the appeal of Scott Rhea from the decision of your office, dated March 18, 1887, in the case of the United States *v.* Scott Rhea, involving the latter's homestead entry for the SW. ¼ of the NE. ¼, the S. ½ of the NW. ¼ and the NW. ¼ of the SW. ¼, of section 33, T. 1 S., R. 40 W., Oberlin land district, Kansas.

The entry was made March 5, 1880. January 28, 1885, the tract was visited and examined by special agent Lee, who reported that no improvements had been made, nor breaking done, that the entryman was not known in the county and has never resided upon or improved any part of the land. He reported that there was no evidence of fraud and recommended the entry for cancellation for failure on the part of the entryman to reside upon, and improve the tract.

Upon this report a hearing was directed to be had. August 10, 1885, J. A. Hoffman made affidavit that he had made careful and diligent inquiry in the neighborhood of the land and in Cheyenne county and was unable to find Scott Rhea or to learn his post office address, and that personal notice of the contest cannot be made upon the said Scott Rhea within the State of Kansas.

A notice dated August 3, 1885, citing Scott Rhea, residence unknown, to appear at the land office at Oberlin, September 23, 1885, was published for the period of six weeks in The Cheyenne County Rustler, a weekly newspaper, and was posted in a conspicuous place in the local office for a period of thirty days. There is no certificate or affidavit showing that a copy of said notice was posted upon the land.

The hearing was held September 30, 1885. There was no appearance on the part of the defense. The special agent and two other witnesses testified that the entryman Scott Rhea was unknown in the neighborhood, had not resided upon the land, and that there were no improvements thereon. The local officers found that Scott Rhea had never resided upon the land in question and had not broken or cultivated any portion of it and recommended the cancellation of the entry. This decision was rendered January 29, 1886, and on March 2, 1886, Scott Rhea made application properly corroborated, to purchase said land under the second section of the act approved June 15, 1880, (21 Stat., 236). Said application was rejected because a hearing was pending. From the said action of the local officers Rhea appealed.

After the hearing was had and before a decision had been rendered, namely on December 4, 1885, A. A. Smith, filed a contest and tendered fees against the homestead entry alleging that "the said Scott Rhea never built a house upon said land and never resided thereon a single

day and has wholly abandoned said tract." This application was rejected by the local office because the hearing was pending. At the same time Smith applied to enter the land under the homestead law and alleged that he had settled thereon November 1, 1883, and erected a sod dwelling house twelve by twelve of the value of $50. December 14, 1885, the local officers transmitted Smith's appeal from their action in rejecting his application to contest.

March 18, 1887, your office affirmed the finding of the local officers that Rhea had not established and maintained residence upon the tract entered as required by the homestead law; but you held that they had erred in rejecting Smith's application to contest which you say, should have been treated as of the nature of a second contest and filed awaiting the determination of the proceedings instituted by the government and modified their decision accordingly. You also affirmed the action of the local office in refusing to allow Rhea to make cash entry of the land.

From the said decision the entryman Scott Rhea, by his attorney, S. W. McElroy, appeals.

Earle and Pugh, attorneys of this city, enter their appearance and file argument as attorneys for Mary Morgan, transferee, and O. H. Herring, attorney of this city, enters his appearance as attorney for J. G. Benkolman, grantee of Scott Rhea. These gentlemen have not complied with Rule 102, of Practice, which provides that "No person not a party to the record shall intervene in a case without first disclosing on oath, the nature of his interest."

The appeal filed by Mr. McElroy attacks the legality of the proceedings and alleges, among other things, that legal notice of the hearing was not given.

It appears from the record that the post office address of the entryman could not be ascertained and this fact is given as accounting for the failure to send him a notice by registered letter. The notice was published for the prescribed time, but it does not appear that a copy of it was posted on the land as required by Rule 14, of Practice. In the case of Kelly *v.* Grameng (5 L. D., 611) it is held that "notice by publication includes the posting of notice upon the land in contest, and if such posting is omitted the notice is incomplete." In the case of Parker *v.* Castle, (4 L. D., 84), it is held that the sending of a copy by registered letter, and the posting of a copy on the land are essential parts of a "notice by publication;" and the absence of any one of these essentials makes inoperative the efficacy of the others, if the defect be not waived. It is quite clear that if the notice was not posted on the land due notice was not given and jurisdiction not acquired, and it has been held that the record must affirmatively show all matters of notice requisite to confer jurisdiction. Kelly *v.* Grameng (5 L. D., 611); Rabuck *v.* Cass (id., 398).

The local officers erred in not receiving the contest affidavit of Smith

and holding it subject to the final determination of the proceedings instituted by the government. It was presented accompanied by the necessary fees, December 4, 1885, and will be held to take effect, by relation, as of that date, upon the disposition of the prior proceedings. Eddy *v.* England (6 L. D., 530). Rhea's application to purchase under the act of June 15, 1880, although dated February 20, 1886, was not presented at the local office until March 2, 1886. Smith's contest had then attached and operated to suspend the right of purchase under the act of June 15, 1880, until the final disposition of such contest. Freise *v.* Hobson (4 L. D., 580); Roberts *v.* Mahl (6 L. D., 446); Clement *v.* Heney (id., 641).

The proceedings instituted by the government were fatally defective and must be set aside; and inasmuch as the government's case has failed, instead of instituting a new inquiry upon the information contained in the special agent's report, it will be the better practice to take up the affidavit filed by Smith, a settler upon the land, who stands ready to pay the expenses of the contest, and have a regular trial thereon in accordance with the rules and regulations of your office.

You will, however, call the attention of a special agent of your office to this entry and direct him to take the steps necessary to a thorough investigation of the same in the event of Smith's failure to prosecute his contest.

Your decision is modified accordingly.

FINAL PROOF—ACT OF MARCH 2, 1889.

WILLIAM F. SIMRALL.

Under the provisions of section 7, act of March 2, 1889, final proof may be submitted within ten days after the day fixed therefor, where accident or unavoidable delay has prevented the claimant or his witnesses from making such proof on the day specified.

First Assistant Secretary Chandler to Acting Commissioner Stone, June 7, 1889.

The tracts involved herein are lots 1 and 2 Sec. 12 and lot 1 Sec. 13, T. 153 N., R. 64 W., Devils Lake, Dakota.

On October 2, 1882, William F. Simrall filed pre-emption declaratory statement No. 85, alleging settlement June 1, 1882, upon the tracts named. On December 22, 1883, Simrall gave notice of his intention to make proof in support of his claim before the local officers at Creelsburg, now Devils Lake, on February 2, 1884.

Simrall made proof before the register but not on the day named in his published notice.

The testimony of Simrall and one of his witnesses was taken on February 3, and that of the other witness on February 4, 1884.

The local officers accepted said proof and issued final receipt and certificate dated February 5, 1884.

Simrall's proof having been made as aforesaid, your office on June 17, 1887 required "new publication and new proof."

On November 1, 1887, Clark W. Kelley, transferee, by his attorney filed in the local office his application to be "allowed to republish the notice of intention of William F. Simrall ; . . . and if on the day mentioned in said notice no one appears at the land office to object or make protest, the final proof already on file be accepted and approved for patent."

This application was refused by your office letter of December 30, 1887, wherein you state that your former decision "being in strict accordance with the rules . . . . can be reversed or modified by the Hon. Secretary of the Interior only upon the merits of the case."

The transferee Kelley, has appealed from both of your said decisions. In support of his said application Kelley avers in his accompanying affidavit that he is the present owner of the land, having bought it from Simrall in June 1885, that Simrall moved to Kentucky in the fall of 1886, and now resides there; that although he has used due diligence to have Simrall make new proof as required, the latter refuses so to do being unable to absent himself from his present abode, and that he has placed on the land improvements to the value of twenty-five hundred dollars. The affiant also avers upon information and belief that Simrall "at the time said final proof was advertised to be made . . . . was serving as a United States grand juror at Fargo Dakota Territory, and that the court refused to excuse him from serving as a juror so that he might be in attendance at the Land Office at Devils Lake."

Sec. 7 of the act approved March 2, 1889 (25 Stat., 854), provides—

That the "Act to provide additional regulations for homestead and pre-emption entries of public lands," approved March third, eighteen hundred and seventy-nine (20 Stat., 472) shall not be construed to forbid the taking of testimony for final proof within ten days following the day advertised as upon which such final proof shall be made, in cases where accident or unavoidable delays have prevented the applicant or witnesses from making such proof on the date specified.

It appearing from the record that Simrall was prevented by an "unavoidable" delay from attending at the local office, on the date named in his notice, and that his proof was submitted within ten days from that date, such proof was, under the act of March, 1889, *supra*, regularly made.

Said proof shows that Simrall began actual residence on the land in June 1882; that the same for more than a year was continuous, and that his improvements, valued at $700, consisted of a story and a half log house thirty by thirty, a barn sixteen by thirty-two, a well and seven or eight acres cultivated.

Simrall's proof having been therefore duly made and showing a sub-

stantial compliance with the pre-emption law, his entry should remain intact.

Your decision is reversed.

I note from the records of your office that Simrall filed declaratory statement December 21, 1883, and made pre-emption cash entry March 4, 1884, for lots 3 and 4 Sec. 7, and lot 1 Sec. 18 T. 153 N., R. 63 W. These tracts are in the Grand Forks district but are contiguous to those involved herein.

Simrall's pre-emption settlement of June 1, 1882, was made upon both the land in question and the said tracts in the Grand Forks district. He accordingly filed his claim and made proof therefor in each of the districts referred to.

Simrall's proof in the Grand Forks district has been accepted and a patent has been issued for the said tracts therein located. His proof for the land in question being, for the reasons stated, hereby approved, I can see no reason why a patent should not also be issued thereon.

REPAYMENT—ACT OF MARCH 2, 1889.

JACOB A. GILFORD.

Repayment may be allowed of double minimum excess erroneously charged for land that had been reduced in price by the act of March 2, 1889.

Secretary Noble to Acting Commissioner Stone, June 7, 1889.

I have considered the appeal of Jacob A. Gilford from the decision of your office of April 22, 1889, refusing repayment of the excess of one dollar and twenty-five cents per acre upon his cash entry, No. 2123, for the NW. $\frac{1}{4}$ of Sec. 22, T. 1 S., R. 14 E., The Dalles, Oregon, upon which final proof and entry were made March 22, 1889.

Said land is within the granted limits of a part of the Northern Pacific Railroad Company, which had not been completed March 2, 1889, the date of the act entitled "An act to withdraw certain public lands from private entry, and for other purposes," and payment was made for the same at two dollars and fifty cents per acre.

The fourth section of the act of March 2, 1889 (25 Stat., 854), provides as follows:

That the price of all sections and parts of sections of the public lands within the limits of the portions of the several grants of land to aid in the construction of railroads which have been heretofore and which may hereafter be forfeited, which were by the act making such grants or have since been increased to the double minimum price, and also of all lands within the limits of any such railroad grant, but not embraced in such grant, lying adjacent to and coterminous with the portions of the line of any such railroad which shall not be completed at the date of this act, is hereby fixed at one dollar and twenty-five cents per acre.

It appears that this entry was made before the receipt of the instructions of your office by the local office, but at the time payment was made

for the land, the land had been reduced in price to one dollar and twenty-five cents per acre, and therefore the sum of two dollars and fifty cents was erroneously charged.

In my communication to you of the 29th of May last, relative to excess payments within the limits of the forfeited grant to the Texas Pacific Railroad Company, in referring to the decision of my predecessor in the case of George D. Clark, (6 L. D., 157,) I said:

The interpretation given to said act by Secretary Vilas in the decision above referred to is that, where a purchaser has been erroneously charged the double minimum price for lands supposed to be subject to said price by reason of being within the limits of a railroad grant, and it is subsequently determined that at the date of the purchase the lands were not subject to the double minimum, that it is the same as if the lands were supposed at date of purchase to be within the limits of said grants, but are afterwards found to be outside of said limits. I think this is a fair and reasonable interpretation of said act, the spirit and intent of the act evidently being, that in all cases where the double minimum was erroneously charged, repayment should be allowed.

Under this authority, I am satisfied that the excess of one dollar and twenty-five cents per acre for this land was erroneously charged, and the claimant will be entitled to repayment of said amount.

HOMESTEAD CONTEST CONTESTANT—RESIDENCE.

CRUMPLER *v.* SWETT.

The contestant of a homestead entry is not required to assert a claim to the land included therein.

Residence requires inhabitancy of the land to the exclusion of a home elsewhere. Mere visits to the land to keep alive the fiction of residence do not constitute compliance with law.

Residence on a tract covered by the entry of another is unavailing where it is abandoned prior to the cancellation of said entry, and not resumed until after the intervention of an adverse right.

The hardship resulting from an order of cancellation does not warrant the Department in ignoring the requirements of law.

First Assistant Secretary Chandler to Acting Commissioner Stone, June 7, 1889.

This case involves the S. ½ SW. ¼ Sec. 31 T. 21 S., R. 29 E., and S. ½ SE. ¼ Sec. 36 T. 21 S., R. 28 E., Gainesville, Florida.

On October 1, 1875, Sarah Bryant made homestead entry for the tract named. Bryant's entry was canceled by relinquishment on February 21, 1881, and on the same day Edwin R. Swett made homestead entry for the land.

On September 12, 1884, Swett gave notice of his intention to make proof in support of his claim before the clerk of the circuit court at Orlando.

On or about September 15, 1884, Marion O. Crumpler initiated contest against the entry of Swett alleging abandonment and failure to settle upon and cultivate the land according to law.

Swett submitted proof in accordance with his published notice on November 14, 1884, but no action was taken thereon.

Notice dated May 22, 1885, of a hearing to be had on Crumpler's contest at the local office July 17, following was issued by the local officers and in accordance with such notice testimony was taken before the clerk of the circuit court at Orlando on July 6th, 7th and 9th, 1885, when both parties appeared with counsel.

On September 11, 1885, the local officers found that the entry of the claimant (Swett) should be canceled. On February 20, 1888, your office considered the case (upon the claimant's amended appeal) and sustained the finding below.

The claimant again appeals.

The claimant went on the land in 1875, when the same was subject to the entry by Bryant. In December 1875, he built a house thereon and in 1876, he obtained Bryant's relinquishment but did not make entry until (as stated) February, 1881.

From 1875, to the latter part of 1879, the claimant with his family, wife and child, resided continuously upon the land, his step-daughter living with him during a part of this time. In the latter part of 1879, he entered the employ of one Townsend and took charge of the latter's "place" some two or three miles distant. The claimant who claimed to be unable to make a living on the land, with his family and most of his household effects, at the time referred to, moved to the Townsend place. He continued to occupy the same for several years, during which period he worked at said "place" and elsewhere in the neighborhood. He left a few household goods on the land and visited the same occasionally and on several occasions employed one or two men to work thereon.

The testimony is voluminous and somewhat uncertain in character, but shows with substantial accuracy that during most of the time following his said departure from the land in 1879, until after the initiation of Crumpler's contest the land presented the appearance of being uninhabited; that during said period the claimant's principal place of abode was at the Townsend place; that he visited the land at intervals of from two to four months when his family occasionally accompanied him; that during the period referred to he was on the tract in the aggregate some two months in each year, and that about the first of November 1884, he returned to the land where he remained until the date of testimony.

The improvements described in the claimant's final proof are valued at $1500, and comprise a log house with a plank addition, a stable, five acres cultivated since 1875, and two hundred and twenty-five orange trees. Concerning his improvements the claimant testified that prior

to 1879, he built a house and set out about one hundred orange trees, and since that time he "built the fence and worked the grove and kept it along;" and also that after he "knew it was contested he only plowed and worked it a little."

It is contended on appeal both from the local office and your office that the contest should be dismissed for the reason that the contestant, Crumpler, has asserted no claim to the land, and that he was not acting in good faith. But the evidence does not sustain the claimant's attempt to prove the contest speculative, and there is nothing in the statute requiring the contestant to be also a claimant for the land involved. Nor do I consider the claimant's plea of poverty well taken. He actually did live on the land from 1875 to 1879, and it is not satisfactorily shown that he could not have continued to have made a living on his claim as well as in the immediate vicinity. But the claimant's inhabitancy of the land from 1875 to 1879—during the existence of the Bryant entry—could avail him nothing. The Bryant entry remained of record until long after the claimant's departure from the tract, and Crumpler's affidavit of contest was received at the local office at least a month prior to his return thereto.

The law is well settled that—

To establish residence there must be a combination of act and intent, the act of *occupying and living* upon the land and the intention of making the same a permanent home. West *v.* Owen (4 L. D., 412.

Residence is constituted by residing upon the land to the exclusion of a home elsewhere, mere visits to the land are not sufficient. Crosby *v.* Dall, 13 C. L. O., 210; Elliott *v.* Lee (4 L. D., 301).

Mere visits to the land to keep alive the fiction of residence do not constitute a compliance with the law. Strawn *v.* Maher (4 L. D., 235).

A claim of residence is not consistent with the substantial maintenance of a home elsewhere. Van Gordon *v.* Ems (6 L. D., 422).

It therefore does not appear from the papers before me that the claimant has ever established or maintained a legal residence on the land.

While this decision apparently works a hardship to the defendant on account of the value of his improvements upon the land, yet the Department can not follow equitable principles to protect him, when to do so results in losing sight of the law. He must know substantially what it demands, and in a reasonable manner observe its behests. If he is unmindful of this duty and places improvements upon the tract, of which he is not entitled to avail himself of the benefit, he has himself and not the government to blame.

Finding in the record no reason for disturbing the decision appealed from the same is accordingly hereby affirmed.

SECOND HOMESTEAD ENTRY—RELINQUISHMENT.

JACKSON C. BROWN.

A second homestead entry may be made by one who relinquished his first entry under the belief that he could not maintain the same without danger to his life.

Secretary Noble to Acting Commissioner Stone, June 7, 1889.

I have before me the appeal of Jackson C. Brown, from your decision of May 24, 1886, holding for cancellation his homestead entry of May 29, 1883, for the NW. $\frac{1}{4}$ NE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ NW. $\frac{1}{4}$ of section 32, T. 10 N., R. 9 W., La. M., Natchitoches district, Louisiana.

The ground for your said decision is that Brown having formerly made another homestead entry (No. 2255) and "voluntarily relinquished" the same, his second entry, No. 2571—the one here in question—was on that account illegal.

But, as your said letter states, the following are the facts presented by the record:

On December 13, 1881, Brown made said homestead entry No. 2255, and thereafter built a house and endeavored to improve the land involved, but was prevented by a party claiming to have purchased some improvements then on the land. After making repeated efforts to comply with the law, he believing his life to be really in danger—relinquished said entry to the United States, January 17, 1883. Being ignorant of the fact that he had exhausted his rights under the homestead law, he, on the 29th of May, 1883, made a second entry, No. 2571, for land in section 32, T. 10 N., R. 9 W., La., and has made valuable improvements thereon, raised crops for three seasons and is still improving and cultivating the same. Mr. Brown, fearing that said entry No. 2571 may be canceled on account of involuntary illegality and he and his family thereby be deprived of income and support now prays that the entry be confirmed and he be allowed to submit final proof on same in due time.

Under such circumstances I cannot concur in your view that the former entry was "voluntarily relinquished" in any such sense as would make it necessary or proper to hold that Brown had exhausted his homestead right. In the case of Thurlow Weed (8 L. D., 100), Weed, on being informed that one Sarah Kellogg, claimed the land under the pre-emption law, abandoned the tract, "because of the uncertainty as to priority of settlement, of his limited financial ability to carry on a contest, of the dissuasions of his wife, of the advice of his friends and because 'it was all along growing more apparent that the threatened contest was liable to engender the most *bitter feelings* between neighbors, who ought rather to be friends." In view of these facts he was allowed to make a second entry for another tract. Brown, in the present case, had, it seems to me, quite as good a reason for giving up his first entry.

I think he should be allowed to make final proof under his second entry in due course. See also James A. Harrison (8 L. D., 98); Chas. Wolters (ibid., 131); Patrick O'Neal (ibid., 137).

Your said decision is accordingly on this ground reversed.

RAILROAD GRANT—ACT OF MARCH 3, 1887.

JOHNSON v. MISSOURI KANSAS & TEXAS RY. CO.

A homestead entry of record at date of indemnity withdrawal excepts the land embraced therein from the operation of said withdrawal.

A settler whose application to enter was erroneously rejected is not entitled to re-instatement under section 3, act of March 3, 1887, if he voluntarily abandoned his claim before title to the land passed under the grant.

Secretary Noble to Acting Commissioner Stone, June 7, 1889.

By letter of December 18, 1888, your office recommended that suit be instituted to set aside the patent issued to the Missouri Kansas and Texas railway company, for the SE. ¼ Sec. 10, T. 23 S., R. 12 E., Independence, Kansas.

The land is within the indemnity limits of the grant for said road, the withdrawal for which took effect April 3, 1867.

It appears that one Randall Brown made homestead entry for the tract December 14, 1866, that he afterwards assigned his claim to Sophronius Johnson and thereupon his entry on March 15, 1872, was canceled on relinquishment.

Johnson applied to make homestead entry of the land July 16, 1872, and his application was submitted to your office by the local officers without opinion.

Your office rejected the application on December 6, 1872, for the reason that in September, 1866, when the survey of the road in the field was made, the land was free from adverse claims. This was in accordance with the rulings of your office at that time. Johnson was notified of the decision but failed to appeal. On April 14, 1873, the company selected the tract and patent issued for the same November 3, 1873.

On April 16, 1888, the affidavit of Johnson was received by your office in which he states that in March, 1872, said Randall Brown assigned to him all his right, title and interest in the land, and that he took possession of the same, built a frame house fourteen by twenty-four feet, valued at $300, set out an orchard of two and one-half acres, broke three acres, dug a well and walled it with stone, enclosed his house and orchard and built a stable; that he continued to reside there for nine months after receiving notice of the rejection of his application to enter, when he left the premises and took up his residence elsewhere. He has not returned to the land.

Thereupon your office, on October 3, 1888, cited the company to show cause why suit should not be instituted under the act of March 3, 1887 (24 Stat., 556) to vacate said patent.

The company responded with an argument and set forth in addition, that on August 31, 1876, said land was sold to one Wm. N. Davis, who subsequently sold to his son Henry Davis "who lives on the land and still continues to improve it."

Your office thereupon recommended suit as stated.

I concur in your opinion that the homestead entry of Brown subsisting at the date the withdrawal took effect excepted said tract from the operation thereof. Upon the cancellation of said entry the tract became open to appropriation by the first legal applicant.

Johnson was such applicant, but his entry was never placed of record. It was erroneously rejected, but from that action he took no appeal. His settlement was abandoned without compulsion before title passed to the company. At the time the patent for the tract issued no claim appeared of record and the settlement claim had been abandoned.

Had Johnson remained in possession of the land, a different question would have been presented. But in view of his voluntary abandonment of the claim, I am of opinion that he is not protected under said act. The third section provides:

> That if in the adjustment of said grants, it shall appear that the homestead or pre-emption entry of any *bona fide* settler has been erroneously canceled, on account of any railroad grant, or the withdrawal of public lands from market, such settler upon application, shall be re-instated in all his rights and allowed to perfect his entry by complying with the public land laws; . . . . *provided, also,* that he did not voluntarily abandon said original entry.

Under these circumstances I am of opinion that there is no sufficient ground alleged to sustain the suit as recommended.

RAILROAD GRANT—HOMESTEAD ENTRY.

BROWN *v.* CENTRAL PAC. R. R. CO.

Lands granted to aid in the construction of railroads do not revert after condition broken until a forfeiture thereof has been declared by the government, either through judicial proceedings or legislative enactment.

A homestead entry can not be allowed for land embraced within an unforfeited railroad grant.

Secretary Noble to Acting Commissioner Stone, June 8, 1889.

October 18, 1887, Manley M. Brown made application at the land office at Shasta, California, to enter under the homestead law the E. ½ of the NW. ¼ and the W. ½ of the NE. ¼ of section 25, in township 39 north of range 4 west.

Said application was rejected by the local officers who wrote the following endorsement thereon:

> The within application refused filing for the reason that the lands embraced therein are situated within the twenty mile primary limits of the grant of July 25, 1866, to the California and Oregon Railroad Company, now Central Pacific R. R. Co. Said lands having been withdrawn for the benefit of said company by letter of Hon. Commissioner of the General Land Office dated August 25, 1871.

Brown appealed, and December 22, 1887, you affirmed the action of the local office.

The appeal from your said decision asks a reversal thereof on the ground—

That said grant of July 25, 1866, to said Railroad Company has lapsed by reason of the failure of said company to comply with the terms thereof in this that they, the said company, utterly failed to construct said road or any part thereof within the time prescribed by the act creating said grant. That by reason of such failure they forfeited all rights to the lands so granted and rendered said lands open to settlement and entry by qualified claimants.

The act of July 25, 1866, (14 Stat., 239) provides—"that there be and is hereby granted" to the California and Oregon Railroad Company "every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty sections per mile (ten on each side) of said railroad line" and makes provision for indemnity for lands excepted from the grant. Section 6, of said act provides that within one year from the passage of the act the company shall file their assent thereto in the Department "And shall complete the first section of twenty miles of said railroad and telegraph within two years, and at least twenty miles in each year thereafter, and the whole on or before the first day of July, one thousand and eight hundred and seventy-five; and the said railroad shall be of the same gauge as the "Central Pacific Railroad" of California, and be connected therewith."

Section 8 provides:

That in case the said companies shall fail to comply with the terms and conditions required, namely, by not filing their assent thereto as provided in section six of this act, or by not completing the same as provided in said section, this act shall be null and void, and all the lands not conveyed by patent to said company or companies, as the case may be, at the date of any such failure, shall revert to the United States.

June 25, 1868, an act was approved (15 Stat., 80-, amending said granting act as follows:

That section six of an act entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad, in California, to Portland, Oregon," approved July twenty-fifth, eighteen hundred and sixty-six, be so amended as to provide that instead of the times now fixed in said section, the first section of twenty miles of said railroad and telegraph shall be completed within eighteen months from the passage of this act, and at least twenty miles in each two years, thereafter, and the whole on or before the first day of July, Anno Domini, eighteen hundred and eighty.

Although served with notice of the appeal the Central Pacific Railroad Company (successor to the California and Oregon Railroad Company) has not appeared in the case.

Although the record does not contain *any evidence* that the company has failed to comply with the terms of the grant, the appellant asks that the decision rejecting his application to enter the land in controversy under the homestead law be reversed and the application allowed. The request rests upon the assumptions—(1) That the railroad company has made such default as to justify the forfeiture of the lands granted and—(2) That it is within the power of this Department to declare a forfeiture of the lands granted to said company upon its failure

to complete the road within the time limited by law. Without passing upon the first point, I will examine the second.

The grant in this case is a present grant as appears from the words employed, viz: "that there be and hereby is granted." The conditions subsequent are that the company shall file their assent to the provisions of this act, and shall complete the various sections and the whole of the road within the time specified and in the event of failure in either requirement "this act shall be null and void and all the lands not conveyed by patents . . . . shall revert to the United States."

In the case of Schulenberg *v.* Harriman (21 Wall, 44), the supreme court passed upon the act of June 3, 1856 (11 Stat., 20), granting certain public lands to the State of Wisconsin, to aid in the construction of railroads in said State. The grant was one *in praesenti* and in section 4, of said act, it was provided that "if said roads are not completed within ten years, no further sales shall be made, and the land unsold shall revert to the United States." It was stated in the decision that the company named in the act of the legislature has never constructed any portion of such road. In relation to the mode of declaring a grant forfeited the court said:

In what manner the reserved right of the grantor for breach of the condition must be asserted so as to restore the estate depends upon the character of the grant. If it be a private grant, that right must be asserted by entry or its equivalent. If the grant be a public one it must be asserted by judicial proceedings authorized by law, the equivalent of an inquest of office at common law, finding the fact of forfeiture and adjudging the restoration of the estate on that ground, or there must be some legislative assertion of ownership of the property for breach of the condition, such as an act directing the possession and appropriation of the property, or that it be offered for sale or settlement. At common law the sovereign could not make an entry in person, and, therefore, an office found was necessary to determine the estate, but, as said by this court in a late case, "the mode of asserting or of resuming the forfeited grant may be after judicial investigation, or by taking possession directly under the authority of the government without these preliminary proceedings." United States *v.* Repentigny, 5 Wall., 211, 268. In the present case no action has been taken either by legislation or judicial proceedings to enforce a forfeiture of the estate granted by the acts of 1856, and 1864. The title remains therefore, in the State as completely as it existed on the day when the title by location of the route of the railroad acquired precision and became attached to the adjoining alternate sections.

The act of July 25, 1866 (14 Stat., 210) provides "That there is hereby granted to the State of Kansas for the use and benefit of the St. Joseph and Denver City Railroad Company . . . . every alternate section of land designated by odd numbers for ten sections in width on each side of said road," from Elwood, in Kansas, to a point of junction not further west than the one hundredth meridian of west longitude, with the Union Pacific Railroad or any branch, and section third, provides

That if said railroad company or its assigns shall fail to complete at least one section of said road each year from the date of its acceptance of the grant provided for in this act, then its right to the lands for said section so failing of completion, shall

revert to the government of the United States: *Provided further*, That if said road is not completed within ten years from the date of the acceptance of the grant hereinbefore made, the lands remaining unpatented shall revert to the United States.

Said act was considered by the supreme court in the case of Van Wyck *v.* Knevals (106 U. S., 360) upon the allegation that the company never completed the construction of the entire road for which the grant was made, and the court said:

So far as that portion of the road which was completed and accepted is concerned, the contract of the company was executed, and as to the lands patented, the transaction on the part of the government was closed and the title of the company perfected. The right of the company to the remaining odd numbered sections adjoining the road completed and accepted, not reserved, is equally clear. If the whole of the proposed road has not been completed, any forfeiture consequent thereon can be asserted only by the grantor, the United States, through judicial proceedings or through the action of Congress.

In the case of the St. Louis, Iron Mountain and Southern Railway Company, *v.* McGee (115 U. S., 469), the supreme court speaking through Mr. Chief Justice Wait, said:

It has often been decided that lands granted by Congress to aid in the construction of railroads do not revert after condition broken until a forfeiture has been asserted by the United States, either through judicial proceedings instituted under authority of law for that purpose, or through some legislative action legally equivalent to a judgment of office found at common law.

In Farnsworth *et al*, *v.* Minnesota and Pacific R. R. Co. (92 U. S., 49) the conditions of the grant and the subsequent legislation affecting it, differed from those passed upon in the cases cited. It was held that upon the facts of that case the grant could be forfeited by legislative enactment without judicial proceedings. Notwithstanding certain expressions used by the court in United States *v.* Repentigny (5 Wall, 211), and in McMicken *v.* United States (97 U. S., 204) where French grants were under examination, the rule as to grants to railroads seems to be well established that lands granted to railroads do not revert after condition broken until a forfeiture has been asserted by the United States either through judicial proceedings or through legislative enactment. This rule has been announced in cases recently decided by this Department. Wisconsin Central R. R. Co. (6 L. D., 190); Alabama and Chattanooga R. R. Co. (8 L. D., 33).

In the case of the California and Oregon Railroad Company no forfeiture has been declared, either through judicial proceedings or through legislative enactment, and it, therefore, follows that Brown's application to enter land within the granted limits of said road was properly rejected. The decision appealed from is, accordingly, affirmed.

HOMESTEAD ENTRY—RESIDENCE—OUSTER.

PARSONS *v.* HUGHES.

The continuity of residence is not broken by a forcible ouster from the land, and subsequent compulsory absence therefrom.

It is not incumbent upon a settler who has been wrongfully ejected from the land, to make a new settlement upon that part of the claim not in dispute, pending judicial action instituted to recover possession.

First Assistant Secretary Chandler to Acting Commissioner Stone, June 8, 1889.

I have considered the appeal of Lee R. Parsons from your office decision of March 13, 1888, dismissing the contest brought by him against the homestead entry of Mrs. Catherine Hughes, of the NE. ¼ of section 29, T. 16 S., R. 3 E., M. D. M., San Francisco, California.

The entry was made May 3, 1880, and March 31, 1885, Lee R. Parsons filed an affidavit of contest charging that the entryman "has wholly abandoned said tract; that she has changed her residence therefrom for more than six months since making said entry; that said tract is not settled upon and cultivated by said party as required by law, that she has never resided thereon nor ever had any improvements thereon." Hearing was had July 28, 1885. The local officers recommended the dismissal of the contest and your office affirmed their decision March 13, 1888, whereupon the contestant appealed.

The material facts shown by the record and the testimony are as follows: Prior to 1876 the land was occupied by Owen McNally, the brother of the claimant; at his request the claimant, a widow, came from Ireland to the land in contest and assisted in the work on the place; soon after her arrival McNally died leaving the claimant, she says, everything he had. The day after he died she put a little house upon the place. This was in 1876. At a time not stated she proved up on a preemption claim and the day after filed a homestead entry for this land.

The testimony does not show that said application was allowed. Claimant swears that in 1876 and 1877, she occupied the house above referred to, plowed some land, cut hay and sowed grain. In 1878 or 1879, Peter Conroy disturbed her possession; her house was burnt about that time and she was not in possession of the land until May 16, 1885. The Peter Conroy above referred to set up a claim of occupancy of the tract, and his right, whatever it was, passed by transfer to Jacob S. Parsons and subsequently to Judson Parsons. December 11, 1879, Mrs. Hughes instituted action in the district court in and for the twentieth judicial district in the State of California, in and for Monterey county, against Jacob S. Parsons. The complaint avers that on the 17th day of November, 1879, and for more than three years next prior thereto, the complainant had been lawfully possessed of a certain piece of land, particularly described therein, in section 29, T. 16 S., R. 3 E., amounting

to about thirty acres; that upon said 17th day of November, 1879, the defendant "entered into the possession of the demanded premises and ousted the plaintiff therefrom and has ever since and now still does unlawfully withhold the possession of said premises from plaintiff;" and asks for a restitution of the land and damages for her ejectment therefrom, for the destruction of the improvements and for the loss of its use. The case was regularly tried by jury and a verdict found for the plaintiff "for the restitution of the premises described in the complaint on file herein and for damages in the sum of one dollar", and judgment was rendered accordingly April 19, 1880. An appeal was taken to the supreme court of California which, on April 21, 1885, affirmed the judgment of the court below. In pursuance of a writ of possession issued in order to carry into effect the judgment of the court, the sheriff of Monterey county put Mrs. Hughes in peaceable possession of the tract that had been in litigation May 16, 1885. It will thus be seen that more than five years elapsed between the ouster of Mrs. Hughes and the rendering of the final judgment in her favor. In the meantime the place had been occupied by Parsons who used it as a stock range or dairy farm and placed upon it improvements of the value of $1,000. Mrs. Hughes' trouble did not end with the judgment in her favor. Upon the afternoon of the day upon which she regained possession of the tract, she was assaulted by the Parsons, brothers of the contestant and sons and employees of Judson Parsons, the adverse occupant, who threw her down, cut her in the face with a fence wire, and ordered her off the place. The young men, also, made threats as to what they would do if she returned; "Creed Parsons," she swears, "said he would like to lasso me and tie me to a horse and drag me to the gulch and bury me there." That the assault was committed and threats made as stated by the claimant was not denied; it was not alluded to in the testimony of the contestant and in cross-examination it was merely shown that the contestant was not present. The claimant having defeated the senior Parsons in the action at law, procured the arrest of the young men who had assaulted her. Another of the family, Lee R. Parsons, had, in the meantime, filed his affidavit of contest and the local officers write that Chatham T. Parsons has filed a complaint which awaits the determination of the one at bar.

It is argued that the pendency of the action involving about thirty acres of the land entered did not excuse Mrs. Hughes from maintaining residence upon the one hundred and thirty acres not in litigation. I do not concur in this view of the law, and will not hold that having been wrongfully ejected from that portion of the claim upon which she had established her actual residence it was incumbent upon Mrs. Hughes to make a new settlement upon another portion. This plea is especially bad when made by, or for the benefit, of those who were instrumental in driving her from her first habitation. I think that the testimony shows that she established residence on the tract prior to

making entry and with a view thereto, that it was not broken by her ouster from the premises by Parsons on November 17, 1879, and continued up to May 16, 1885, and that she at no time abandoned the tract. The facts in the case are unusual and show a persistent effort by strong and rich men to deprive an ignorant and defenseless woman of her right under the law to the tract in dispute, and they urge in support of their contention the absence of the claimant from the tract while the evidence all points to the conclusion that it was due to the burning of her house, her ejectment from the land and the threats made by those who were associated in business, if not in interest in the contest with the contestant. Their disregard of law, their contempt for the judgment of the highest State court, and their determination at all hazards to drive this poor woman from the place, are shown by the assault which was made upon her the very day the sheriff restored her to possession of the place. They will not be allowed to take advantage of their own wrong-doing and your decision dismissing the contest is, therefore, affirmed.

PRACTICE—APPEAL—NOTICE—ACT OF JUNE 15, 1880.

PIERPOINT *v.* STALDER.

Failure of the contestant to appeal from a decision of the local office dismissing his contest, will not preclude a subsequent assertion of his rights thereunder, if the record does not show affirmatively due notice of such action.

The Department, in order to avoid unnecessary delay, may finally determine a case on its merits, if the record therein is complete, and the parties are present in court, though the questions so presented were not passed upon below.

The pendency of a contest against the original entry suspends the right of purchase under section 2, act of June 15, 1880.

First Assistant Secretary Chandler to Acting Commissioner Stone, June 8, 1889.

This is an appeal by Albert B. Pierpoint from your office decision of October 8, 1887, affirming the local office and rejecting his application to make homestead entry for SE. ¼ Sec. 8 T. 18 S., R. 32 W., Wa Keeney Kansas.

On September 12, 1879, Jacob E. Stalder made homestead entry for the land then in the Hays City district, against which entry Pierpoint on September 7, 1885, initiated contest alleging abandonment and failure to comply with the law in regard to settlement, residence and cultivation.

After notice by publication a hearing was had on said contest at the local office November 6, 1885, when the contestant (Pierpoint) appeared and submitted testimony, and the claimant (Stalder) made default.

The local officers took no action upon the evidence thus adduced, but on February 26, 1886, they permitted the claimant to purchase the land

under the act of June 15, 1880 (21 Stat., 237), and on the same day dismissed the contest of Pierpoint. The contestant presented his said homestead application on August 6, 1886, which was (as shown by endorsement thereon) rejected by the local officers "for the reason that said tract is covered by cash entry No. 1570, made February 26, 1886, by Jacob E. Stalder."

The register in response to an inquiry by your office as to whether the contestant was ever officially notified of the decision dismissing said contest and allowing the defendant to purchase said tract, by letter dated September 10, 1887, stated that there is no record of such notice in the local office, but that it must have been sent in accordance with the invariable custom, and that if so sent "it was by letter not registered."

No appeal having been taken from this last mentioned action by the local officers, your office in the decision appealed from held such action to be final, and the said rejection of the contestants' application to enter consequently proper.

In the affidavit accompanying his appeal to your office, the contestant avers that until June 20, 1886, when he was informed of the claimant's cash entry, and of the dismissal of this contest, he believed that the claimant's homestead entry would be canceled upon the evidence, and that until after July 20, 1886, he supposed that he had no right of appeal, as more than forty days had elapsed.

There being no appeal within thirty days a decision of the local office, by rule forty-eight of practice, becomes final except (*inter alia*) where the decision is contrary to existing laws and regulations, and where it is not shown that the party against whom the decision was rendered was duly notified of the decision and of his right of appeal.

It was the duty of the local officers to have acted upon the testimony submitted in support of the contest, and they erred in allowing the cash entry, and in dismissing the former.

It, therefore, will not do to hold that such erroneous action could in the absence of notice, work a final disposition of the contest involved.

The said contest having been neither properly nor finally disposed of, the land was not at the time of the claimant's cash entry legally subject to sale under the act of June 15, 1880, supra. Friese *v.* Hobson (4 L. D., 580); Clement *v.* Heney (6 L. D., 641).

The contestant (although you state otherwise), disclaimed notice during the prescribed period of the sale of the land, and of the dismissal of his contest, and the record does not show that it was given to him. Such notice not being affirmatively shown, it was error in your office to hold that the contestant's rights were concluded by his failure to appeal from the action just referred to. Ariel C. Harris (6 L. D., 122); Ida May Taylor (Id. 107); Churchill *v.* Seeley (4 L. D., 589).

It perhaps would be more regular to return the record in this case for the judgment of the local officers on the testimony submitted. But the

parties in interest being all before the court, and in view of the long period during which the contestant through the error and neglect of the land officers have been deprived of his rights, I think it more in consonance with equity and justice to finally determine the case now on the complete record of that testimony as was done in the case of Kiser *v.* Keech (7 L. D., 25), wherein judgment was rendered "in order to avoid unnecessary circuity of action and consequent delay."

The hearing on the contest was duly had and the testimony submitted, showing the land to be totally abandoned and wholly unimproved, fully sustains the allegations upon which it is based.

Within a reasonable time after learning that his rights had not been concluded the contestant asserted his claim by applying to enter the land, and he should have been allowed to do so.

You will, therefore, cancel both the homestead and cash entry of the claimant and allow, if in other respects regular—the contestant's application to make homestead entry for the tract involved.

Your decision is reversed.

HOMESTEAD ENTRY—SETTLEMENT RIGHT.

PAULSON *v.* RICHARDSON.

On the cancellation of an entry under contest, a *bona fide* settler then on the land embraced therein is entitled to the right of entry as against every one except the successful contestant.

First Assistant Secretary Chandler to Acting Commissioner Stone, June 8, 1889.

I have considered the case of Andrew Paulson *v.* Geo. W. Richardson, on appeal of the latter from your office decision of April 2, 1889, holding for cancellation his timber culture entry for SW. $\frac{1}{4}$, Sec. 1, T. 107 N., R. 57 W., Mitchell, Dakota, land district.

It appears from the record that one Peter Green made timber culture entry for said tract June 3, 1880, but his entry was contested by one L. Ettie Johnson, and as the result of such contest was canceled July 27, 1885, and the preference right of entry was awarded to said Johnson, but she having married before the decision was rendered, could not make entry and her application filed with her contest affidavit was rejected August 3, 1885, and from this decision no appeal was taken.

On August 11, 1885, Paulson presented an application accompanied by legal fees to make homestead entry of said tract, claiming that he had established a residence upon the land May 30, 1885.

It appears also that said Paulson offered to file application to make homestead entry on August 5, 1885, but was not allowed by the local officers to file and no record entry of the offer thereof was made.

Simultaneous with the offer of Paulson to make homestead entry on August 5, 1885, Geo. W. Richardson made timber culture entry for said

tract, and when on August 11, Paulson again presented his application a hearing was ordered by the local officers. Upon the evidence taken at this hearing held October 5, 1885, the local officers decided against Paulson, but upon appeal your office by letter of April 2, 1888, reversed their decision, awarded to Paulson the prior right of entry and held for cancellation Richardson's entry, upon the ground that Paulson being a resident on the land on the day that Green's entry was canceled, acquired a right of entry as against every person but the successful contestant, and as Johnson is not making any claim she is no longer a party in interest.

The evidence is somewhat conflicting but upon a careful examination I am satisfied that it sustains your conclusion that Paulson at the time Green's entry was canceled was a *bona fide* settler on said land with the intention of claiming the same under the homestead laws.

Your said decision is accordingly affirmed.

CONTEST—DEATH OF THE CONTESTANT.

ARMSTRONG *v.* TAYLOR ET AL.

The right of the contestant is personal and terminates with his death.

The death of the contestant abates the contest, and leaves the case solely between the entryman and the government; but the claimant is not entitled to an order dismissing the contest on account of the contestant's death, as the Department may on its own motion proceed against the entry.

First Assistant Secretary Chandler to Acting Commissioner Stone, June 12, 1889.

I have considered the appeal filed by the attorney of claimant and T. L. O'Bryan, transferee, from the decision of your office, dated April 9, 1888, canceling Osage cash entry, No. 476, of the E. ½ of the NE. ¼, the SW. ¼ of the NE. ¼ and the SE. ¼ of the NW. ¼ of Sec. 20, T. 32 S., R. 11 W., made by Alice Taylor at the Larned, Kansas, land office, on September 6, 1883, and also from the decision of your office, dated April 30, 1888, refusing the appellant's application for a rehearing.

The record shows, that upon the application of Franklin Armstrong, alleging that the entryman never resided on said land, a hearing was had to determine the validity of said entry. Upon the testimony submitted, the local land officers decided in favor of the claimant, and held the contest for dismissal. The contestant appealed. On September 18, 1886, defendant moved to dismiss the appeal for failure to give due notice of said appeal and furnish copy of specification of errors.

On October 4, 1886, the local officers transmitted a communication from the attorneys for the contestant, suggesting his death, and asking permission to continue the prosecution of the contest for the benefit of his widow.

On December 4, 1886, your office directed a special agent to investigate said entry, and in accordance with said instructions, the agent reported, on May 4, 1887, that the county records showed, that claimant deeded said land to T. L. O'Bryan, her brother-in-law, on July 28, 1883, the consideration being $250.00, reserving to herself the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said section; that there were no indications of residence upon said land, other than that made by the contestant, and that the entry was evidently made for the "purchaser." The agent recommended that the decision of the local office be reversed, the entry canceled, and the widow of contestant allowed to enter the land, "being the first and only actual settler upon said land."

On October 29, 1887, your office held said entry for cancellation, upon the report of said agent, for the reason that the entry was made for speculative purposes, and that no *bona fide* settlement was made on the land. The local officers were directed to give claimant due notice of said decision, and advise her that she would be allowed sixty days within which to apply for a hearing to show cause why her entry should be sustained.

On February 1, 1888, the local office reported, that the claimant had been duly notified of said decision; that more than sixty days had elapsed since said notification, and no appeal had been taken therefrom.

On February 11, 1888, your office advised the local land officers that, "As no notice appears to have been issued to Mrs. T. L. O'Bryan, who is a party of record in the case as transferee," they should duly notify her without delay. On February 14, 1888, the local officers, referring to said letter of February 11, 1888, reported, "that T. L. O'Brien was notified by registered letter on November 22, 1887," in the same manner as the claimant, and no appeal had been filed by the transferee.

On February 14, 1888, the local officers advised "Mrs. T. L. O'Bryan, transferee of Alice J. Taylor," that she was "allowed sixty days to apply for a hearing to show cause why said entry should be sustained."

On April 9, 1888, your office directed the local officers to cancel said entry, and "allow Mrs. Armstrong, widow of Franklin Armstrong, who contested the entry, thirty days within which to file an application for the land.

On April 20, 1888, the local officers transmitted the application of Mrs. T. L. O'Bryan, duly verified, in which she alleged that she was the lawful owner of said land, having purchased the same for a valuable consideration; that said entry was made in good faith for the purpose of a home; "that the facts concerning said entry have been misrepresented to the officers of the land department;" that applicant would be able to show to the satisfaction of the local officers and the land department, that said entry should not be canceled, and for that reason she asked that a hearing be ordered to enable her to present her proof.

On April 30, 1888, your office declined to re-open the case, for the reason that "it is shown in the special agent's report that Alice J.

Taylor was not an actual settler on her claim at any time," and it appeared that the parties of record were duly notified of the action holding said entry for cancellation.

It further appears that Mrs. Armstrong, the widow of the contestant, on July 20, 1887, executed a quit claim deed to Samuel Webster of her interest in said land, the consideration thereof being $150.00. Said deed was filed for record on April 18, 1888. It also appears that one George T. Knight claims an interest in said land by virtue of settlement and improvements, which he says are valuable, and he protests against the re-instatment of said entry, and asked to be allowed to enter said land.

The grounds of error alleged by counsel for appellants are: (1) Error in canceling said entry upon said report of the special agent, while said contest was pending undecided in your office; (2) Error in canceling said entry prior to the expiration of sixty days "given said T. L. O'Bryan by receiver's letter of February 14, 1888, in which to show cause why said entry should not be canceled, and (3) Error in refusing the application for a hearing.

The record is somewhat confused, and the action of your office, as appears therefrom, was in some respects irregular. It nowhere appears that your office rendered any decision upon the record of the contest transmitted by the local officers. It appears, however, that the death of the contestant was suggested and application was made in behalf of the widow to prosecute the contest for her benefit.

It is well settled that the death of the contestant terminates all right, so far as the contestant is concerned, which he might secure if living. Morgan *v.* Doyle (3 L. D., 5); Hotaling *v.* Currier (5 L. D., 368); Fitzsimmons *v.* Meder (6 L. D., 93); Rasmussen *v.* Rice (idem., 755); Hurd *v.* Smith (7 L. D., 491). If, then, the death of the contestant works an abatement of the contest, and leaves the case solely between the government and the entryman, the claimant can not complain of the action of your office in not making a formal decision dismissing said contest on account of the death of the contestant. Besides, the Department has the right to institute proceedings of its own motion looking to the cancellation of an entry. Cleveland *v.* Dunlevy (4 L. D., 121); McMahon *v.* Grey (5 L. D., 58).

But the record shows, that your office on February 11, 1888, directed that notice be "issued to Mrs. T. L. O'Bryan, who is a party of record in the case as transferee."

This direction was evidently an inadvertence, for the record at that time failed to show that Mrs. O'Bryan was transferee. The subsequent action of your office canceling said entry on April 9, 1888, appears to have recognized the application of Mrs. Armstrong to prosecute said contest, for she was allowed thirty days within which to file her application for the land. The only right Mrs. Armstrong could exercise would be by virtue of settlement and not by virtue of the contest.

It appears, however, that long prior to the decision allowing Mrs. Armstrong the preference right of entry, she had released all her interest in said land to said Webster, as aforesaid. Moreover, the local officers advised Mrs. O'Bryan that she would be allowed sixty days, within which to apply for a hearing, and within the time allowed she made application under oath, alleging that she was the rightful owner of the land and could show that the entry of said land was made in good faith, and in compliance with the requirements of the law. This application was refused and an appeal taken.

The appeal purports to be taken by Alice J. Taylor and T. L. O'Bryan, while the real owner of the land—if the application filed for a hearing be true—is Mrs. T. L. O'Bryan.

Again, there appear to be other parties claiming right to said land, either as transferee or settler, and I am of opinion that a hearing should be had, after due notice to all parties in interest, to determine their respective rights. The entry will be reinstated, and the parties claiming adversely will have an opportunity of proving that said entry was invalid by reason of the failure of the entryman to comply with the requirements of the law in good faith, or for any other reason.

Upon receipt of the testimony taken at the hearing, together with the opinion of the local officers thereon, your office will readjudicate the case.

TIMBER CULTURE CONTEST—PLANTING AND CULTIVATION.

STREIB *v.* ZALONDEK.

Failure to secure the requisite growth of thrifty trees is sufficient cause for cancellation, if such condition is the result of the entryman's neglect, and willful non-observance of the law in the matter of planting and cultivation.

First Assistant Secretary Chandler to Acting Commissioner Stone, June 12, 1889.

I have considered the appeal of John, Zalondek from the decision of your office dated May 5, 1888, in the contest case of Charles M. Streib *v.* John Zalondek, holding for cancellation the latter's timber culture entry, No. 1,540, for the S. ½ SW. ¼ Sec. 6, T. 14 S., R. 10 W., Salina land district, Kansas.

Conceding, as plaintiff's counsel claims, that the entryman has five and one half acres broken and set out to trees, what do we find? At most, eight or nine hundred trees from six inches to two and one half feet in height, with possibly a few, eight feet high. This is a very poor showing to grow a forest as evidence of an honest intent and purpose to observe the spirit and objects of the timber culture act, and as we observe, that this condition of affairs is produced by the neglect of the claimant, we must conclude that there is a want of good faith on his part to comply with the law's commands. His own son testifies:

We planted the trees with a pick. We made a hole about an inch square and put in a cottonwood cutting. The ground was not plowed.

How the claimant could expect a rank growth of wood from a puny sprout under such heroic treatment can hardly come within the range of the imagination. No wonder the weakling, struggling for an existence among weeds and grass, under such circumstances fell by the wayside by an attack of the "drouth," and that such as did survive, reached, after years of cultivation, the magnificent height of from six inches to two feet and a half.

From the evidence in this case, it is clearly apparent that the entryman has trifled with the law; has not fairly, and in a substantial manner observed its requirements, so that if he were in default as to the number of acres or trees the equitable rules of the Department would protect his evidence of good faith as disclosed by his works.

The cases cited and relied upon by counsel for the appellant do not obtain in this case for in those cases evidence of good faith characterized the efforts of the entrymen to observe the terms of the law and the rules of the Department, while in the case at bar every act of the entryman, relative to the setting out of his trees, the care, protection and cultivation thereof show a heedless and an almost wanton non-observance of the law. From the start, the cuttings were beset with weeds, besieged by drouth, and devastated by prairie fires, without any apparent attempt at protection from the ravages of either. The cases applicable to this case are: Satterlee *v.* Dibble, 2 L. D., 307; Nall *v.* Pulver, 3 L. D., 398; and Caviness *v.* Harrah, 4 L. D., 174.

I am constrained to concur with you in your conclusions in believing that the entryman has not in good faith attempted the artificial growth of timber upon this tract in compliance with the spirit of the law. Your decision is affirmed.

MINING CLAIM—EXCLUDED GROUND.

ANTEDILUVIAN LODE AND MILL SITE.

Patent will not issue on an application wherein the land upon which are situated the discovery shaft, and improvements, is expressly excepted therefrom, and the proof fails to show the discovery or existence of mineral on the claim as entered, or the requisite expenditure for the benefit thereof.

There is no authority of law for the insertion in a mineral patent of a clause reserving the right of a townsite.

First Assistant Secretary Chandler to Acting Commissioner Stone, June 12, 1889.

I have considered the appeal of George W. Teal, *et al.*, from your office decisions of May 26, and August 2, 1888, declining to approve their mineral entry No. 3016, made April 14, 1886, at Central City, Colorado, for the Antediluvian Lode and Millsite claim, lot No. 2249, A and B.

The claimant made application to purchase the said mining claim April 14, 1888, expressly excepting and excluding from their application "all that portion of the ground embraced in mining claims or sur-

veys as lots No. 363, 561, 617, 1748 and 2168 A, and Georgetown townsite and also all that portion of any vein or lode the top or apex of which lies inside of said surveys No. 657, 1748 and 2168 A." The receiver's receipt and register's final certificate excepted and excluded from the sale and entry all that portion of the ground embraced in the said five several mining claims and Georgetown townsite, and "also all that portion of any vein or lode the top or apex of which lies inside of said excluded ground."

The mining claim so entered embraced 1.36 acres and said mill site claim 4.60 acres—the receipt is for thirty dollars.

The approved plat of survey shows that the discovery shaft, the basis of the Antediluvian lode location, is within the limits of the Georgetown townsite, and therefore, expressly excepted from the application and entry. You say in your office letter of May 26, 1888, regarding this point—

> There is no evidence in the record before me, that the alleged vein or lode for which patent is sought, extends on its onward course or strike through or into the claimed ground; nor is it shown that any vein, lode or mineral has been discovered thereon . . . . . If a vein or lode has actually been discovered within the claimed ground the evidence must show the place where, and when such discovery was made, the general directions of the vein or lode and all the material facts relating thereto, and must be clear and positive and based on actual knowledge of the facts. The witness's means of information must be clearly set forth.

It also appears from the approved plat of survey that the improvements included in the "surveyor-general's certificate, as amounting to five hundred dollars in value, consist of two shafts and a drift, all upon ground excluded from this application and entry.

Regarding this fact, you say in your said office letter of May 26, 1888,

> If five hundred dollars have been expended on the claim as *entered* as required by statute, or in a tunnel run for the development thereof an explanatory certificate by the surveyor-general to that effect should be furnished, showing fully and in detail the value of such of the improvements as are properly credited to this claim.

You declined to approve the entry by said office decision but allowed the claimant sixty days from notice of your said decision in which to furnish satisfactory evidence to overcome the objections indicated.

In pursuance of such order the claimants forwarded the several affidavits of George W. Teal and John T. Harris, both bearing date June, 1888. Teal swears—

> That to the best of his knowledge and belief, said lode (meaning the said Antediluvian lode) was known to exist long prior to the location of the Georgetown townsite or the application for patent thereto; that the location of the Antediluvian lode was made in good faith and with the belief that it was excepted from the townsite entry of Georgetown, as known mineral land, and was, therefore, open to location under the U. S. mineral laws.

Harris asserts in his affidavit that he had known the said lode:

> That during the year 1864, the Georgetown Gold Mining Company ran a tunnel on said vein the distance of about one hundred and thirty feet . . . . that said vein

was known and did exist long prior to the occupation and entry of the Georgetown townsite, which entry was in January, A. D., 1874, that said Georgetown Gold Mining Company have abandoned the above claim and all others, that it had here more than twenty years ago.

Your office considering this additional evidence, concluded the same not to be satisfactory. You state in your decision of August 2, 1888—

As claimants expressly excepted from this application and entry the surface ground in conflict with the Georgetown townsite, and as the improvements claimed in the entry are upon said excluded ground, claimants will be held to a strict compliance with the requirements of office letter of May 26, 1888, in case of said mineral entry.

The claimants appealed from your said office decisions to this Department.

They urge in their appeal that though the surface ground of the Georgetown townsite is excluded from their claim, the land underneath if it contained valuable minerals was not necessarily excepted therefrom. They assert that when the United States parted with its title to the town of Georgetown the grant contained the following exception: "No title shall be hereby acquired to any mine of gold, silver, cinnabar or copper or to any valid mining claim or possession held under existing laws of Congress." Hence, they argue, the land underneath the surface containing minerals was reserved from the townsite-grant, and impliedly included in their application. The entry and survey admittedly exclude such land and it did not form part of the land for which payment was made.

Claimants' argument can not be sustained. The case of Deffeback *v.* Hawke (115 U. S., 392), establishes the legal principle that the government can not by its patent partition lands horizontally. In that case it is held that there is no authority of law for the insertion in a mineral patent of a clause reserving the right of a townsite and that a townsite patent is inoperative as to all lands known at the time of the entry to be valuable for mineral or discovered to be of such character prior to the occupation or improvement of land under the townsite law. See W. A. Simmons *et al.* (7 L. D., 283).

The claimants made their application in *haec verba* expressly excepting and excluding therefrom all that portion of the ground embraced in the Georgetown townsite; the certificate of entry excluded the said ground and also all that portion of any vein or lode the top or apex of which lies inside of said excluded ground. The receiver's receipt corresponded to this description, claimants did not pay for any land thus excepted and it seems to me that for the reasons stated in your said office letters of May 26, and August 2, 1888, the conclusion therein expressed is correct.

The claim asserted for the first time in the appeal that your said decisions were erroneous "because the exclusion of the surface ground in conflict with the Georgetown townsite was not of the free will of the appellants, but by compulsion the surveyor-general refusing to approve

of the survey and plats until the ground in conflict with the townsite was excluded" cannot be entertained. In the first place it is a mere assertion of George W. Teal, unsupported by his oath; and then if the surveyor-general unlawfully refused to approve of a proper survey and plat, the claimants would have had their proper remedy. Their application remains the same and this assertion of the claimants cannot change it; it is the only application in the case.

I must, therefore, conclude that your said office decisions be affirmed.

DESERT LAND ENTRY—RELINQUISHMENT.

BELLIVEAUX *v.* MORRISON.

On relinquishment of a desert land entry the land covered thereby is held open to settlement and entry without further action on the part of the Commissioner of the General Land Office.

First Assistant Secretary Chandler to Acting Commissioner Stone, June 13, 1889.

I have considered the appeal of Louisa Belliveaux from your office decision of June 11, 1888, rejecting her application to make desert land entry for the S. ½ of the SE. ¼ and S. ½ of the SW. ¼ of Section 22, T. 13 N., R. 18 E., North Yakima land district, Washington Territory.

The facts in the case have been sufficiently set out in your office letter of the said date. Of the correctness of the conclusion therein there can be, it seems to me, no donbt. Counsel for the appellant admits that

> The only question involved in this case is, who was the first legal applicant to enter the land after the cancellation of the said desert filing of M. B. Morrison of January 30, 1886?

He likewise admits that Josiah H. Morrison, at the date of said relinquishment applied to enter the tract, which, in point of time, was prior to the application of the plaintiff. It is held in the case of Mary Stanton (7 L. D., 227), that:

> On relinquishment of a desert land entry the land covered thereby is held open to entry and settlement, without further action on the part of the Commissioner of the General Land Office,

and this is in consonance with section one, of the act of May 14, 1880 (21 Stat., 140), which provides:

> That when a pre-emption, homestead, or timber culture claimant shall file a written relinquishment of his claim in the local land office, the land covered by such claim shall be held open as to settlement and entry, without further action on the part of the Commissioner of the General Land Office.

Clearly, then, Mr. Josiah H. Morrison should be permitted to make homestead entry of the land upon his application, it being first after the relinquishment of the desert land entry of Major B. Morrison.

Your said office decision is affirmed.

HOMESTEAD ENTRY—RELINQUISHMENT—ACT OF JUNE 15—1880.

RICE *v.* BISSELL.

A voluntary relinquishment of the original entry, divests the entryman of all claims thereunder, and effectually precludes the right of purchase under section 2, act of June 15, 1880.

First Assistant Secretary Chandler to Acting Commissioner Stone, June 13, 1889.

I have considered the case of James W. Rice *v.* Harlow A. Bissell on appeal by the former from your office decision of April 13, 1888, rejecting his application for the SW. ¼ of Sec. 3, T. 19 S., R. 25 W., Wa Keeney, Kansas, land district.

Bissell made homestead entry for said tract October 18, 1878, which entry was canceled May 26, 1882, on relinquishment. On the same day May 26, Joseph Langellier made timber culture entry for said tract. This entry was canceled December 10, 1885, on relinquishment and on the same day, Bissell the first entryman, purchased said tract under the act of June 15, 1880 (21 Stat., 237).

On January 20, 1887, James W. Rice applied to make homestead entry for said land which application was rejected by the local officers because the land was covered by Bissell's cash entry. Rice appealed from that decision urging that Bissell's entry should be canceled because previous to making the same he had sold or agreed to sell the land covered thereby, and because long before the date of said entry he had forfeited all right under his original entry by his relinquishment. In your office it was held that the fact that the entryman had made a previous agreement to sell, would not affect his right to purchase the land under said act, and affirmed the action of the local officers. The other objection urged against Bissell's entry was not mentioned in said decision nor does it seem to have been considered in your office.

In the appeal to this office it is earnestly urged that Bissell, by his relinquishment determined all his rights under said entry and that he could not thereafter become entitled to the benefit of the act of June 15, 1880.

In the case of George S. Bishop (1 L. D., 69) the entryman's application to purchase under the second section of said act, was allowed subject to the adverse intervening rights of another, although, as the statement of facts in that case shows, the original entry had been canceled for voluntary relinquishment. It has also been the invariable rule of this department to allow the entryman in the absence of adverse claim, to purchase under the provisions of said act, where the original entry had been canceled for abandonment, or for failure to offer final proof in support of his entry within the period provided by law therefor. John W. Miller (1 L. D., 57); John R. Choate (7 L. D., 281); Campbell *v.* Kelley (8 L. D., 75).

It has also, however, been held that one, who has sold and attempted to convey to another his interest in the land covered by the original homestead entry, will not be allowed to purchase said land under this act. Watts *v.* Williams (6 L. D. 94); Matthiessen and Ward *v.* Williams (6 L. D., 95); Warden *v.* Shumate (8 L. D., 330).

The theory of the law is to allow the party who has the present interest in the entry and who has not attempted to transfer to another to acquire title to the land covered by such entry by way of a purchase, and in support of this proposition it may be noted that the rules and regulations require that an entryman who applies to purchase under this act must present his duplicate receipt or show its loss and that he has not transferred nor attempted to transfer his homestead rights under said entry.

One who has formally relinquished his right under an entry has just as effectually divested himself of all claim under that entry to the land covered thereby, as if he had, by a written instrument, attempted to convey his interest to another. He has by his own free and voluntary act released all claim to the land thereunder, and should not afterwards be allowed to set up a claim based upon said entry, unless upon a showing, as for instance of mistake in the execution of the relinquishment, such as would justify the reinstatement of the original entry.

Rice filed with his application to make entry for said land the affidavit of one A. B. Porter, who states that he owns land adjoining the tract in dispute, and is well acquainted with Bissell, that he purchased from Bissell for the sum of fifty dollars, his relinquishment of all claim in said land; that some months afterwards, he, the affiant, sold said relinquishment to Joseph Langellier who filed the same in the land office and made timber culture entry for said land. He also filed an abstract of the title to said land which shows that on December 4, 1885, Harlow A. Bissell executed a power of attorney authorizing Langellier to grant, bargain, sell and convey, said land as soon as final receipt should be issued; that on December 10, 1885, final receipt was issued to Bissell under the act of June 15, 1880; that on January 28, 1886, Harlow A. Bissell, by his attorney in fact, Joseph Langellier conveyed said land by warranty deed to Ella Langellier, wife of said Joseph Langellier; that on April 7, 1886, Joseph Langellier and wife, Ella, mortgaged said land to Smith & Briston, that on May 20, 1886, said Langellier and wife conveyed said land by warranty deed to A. B. Miller, and that on June 14, 1886, Ellen Bissell executed a quit claim deed conveying her interest in said land to Ella Langellier.

Although it would seem that the entry under consideration was not warranted by the law, yet, inasmuch as the present owners and parties in interest have had no opportunity to defend the validity thereof, against the attack of Rice, or to controvert the allegations made by him, I do not feel justified in canceling it at this time. The case is, therefore, returned to your office and you will please direct that a hearing

be had, of which all parties in interest should have due notice, to ascertain all the facts and circumstances in regard to Bissell's connection with the land, his relinquishment of the original entry, the execution of the power of attorney to Laugellier, and the sale of the land by said attorney in fact, together with any other facts that may be of service in determining the rights of these various parties. Upon receipt of the testimony adduced at that hearing, you will consider and pass upon the validity of said cash entry in view of the facts established thereby, and in accordance with the views herein expressed.

SOLDIERS' ADDITIONAL HOMESTEAD ENTRY-CERTIFICATE.

HOFFMAN *v.* BARNES ET AL.

The right to make a soldiers' additional homestead entry is not assignable.

An application to make a soldiers' additional entry, under a certificate of right requiring residence to perfect the same, by one acting nominally as the agent of the soldier, but in fact for himself, and without any intention on the part of the soldier to comply with the law, is illegal and can not be allowed.

First Assistant Secretary Chandler to Acting Commissioner Stone, June 13, 1889.

I have considered the case of Charles L. Hoffman *v.* Hiram Tomlinson and Theodore F. Barnes on appeal by Hoffman and Tomlinson from the decisions of your office of October 23, 1886, and of January 14, 1887.

On October 9, 1883, Barnes made homestead entry for the SW. $\frac{1}{4}$ of Sec. 8, T. 13 N., R. 38 W., 6th P. M., North Platte, Nebraska, land district. On September 11, 1884, one Charles E. Collier, filed his affidavit of contest against said entry alleging abandonment. The hearing of this contest was continued at various times and finally fixed for May 4, 1885, the contestant having in the meantime procured by way of depositions the testimony of a part of his witnesses.

On May 2, 1885, the entryman presented at the local office Collier's dismissal of his contest. Barnes was notified that day that no action would be taken in the contest until the day to which the case had been adjourned. He, thereupon, executed his relinquishment of said entry and presented it together with two applications to make soldiers' additional homestead entries, one for forty acres based upon certificate issued to Hiram Tomlinson, February 10, 1885, and for one hundred and twenty acres based on certificate issued to Daniel L. Emerson, March — 1884, when he was, as is stated in the register's letter of May 6, 1885, informed:

> That his said relinquishment would be received and acted upon at once but that I would not allow him to locate the soldiers' additionals until the contest was disposed of, and upon examination of the soldiers' additionals he was informed that they would not be acted upon by this office until they were submitted to the General Land Office whereupon he left the whole with his said appeal to be filed on May 4, 1885.

In this letter the register further says:

The so called soldiers' additionals are different from any that we have ever seen and the whole is herewith respectfully submitted for your consideration.

Barnes appears to have signed the appeal as the agent of Daniel L. Emerson and Hiram Tomlinson.

On May 4, 1885, Charles L. Hoffman presented his contest affidavit against the said entry of Theodore F. Barnes, which was rejected by the local officers for the reason of the said relinquishment of the said Barnes. Hoffman, thereupon, made application for a homestead entry for the said lands. This application was also refused, because of the pendency of soldiers' additional homestead application of Emerson and Tomlinson.

Hoffman appealed from the action of the local officers and your office considering said appeals by decision of October 23, 1886, allowed Barnes to locate the additional application of Emerson for one hundred and twenty acres of the said land and rejected the additional application of Tomlinson, because the same was not signed by the latter nor accompanied by a power of attorney authorizing Barnes or any one else, to locate the same. By your said decision you approved the rejection of Hoffman's application to contest, but held that his application to enter should have been allowed as to that portion of the land left unappropriated after Barnes had made his election as to what part of the land he would locate with the additional of Emerson.

Barnes, in his own proper person on November 12, 1886, files his motion for a review of your said office decision in relation to the rejection of Tomlinson's additional homestead entry. The motion is based on the ground, that at the date of the presentation of Tomlinson's application, he, Barnes, was fully authorized to file the same, but that the power of attorney delegating such authority (filed in your office October 23, 1886, by defendant's attorneys, Messrs Curtis and Burdett) having been mislaid he was unable to produce it. The power of attorney filed as aforesaid purports to be executed by Tomlinson to T. F. Barnes, July 7, 1881; it appears to be acknowledged the same day before the judge of Llano county, Texas.

By your office decision of January 14, 1887, Barnes' motion was denied.

Messrs. Curtis & Burdett, as attorneys of Hiram Tomlinson thereupon appealed from so much of your said decision of October 23, 1886, as declines to permit the location of the additional homestead certificate of Tomlinson on the land in controversy and from the whole of your said decision of January 14, 1887, declining to review said decision of October 23. Hoffman, also appealed to this department from so much of your said decision of October 23, as denies his application to enter the said SW. ¼ and allows the said Barnes to enter any portion of the same.

The whole case is, therefore, before me upon the said appeals and I have carefully considered the same.

Examining the records of the application of Tomlinson, I find that he made two affidavits before the county judge of Llano county, Texas, bearing date respectively July 4, and July 7, 1881, both of which are signed by what appears to be his mark. These affidavits constituted his application for a soldiers' additional homestead entry and are in the form at that time in use. These affidavits are designed among other things to prove the applicant's identity, his good faith, that his original entry was in good and regular standing at the local office and that he had not made or agreed to make any sale, transfer, pledge or other disposition of his right to make the entry for which he thus applied. Tomlinson's power of attorney to Barnes, referred to above, bears date July 7, 1881, and purports to be signed by the former in fair, legible handwriting. The certificate of your office bears date February 10, 1885, and certifies that the original homestead entry of Tomlinson comprising eighty acres had been canceled October 31, 1868, by reason of conflict with prior grant of lands to a railroad company, that he, Tomlinson, is entitled to make an additional homestead entry of not exceeding eighty acres, subject to the conditions of the homestead laws, requiring the said Tomlinson to actually settle on, reside upon any tract which he may so enter, and improve and cultivate the same.

The application of Tomlinson to enter under the said certificate the NE. ¼ of the SW. ¼ of said section 8, bears no date and is not signed, either by Tomlinson or by his presumed agent Barnes, for him.

The records of the application of Daniel L. Emerson for a soldiers' additional homestead entry show, that his two affidavits constituting such application were made before the clerk of the circuit court, county of Calhoun, Michigan. They are in the same form as the affidavits in Tomlinson's application. Emerson swears that his original entry was in good and regular standing upon the records of the local office and also that he had not made or agreed to make any sale, transfer, pledge or other disposition of his right to make the entry for which he thus applied.

The certificate of your office bears date March, 1884, and certifies that the original homestead entry of Emerson, containing forty acres had been canceled April 28, 1871, by reason of abandonment; that he, Emerson, is entitled to make an additional homestead entry of not exceeding one hundred and twenty acres subject to the conditions of the homestead laws, requiring the said Emerson to actually settle on and reside upon any tract which he may so enter, and improve and cultivate the same.

The application of Emerson to enter the S. ½ of the SW. ¼ and NW. ¼ of SW. ¼ of the said section 8, bears no date; it purports to be signed by Daniel L. Emerson; comparing this signature with the signatures of Emerson attached to his said affidavits I conceive grave doubts regarding the genuineness of the former. This signature seems to me not to be genuine, but an imitation of Emerson's signature to his said affidavits.

It further appears on the face of such application that the description of the lands to be entered is in a handwriting different from the handwriting of the rest of the paper. The description seems to be in the handwriting of the person that wrote Tomlinson's application for the entry of his forty acres.

In addition to these incongruities presented by the records, there are other circumstances in the case that lead me to suspect that the entries sought to be made by Barnes ostensibly for Tomlinson and Emerson, were really intended for himself.

Barnes had made a homestead entry for the whole SW. ¼ a contest against his entry having been initiated, he files, shortly before the hearing, the withdrawal of the contest by the contestant; also his own relinquishment and the applications of Tomlinson and Emerson, for entries covering the same land. Tomlinson's residence in 1881, was in Texas. Emerson's in 1882, in Michigan; it did not appear where they resided May, 1885. Tomlinson being entitled to make an entry for eighty acres, makes claim to but forty, for this amount together with Emerson's claim covered the whole one hundred and sixty acres. When Tomlinson's application is rejected, Barnes in his own proper person moves for a review. The power of attorney mentioned he forwards, as stated in his affidavit, to *his* attorneys Curtis and Burdett. In short, through the whole proceedings he seems to act as principal not as agent.

Inasmuch then as the law forbids and will not recognize an assignment of a soldiers' additional homestead entry (John M. Walker, *et al*, 7 L. D., 565), I think the facts in this case should be further investigated. If Tomlinson and Emerson never intended to make an actual personal settlement on the land covered by their respective claims, never intended to reside thereon and improve and cultivate the same, if, in fact they had no knowledge of the said applications made by Barnes for them, never having been informed of the location of those entries; if Barnes, pretending to act as the agent of Tomlinson and Emerson, in truth acted solely for himself, using the said pretended agency to cover the said lands with entries illegal in their inception,—then these applications of Tomlinson and Emerson must be denied and Hoffman must be allowed to make homestead entry for the said lands, as prayed for by him.

For the purpose, therefore, that the right of the said parties in relation to the matter in difference between them may be fully investigated and ascertained, it is ordered, that a hearing be had before the local officers when the facts in relation to the various applications of the parties can be fully inquired into and their rights regarding the lands in controversy determined. All parties in interest should be served with notice of the hearing.

Your said decision is accordingly modified.

PROCEEDINGS ON FINAL PROOF—COMMUTATION—CULTIVATION.

CAROLINE WELO.

The action of the General Land Office on final proof should cover the sufficiency thereof, as well as other questions affecting the validity of the same.

In the commutation of a homestead entry, breaking may be accepted as satisfactory proof of cultivation.

First Assistant Secretary Chandler to Acting Commissioner Stone, June 14, 1889.

I have considered the appeal of Caroline Welo, formerly Caroline Anderson, from the decision of January 10, 1888, rejecting her commutation proof and suspending her cash entry for the N. ½ of the NE. ¼ Sec. 9, T. 155 N., R. 66 W., Devil's Lake, Dakota.

The record shows that Caroline Anderson made homestead entry of above tract September 29, 1885, established her actual residence thereon March 30, 1886, and made commutation proof October 16th following.

It appears that claimant married after making entry and before submitting final proof. Her improvements consisted of a frame house eight by eighteen feet, a well twenty-four feet deep, nine acres of breaking—total value $150. Her residence from March 30, 1886, to date of proof was continuous.

The local officers rejected claimant's final proof, as appears from their endorsement thereon, "for the reason that claimant was married since homestead entry."

From this action an appeal was taken to your office, and on April 13, 1887, the papers in the case were returned to the local officers, "for your further action in accordance with the decision of the Hon. Secretary of the Interior, rendered October 22, 1886, in the case of Maria Good, formerly Wilcox (5 L. D., 196), which decision allows final proof to be made by women who have married since the making of their original entries, and before final proof is submitted, when it is shown that all conditions of law have been complied with in good faith."

The sufficiency of claimant's proof was not acted upon until the papers were again returned to your office. This was unjust to the entryman, as it delayed final action upon her claim. The system of rendering decisions piecemeal is oppressive to settlers and should not be continued.

In pursuance of said instructions, the local officers, on May 6, 1887, accepted claimant's proof, received the price of the land and issued final receipt therefor.

January 10, 1888, claimant's proof was rejected and her cash entry suspended by your office, on the ground that "she failed to show satisfactory improvements and cultivation." At the same time she was allowed, during the lifetime of her entry, to submit new proof showing compliance with law in all respects. From this decision claimant duly appealed to the Department.

The above action of your office is based upon the decision which Assistant Secretary Muldrow rendered in the case of Adelphi Allen (6 L. D., 420), on December 15, 1887. An examination of that case shows, however, that it is not analogous to the one at bar. In the Allen case the improvements consisted of a frame house with fence and outbuildings, and construction of a private road leading from the highway to the house, in which claimant had one-third interest. There was no breaking done in that instance and no cultivation. In the case at bar, the improvements consisted of a frame house, a well and nine acres of breaking. In the Allen case (*supra*) reference is made to the case of Engen *v.* Sustad (11 L. O., 215), in which the Department decided, that the erection of a house, the digging of a well, the erection of a stable, and breaking three and one-half acres constituted cultivation.

Section 2301 of the Revised Statutes confers upon the entryman the privilege of commuting his homestead into a cash entry by paying the minimum price for the land and "making proof of settlement and cultivation, as provided by law granting pre-emption rights." As already stated, claimant's residence from March 30, 1886, to date of proof, was continuous. Her improvements consisted of a frame house, a well and nine acres of breaking—total value $150. She has, therefore, complied with the law in the matter of residence and settlement, and as appears from the case above cited she has, also, by breaking nine acres of the tract, complied with the law in the matter of cultivation. I see therefore no good reason, as far as these requirements are concerned, why claimant's proof should not be accepted.

Said decision is accordingly reversed.

SURVEY—ACT OF OCTOBER 2, 1888.

NO MAN'S LAND.

The appropriation for surveys, made by the act of October 2, 1888, should be expended in the survey of townships occupied in whole or in part by actual settlers; but if there are no such lands remaining unsurveyed, there is no legal objection to the use of such appropriation in sub-divisional surveys of the public land strip.

Secretary Noble to Acting Commissioner Stone, June 14, 1889.

I am in receipt of your communication of the 16th ultimo, transmitting a letter from Senator P. B. Plumb, suggesting that a portion of the funds appropriated by the last Congress for public land surveys be expended in surveying the public land strip, commonly known as "No Man's Land."

You recommend that if it be considered legal, your office be authorized to contract for such surveys within the public land strip, as may be deemed advisable, the same to be charged to the regular appropriation for surveying the public lands.

The act of October 2, 1888 (25 Stat., 525), making appropriations for the survey of public lands, for the fiscal year ending June 30, 1889, provides, "That in expending this appropriation preference shall be given in favor of surveying townships occupied in whole or in part by actual settlers; and the survey shall be confined to lands adapted to agriculture and lines of reservation."

The standard and township lines within said strip were surveyed under an appropriation made March 3, 1881, for this purpose, and no other appropriation has been made for a survey of lands in said strip.

The general appropriation made for the survey of public lands for the fiscal year ending June 30, 1889, clearly contemplates that it should be expended in the survey of lands occupied in whole or in part by actual settlers and subject to entry under the settlement laws, and proper execution of this law would demand that no part of said appropriation should be used so long as lands of this character remain unsurveyed. But it does not prohibit the use of said appropriation on public lands of the United States, although they may be not now subject to settlement and entry.

If there is any part of said appropriation remaining unexpended, and there are no townships occupied in whole or in part by actual settlers remaining unsurveyed, I see no legal objection to the use of said appropriation in making subdivisional surveys in the public land strip.

FINAL HOMESTEAD PROOF—EQUITABLE ADJUDICATION.

EDWARD FULLMER.

In the absence of an adverse claim, or evidence of bad faith, a homesteader, whose proof was submitted after the expiration of the statutory period and found insufficient, may make new proof, and if satisfactory the entry may be sent to the Board of Equitable Adjudication.

First Assistant Secretary Chandler to Acting Commissioner Stone, June 15, 1889.

April 1, 1881, Edward Fullmer made homestead entry of the S. ½ of the NE. ¼, the NE. ¼ of the SW. ¼ and the NW. ¼ of the SE. ¼ of section 36, T. 27 N., R. 3 E., Wausau, Wisconsin.

May 1, 1888, the local officers transmitted the application of the entryman to be allowed further time within which to comply with the law as to residence upon the said land. Accompanying the application and filed in support thereof is proof on the usual forms. The entryman swears that he made the entry in good faith, has made improvements on the land, but that he has actually resided thereon only "from one to two months" each year. Poverty is given as the reason for not continuously residing upon the tract. The testimony shows that the improvements consisting of a frame house fourteen by twenty feet, a log

stable sixteen by twenty-eight feet, and ten acres cleared and fenced, are valued at $350.

May 29, 1888, your office considered said application and found that the entryman had failed to establish his residence on the tract and had also allowed the statutory period to expire without making proof. The entry was held for cancellation, whereupon the claimant appealed.

Inasmuch as there is no adverse claim and as bad faith is not established, I will not cancel the entry for the sole reason that the entryman has failed to make final proof within the statutory period. The entry may stand and the claimant may make new proof showing compliance with the requirements of the homestead law. Such proof when offered will, if satisfactory, be referred to the Board of Equitable Adjudication. Goran Sandberg (7 L. D., 384).

Your decision is modified accordingly.

HOMESTEAD CONTEST RESIDENCE.

SPALDING *v.* COLFER.

In the absence of proof to the contrary, the place where a married man's family resides must be held to be the place of his residence also.

Residence is not acquired by one who goes upon public land with the fixed intention of leaving the same after a colorable compliance with the law, and in the meantime substantially maintains a home elsewhere.

First Assistant Secretary Chandler to Acting Commissioner Stone, June 15, 1889.

February 18, 1885, Thomas Colfer made homestead entry of the SW. ¼ of section 31, T. 4 N., R. 29 W., McCook, Nebraska, and August 23, 1885, Morillo A. Spalding filed an affidavit of contest against said entry alleging that the entryman—

Has wholly abandoned said tract; that he has changed his residence therefrom for more than six months since making said entry; said tract is not settled upon and cultivated by said party as required by law, and that he has failed to establish his residence on said land within six months after making nor since to this date.

A hearing was regularly had at which both parties were present with their attorneys and witnesses. The local officers rendered the following decision:

From the testimony presented it appears that the claimant, Thomas Colfer, has failed to establish residence as required upon the SW. ¼, Sec. 31, T. 4 N., R. 29 W. We are, therefore, of opinion that said H. E. No. 2315, should be canceled.

Colfer appealed and April 30, 1888, your office affirmed the action of the local officers and held the entry for cancellation on the ground that the entryman had failed to establish residence upon the tract entered. From your said decision Colfer took the appeal that is now before me for consideration.

The charge of abandonment is not sustained by the testimony and the only question for determination is whether the entryman ever really established residence upon the tract embraced in his entry.

The land in contest is about four miles from the town of McCook where for months prior to making the entry Colfer was an attorney-at law, practicing before the local office. He was a married man with a wife and several children and lived in a five room frame house in the town of McCook, which he had contracted to buy for $1165 and had partly paid for. In the early part of 1885 he bought the improvements on the land in contest, consisting of a small house and several acres of breaking, from a former settler named Walsh and also the relinquishment of the latter's claim to said land. Colfer filed the relinquishment and made entry of the land. He removed the house to a more desirable location on the tract, put some repairs on it and placed sufficient furniture in it to render the same habitable. This was done on or about June 9, 1885, and the next day the entryman claims that he established actual residence upon the land and that it has since been his only home. Before going to the land he took leave of his wife and children whom he left in McCook and told them that for six months at least, he would not be a member of their household. He was accompanied to the tract by his brother and another man and he asked them with the purpose as he says, of calling them as witnesses to his final proof, to remember that he had upon that day established his residence upon the land. The entryman swears that thereafter it was his custom to spend the nights in the house upon the claim and the days in McCook where his business required his presence and that when he failed to return to the land at night it was because of the sickness of his wife or of himself, unusually severe weather or some pressing matter of business. He was away from the State for a time on business. Some months after the entry was made he bought a horse and buggy to facilitate his going to and from the tract. The improvements made on the claim after entry were slight. The testimony for the contestant as to entryman's presence on the land is chiefly of a negative character; the witnesses seldom saw him there. The entryman testifies that between June 10, and August 25, 1885, he slept in the house on the land in contest "as many as fifteen or eighteen times, possibly twenty times;" when he stayed in McCook at night he slept in the house occupied by his family and sometimes took his meals there during the day. He had upon the place a heating and cooking stove and made tea and coffee but "my cooking" he says, "such as the baking of bread, pastry, and meat and so on, was done by my family in McCook." His washing and ironing was done at different places, some at the Chinese laundry in McCook and more by his hired help engaged in his family at McCook. He sometimes took a change of clothes to the house on the homestead claim but such clothes as he was not using and were not at the tailor shop for repair, he left in his house in McCook. It was his custom when he left town in the evening to take

with him a bucket filled with water; there was no well on the place and he could not afford, he says, to have one dug and was told that boring for water would not be successful. Before leaving town he would water the horse and water him again on his return to town in the morning. During the night the horse was "lariated out" and during the day he was kept in a stable which the entryman had built for the purpose near his house in McCook.

I will now proceed to consider the excuse given by the entryman for the failure of his family to reside on the land embraced in his entry although he contends, as a matter of law, that residence of the family of the entryman is not a requirement of the homestead law. He swears that his wife was the mother of several children, was in delicate health and was often sick; that he was frequently kept in town to attend to and nurse her; that when he spoke to her about removing to the house on the homestead she declined to go on account of her health and that he was advised by his family physician that it would not be prudent to remove her to his claim. Dr. Andrew J. Willey testified that he has several times been called to attend the family of Mr. Colfer; that Mrs. Colfer "was feeble during the summer and was pregnant which made her more so;" that such lack of health "continued until after her confinement which was on the 29th of September." Asked if he had given any advice to Mr. Colfer in relation to his wife and children going to the homestead and remaining there, the witness said: "I advised him against taking his wife there as I concluded it unsafe for him to do so on account of her physical condition;" his first conversation on the subject with Mr. Colfer was in May, 1885. He says Mrs. Colfer might or might not have been moved with safety but he advised against the removal because McCook, in her condition, was the better place for her to be; on the homestead she might not have the necessary comforts that she would have in McCook and in the latter place the assistance of a physician and neighbors could easily be procured, and, as an additional reason, the roads to the homestead were very rough. Dr. Kay corroborated the testimony of Dr. Willey as to Mrs. Colfer's condition and adds that she was suffering from consumption. He advised against the removal to the homestead and does not believe that it would have been safe for her to have lived there.

In the case of Stroud *v.* De Wolf (4 L. D., 394), it was held:

> It must be conceded that, in the absence of proof to the contrary, the place where a married man's family resides must be deemed to be his residence.

In the case of West *v.* Owen (4 L. D., 412), it was said:

> The idea that an individual can acquire or maintain a residence on a tract of public land by making occasional visits thereto while all his interests and household effects, apparently, are with his family, has been long since exploded, if, indeed, it ever had any real existence. That is to say, in order for an individual to establish residence on a tract of public land as required under the homestead law, it is necessary that there be a combination of act and intent, on his part, the act of occupying and living

upon said tract and the intention of making the same his home to the exclusion of a home elsewhere. That is "a true fixed and permanent home, and principal establishment, and to which whenever he is absent he has the intention of returning." Story's Conflict of Laws, page 35.

In a later case it was held that the residence of a settler is presumed to be where his family reside. Gates *v.* Gates (7 L. D., 35). Applying the principle announced in these cases to the case at bar the failure of Colfer's family to reside upon the tract raises a strong presumption against the claim set up by him that he established residence on the land prior to the contest and this presumption is not overcome by the testimony. The announcement made by Colfer to those who were with him on the land upon the day that he claims to have settled thereon, that he had that day established residence, taken into consideration with the intention existing at the date of the entry to prove up at the expiration of six months; his statement to his wife that for six months he would not be an inmate of the household in McCook; the making of slight improvement on the land while adding one of considerable value to his house in McCook; the facts in relation to his washing, his cooking and the keeping of his clothes; the fact that he made the entry with knowledge of the delicate condition of his wife's health; are circumstances that lead me to conclude that the entryman never established his residence on the land.

A settler who goes upon public land with the intention of remaining just long enough to secure title by colorable compliance with the law, and then return to his former home where his family has in the meantime resided and the greater part of his personal property remained, does not establish or maintain the residence required by the homestead law. Van Ostrum *v.* Young, 6 L. D., 25.

A claim of residence is not consistent with the substantial maintenance of a home elsewhere. Van Gordon *v.* Ems, 6 L. D., 422.

"Mere visits to the land to keep alive the fiction of residence do not constitute compliance with the law. Strawn *v.* Maher, 4 L. D., 235.

The object of the homestead law cannot be defeated by a seeming compliance with the letter of the law while disregarding its spirit. Sidney F. Thompson, 8 L. D., 285.

The entryman, if he did not act in bad faith, acted under a mistaken understanding of the law and his pretended residence will not prevent the cancellation of the entry. Your decision is affirmed.

FINAL PROOF PROCEEDINGS—RELINQUISHMENT—MORTGAGEE.

ADDISON W. HASTIE.

A relinquishment made by the entryman, after mortgaging the land covered by his final proof, will not defeat the right of the mortgagee to show that the entryman had in fact complied with the law, and was entitled to patent.

First Assistant Secretary Chandler to Acting Commissioner Stone, June 20, 1889.

I have considered the appeal of Addison W. Hastie, as mortgagee, from the decision of your office dated April 14, 1888, cancelling the homestead entry No. 465, and final certificate No. 116, of William A.

Nicholas, for the SE. ¼, SE. ¼, SW. ¼, SE. ¼, Sec. 12, and NE. ¼, NE. ¼, Sec. 13, T. 6 N., R. 2 E., Deadwood land district, Dakota Territory.

The record shows that on March 20, 1879, said Nicholas filed pre-emption declaratory statement No. 46, for said described tract, alleging settlement February 8th, same year; and on November 16, 1881, he transmuted said filing to homestead entry No. 365.

On March 29, 1884, in accordance with published notice he made final proof before the register and receiver at Deadwood, D. T., which was approved and on March 31, final certificate issued thereon.

In his final proof Nicholas stated that he was a native born citizen, twenty four years of age and a single man. That he built a house on the tract February 8, 1879, and commenced actual residence therein at that date, which was continuous. His improvements consisted of a log house fifteen by twenty-one feet, a stable sixteen by eighteen feet, a granary twelve by fourteen feet, a root house fifteen by twenty feet and one and three fourths miles of fencing; that he broke fifty acres and cropped the same six successive seasons. He valued his said improvements at $1,000.

The entryman's two final proof witnesses (Washington E. Henry, and Robert McGimpsey), stated that they believed Nicholas was qualified to make said entry; but Henry stated that he believed there was only forty acres cultivated and cropped six seasons, and placed the value of improvements at $500, while McGimpsey corroborated Henry's testimony as to number of acres cultivated and cropped five years, yet, he valued the improvements at $800.

Your office by letter "C" of February 9, 1885, directed the register and receiver to notify the entryman that according to his own proof he was a minor at the date of settlement, and that his residence can only be accredited to him, since the date of attaining his majority, but that, "If by special affidavit or otherwise the party can show, to the satisfaction of this office, that he was legally entitled to make settlement in February, 1879, his proof will be accepted."

By letter dated June 29, 1886, the register and receiver informed your office that—

> Wm. A. Nicholas, who made homestead proof F. C. 116, has been repeatedly notified of your letter of February 9, 1885, "C", by which he was required to show that he was twenty-one years of age when he made settlement. He has never yet made the proof required though we are informed that he is now living on the land and did live on it more than five years after he became of age.

On July 19, 1886, your office by letter "C", informed the register and receiver that—

> As the entryman is still on the land and was duly notified of the suspension of his entry, but had made no response thereto, his final entry is therefore held for cancellation, but the original entry will be allowed to stand, subject to future compliance with the law.

On July 20, 1886, the entryman appeared at the local office and executed a relinquishment of his said entry in which he alleged that he could not funish the proof called for; and at the same time surrendered his

final receiver's receipt, No. 116. On the same day the register transmitted the duplicate receipt and relinquishment to your office, and stated that "As final certificate No. 116, has been issued we have not noted relinquishment until so instructed. Please advise us in the premises."

On July 24, 1886, Addison W. Hastie appeared in person at the local office and filed the following affidavit of protest against the relinquishment of Nicholas:

That said William A. Nicholas made original declaratory statement No. 46 (Deadwood series) on the E. ½, SE. ¼ SW. ¼ SE. ¼, Sec. 12 and the NE. ¼ NE. ¼ Sec. 13, T. 6 N., R. 2 E., B. H. M., claiming settlement thereon February 8, 1879. That on November 16, 1881, the said Nicholas converted said declaratory statement into original homestead entry No. 365; that on March 31, 1884, said Nicholas made final homestead entry No. 116, of said homestead entry No. 365, and on the land above described. That the said Nicholas delivered to affiant a note for $250, and secured the same by a mortgage on said land, which mortgage was filed for record in the office of the register of deeds, Lawrence county, D. T.,—on April 21, 1884, recorded in book 28, p. 116, that affiant is still the owner and holder of said note and mortgage and that the same has not been paid or any part thereof, and that affiant has judgment therefor, in the district court of the first judicial district in and for said Lawrence county, Territory of Dakota. . . . . That the said Nicholas, has conspired with his sister Mary Biglin, and a firm of attorneys of said Deadwood, to defraud and cheat this affiant. That said Nicholas on the day upon which judgment was rendered upon the said note and mortgage to wit, July 20, 1886, went with his sister and said attorneys to the land office at Deadwood, D. T., and attempted to file a relinquishment of said land, and at the same time and place his sister Mary Biglin, attempted to fil [make] a homestead entry upon said land, but that the same was refused by this office, and that said relinquishment was on the same day sent to the Hon. Commissioner of the General Land Office at Washington, D. C., before affiant had knowledge that the same had been made or filed. Affiant states upon information and belief, that the said Nicholas resided on said land for over five years after making said original homestead entry and after he had attained the age of twenty one years; and that affiant is ready and anxious to furnish said proof if he has an opportunity so to do. . . .

On September 16, 1886, attorneys for the mortgagee filed a certified copy of the mortgage, given by Nicholas, also a certified copy of the judgment of foreclosure of said mortgage which amounts to the sum of $502.85, principal, interest and costs; said counsel also filed the affidavits of five persons who live in the immediate vicinity of the tract in dispute, intending to show that the entryman resided continuously on the homestead tract since the date of final proof up to January 1, 1886.

On April 14, 1888, your office by letter "C", addressed to the register and receiver at Deadwood, D. T., declined to order a hearing and decided that—

The duty of this office in this instance is plain. If the entryman cannot as he alleges or will not, furnish the evidence necessary for the completion of his claim, but insists upon relinquishing all his interests therein to the government, said relinquishment must be accepted and the entry canceled, which is now done. You will note upon your records the cancellation of homestead entry No. 365, and final cash entry No. 116, based thereon, as of this date.

From this decision Hastie appealed urging that the Department should not receive and act upon Nicholas' relinquishment and thus as-

sist him in his attempt to defraud his mortgagee, and urging also that the appellant should be afforded an opportunity to show that the entryman had resided on the land for more than five years after attaining his majority.

Upon review of the record and proofs herein, I am of the opinion that your office erred in directing the local officers to cancel Nicholas' entry as it is shown that more than two years prior to the date he filed his relinquishment, he had mortgaged said described tract to the appellant for a valuable consideration, thus parting with his personal right of relinquishing to the government his interest in said entry.

In view of this fact his pretended relinquishment should not have been accepted, nor his entry and final certificate canceled.

The case at bar is somewhat similar to the case of Falconer *v.* Hunt, *et al.* (6 L. D., 512), wherein it was held that—

> The land department will take notice of the rights of subsequent purchasers and mortgagees in good faith after the issuance of final certificate to the original entryman, when notice of such mortgage or transfer is brought home to it. And the right of said third parties to appear and protect their interests by showing a proper compliance with the law on the part of the entryman is uniformally recognized.

If the facts set up in said affidavit are true, the government will not be a party to such an unconscionable wrong, nor permit the entryman by such a fraudulent practice to defeat the rights of the mortgagee who has confided in what he supposed to be the integrity of Nicholas in connection with this entry and loan. Let honesty and fair dealing characterize the acts of the entryman both towards the government and those with whom he deals in making his entry. If Nicholas was a qualified entryman at the time of making this entry and had complied with the homestead laws, the entry should stand.

In view of the foregoing decision, and as Hastie appears to be a mortgagee in good faith, you are directed to re-instate the said original entry and final certificate of Nicholas, and the mortgagee will be permitted, within a reasonable time, to file supplemental proof duly corroborated showing that the entryman resided continuously on the said described tract during five years after attaining his majority.

The said decision of April 14, 1888, is reversed.

GRADUATION ENTRY—SWAMP GRANT—REPAYMENT.

FARMER MOORE.

The inadvertent issuance of patent under the swamp grant for a tract of land included within a previous graduation entry, erroneously allowed therefor, defeats the confirmation of such sale under the act of March 2, 1855, and entitles the purchaser, or his assignee, to repayment.

First Assistant Secretary Chandler to Acting Commissioner Stone, June 20, 1889.

On December 19, 1887, Farmer Moore made application to your office for the repayment of the purchase money paid on entry of the NW. $\frac{1}{4}$ of

the NE. ¼ of section 25, T. 33, R. 23, Springfield land district, Missouri, as per certificate No. 17,072.

His application was denied by your office decisions of February 11, and June 7, 1888.

S. L. Crissey, attorney, on behalf of Moore, appealed to this Department.

The facts in the case are as follows: One Terry Tucker on December 15, 1854, made cash entry No. 17,072 for the W. ½ of the SE. ¼, section 24 and the NE. ¼ of section 25, T. 35 N., R. 23 W., at the land office at Springfield, Missouri under the graduation act of August 4, 1854, paying for the land at the rate of seventy-five cents per acre.

Patent was issued to Tucker for the land covered by his entry October 30, 1857.

Previous to the time of the said entry October 12, 1854, the State of Missouri claimed the said section 25, as swamp land under act of Congress passed September 28, 1850, (9 Stat., 519). The claim of the State was approved by the Secretary of the Interior, January 17, 1857, and patent, covering the whole of section 25 aforesaid, issued to the State, March 26, 1857.

It appears that the right and interest of Tucker to the said NW. ¼ of NE. ¼ passed by deed dated February 26, 1869, to Farmer Moore, the applicant; it further appears that the State of Missouri by patent dated November 19, 1869, conveyed the NE. ¼ of said section 25, to Polk county in the said State and that Polk county, after having in an action of ejectment recovered from the said Farmer Moore the said forty acres, described above, conveyed the same for a valuable consideration to him by proper deed of conveyance dated, December 1, 1887.

In Farmer Moore, therefore, centers the titles to the said land derived from Tucker and also from the State of Missouri. Moore's attorney urges, that the said act of 1850, was a grant *in præsenti* and therefore conveyed all the interest the government had in the land to the State and that Tucker's entry, so far as the said NW. ¼ of NE. ¼ is concerned, was consequently illegal and should be canceled.

Your action refusing Moore's application was controlled by an act of Congress entitled "An act for the relief of purchasers and locators of swamp and overflowed lands," passed March 2, 1855, (10 Stat., page 634). Admitting the said forty acres to be swamp land, and the character of the same seems, as between the government and the said State, to have been fully determined by the Secretary's approval of the State selection January 17, 1857, and the issue of patent to the State, March 26, 1857—I think, the allowance of Tucker's entry for the same was erroneous; and it further seems clear to me that by the issue of the said patent, to the State, though the same might have been in view of the act of March 2, 1855, inadvertently issued, title to the land so patented passed out of the United States. Wisconsin Central R. R., *v.* Stinka (4 L. D., 344) and cases there cited. Henceforth, while the

patent to the State was outstanding, the government could convey nothing by a subsequent patent. When, therefore Moore, the transferee of Tucker, comes before this Department waiving his right under the Tucker patent it seems to me his petition for the repayment of the purchase price for the lands in question should be granted. He paid for the land, as it now stands, twice, and unless relieved here, he would be remediless. The said land being swamp land was erroneously sold by the United States and the government having issued patent therefor to the State of Missouri and thereby incapacitated itself to confirm the sale, the said act of March 2, 1855, notwithstanding. Accordingly I conclude that Moore's application should be granted and repayment allowed in conformity with the provisions of section 2362 of the Revised Statutes.

Your said office decision is therefore reversed.

HOMESTEAD ENTRY—PRE-EMPTION FILING—SETTLEMENT RIGHTS.

WILLIS *v.* PARKER.

A pre-emption filing should not be allowed for land covered by the homestead entry of another; but if offered, for land thus appropriated, a hearing should be had, if priority of right is alleged by the pre-emptor, and, if such priority is established, the entry canceled so far as in conflict with the filing which may then be allowed.

The burden of proof is upon one alleging priority of settlement right as against the subsisting entry of another.

Settlement rights under the public land laws are not acquired by the purchase of the possessory right and improvements of another, but rest on the acts of settlement performed in person by the party claiming the benefit thereof.

First Assistant Secretary Chandler to Acting Commissioner Stone, June 20, 1889.

The land involved herein is the E. ½ of the NE. ¼ of Sec. 12, T. 8 N., R. 3 W., and lot 3, Sec. 7, T. 8 N., R. 2 W., Marysville land district, California.

The record shows that on September 4, 1885, Eugene P. Willis made homestead entry for these tracts together with lot 7, of Sec. 6, T. 8 N., R. 2 W., and that on September 15, 1885, Franklin L. Parker was permitted to file his pre-emption declaratory statement covering the tracts in question and lot 3, of Sec. 7, T. 8 N., R. 2 W., alleging settlement August 29, 1885. The township plot embracing T. 8 N., R. 3 W., was filed May 13, 1884, and that embracing T. 8 N., R. 2 W., was filed February 9, 1885.

In pursuance of published notice Parker submitted final proof April 5, 1886, and was met by the protest of Willis against the acceptance thereof. A hearing was had before the local officers for the purpose of determining the respective rights of the parties, at which they both appeared and submitted testimony.

Upon the evidence produced the local officers found for Parker, and recommended that he be allowed to make payment for the land on the proofs submitted; and that the entry of Willis be canceled.

On appeal by Willis, your office, on August 30, 1886, reversed the action below and awarded the land to Willis, subject to his future compliance with the homestead law and rejected the proof of Parker and held his filing for cancellation.

The papers are now before me on Parker's appeal from this decision.

The only serious question to be determined upon the record presented is, whether Parker actually made settlement on the land at the date alleged in his pre-emption declaratory statement, or prior to the homestead entry of Willis.

There has been, however, some irregularity in the proceedings. The local officers erred in permitting the filing of Parker to be made, after the land in question had been segregated from the public domain by the entry of Willis, simply upon Parker's allegation of prior settlement—the proper practice in such cases being to require a contest against the homestead entry, and a hearing to determine the question of such prior settlement, after which, if such prior settlement be established, the homestead entry should be canceled and the pre emption filing then allowed.

Parker should have been required to establish his prior right to the land, and to have thus secured the cancellation of the entry of Willis, so far at least, as it was in conflict with his proposed filing, before the latter was allowed to be placed of record; and in determining the issue herein involved the burden of proof must therefore be considered as resting on the pre-emption claimant. By thus considering the testimony it is not seen that any injustice will result to either party by reason of the irregularity aforesaid.

The testimony submitted at the hearing, examined in the light of the foregoing, discloses the following facts:

During the winter of 1883–4, Willis and one Hall Allison lived together in a cabin built by them jointly, on lot 3, Sec. 7, of the land in controversy, and appear to have been engaged in cutting and removing wood and timber therefrom and from the tracts adjoining on the north and west. They were thus operating, and apparently residing on these tracts for some time before they were surveyed, their object professedly being to acquire title to the same under the homestead law. After the public surveys were made, to wit, about August 1, 1885, there was, according to the testimony of Willis (Allison not being examined as a witness at the hearing) a verbal agreement or understanding between them to the effect that Allison was to have the land on the west side of the township line between T. 8 N., 3 W., and T. 8 N., 2 W., and that Willis was to take that on the east of said line and to move the house in which he was then residing on lot 7, Sec. 6 N., R. 2 W., to Allison's claim on the west of said line, and about three quarters of a mile further south;

but no definite description of the specific tracts included in said agreement is given, nor does it appear that any attempt was ever made by either party, to carry the agreement into effect.

On August 29, 1885, Parker agreed with Allison to purchase the improvements situated on the tracts here in question, consisting of a cabin or house of three rooms, a well, and some fencing and breaking, and which, so far as this record shows, were chiefly if not wholly, on lot 3 of Sec. 7, T. 8 N., R. 2 W., and therefore on the east side of said proposed division line, at the price of $300. He paid $20 cash on the purchase price and on the day named, he and his wife, with a couple of relatives, ate their dinner on the land (said lot 3) under a tree near the cabin, in which Allison then resided, fed their horses and went away. Allison remained on the premises and continued to occupy the same until September 5th following, when Parker returned, paid the balance of the purchase price for the improvements, took possession thereof and established his residence in the cabin or house. He rebuilt the house, made some fencing and some repairs and cultivated seven acres valued in all at $400; and his residence on his claim since September 5, 1885, has been continuous.

It further appears that Willis lived with Allison in the cabin or house on said lot 3 until about the month of September, 1884, when the latter brought his widowed sister-in-law with her family there to reside; whereupon he (Willis) moved into a cabin which he had previously built on said lot 7, Sec. 6. He did some breaking on this latter tract, and cultivated five or six acres thereof during the season of 1885-6, and swears that he has resided thereon continuously since November, 1885. He further states, in effect, that he first learned that Allison had agreed to sell out to Parker about the 1st or 2d of September, 1885, through one J. C. Pitkin; that he met with Allison in the town of Winters on September 2nd and asked him if he had agreed to sell his claim, and he replied that he had agreed to sell the W. ½ of the NW. ¼, Sec. 7, and the E. ½ of the NE. ¼, Sec. 12, and that he (Willis) could look out for himself; that he started the next morning for the land office at Marysville, for the purpose of making said entry but did not reach there until September 4th. Parker claims that he made complete purchase of said improvements and the possessory right of Allison on the 29th of August, 1885, and that his first act of settlement on the land was then acquired by making such purchase and in eating his dinner and feeding his horses thereon. He did no act, however, so far as the record shows, that would even tend to give notice to the world that he had, on that day, made actual settlement on the land. Especially is this true in view of the fact that Allison remained in possession and full control of the premises for some days thereafter, and until Parker's return September 5th, following, when absolute possession was for the first time surrendered to him.

While it may be a hardship for Mr. Parker to lose the money ex-

pended for the possessory right of Allison, yet that fact would not avail him in this case. Settlement rights under the public land laws can not be acquired by the mere purchase of the improvements and possession of another. Such rights are only acquired through acts of settlement made in person by the party seeking to secure the benefit thereof. Knight *v.* Haucke (2 L. D., 188).

The fact that Parker and those with him, ate their dinner and fed their horses on the land the day he claims the purchase was made, of itself proves nothing, and does not, when considered in connection with any other facts disclosed by this record, amount to proof of a legal and *bona fide* act of settlement by Parker, on that day; while the further fact that possession of the premises was not surrendered by Allison until September 5, 1885, when the purchase price for the improvements was paid in full, tends strongly to show that the sale was not complete until that date.

I do not think, in view of the foregoing, that Parker ever made actual settlement on the land in dispute, until September 5, 1885, when he took possession of the improvements as shown, which was after the land had been legally appropriated by the homestead entry of Willis.

The tracts in controversy must, therefore, be awarded to Willis, subject to his future compliance with the homestead law, and the filing of Parker, to the extent of the conflict must be canceled. The latter's final proof being in all respects satisfactory as to the lot, not in dispute, I see no good reason why the same may not be to that extent approved and passed to patent upon payment being made for the tract, and it is accordingly so ordered, unless he shall elect to relinquish his entire filing.

With this modification your office decision is affirmed.

HOMESTEAD ENTRY—RESIDENCE—EQUITABLE ADJUDICATION.

THRASHER *v.* MAHONEY.

When a homesteader with his wife has in good faith established a residence, no one but the wife, during the life of the entry, is entitled to allege "desertion" in proof of his abandonment of the land.

After the establishment of residence, absence for the purpose of providing a support for the family, though covering several years, will not be held to constitute abandonment, if the family in the meantime continue to live upon the land.

A homestead entry should be submitted to the Board of Equitable Adjudication where the final proof is not made within the statutory life of the original entry.

First Assistant Secretary Chandler to Acting Commissioner Stone, June 20, 1889.

I have considered the appeal of Fannie H. Thrasher from your decision of March 20, 1888, holding for cancellation the homestead entry of Florence Mahoney upon the W. ½ of NE. ¼ Sec. 22 and W. ½ of SE. ¼ Sec. 15, T. 7 S., R. 17 W., 6th principal meridian, Kirwin, Kansas.

The record shows that Mahoney made homestead entry of above tract October 29, 1874, and submitted final proof therefor December 20, 1881.

September 23, 1881, Mary Mahoney, wife of said Florence Mahoney, made application to be allowed to make final proof on her husband's homestead entry. Her application is accompanied by a duly corroborated affidavit in which she states that she and her husband, with their family consisting of seven children, took possession of said tract on March 17, 1875, and that she and her children have since continuously resided upon and cultivated the same; that in April 1875, her said husband went to Colorado and that she had no word or tidings from him for nearly four years and six months; that she and her children had a comfortable house fourteen by twenty-eight feet upon said tract, also had a stable, a well and corral and had about forty-five acres of said land in cultivation; that the seven years allowed her husband to make final proof would soon expire and that the land is and has been the *bona fide* home of herself and children for over six years, and is the only home she has for herself and family.

Mahoney, however, returned a few months after the above application was filed, and as already stated made final proof on December 20th following.

January 13, 1882, your office advised said Mary Mahoney that "in view of the statements made it will be proper for her to make final proof on said land with a view to submitting the case to the Board of Equitable Adjudication for its action."

April 22, 1882, your office suspended Mahoney's entry "by reason of non-compliance with the homestead law as to residence, and failure to make final proof within the time prescribed by law." At the same time claimant was called upon for an affidavit, duly corroborated, showing cause of his non-compliance with the law as above referred to.

July 1, 1886, the local officers transmitted the corroborated affidavit of the said Mary Mahoney in which she reiterated the facts stated in her application to make proof and further mentioned her efforts to raise crops upon the land and the losses she had sustained by drought and grasshoppers.

December 18, 1886, W. F. Thrasher, the grantee of said Florence and Mary Mahoney inquired from your office through his attorney, "why patent has not been issued for said land."

January 24, 1888, the local officers transmitted the application of said W. F. Thrasher, duly sworn to and corroborated, to contest Mahoney's entry upon the ground that he "did not make final proof in seven years from date of his homestead, and that he was absent from said land himself a greater portion of the time from date of entry until final proof."

March 20, 1888, your office rendered a decision holding Mahoney's entry for cancellation on the ground "that said entryman has wholly failed to comply with the homestead law as to residence, and that he

has abandoned his wife and family and in addition he has attempted to dispose of said land and deprive his wife and family of a home." You further decided that "should this decision become final Mrs. Mahoney will be allowed, under rule two of departmental decision of Bray *v.* Colby (2 L. D., 78), a preference right to enter said tract in her own name." You also decided that "in view of all the facts as herein set forth the application to contest is not favorably considered, a hearing is therefore denied."

From your said decision Fannie H. Thrasher, wife of the said W. F. Thrasher, duly appealed to the Department.

In the record in this case is found an abstract of title to the tract in question from which the following facts appear.

On January 2, 1882, thirteen days after the submission of final proof, the said Florence Mahoney conveyed to his wife Mary, by warranty deed, all his right, title and interest in and to said tract.

January 25, 1882, the said Florence Mahoney and Mary his wife, mortgaged said premises to Garwood H. Atwood for the sum of five hundred dollars.

June 2, 1884, Mary Mahoney and her said husband conveyed by warranty deed, all their interest in and to said tract to W. F. Thrasher for the sum of eight hundred dollars, and on September 3, following, the said W. F. Thrasher conveyed all his interest in said land to his said wife, Fannie Thrasher. The latter claims to be the present owner of said tract and to occupy the same with her said husband and family. She also claims to have paid the mortgage for five hundred dollars due upon the tract, and in this she is sustained by said abstract as it appears therefrom that the same was canceled of record November 26, 1886.

From the foregoing statement of facts it appears that Florence Mahoney established actual residence upon the tract with his wife and family on March 17, 1875, and after remaining there for six weeks went to Colorado "to provide for the family." Before leaving he built upon the tract a house fourteen by thirty-two feet, with two rooms, two doors two windows, a pine floor and board roof. He also built a milk house and stable and dug a well thirty-two feet deep. He seems to have communicated regularly with his wife during the two first years of his absence and about four years before his return wrote to her that "he would soon come back." This fact, together with his actual return and the affidavit of his wife that he was "unable to come to said land until in December, 1881," would seem to indicate that Mahoney never intentially abandoned either his wife or his homestead.

In the case of Gates *v.* Gates (7 L. D., 35), it was held that an absence of nearly three years for business purposes did not justify the conclusion that the entryman had abandoned the tract, his wife and family having in the meantime resided thereon.

In the case of Bray *v.* Colby (2 L. D., 88), it was held that—

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

In the same case the Department also held—

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

In the case at bar, the entryman's wife did not allege her husband's abandonment as the ground upon which she based her application to be allowed to make entry in her own name. On the contrary she stated her belief that her husband was dead, as he had written four years before that he would soon return home. His not returning convinced her he was not alive.

The Department has uniformly held that the residence of a settler is presumed to be where his family resides.

It was held in the case of Stroud *v.* De Wolf (4 L. D., 394), that "in the absence of proof to the contrary, the place where a married man's family resides is held to be his residence."

The same doctrine is laid down in Story on Conflict of Laws, Sec. 47.

From the foregoing it would seem that Mahoney has, in contemplation of law, complied with the provisions of the homestead act in the matter of residence. It also appears that he has complied with the law in the matter of cultivation and improvements, the latter being worth at the date of final proof the sum of $200.

Besides Mahoney's return, and his acts subsequent thereto would seem to condone his absence. The fact that after making final proof he conveyed to his wife all his interest in the tract, and his subsequently joining her in a deed of the same to F. F. Thrasher, would also seem to indicate good faith, and to show that he had not intended leaving his family without making provision for their maintenance and support.

Your decision therefore holding for cancellation the homestead entry of Florence Mahoney is reversed.

Inasmuch, however, as Mahoney's final proof was not made within the life time of the original entry, I direct that the case be submitted to the Board of Equitable Adjudication.

This disposition of the case also disposes of the application of W. F. Thrasher to contest, as in this way the purchase of Fannie H. Thrasher his wife, will be protected. Besides this contest was initiated to secure a preference right of entry and thus ensure title to the tract in case Florence Mahoney's entry was canceled.

CONFLICTING SETTLEMENT RIGHTS—DESERT LAND ENTRY.

PADGETT *v.* BELL.

Settlement and improvement before survey on land included within the known settlement right of another, though in good faith, do not confer any right as against the prior settler, but are valid as to the land covered thereby and not in conflict.

Land covered by the improvements of a *bona fide* settler is not subject to desert land entry.

First Assistant Secretary Chandler to Acting Commissioner Stone, June 20, 1889.

In the case of Elijah Padgett *v.* John T. Bell, before me on appeal from the decision of your office, dated April 4, 1887, the land in controversy is the S. ½ of the SE. ¼ of Sec. 2, and the N. ½ of the NE. ¼ of Sec. 11, T. 7 S., R. 13 E., Hailey land district, Idaho.

The plat of said township was filed in the district land office March 31, 1885. On the 26th of the same month, Bell made desert land entry for the west eighty of the land in dispute, together with the forty acres adjoining the same on the north, and on April 16th following, he made homestead entry for the east eighty of the disputed tract, together with seventy odd acres adjoining same on the north.

On May 22, 1885, Padgett applied to enter the disputed tract as a homestead, alleging settlement and residence thereon since December, 1883. His application to enter being denied, because of said prior entries, he, on the next day, filed his duly corroborated affidavit of contest against Bell's said entries, and asked that a hearing be ordered to determine the rights of the respective parties to said tract.

In his affidavit he alleges, among other thing, that at the time he settled and established his residence on said tract, "it was unclaimed, unappropriated, and unsettled public land."

The hearing asked for was subsequently duly had, and resulted in a decision by the local land officers, awarding to Padgett the west eighty and to Bell the east eighty of said tract.

From this decision each of the parties appealed, or attempted to, and on appeal the decision of the local office was affirmed by your office. The case is here on appeal by Bell, and he insists that your office erred, 1st: In finding that Padgett, by reason of his improvements, or cultivation, or otherwise, had any prior claim to any portion of Bell's desert land entry; 2d: "In finding at all for Padgett, the testimony showing he had sold, parted with, and relinquished any and all right to any of the said land at time of contest."

The land in controversy is situated between a high rock bluff on the east and Snake river on the west, and is about a mile and a half south of where the Malade river enters Snake river from the east. Bell's homestead claim extends along the rock bluff for nearly a mile, and his

residence is on the north smallest legal subdivision of the same, about a mile south of the Malade river, and about three quarters of a mile north of Padgett's house. He established his residence there in 1875. Between that time and the time Padgett established his residence on the northeast quarter of the tract in dispute—which was in December 1883—Bell built a fence from said bluff to the river, at a point south of his house and north of the tract in dispute. This fence, with the natural boundaries mentioned, seems to have afforded fair protection to the crops raised by Bell between the dates mentioned. The quantity of land thus inclosed, as loosely estimated by witnesses, is from four to eight hundred acres. At the time of Padgett's settlement the land south of said fence was open and without such improvements as indicated that it was claimed as a homestead, and Padgett testifies, that at the time mentioned Bell claimed the land within the described inclosure as a homestead and timber claim.

Padgett's house is on the SE. ¼ of the SE. ¼ of Sec. 2, and near the center of the one hundred and sixty acre tract in controversy. His improvements consist of a house, or "dugout," in which he has continuously resided since December 1883, a chicken house, irrigating ditch, about 15 acres of land cleared of willows and sage brush, and of which from five to seven acres were cultivated as a garden or truck patch in 1884 and 1885. These improvements are valued at from two hundred to three hundred dollars, and a portion of the land improved by Padgett is on the eighty in dispute embraced in Bell's desert land entry.

Bell's residence has been continuous, and since 1875 he has annually cropped a portion of his homestead claim. His improvements consist of a dwelling house, various outbuildings, orchard—partly in bearing—grape vines, grass plats, ornamental trees, plowed lands, etc.—all valued by contestee at twenty-five hundred dollars. In January, or February, 1882, Bell, assisted by James Edster, measured the east and south lines of the land he then intended, as he testifies, to claim as a homestead. Starting at the township line, he says, they ran south, or nearly south for not quite a mile, and put up a stake on the southeast corner, then ran west a quarter of a mile and put up another on the southwest corner of the land so measured, and marked each stake, by writing thereon, either "J. T. Bell" or "John Bell's homestead." The stake placed on the southwest corner of the land measured is within from five to ten rods, Bell thinks, of the southwest corner of his desert land claim.

It will be seen from this testimony, that Bell's intended homestead included a part of the land afterwards entered as a homestead and a part of his desert land claim.

Bell further testifies, that the land measured in 1882 for a homestead is a narrow valley, inclosed on the east side "by a wall-rock, three hundred or four hundred feet high, and on the west side covered by a bed of lava rocks extending from the river bluff about half way across the

desert land entry;" and that only about one-half of each of his claims is arable land, the government survey running the east line of his homestead over on the wall-rock, for three quarters of the length of said line, instead of along its base, where the line measured by him in 1882 was run.

It is shown by a preponderance of the evidence, that Padgett, prior to his settlement, had notice of Bell's older settlement claim to the land on which Padgett built his house and established his residence. It is also satisfactorily shown, that Bell, at the time he made his desert entry, had notice of Padgett's improvement on and settlement claim to the south eighty included in said entry, the same being the west eighty of the land in controversy.

Bell's attorney, in his argument in support of the first assignment of error, contends that Padgett was a wilful trespasser on the claim of another and not a settler in good faith on public land; that by his settlement on Bell's homestead claim he did not initiate a valid claim to the eighty acre tract awarded to him by the decision of your office, and that the work done by Padgett on said tract should not be held to except it from desert land entry.

No decision has been cited which sustains the position taken by appellant in argument, nor have I been able to find any authority directly in point on the question raised. The case of Oliver *v.* Thomas *et al.* (5 L. D., 289), cited as being in principle like the present case, differs from it in the material fact that in the case cited the land settled upon was, at the time of settlement, segregated from the public domain by a homestead entry; and it seems to me that the case cited carries the doctrine contended for by appellant to its utmost limits, and that it can not justly be extended to the case under consideration.

The land on which Padgett settled was uninclosed and unsurveyed public land, and though he had notice of Bell's claim, he also knew that under the settlement laws Bell could legally hold only one hundred and sixty acres of unsurveyed land, and he had apparently good grounds for believing that Bell was claiming more land than he was entitled to hold as a settler. Bell had, with the assistance of natural barriers, inclosed a much larger tract of land than a settler could legally hold on unsurveyed public land, and Padgett might reasonably conclude, notwithstanding said claim, that the tract in controversy was open to settlement.

The facts, in my opinion, show Padgett to have been a settler in good faith, and though after survey his house and the main part of his improvements were found to be on land rightfully included in Bell's homestead entry, yet that fact did not make him a trespasser *ab initio*, nor prevent his settlement claim attaching to the other vacant public land, which he intended at the time to enter, and on which he had prior to survey made improvements. In my opinion, it was not error to hold that

Padgett's improvements on said west eighty excepted it from Bell's desert land entry.

At the hearing an instrument in writing, dated March 31, 1884, and purporting to be a bill of sale from Padgett to Robert L. Justice, for the land in controversy, was introduced in evidence by Bell. The consideration expressed in this instrument is fifty dollars, and it purports to have been signed in the presence of R. C. Smith and W. F. Thompson, and to convey to said Justice Padgett's title to one hundred and sixty acres of unsurveyed land, on which he had lived without being molested since December 15, 1883. About April 8th to 10th, Bell and Padgett were each arrested, because of a conflict that had taken place between them, and taken by a constable to Shoshone. Padgett testifies, that, just before the constable came for him, Smith, one of the witnesses to said instrument—he says the other was not present—came to his "dug-out" with it and asked him to sign it for him (Smith); that he asked what the writing was, and Smith said, "nothing but a description of the land; hurry up here comes the constable to take you to Shoshone . . . . . it is nothing but to show that you have lived here, and if you are kept away we can help you to hold the ranch . . . . . Pollard (the constable) was close by, and I signed it in a hurry." He further testifies, that he did not read said instrument; that he never made any contract or agreement to sell his claim and improvements to Justice; that Justice never paid, or offered to pay, him a dollar of the consideration mentioned, never demanded possession, and that he (Justice) does not claim any right or title to the land under the pretended bill of sale. This testimony stands uncontradicted, and Padgett's residence on said land since the signing of said instrument has been continuous.

This evidence does not show that Padgett has sold, relinquished, or parted with his possessory right, or settlement claim to the land in controversy, or that he does not in good faith desire to enter said tract for his own exclusive use and benefit. Appellant's second exception to the decision of your office is therefore not well taken, and said decision is affirmed.

There appears to be some doubt entertained as to whether Padgett is willing to enter the eighty acres awarded to him, unless he is also allowed to enter the other eighty in controversy. If Padgett shall exercise his preference right to enter the eighty awarded to him within thirty days from the receipt by him of notice of this decision, Bell's desert land entry to that extent will be canceled, otherwise it will remain intact.

COMMUTED HOMESTEAD ENTRY—RESIDENCE.

MARTHA BLAKE.

The rule requiring six months of actual residence immediately preceding entry is for the purpose of testing the claimant's good faith, but where such good faith is manifest, temporary absences, during any period of the inhabitancy, occasioned by poverty or ill health, may be properly excused.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, June 20, 1889.

I have considered the case of Martha Blake on her appeal from your office decisions of October 16, 1885 and May 6, 1886 involving her homestead entry, as commuted to cash entry, for S. E. ¼ Sec. 24, T. 111 N. R. 73 W. Huron Dakota land district.

It appears from the record that on May 23, 1883, the said Martha Blake, then unmarried and named Fuller, made homestead entry for said land, and on April 8, 1885, she made final commutation proof and on payment of the government price received final certificate.

The published notice of making final proof was in her unmarried name although she had been married to Blake in January previous.

The claimant and her witnesses testified that about June 1, 1883, she established her actual residence on the tract in question; that the improvements consisted of a house eight by ten feet in size, with ten acres in cultivation, value $100. That her residence had been continuous except two or three times, once for a little over two months being absent in order to earn money to live upon and to improve her land.

With her final proof she submitted a special affidavit stating the date of her marriage, and also that from the last of May to December 1st 1883, she had resided continuously on the tract, but being then taken sick she was obliged to go to Pierre for medical treatment, and that at the end of three months having nearly recovered she returned to her said land and remained there continuously except when sick or absent to earn a living, and when so absent it was never for more than a week at a time.

Upon this evidence your office in letter "C" of October 16, 1885, to the local officers said.

> I am of the opinion that this is an attempt to obtain title to the land through fraud and in evasion of legal requirements, therefore the original and commutation entries are held for cancellation and the present final proof rejected.

Subsequently the counsel for Mrs. Blake filed a motion in your office for review of the said decision, supported by her own affidavit and that of four others, stating substantially the same facts as above set out, and in addition it is alleged that from the first of June 1883, until January 1, 1884, she was not absent from said land at all, but that in January 1884, having exhausted her means she went to a neighboring town to earn money for her support. She returned to the land March 1,

1884, and remained there until July. During the spring of 1884 she caused the three acres previously broken to be sowed to wheat, had eight acres more broken, set out six evergreens, seventy-seven box-elders and maple trees, also a number of cottonwoods and flowers and shrubs.

In July 1884, she was taken sick and was confined to bed until October, and that she was advised by her physician that it would not be safe for her to remain alone upon her farm during the winter and did not return to her land until April 1885.

That she spent upon her land all the money she earned except barely enough to feed clothe and maintain herself and that she has only been absent from the land since final proof because of ill health.

Your office by letter of May 6, 1886, refused to grant the motion for review but modified the former decision to the extent of "allowing the claimant ninety days to make new proof after proper advertisement wherein she must establish her residence in good faith in every particular," in default of which the entry was again directed to be canceled.

It fully appears that she established actual residence upon her land about the last of May or first of June, 1883, and that her residence was actual *bona fide* and continuous until December 1, fully six months, and that her subsequent absences were caused by sickness and by the necessity of earning a livelihood.

I think you are too harsh in your conclusions when you say, "I am of opinion that this is an attempt to obtain title to the land through fraud, and in evasion of legal requirements."

To my mind the evidence clearly shows that the entryman settled upon the tract in good faith, built a small house and resided therein for such length of time as could be expected, struggling as she was with poverty and ill health. As evidence of her good faith, she performed manual labor in the field, harvesting her crop. Surely if she desired to commit a fraud upon the government in securing this land, she would not have taken her place in the field as a harvest hand. I have no doubt that the cause of her sickness is largely attributable to her exposure, trials, privations and manual labor upon the tract in seeking to comply with the law. Under such circumstances the government should treat her tenderly and justly. It has been repeatedly held, that—

> The rule requiring actual residence of the claimant on the land for six months preceding entry, is for the purpose of testing the good faith of the claimant; but where the good faith of the settler is otherwise sufficiently established, temporary absences during any period of the settlement for the purpose of earning a living, not inconsistent with an honest intention to comply with the law, are accounted a constructive residence.

Israel Martel, 6 L. D., 566; Henry H. Harris, 6 L. D., 154; William A. Thompson, 6 L. D., 576; Evan L. Morgan, 5 L. D., 215; Nellie O. Prescott, 6 L. D., 245.

In my judgment the evidence is not sufficient to sustain the conclusion

of fraud and evasion of law upon which your decision of October 16, 1885, is based.

Both of said decisions are accordingly reversed and said cash entry may be passed to patent.

REPAYMENT—ASSIGNEE.

D. D. WINTAMUTE.

Repayment may be allowed where the entry was allowed on final proof irregularly submitted, and the entryman is unable to make new proof and publication as required.

The transferee holding the present interest in the land to which title has failed is the party entitled to repayment.

First Assistant Secretary Chandler to Acting Commissioner Stone, June 20, 1889.

February 11, 1888, D. DeWitt Wintamute made application for the repayment to him of the money paid by William M. White for the SE. ¼ of Sec. 27, T. 26 S., R. 23 W., Garden City land district, Kansas—the same being Osage trust and diminished reserve lands. By your office decision of June 1, 1888, this application was denied, on the ground that the entryman (White) had not made proof before the officer, nor at the date advertised for making the same, and because he was guilty of laches in not giving new notice and making new proof as required by your office. From this decision Wintamute prosecutes his present appeal.

In his said application Wintamute says, that the described tract of land is in Ford county, Kansas, and that he is the owner of the same. His application is accompanied with the following documents:

1st, Receiver's receipts to White for the first, second, third and fourth payments for said land, together with interest ($6.16), amounting in all to the sum of $206.16.

2d, A certificate of the register of deeds of Ford county, Kansas, that the records of his office show, that D. D. Wintamute is the legal owner of the described tract of land, "and that the only instruments filed for record in my office, affecting or referring to said land, are receiver's receipt No. 142, issued at the Garden City, Kansas, land office, dated January 2, 1885, in the name of William M. White, and a warranty deed, executed on the 28th day of April, 1886, by William M. White to D. D. Wintamute." This certificate is dated "February 11, 1888, 3 P. M."

3d, A relinquishment by William M. White to the United States of all his right, title and interest in and to the described tract of land. This instrument was signed and acknowledged before a notary public at St. Louis, Missouri, on February 6, 1888.

4th. A relinquishment by D. DeWitt Wintamute to the United States of all his right, title and interest in said land, "subject, however, to the payment by the United States of the entry money paid by said White to the United States for said land, and said Wintamute hereby stipulates that on such payment being made to him, that this relinquishment by him shall become absolute."

The relinquishment of White appears to have been filed by Wintamute at the same time that the latter filed his conditional relinquishment above mentioned, and his application for repayment to him of the money paid by White for the land.

It also appears from the letter of the register, dated February 14, 1888, transmitting to your office the papers above referred to, that accompanying said papers when they were filed in the local office was the declaratory statement application of Frederick A. Carrier to file for the same tract.

White completed payment for the land, and made entry thereof January 2, 1885. He sold said land to Wintamute April 28, 1886.

The action of your office requiring new notice and new proof was under date August 19, 1887.

The appeal of Wintamute from your office decision denying his application for repayment sets out, among other things, that White went on to the land in April, 1882, and resided there until April, 1886, when he sold to appellant, and soon after left the State and moved to St. Louis, Missouri, where he has since resided. If this statement, as to White's removal from the State, be true (and it finds corroboration in the fact that said White's relinquishment was executed before a notary public in the city of St. Louis, Mo.), it tends to explain his failure to comply with the requirements of your office that he make new publication and new proof. As the only objection to the original proof was, that it was not all made at the time and place advertised, and as with full knowledge of this fact it and the money in payment for the land were accepted by the local officers, I am of the opinion that the case is one which fully justifies repayment, and were the foregoing all the facts disclosed by the record, Wintamute's application should be allowed.

It appears, however, from your office letter of May 23, 1888, a copy of which is in the record before me, that the register and receiver, on April 21, 1888, transmitted to your office the application of one Benj. F. Click to contest White's entry, with which was an abstract of title, showing that Wintamute had, on January 26, 1888, sold the land in question to Frederick A. Carrier for an expressed consideration of $550.

Click's application to contest was in effect refused by your office, but the disclosure made by him as above suggests a doubt as to whether repayment can properly be made to Wintamute. If he has sold to Carrier, and received the consideration for the land, Carrier would *prima facie* be the party entitled to the repayment. But he is not asking it, though according to the abstract of title, he had purchased from Winta-

mute prior to the application of the latter for repayment. Said application may be pursuant to a complete understanding between the two; but this can not be assumed, and on the facts as they now appear Wintamute's application can not properly be allowed.

The parties in interest will be allowed to make a further showing, with a view to determining to whom repayment should be paid.

Your office decision is modified accordingly.

PRE-EMPTION FINAL PROOF—TRANSFEREE.

FRED. G. WAITE.

The submission of pre-emption final proof a few days prior to the expiration of the requisite six months of actual residence, does not, in the absence of protest, call for new proof, where the land is held by a subsequent purchaser without notice.

First Assistant Secretary Chandler to Acting Commissioner Stone, June 20, 1889.

I have considered the appeal of Fred. G. Waite, transferee from the decision of your office dated December 8, 1887, requiring new publication and new proof in support of pre-emption cash entry No. 2220 of the N. ½ of the NE. ¼ and the N. ½ of the NW. ¼ of Sec. 29, T. 13 N., R. 20 W. made May 29, 1884, at Grand Island land office in the State of Nebraska. The record shows that the final proof was made after due notice, and shows that the claimant was qualified to make entry under the pre-emption laws; that he settled upon said land November 19, 1883, and began actual residence there on December 1st, same year; that his residence was continuous up to date of final proof; that his improvements consisted of a sod house fourteen by sixteen feet, with a door—one window; a sod stable fourteen by fifteen feet; hen-house six by eight feet; corral six by eight rods, and a mill,—all valued at $250; that claimant has broken about five acres of the land. The final proof was accepted by the local officers and final certificate issued thereon. Your office rejected said proof for the reason that the same did not show actual residence on the land for the full period of six months. The appellant has filed with his appeal, an abstract of title, showing that the entryman sold said land on July 13, 1887, and his own affidavit alleging that he bought said land from the grantee of the entryman on February 20, 1888, in good faith without any notice of any defect in the title, and he avers that the entryman is a non-resident of said State and it would be impossible for him to get him to make new proof as required by said decision of your office. Since there was no protest and no objection to the allowance of said proof, and the only defect is, that it was made a few days prior to the expiration of six months of actual residence on the land, and the land has been sold in good faith to a subsequent purchaser without notice. I am of the opinion that new proof is not necessary, and that said entry should be passed to patent. The decision of your office is modified accordingly.

COMMUTED HOMESTEAD—IMPROVEMENTS—RESIDENCE.

HELEN E. DEMENT.

The degree and condition in life of the entryman may be properly taken into consideration in determining whether the improvements show good faith.

Temporary absences occasioned by poverty, and for the purpose of securing a livelihood, may be excused, where residence has been established, and an honest intention to comply with the law exists.

First Assistant Secretary Chandler to Acting Commissioner Stone, June 20, 1889.

I have considered the appeal of Helen E. Dement from the decision of October 26, 1887, rejecting her commutation proof and holding for cancellation her original homestead entry of the W.½ of NE.¼ and W.½ of SE.¼, Sec. 32, T. 108 N., R. 67 W., Mitchell, Dakota.

It appears that Dement made homestead entry of above tract October 26, 1883, made settlement thereon April 12, 1884, and made commutation proof July 30, 1885. Her improvements consist of a house, eight by ten feet, a well (not finished), five or six acres broken and cropped two years, one hundred and three growing trees—total value $60.

Her proof shows that she is a single woman, that she remained upon the tract from April 12, 1884, to some time in August, 1884, then left and was absent until January 24, 1885, when she returned and remained upon the land until July 30th following.

August 7, 1885, the local officers accepted payment for the land and issued receipt therefor.

Your office was not satisfied with claimant's proof, and on July 28, 1886, she was called upon to furnish a corroborated affidavit, showing whether she had maintained continuous residence upon the tract before and since final proof.

April 29, 1887, the local officers forwarded a letter from claimant, dated Polo, Ogle county, Illinois, in which she stated that on April 12, 1884, she had a house built upon her claim, with door, window and floor in it, also bed and bedding, and stayed all night; during the month of May she had over five acres broken and planted to corn, potatoes and beans, she had also three hundred trees planted; that "being a single woman it was not prudent to stay alone all of the time; I stayed with my brother, who lived a mile away. During these six months I stayed every two weeks and sometimes oftener all nights on my claim, and a good deal of the time through the day." She also stated in this letter, that in the spring of 1885 she boarded with a family about two miles from her claim, but stayed and worked upon the tract as much as her health would permit, sometimes nearly a week at a time, and was not off her claim more than ten days at any one time before making final proof, and that since proof she has been "serving to get money to pay back the money I hired to make my final proof."

This letter was sworn to by claimant and corroborated by Mary E. Curtis.

October 26, 1887, your office decided that claimant's proof was not satisfactory, and held her original entry and cash certificate for cancellation.

January 28, 1888, claimant addressed another letter to your office, in which she reiterated many of the statements contained in her former letter, and added,

> It was impossible for me to stay on my claim all of the time, for I had to work for my board. I complied with the law, as far as I was able in every respect. It was impossible to get money for work done in that part of the Territory, and I had to go back to the States where I could get pay for the work I done; the work I had to have done was such I could not do myself, and if I had not earned money I never could have improved my claim. I supposed after I had fulfilled the law in every respect, I had a right to prove up and go where I pleased, until I could get means to make further improvements.

From the foregoing it would appear that claimant acted in good faith and that her residence and improvements were such as her circumstances would warrant. There is no adverse claimant and she has paid the government the stipulated price for the land. She is still the owner of the tract, and did not dispose of the same after receiving final certificate. The Department has held that no fixed rule can be established which shall govern in every case that may arise relative to the good faith of the applicant. It is right and proper to take into consideration "the degree and condition in life of the entryman" in determining whether the improvements show good faith.

In the case of Holz *v.* Fox (2 L. D., 162), it was held that the entry should be allowed to stand, in case where a homestead claimant, who having established a residence upon a tract, went into service, the absence being necessary to obtain a livelihood. The facts in that case are almost similar to those in the case at bar. In that case claimant began to reside upon the tract on November 27, 1881, and after remaining two nights and one day, went out to service, returning on April 16, 1882. She remained six weeks on the land and again went out to service. In that case my predecessor, Secretary Teller, held: "I am of opinion that in view of all the circumstances, Miss Fox established a *bona fide* residence on the land."

In the case of Sandell *v.* Davenport (2 L. D., 157), it was held that where a claimant temporarily leaves his land for the purpose of earning an honest livelihood, coupled with a *bona fide* intention of complying with the law, such absence is accounted a constructive residence and compliance with legal requirements.

In harmony with the foregoing decision, in view of claimant's apparent good faith, of her poverty, and of the expense of making new proof, I am of opinion that the proof she has already made should be accepted, and that patent should duly issue thereon.

The decision of your office is accordingly reversed.

PRE-EMPTION—RELINQUISHMENT—TRANSFEREE—TIMBER LAND.

DANIEL R. MCINTOSH.

The relinquishment of an entryman after he has parted with all his interest in the land is null and void.

A transferee who has notified the local office of his interest is entitled to notice of all action affecting the entry under which he holds.

Land valuable for the timber growing thereon may be acquired under the pre-emption law, but the final proof should clearly show that it was taken in good faith for a home, and not for the value of the timber alone.

In the absence of an adverse claim, a transferee may submit supplemental proof, where the final proof is found insufficient but bad faith is not apparent.

First Assistant Secretary Chandler to Acting Commissioner Stone, June 21, 1889.

I have considered the appeal of Daniel R. McIntosh, from the action of your office dated July 22, 1887, holding for cancellation cash entry No. 6,187, upon lots 1 and 2, and S. ½, NE. ¼, of Sec. 1, T. 1 N., R. 1 E., Humboldt land district, California, and also from your decision of October 19, same year, cancelling said entry.

The record shows that on January 10, 1884, Charles G. Lane, filed pre-emption declaratory statement No. 5,210, for said described tract alleging settlement thereon July 24, 1883. On May 19, 1884, in accordance with published notice he made final proof and payment before the register and receiver at Eureka, and final cash certificate was issued thereon that day. On the same date at 2:30 p. m., John McCarthy appeared by one Frank McGowan, his attorney, and filed two affidavits, one of which was sworn to by Thomas A. Smith, the other was executed by said McCarthy.

Smith in his affidavit alleges—

> That he is well and thoroughly acquainted with lots 1 and 2, and S. ½ of NE. ¼ Sec. 1, T. 1 N., R. 1 E., H. M. . . . . That he has frequently traveled over the same and surveyed the sections lines of said land . . . . under a government contract . . . . and thus became and is familiar with the land, its character and the present and prospective value of the same; the use to which it can be ordinarily applied and its adaptability to agricultural purposes. That said land and the whole thereof . . . . is heavily timbered with a valuable growth of redwood timber; there are a great many of said redwood trees to each acre . . . . some of which will measure six or seven feet in diameter; that said trees are so close together and so deeply rooted that they make the cultivation of said land well nigh impossible; that the chief and only value of said land is the timber growing thereon; that said John McCarthy filed on said land under the provisions of the act of June 3, 1878, on the 7th day of January, 1884. . . . . That your affiant has no interest of any kind or character in said land and is in no way related to either of said parties.

In McCarthy's affidavit it is alleged that he is ready—

> To prove all the facts set forth in the affidavit of Thomas A. Smith . . . . and to prove the further fact that said Lane has not complied with the requirements of the pre-emption laws with regard to cultivation, improvements, or habitation; that said Lane seeks to acquire said land for its speculative value as a timber land

claim; that said Lane has not made the same his home or in any manner or form complied with or conformed to any requirement of the pre-emption laws. Wherefore said McCarthy asks that he be permitted to show these facts and that the Commissioner order a day for such purpose.

On April 17, 1886, your office after considering the foregoing affidavits informed the local officers by letter "G" as follows:—

An applicant to enter or file for land under the act of June 3, 1878, is required to show in addition to the fact that the same is valuable mainly for the timber thereon, that the land is unoccupied and unimproved at the date of application. If McCarthy desires to contest the claim of Lane, on the ground of invalidity or for other reasons, the matter will be considered upon receipt of his affidavit to that effect, corroborated by one or more witnesses. Notify him accordingly, and advise him that said entry will be held in suspension and he allowed to furnish such affidavits.

On May 18, 1887, McCarthy having failed to comply with the foregoing requirements, your office by letter "G" directed the local officers to "report action taken in the case", and by letter dated June 9th, the register (S. C. Brown) informed your office that "I can find no record as to anything having been done in the case. I have this day seen Frank McGowan, who stated that he was attorney for McCarthy, and that nothing was done, his client McCarthy withdrawing from the case."

On July 22, 1887, your office held the entry for cancellation on the ground that "The improvements are insufficient and do not show good faith on the part of claimant," and allowed Lane seventy days from date of mailing notice, to appeal or show cause why his entry should not be canceled.

On August 9th, a notice in accordance with the foregoing decision was mailed to the entryman, and on September 21st, Lane filed a relinquishment of his interest in and to said described tract.

On October 19, 1887, your office canceled said cash entry and on December 7, 1887, Daniel R. McIntosh, as transferee, filed an affidavit of intervention in which among other things he alleges as follows:

That on the 22nd day of May, 1884, said Lane conveyed said land . . . . to Laura Wilson, a widow woman, of said county and state, that on the 15th day of October, 1884, said Wilson, executed to one Emma F. View, a mortgage on said land. That on the 11th day of November, 1886, said Laura M. Wilson, conveyed said land for the consideration of the sum of $1000 to said Dan R. McIntosh, which said deed of conveyance was, on the 21st day of November, 1886, duly recorded in the office of the recorder of Humboldt county, State of California. That on the 11th day of November, 1886, said Dan R. McIntosh, was, ever since has been, and is now the owner and holder of said land, That on October 31, 1887, one Margaret Mathews, a married woman, applied to purchase said land under the act of June 3, 1878. That your affiant had no notice either actual or constructive of the contents of the Commissioner's said letter dated July 22nd, 1887, or of the notice of such contents to said Lane, or of said Lane's relinquishment as aforesaid, or of the Commissioner's said letter of October 19, 1887, cancelling said entry, until the 15th day of November, 1887, That said Dan R. McIntosh notified the register of the U. S. land office, at Humboldt during the month of December, 1886, that he was the owner of the land.

On December 20, 1887, McIntosh by his attorney, filed a request that said cash entry be re-instated and the local officers advised in the premises and that the case be submitted to this Department on appeal.

On January 6, 1888, your office re-instated the entry and on March 6th, transmitted the papers in the case for my consideration.

If Margaret Mathews applied to purchase this land under the act of June 3, 1878, as stated in the intervenor's affidavit, said application must have been rejected by the local office since there is no minute on the records of your office of any such application.

The relinquishment of Lane upon which this entry was canceled was executed and filed in the local office, long after he had parted with all the interest he ever had in and to this tract. At the date of the execution of this relinquishment Lane had nothing to relinquish and said instrument must be null and void. Falconer *v.* Hunt, *et al.* (6 L. D., 512).

The transferee and appellant here not only placed his deeds on record but notified the local officers of his interest in the land and should have been notified of all action had in relation to said entry. The action of your office re-instating said entry and allowing the transferee to appeal from the decision holding said entry for cancellation, was therefore proper, and the case will be considered on its merits.

From an examination of the final proof it appears that the entryman and his two witnesses testified that Lane was a native born citizen of the United States, age twenty-two years, and a single man. On July 24, 1883, he made settlement on the tract by laying the foundation of a house, and on August 10th, same year, he established actual residence on the land which was continuous. His improvements consisted of a house about eighteen by twenty feet, one door, one window, a floor, a chimney and fire-place. He cleared and broke about three quarters of an acre and fenced the same and raised grain, potatoes, and beans thereon. Total value of his improvements amounted to $300.

This proof is not satisfactory. The improvements are very small although the value placed upon them is large. From the facts set forth in the proof it can not be determined that the entryman ever in good faith established his residence on this land. No statements are made as to the kind or amount of furniture he placed in the house. The indefinite character of the final proof taken in connection with the character of the land and the further fact that he sold the land three days after making his final proof are sufficient to create a suspicion as to Lane's good faith in this matter. Since, however, bad faith is not positively shown the transferee will, in the absence of an adverse claim, be allowed to submit supplemental proof in support of said entry. This proof must be submitted within ninety days after notice of this decision and should show with particularity all that Lane did on or in connection with said land up to the date of his final proof. This proof should show what improvements were made there, giving the value of each separate item. The local officers should be instructed to inquire as to the character of the land. Land valuable for timber growing thereon may be acquired under the pre-emption law but the final proof should

clearly show that it was taken in good faith for a home and not for the value of the timber, alone.

You will consider such proof as may be submitted under this decision in connection with that already in the case and pass upon the sufficiency thereof. If no supplemental proof shall be submitted that already in the case will be rejected and the entry canceled.

The decision appealed from is accordingly modified.

SWAMP GRANT—PRIVATE ENTRY—EQUITABLE ADJUDICATION.

STARR v. STATE OF MINNESOTA.

A *prima facie* valid claim under the swamp land act while of record reserves the land covered thereby from sale or other disposition.

A private cash entry for land included within a prior swamp land claim will be suspended, with opportunity given to the entryman to show that the land did not in fact pass under the swamp grant.

An entry thus allowed may be sent to the Board of Equitable Adjudication, if it be shown that the land was not of the character granted to the State.

Secretary Noble to Acting Commissioner Stone, June 21, 1889.

I have considered the appeal of John Starr from your office decision of March 17, 1888, holding for cancellation the private cash entry made by him August 1, 1887, of the SW. ¼ of the SW. ¼ of section 12, T. 109 N., R. 10 W., Tracy, Minnesota, for conflict with the claim of the State of Minnesota, under the swamp grant of March 12, 1860.

The claim of the State to said tract was filed in December, 1876, and made a matter of official record in September, 1877. It is still pending undetermined.

When the cash entry of Starr was made in August, 1877, the claim of the State was then of record; it was *prima facie* valid and so long as it remains uncanceled, no disposition of the land can be made.

The cash entry having been allowed, it may remain suspended in order to afford the entryman an opportunity to file affidavits, alleging that the tract is not of the character that passed to the State under the swamp land grant. If such affidavits are filed, you will order a hearing, and if it is proven that the tract was not swamp land at the date of the grant, the entry will be referred to the Board of Equitable Adjudication, in accordance with the ruling in the case of Frank V. Holston (7 L. D., 218). If, however, the entryman fails within sixty days from receipt of notice hereof to file such affidavits, or if, after such affidavits are filed and a hearing had thereon, the claim of the State is sustained, the cash entry of Starr will be canceled. Your decision is modified accordingly.

PRE-EMPTION—FINAL PROOF—RESIDENCE.

LEWIS H. PENNELL.

In determining whether the claimant has in good faith complied with the requirements of the law, the degree and the condition in life of the entryman may be properly considered.

Inhabitancy is not impeached, after residence is once secured, by absences necessary to secure means for the improvement of the land and payment of the purchase price.

First Assistant Secretary Chandler to Acting Commissioner Stone, June 21, 1889.

I have considered the appeal of Lewis H. Pennell from the decision of your office, dated November 3, 1887, requiring him to give new notice and make new proof in support of his pre-emption cash entry No. 754, of the NW. ¼ of Sec. 28, 28 N., R. 22 W., Valentine, Nebraska land district, because "it does not appear that the claimant has shown sufficiently good faith in the matter of improvements, residence and cultivation."

The record shows that said Pennell made final proof after due notice, by publication, before the clerk of the district court at Ainsworth, Nebraska, on January 12, 1885. The proof showed that the claimant was duly qualified; that the land was subject to settlement and entry under the pre-emption laws; that claimant first settled on said land June 18, 1884, and established his actual residence July 8, same year; that his residence was continuous except when away at work at his trade (carpenter) and that he had no other home; that his improvements, consisting of a house ten by twelve feet, a well and four acres of breaking are worth $75.

On January 26, 1885, the claimant filed his ex-parte affidavit in which he swears that he was a poor man and compelled to work for a living; that he improved said land as much as he was able; that he was not away from the land from the time of establishing his residence thereon any more than he was compelled to be in order that he might earn a living by his labor, and at no time to exceed two weeks. This affidavit, together with said final proof, was satisfactory to the local officers, and on February 7, 1885, they issued cash certificate for the land.

On September 3, 1887, your office "called for affidavit of continued residence and non-alienation," and on October 4, 1887, the register transmitted the affidavit of the claimant, in which he swears that he resided on the land and made it his home from before the date of entry and until the spring of 1885, and was only absent to obtain employment and procure means to live upon; that he cannot give dates when absent, but he lived on the land all the time he possibly could; that he has not sold or disposed of said land, and that he improved the same in good faith.

On November 3, 1887, your office considered said affidavit and the entry papers and required new notice and new proof as aforesaid. With his appeal, claimant has filed his affidavit in which he swears that he took said land in good faith; that he is a single man, a carpenter by trade and was at that time dependent upon his daily labor for support; that during the months of July, August, September, and October, of said year, he was away from said land probably half of the time, "solely for the purpose of earning a living," and that during said time, three weeks was the longest time that he was absent at any one time; that from November 1, 1884, until April, 1885, claimant was not absent from the land at all; that he has acted in the best of faith in every particular, in trying to procure a home for himself on said land; that he has never alienated said land in any way; that the land is located in a little valley among the sandhills in Brown county, and that the settlers who settled at the same time as the affiant, and are the only persons who knew about his settlement, have proved up and left the country, and that it would be impossible for him to make new proof in support of his said entry.

Since the notice of publication was duly given and the final proof made in accordance therewith, there being no protest or adverse claim, the entry should be passed to patent, unless there is some evidence of bad faith on the part of the claimant. In determining the question of good faith, the degree and condition in life of the entryman should be considered. The claimant swears that he took said claim and did the best he could under the circumstances. That he was poor and had to work out for his living, was not his fault and, in my judgment, since the proof not only does not indicate bad faith, but, on the contrary, shows substantial compliance with the law, the entry should be passed to patent.

While there is no cast iron rule by which all cases can be governed, each case depending upon the circumstances surrounding it, and where they clearly indicate fraud, it should be fearlessly disclosed, yet when it is purely a question between the government and the entryman shall the government presume not only bad faith, but that the entryman and his witnesses have perjured themselves in support thereof? Certainly the circumstances surrounding this case ought to tend to a more charitable view. As I look at it, it ill-becomes the government to accuse its poverty stricken citizens, struggling for a home and an existence, with perjury and bad faith, except upon the clearest and most convincing proof, as disclosed by the circumstances.

The law in its mercy and charity presumes that all men act honestly and comply with its provisions. It never imputes bad faith without proof and when this presumption is supported by the oaths of three witnesses, it ought not lightly be overturned. Besides:

Poverty is accepted as a satisfactory excuse for temporary absences from the land, there being no indications of bad faith on the part of the settler. (Henry H. Harris, L. D., 154.)

The fact of a commutation does not in all cases defeat the plea of poverty when offered as an excuse for absence from the land or a want of improvement. Neither is inhabitancy impeached after residence is once secured by absences necessary to secure means for the improvement of the land and the payment of the purchase price. William A. Thompson, 6 L. D., 576.

The decision of your office is modified accordingly.

INDIAN LANDS—ALLOTMENTS.

By section 4, act of February 8, 1887, allotments of land are provided for Indians not living on a reservation, or for whom no reservation has been made, and to the minor children of such Indians, to the same extent, in the same manner, and under the same restrictions as are enacted in the case of Indians living on reservations, with the added requirement of actual settlement on the part of non-reservation adult Indians.

Orphan children, under eighteen years of age, are not entitled to the benefits of section 4, of said act.

Proof of actual settlement should not be required in the case of allotments under section 4 to minor children.

Non-contiguity of the tracts allotted may be permissible in case of allotments within a reservation, but the ordinary rule, as applied under the settlement laws, requiring contiguity, should be observed in allotments of land outside of a reservation.

An allotment to a minor child, under the fourth section, is not required to be contiguous to that made to the head of the family.

Allotments are made by legal sub-divisions of the section, without respect to the actual area included in such sub-division.

Assistant Attorney-General Shields to Secretary Noble, June 22, 1889.

On October 16, 1888, the register of the land office, at Ashland, Wisconsin, by letter, requested instructions from the Commissioner of the General Land Office in regard to Indian allotments under the act of February 8, 1887 (24 Stat., 388). This letter was referred to this Department, and by it to the Commissioner of Indian Affairs, for consideration and report. Report was made by that office on December 27, 1888, and a further communication from it on the same subject, was sent to this Department, under date of March 21, 1889. Since then said papers have been referred to me, by the First Assistant Secretary, for my views, "on the questions herein propounded."

The first section of the act of Congress, referred to above, provides, that where Indians are located upon a reservation, the lands therein may, by authority of the President, be allotted to them in certain quantities; that is to each head of a family, one quarter section; to each single person, over eighteen years of age, one eighth of a section; and to each orphan child, under eighteen, one-eighth of a section; and to every other single person under eighteen, then living or born prior to the President's order, one-sixteenth of a section: provided, that where the

lands are only fit for grazing purposes double the quantity is to be allotted. Section two of the act authorizes the heads of families to select lands for themselves and for their minor children, and the government agents are to select the lands for the orphans. Section four provides, that where any Indian "not residing upon a reservation, or for whose tribe no reservation has been provided," "shall make settlement" upon any public land of the United States, "not otherwise appropriated," he or she shall be entitled, upon application to the local land office of the district in which the lands are located, "to have the same allotted to him or her, and to his and her children, in quantities and manner as provided in this act for Indians residing upon reservations."

It is thus seen that section one provides for allotments to Indians located upon reservations, and section four for allotments to Indians not residing upon a reservation or for whose tribe no reservation has been made. In addition to these two general classes, the Indians are, for the purposes of this act, subdivided into two other classes: viz, those above eighteen years of age and those under that age. Those above eighteen years of age are again divided into those who are heads of families, and those who are single persons; it being evidently intended that single persons over eighteen and under twenty-one years of age should, *pro hac vice*, be regarded and treated as adults. Those under eighteen years are also divided into the two classes constituting the minor children of heads of families and the children of deceased parents.

The language of section four is not very clear, but rather involved and confused. It requires that the Indian applying for land must have made previous settlement upon the tract and thereupon he shall "have the same allotted to him or her, and to his or her children, in quantities and manner as provided in this act for Indians residing upon reservations." This language could very well mean, that the tract settled upon was to be allotted, to the extent of one hundred and sixty acres, to the settler and his or her children as joint tenants, patents therefor to be issued as provided in section one.

But, viewing the act in all its parts, thus gathering all its purposes and its whole scope, it would seem that it must have been the purpose of Congress to allot to Indians, not living on a reservation, or for whom no reservation has been provided, and to the minor children of such Indians, lands to the same extent, in the same manner, under the same restrictions and limitations, *mutatis mutandis*, as were enacted in the case of Indians living upon reservations; with the additional requirement, however, of actual settlement on the tract applied for by the non-reservation adult Indians. Orphan children, under eighteen years of age, do not seem to come within the benefits of this fourth section, inasmuch as the enumerated beneficiaries therein are the Indian settlers and their children.

The inquiries of the register are as follows:—

Is it necessary when the head of a family applies for an allotment, for his or her minor children, for them to make affidavit of actual settlement. As I understand it, heads of families can take allotments for themselves and for each one of their minor children at the same time. Is it necessary that the land taken should be contiguous, providing there is not enough to fill the allotment? If the quarter section is fractional, and more than one hundred and sixty acres, must the Indian pay the excess as in a homestead entry? Does the Department furnish a register to record the allotments in?

These inquiries are not confined in terms to any particular section of said act, but the register asks generally, "for instructions regarding Indian allotments." The Commissioner of Indian Affairs, however, it will be observed, regards the inquiries as being restricted entirely to the allotments to be made under the fourth section. From the character of some of the questions asked, I am inclined to think this conclusion somewhat questionable.

On September 18, 1887, this Department issued a circular containing rules and regulations in relation to the allotment of lands under the fourth section of said act; but these do not cover all the cases presented by the register.

The circular requires, that an Indian applying for an allotment under said section shall make oath, that, among other things, he has made actual *bona fide* settlement upon the lands he desires to have allotted to him. And, if the applicant, being the head of a family, is seeking allotments for his minor children, he is required to swear to their ages, and "that they are living under his care and protection." This last requirement would seem to negative any idea that an affidavit of residence, by the children, upon the respective tracts applied for, is required by the land office, and, I think, answers the inquiry on this point. Besides, the act nowhere expressly demands such an affidavit; and, in the absence of such express demand, it is not to be inferred that Congress intended in this instance to upset well settled law, and require that a minor child should have a residence separate and apart from that of his parents. I therefore concur in the conclusion arrived at, by the Commissioner of Indian Affairs, that no actual settlement should be required in the case of allotment to minor children under the fourth section.

The next inquiry is, whether it be necessary that the land taken should be contiguous, if there is not enough together to fill the allotment? The Commissioner of Indian Affairs considers that this inquiry is made only in relation to the allotment to minor children under the fourth section. In this I think he is mistaken, as the question is general in its terms and the concluding part clearly refers to allotments to be made of reservations, where there is the possibility of an insufficiency of land within the prescribed limits "to fill the allotment."

In the administration of the settlement laws, it has been the uniform practice of the Land Department to require that tracts of land taken thereunder should be contiguous to each other. Possibly, there may be

some exceptions to this rule, because of peculiar circumstances, but I do not now recall any such exceptions. But the rule stated has been co-existent with the settlement laws, and would seem to be most wise and in entire harmony with the theory of those laws; whilst any other could but result in discord and confusion. The act we are now considering is, in its essential elements, a settlement law. Its immediate purpose is to obliterate the tribal relations of the Indians, so far as to induce them to become individual land-holders; thence, stepping by easy gradations, it is hoped, along the path of civilization into the dignity of citizenship. To make such act effective to accomplish the purpose in view, it was doubtless intended it should be administered, so far as practicable, like any other law based upon settlement.

The Commissioner of Indian Affairs states, that it has been the practice, in regard to allotments within reservations, to require that the tracts should be contiguous, if possible; but that it was permitted to depart from this rule in order to give to the allottee a due proportion of farming and timber land, or in order fairly to distribute land fronting on water courses. This departure from the rule, for many reasons, might be proper with regard to the division of an Indian reservation, which is entirely under the control and supervision of the Indian Office. But, when the question is presented in connection with the allotment of portions of the public domain, "not otherwise appropriated," with the change of conditions, the reasons applicable to the reservation disappear, and those, which have so long governed the land department in the administration of the settlement laws, should assume control. I can not agree with the Commissioner of Indian Affairs that the practice, or "manner," which has thus obtained in the allotments within a reservation should, under the provisions of this act, be applied outside of a reservation. Whilst allotments within reservations may be made, as stated, without regard to contiguity, and whilst in my opinion it is not required that allotments to minor children under the fourth section shall be contiguous to that made to the head of a family; it is required that each allotment made to an individual, whether the head of a family, a single adult, or a minor child, where such allotment embraces more than one legal subdivision, must be composed of contiguous tracts as the ordinary disposition of the public domain under the settlement law.

The next inquiry is, if the quarter section is "more than a hundred and sixty acres, must the Indian pay the excess as in a homestead entry?"

The allotments authorized by the act of Congress is not by acres, but by the legal subdivisions of the section, as one quarter, one eighth, and one sixteenth of a section. Therefore, on the selection of one of these legal subdivisions, the allotment should be made whether the area thereof be more or less than is ordinarily the case where the section is perfect. Apart from this, it is evident from the provision in section four for the payment from the United States Treasury of the land office fees incident to these allotments, it was not intended that the Indians should be at any expense in connection with the execution of the law.

The remaining inquiry of the register, as to whether the Department will furnish a book to register the allotments in, is a matter of detail, which may be safely left to the Commissioner of the General Land Office, whose duty it is to furnish such records as may be needed in the proper administration of his office.

[Endorsed,]

Referred to the Acting Commissioner of Indian Affairs for his information and direction.

JOHN W. NOBLE,
Secretary.

JUNE 22, 1889.

COMMUTATION PROOF—RESIDENCE—IMPROVEMENTS.

NELLIE E. BURCH.

Final proof made within the shortest period permissible under the law and regulations invites special scrutiny.

It is an element of weakness in final proof that the witnesses do not reside in the immediate vicinity of the land.

When poverty is pleaded as an excuse for absence from the land, commutation is a circumstance that makes against the good faith of the claimant.

Commutation proof should show affirmatively due compliance with the law, giving an explicit description of the improvements, and a full statement of the facts with respect to residence and cultivation.

By commutation the original entry is merged in the cash entry, and cancellation of the latter involves cancellation of the former.

If commutation proof is found insufficient, and bad faith is not apparent, the entry based thereon may be suspended and new proof submitted within the life of the original entry.

First Assistant Secretary Chandler to Acting Commissioner Stone, June 25, 1889.

June 14, 1883, Nellie E. Burch made homestead entry of the NW. ¼ of section 15, T. 108 N., R. 61 W., Mitchell, Dakota, and on October 17, 1883, gave notice of her intention to make final commutation proof December 15, 1883. Proof was made in accordance with the published notice before the register of the local office. It shows that the claimant is a single woman over the age of twenty-one years who has never made any other homestead entry and that she is a native of the United States.

The two witnesses use nearly the same language in answering the questions. They say that claimant "settled April 29, 1883, established actual residence April 29, 1883," that the improvements consisting of a frame house five by twelve and five acres of breaking are valued at about $50; that she has continuously resided on the homestead since first establishing her residence thereon and has not been absent except

to work in the vicinity of the land and has broken and cultivated for one season five acres.

The claimant swears that she is a single woman twenty-five years of age, that she settled on the land April 29, 1883, and established her actual residence thereon the same day; that her improvements consisting of a frame house five by twelve and five acres of breaking are valued at about $50; that she has cultivated the land broken one season. "I have made my home upon the land" she says, and have not been "absent except to work in the vicinity of the land."

The proof was approved by the local officers but for some unexplained cause final certificate did not issue until March 13, 1884.

The proof was not satisfactory to your office which by letter of June 14, 1886, called upon the claimant to furnish an affidavit, duly corroborated by at least two disinterested persons residing in the neighborhood of the tract entered and having personal knowledge of the facts sworn to, setting forth clearly the number of times she was absent from her claim, the duration and cause of each absence and also whether she had continued to reside upon the land since making final proof and has maintained an actual *bona fide* residence thereon, with full information as to the character and value of the improvements and the nature and extent of the crops raised.

A registered letter notifying the claimant of the requirements of your office was mailed to her last known postoffice address but the same was returned to the local office marked "not here" and nothing was heard from her until the local officers, October 5, 1887, transmitted an affidavit in response to your call for further information. This affidavit was made August 24, 1887, before a notary public in and for the county of Lewanee, State of Michigan. It sets forth:

That within the past thirty days she has just learned of the existence of Commissioner's letter "C", June 14, 1886. That she made an actual *bona fide* settlement upon said tract on April 29, 1883. That said settlement consisted of having built a frame house five by twelve feet in size and on that day she established an actual *bona fide* residence therein. That she was not absent from said tract since making settlement until after she made final proof with the following exceptions: She worked in the family of her brother three miles north until after harvest and up to about September 1st. That from two to three times a month she went home on said tract and stayed all night and sometimes over Sunday. That she had no means of support, and was dependent upon her individual efforts to obtain a livelihood, and she worked in her brother's family helping his wife in her household affairs, to obtain means to purchase her clothing and to pay for the improvements on this land. That after about the 1st of September, 1883, she quit working for her brother and on two occasions visited a friend in the town of Huron some ten miles distant. That her visits on these occasions to the best of her recollection did not extend over three or four days at one time. Affiant further says that she cannot give the exact dates of these two visits by reason of there being no peculiar circumstances connected with it to refresh her memory. That other than these temporary absences she was not absent from her home on this land. That during all of the times she kept her clothing other than what she actually wore, upon the land as well as her trunk; that during the season

of 1883 she had about ten acres of the tract broken and had ten acres planted to crop each year of 1883 and 1884. That she took this tract of land in good faith and to the best of her knowledge she has done all she could in complying with the homestead law.

George W. Woodford and William P. Fell of Beadle county, Dakota, swear that they have carefully read said affidavit and from their own personal knowledge know the facts therein set forth to be true.

Upon receipt of said affidavit your office took up the case for consideration and by letter of October 28, 1887, suspended both the original entry and the cash certificate with permission to the claimant to make new proof during the life-time of the entry when she can show full compliance with the law in every respect. "From the claimant's own statements" your predecessor said, "she has not lived on the tract more than two and one half months, from the date of settlement, and during that time was absent on two occasions for several days at a time. The improvements are very meagre and the proof is not of a character to justify this office in issuing a patent thereon."

The case is brought before me by the appeal of the claimant from your said decision which in a general way, alleges error in holding that the residence and improvements shown were not sufficient.

Payment of the consideration and compliance with the requirements of the law as to residence, cultivation and improvements are the matters of substance, which authorize the commutation of a homestead entry. Louis W. Bunnell (7 L. D., 231). The proof should show *affirmatively* compliance with the law. United States *v.* Skahen (6 L. D., 120).

The claimant alleges settlement April 29, and made proof December 15, 1883, and says that from the former date until September 1, "from two to three times a month she went home on said tract and stayed all night and sometimes over Sunday;" after the date last named her affidavit leaves the impression and should be understood as asserting, that she was actually residing upon the tract until she made proof and was absent only temporarily on several occasions for not longer than three or four days at one time. It thus appears that presence upon the tract was the exception and absence the rule. She alleged poverty as the cause of her absence but nevertheless avails herself of the privilege of purchasing the land by commuting at nearly the earliest moment possible. This Department held in the case of Andrew J. Healey (4 L. D., 80), that:

No fixed rule can be formulated as to what shall constitute good faith. The facts and circumstances surrounding each case should be carefully considered and if the acts of the entryman, as shown by the evidence do not clearly indicate bad faith, the entry should not be forfeited.

In carefully examining the circumstances in this case, I find that the proof was made a little more than six months after the date on which settlement is alleged and it therefore invites especial scrutiny. Frances M. Cull (5 L. D., 348); R. M. Chrisinger (4 L. D., 347). I also find that

the two witnesses to the proof do not live near the land and this fact is an element of weakness. Whitcomb *v.* Boos (5 L. D., 448). The house is not described with particularity as it should be (Fred. King, 4 L. D., 253), nor is any information given as to what was placed in it; the improvements are very meager and are valued at $50. I further find that absence was the rule and presence the exception and where poverty is pleaded as the excuse for absence from the land, the commutation of a homestead is a circumstance that makes against the good faith of the claimant. Whitcomb *v.* Boos, *supra.* In the case of L. and B. Knippenberg (4 L. D., 477) it was held that:

> In commutation homestead cases, the settler may be excused for temporary absences under certain circumstances but in such cases where absence is the rule the claimant must conclusively show his good faith as to residence before the officers of the government can be justified in parting with title to public land so sought to be acquired.

The proof in this case does not satisfy me that the claimant has complied with the requirements of the homestead law and it is rejected. Inasmuch as the original entry has been merged in the cash entry (Greenwood *v.* Peters, 4 L. D., 237), and the cancellation of the final certificate would involve the cancellation of the original entry, I see no reason for disturbing your decision suspending the final certificate and allowing her to make new proof, under her original entry, during the life-time of the entry. Samuel H. Vandivoort (7 L. D., 86).

Your decision is affirmed.

INDEX.

Page.

Abandonment.

See *Residence.*

Accounts.

See *Repayment.*

Rendered by a deputy surveyor, and approved by the Surveyor-General, should not be rejected on the report of a special agent without opportunity for a hearing........ 156

A provision in a deputy surveyor's contract that the cost of the work shall not exceed a specified amount restricts the adjustment of the account accordingly....... 185

Cancellation fees deposited before the act of August 4, 1886, but not earned until after said act, must be accounted for under the regulations of March 15, 1887............... 296

Alabama.

See *Homestead, Mineral Land.*

Alien.

See *Filing, Naturalization, Settlement.*

Alienation.

See *Practice* (under *Notice*), and *Final Proof* (under *Pre-emption*).

A contract made by a pre-emptor to convey the land on receipt of final certificate renders the entry fraudulent and requires its cancellation.............................. 269

One who purchases from a pre-emptor prior to patent takes no greater right than existed in the pre-emptor 269, 331, 524

Purchaser from one holding final certificate buys with notice that patent will not issue if the entryman has not complied with the law.................................... 46

Homesteader may, before issuance of final certificate, for any purpose not inconsistent with good faith, mortgage his claim........ 243

If settlement is made in good faith, under the act of May 28, 1880, a subsequent agreement to convey the land will not in itself invalidate the entry........................ 173

The right of a transferee to be heard in defense of the entry will not be defeated by the fact that the transfer was not of record.....................................283, 526

Page.

After final proof, and prior to the issuance of final pre-emption certificate, will not necessarily defeat the right to a patent, though the non-alienation affidavit was not furnished, if the pre-emptor had in fact complied with the law at the time of making proof, and could have then truthfully made such affidavit.................................. 486

Transferee may submit testimony to show that the entryman had complied with the law, and not disqualified himself for the execution of the necessary proof of non-alienation.. 486

Equitable consideration will be given to evidence submitted by a transferee in defence of the entry.... .. ..486, 641

Mortgagee may show that the entryman had complied with the law................. 618

Transferee entitled to be heard in defense of the entry................................. 641

Amendment.

See *Entry, Filing, Practice.*

Appeal.

See *Practice.*

Application.

See *Entry, Timber and Stone Act,*

To make entry pending, will take precedence over one filed with a relinquishment. 559

To make homestead entry not accompanied by the requisite fees does not reserve the land................................... 224

Approximation.

See *Entry.*

California,

See *School Land, States and Territories.*

Certificate.

See *Pre-emption.*

Certification.

See *Patent.*

Page.

Certiorari.

Supervisory authority of the Department ... 2, 423
The supervisory authority of the Department is exercised under certain rules formulated to avoid confusion in practice ... 396
Will not be granted if it is apparent that the failure to be heard on appeal, or through motion for re-hearing, was the result of the applicant's negligence ... 396
Supervisory authority may be exercised on motion for review of a decision denying the writ ... 423
May be granted, if it appears that the applicant is entitled to relief, though he may have failed to appeal in time ... 423
Will not lie if the petitioner has suffered no material injury, or fails to show error in the decision complained of ... 485

Circulars.

See table of, page xv, and circulars cited, construed, etc., page xv.

Citizenship.

See *Naturalization.*

Coal Land.

Entry voidable for illegality, may be passed to patent for the benefit of a transferee in view of the price paid for the land, and the fact that repayment can not be allowed ... 140
Only one entry allowed to the same person or association ... 140
Cash entry of, may be amended after patent, when the mistake was caused by the indistinct marks at section corners ... 303

Commutation.

See *Final Proof, Homestead.*

Contest.

See *Evidence, Jurisdiction, Practice.*

GENERALLY.

May be properly rejected if the affidavit of, is not corroborated ... 446
May be refused in the discretion of the commissioner when the entry in question is under investigation by a special agent ... 139
Should not be allowed when the government has in its own interest commenced preceedings against the entry ... 301, 573, 578
Suspended, on account of pending proceedings by the government, takes effect as of the date filed on failure of such proceedings ... 579
When accepted, the defendant is the only person entitled to complain of irregularity in the application ... 241
Government has the right to appear in, and cross-examine witnesses, or have the case continued ... 2

Page.

Second should not be allowed on issues involved in the first, and finally disposed of on appeal to the Department ... 444
Proceedings initiated by one claiming a superior right to the land are in the nature of a contest, and must be governed by the rules provided therefor ... 493
If a few seconds intervene between two applications to contest an entry, precedence should be given to the one first actually received ... 241
Good faith of a, may be inquired into on the hearing ... 248
Is speculative if brought for the purpose of, securing a speculative entry ... 248
The claimant not entitled to a dismissal of, on showing the contestant's death as the Department may proceed against the entry ... 598
The hardship resulting from an order of cancellation does not warrant the Department in ignoring the requirements of law ... 584

HOMESTEAD.

Does not require that the contestant should assert a claim to the land involved ... 584
The rule that a contest is premature if begun before the expiration of six months and a day after entry can only be invoked by the contestee ... 400

TIMBER CULTURE.

May be properly based on a charge of sale, relinquishment, and abandonment ... 294
Must fail, if the default charged is cured before service of notice ... 552
Good faith an important element in considering evidence as to compliance with law between the dates of filing affidavit of contest and service of notice ... 552
The devisee of a deceased entryman a party defendant ... 452
Must be against the heirs or legal representatives of a deceased entryman ... 452

Contestant.

See *Relinquishment.*

Right of the, dependent upon the successful issue of the contest ... 139, 357
Right of timber culture, who applies to enter, depends upon establishment of default alleged ... 357
Right of the, is personal and terminates with his death ... 598
Death of the, leaves the case as between the government and the entryman ... 598

PREFERENCE RIGHT.

Not secured under a proceeding in bad faith ... 248
Does not entitle the contestant to make private entry of a tract not subject thereto ... 282
Right of the, is only held personal and terminating with his death, where he has no other than the preference right of a successful contestant ... 405

Page.

May be secured as to the land finally excluded from an entry, allowed for more than 160 acres, and contested for such irregularity 205

A ruling that the contestant is not entitled to a preference right, in a decision ordering a hearing, will not bar the subsequent assertion of such right, though no appeal was taken from such decision 400

Continuance.

See *Practice.*

Cultivation.

See *Final Proof* under *Commutation.*

Decision.

See *Jurisdiction.*

Deed.

From husband to wife recognized as valid if authorized under the laws of the State in which the land is situated 502

Deposition.

See *Evidence.*

Desert Land.

See *Entry, Final Proof.*

Of no consequence to the government whether the non-irrigable land covered by the entry is situated in one or more of the smallest legal subdivisions 48

Entry not allowed to include a non-irrigable tract of 80 acres 113

Land which produces native grasses sufficient to make an ordinary crop of hay in usual seasons is not 163

Price of, within the limits of a railroad grant may be fixed at double minimum 368

Entry.

See *Alienation, Equitable Adjudication, Final Proof, Railroad Lands.*

GENERALLY.

Circular regulations with respect to amendment of 187

On allowance of second the entryman should be required to state under oath that the relinquishment of the first is not for the benefit of another 507

On allowance of amendment after patent, reconveyance of the land improperly patented is required 303

Covering tracts of land upon the opposite sides of a meandered stream, allowed in accordance with existing practice, will not be disturbed 62

Allowed on proof submitted after due notice, should not be canceled on finding the evidence as to residence insufficient, but suspended, and further proof required 202

Page.

DESERT LAND.

In each, the questions are: (1) Was the land desert in character and the entry compact in form; and (2) Was the entryman duly qualified, and has he shown due compliance with law 48

Preliminary affidavit must be made on the applicant's knowledge of the land derived from a personal inspection thereof 96

Not allowed for land covered by the improvements of a *bona fide* settler 630

Decisions and regulations of the Department with respect to "compactness" cited and compared 104

Application to make in accordance with existing regulations should not be rejected because not in conformity with later regulations 408

An entry allowed in accordance with existing regulations, and for which proof was accepted, will not be disturbed, though not within the later requirements as to "compactness" 104

Allowed in conformity with existing regulations as to compactness should not be canceled under later regulations imposing a more rigid rule 231

Not canceled on account of its covering non-irrigable land, where the land susceptible of irrigation is reclaimed and valuable improvements placed thereon 48

Should not be canceled in the absence of adverse claim, though on hearing it appear that the land was not reclaimed at date of final proof, but that reclamation was subsequently effected 48

HOMESTEAD.

Elements constituting, considered 224

Not effected by application and preliminary affidavit unaccompanied by the legal fees 224

Constitutes a segregation of the land 528

Final, excludes the land from settlement and filing 243

If made for any other purpose than the establishment of a home is in bad faith 248

Right to make, in representative capacity considered 286

Married women may, as heir of a deceased homesteader, file application, submit proof, and receive patent 286

Should not be allowed for land involved in a prior contest, pending an appeal 121

Not allowed for land suspended from sale or entry, by order of the surveyor-general, pending the final location of a private claim. 186

Of land included within the entry of another is irregular, but *prima facie* valid on cancellation of the senior entry 378

Voidable where the preliminary affidavit was made before a clerk of court without the prerequisite residence on the land; but such defect may be cured prior to contest.. 1

Page.

Embracing tracts in two or more quarter sections must approximate 160 acres as nearly as practicable, without requiring a division of the smallest legal subdivision.. 205

Allowed in violation of the rule of approximation segregates the land covered thereby, but is subject to attack .. 205

May be amended in accordance with the original application, where the amount was improperly restricted by the local office .. 58

Right to make second recognized, where the first, through no fault of the entryman, was not for the land intended to be taken. 429

On allowance of second, the first must be relinquished 429

The right to make a second recognized where the first, made in good faith, was abandoned on account of conflict with the *bona fide* pre-emption claim of another ... 100

The right to make second accorded where the first through no fault of the entryman was made for land covered by a prior *bona fide* pre-emption claim 98

Second allowed, where the first, for equitable reasons, was relinquished on account of conflict with the prior settlement right of a pre-emptor who was in default in the matter of submitting proof 131

Second allowed, where the first was made in good faith for land afterwards held not subject thereto, and accordingly canceled on relinquishment 137

Second may be made where the first was relinquished under the belief that it could not be maintained without danger to the entryman's life 587

Second allowed where the first covered land not habitable, and the reasons therefore were not discoverable by ordinary diligence 507

The right to make a second will not be accorded, where the first was for land subject thereto, and failed through the fault of the entryman 96

Right to make second under the act of March 2, 1889; circular of March 8, 1889... 314

Additional under the act of March 2, 1889, allowed to include a tract of adjacent land intended to be covered by the original entry on which patent had issued 500

Right to apply for additional, under the act of March 2, 1889, treated as a preferred right in case pending at the passage of said act 474

Preference right to apply for second under the act of March 2, 1889, accorded in case pending at the passage of said act 457

By commutation the original is merged into the cash entry, and the cancellation of the latter involves the cancellation of the former 651

Commuted may be sent to the Board of Equitable Adjudication, where residence was not established within six months from date of the original entry 566

Page.

Commuted, allowed since the McKay decision, where residence was not established within six months from date of original entry, may be submitted to the Board of Equitable Adjudication without calling for explanation from the entryman 566

Under section 2291, not allowed on proof, submitted in commutation of the original entry 86

PRE-EMPTION.

When perfected is an appropriation of the land 224

If made contrary to law should be canceled 269

Allowance of, by the local officers does not preclude the General Land Office or Department from passing on its validity 269

Found to be fraudulent in character and based on false proof must be canceled 524

May be sent to the Board of Equitable Adjudication when allowed on proof made by a married woman who, prior to marriage, had complied with the law and tendered proof 433

May stand as made, where the difference between the excess and the deficiency that would be caused by approximation is slight. 79

Allowed on second filing may be sent to the Board of Equitable Adjudication, where the fact of the first filing was disclosed at the time of entry 445

Entry should be sent to the Board of Equitable Adjudication where made after the expiration of the statutory period 355

Joint, not allowed unless the settlement was prior to the survey in the field 536

An alien, who settles prior to survey in the field and files declaration of intention to become a citizen before approval of the survey, is entitled to make joint 536

Conflicting settlement rights acquired prior to survey may be adjusted by allowing either settler to enter the entire tract, on condition that he tenders the other a written agreement to convey to him that portion of the land covered by his rightful occupation 536

TIMBER CULTURE.

The preliminary affidavit is statutory, and the Department has no authority to add thereto 20

Allowed on preliminary affidavit executed outside of the State where the land is situated is voidable, but may be amended, to relate back to the original entry, in the absence of adverse right 478

The sole devisee of a deceased entryman considered as a "legal representative." 452

Second allowed where the first, through no fault of the entryman, did not cover the land intended, and amendment is barred by an adverse claim 239

Page.

Should not be canceled on the ground that the land is not "devoid of timber," if allowed under rulings in force, and the entryman thereafter proceeded to comply with the law 399, 534

The phrase "devoid of timber," should be construed as meaning land practically so; no arbitrary rule can be formulated to cover every case 467

Former rulings of the Department on the phrase "devoid of timber," cited and compared 467

Land not excluded from, by a scanty growth of brush lining the banks of a small stream that passes through the section 534

Should not be allowed if the returns show timber in the section; but a hearing may be had, if the correctness of the return is questioned, to determine whether the land is subject to entry 467

Not allowed, though the land applied for has but few trees thereon and is the only public land in the section, if the *section* is not "devoid of timber." 544

Held for cancellation on account of conflict with the prior settlement right of another may stand on the subsequent abandonment of the adverse claim 461

Equitable Adjudication.

See *Entry*, *Final Proof*, *Private Entry*.

The authority of the Board under the statutes and regulations considered 87

In suspended pre-emption entries where the error arises from ignorance, accident, or mistake, and the land is held by a transferee 489

Patent should be surrendered on application for confirmation of entry which has passed to patent 183

Rules 11 and 13, prescribed by the Board, not annulled by section 2457, R. S 95

Rule 13 considered in its application to private cash entries 410

Rule 24, covering cases where the homesteader has failed to establish residence within the period required 568

Rule 30, covering desert land entries in which reclamation and proof were not made within the statutory period 574

Evidence.

Burden of proof is upon one attacking the official return of surveys 440, 467, 555

In proceeding against an entry the burden of proof is upon the government 526

Burden of proof is upon one alleging priority of right as against a subsisting entry 623

Objection to the officer appointed to take testimony should be made before the testimony is submitted 534

Officers selected to take, should not be open to the charge of bias or prejudice 534

Page.

Submitted on defective notice of contest may be accepted after new notice, if the defendant does not respond thereto 558

The report of a register based on an inspection of the land, made without notice to the parties and after the case is closed, is not admissible 38

Matter of record not impeached by an unverified statement 294

Fees.

See *Accounts*, *Repayment*.

Filing.

See *Entry*.

Does not reserve the land covered thereby. 224

Is not a condition precedent to the right of pre-emption, but a protection against subsequent settlers 433

Of one qualified in the matter of citizenship relates back to settlement and legalizes the same, though made when the settler was an alien 536

Made by one entitled to the rights of citizenship on compliance with section 2168, R. S., will not be canceled if the requirements of said section are subsequently observed.. 60

Default in, for unoffered land, forfeits the claim only in favor of the "next settler" who has complied with the law 346

Purchaser at private entry held not a "settler" that can take advantge of default in 346

Should not be received for land included within the homestead entry of another without a hearing 528, 623

Held to precede settlement where the declaratory statement is made out and mailed prior to performing any act of settlement.. 331

Second permissible where the first was for land not subject thereto, and the pre-emptor in good faith abandoned the same on discovery of such fact 528

Circular regulations with respect to amendment of 187

Final Proof.

See *Alienation*, *Entry*.

GENERALLY.

Action of the General Land Office on, should cover the sufficiency thereof, as well as other questions affecting its validity 612

Regularity of, should be determined by the regulations in force at the date of its submission 512

Element of weakness in, that the witnesses do not live near the land 651

Submission of, at a particular time in order to leave the land not necessarily inconsistent with good faith 508

If no protest is found in the record it will be presumed that none was filed 202

Page.

Failure of a railroad company to appear in response to notice under the act of March 3, 1879, and assert its right to land within the granted limits bars the subsequent assertion of such right 389

In publishing notice of intention to submit, it is the fault of the register if the proper officer before whom it will be taken is not designated therein 483

Defect in, caused by the substitution of a witness, may be cured by republication, and the proof accepted as made in the absence of protest 475

Republication of notice required where the name of one of the witnesses was not properly given in the published notice 204

May be accepted as submitted after republication by the transferee, where the land was misdescribed in the published notice .. 415

Failure to submit on the day advertised may be cured by action of the Board of Equitable Adjudication 415

Made the following day sufficient, when by mistake Sunday is designated as the day for submission of 233

Failure of the claimant to make his own proof on the day fixed may be cured by action of the Board of Equitable Adjudication where his witnesses appeared and testified at the time and place designated 202

When taken at the time and place designated, but not before the officer named in the notice, the entry may be sent to the Board of Equitable Adjudication 406, 411, 519

An entry allowed on proof taken before an officer not authorized to act in such capacity, may be referred to the Board of Equitable Adjudication, in the absence of other objection thereto 483

That the officer named in the notice was unauthorized to take, will not prevent equitable confirmation of the entry where the proof was made at the time and place designated but not before said officer 411

Where irregularly made supplementary proof may be submitted after republication by a transferee, showing that the entryman complied with the law during the period covered by the final proof, and the facts as to the transfer 18

May be taken within ten days after the time advertised, where accident or unavoidable delay prevents submission on the day fixed. Act of March 2, 1889, and circular thereunder 314, 581

Proof of non-alienation between the date of submitting final proof and issuance of certificate should not be required if such proof was sufficient when made and the claimant had at such time complied with the requirements of law 475

A certificate of the officer before whom the proof was taken that the witnesses were duly cross-examined accepted under the circular of December 15, 1885 512

Page.

Evidence as to filing declaration of intention to become a citizen, furnished in homestead proof, may be accepted in subsequent pre-emption 233

Right to submit supplemental, accorded to a transferee in the absence of adverse claims 641

Circular of February 21, 1887, amended .. 3

COMMUTATION.

Requisites of, defined 651

Made within the shortest period permissible invites special scrutiny 651

Submission of, makes against the good faith of a claimant who pleads poverty as an excuse for absences from the land 651

If found insufficient, new proof may be submitted within the life of the original entry, if bad faith is not apparent 84, 651

The degree and condition in life of the entryman may be taken into consideration in determining whether the improvements show good faith 639

Breaking accepted as proof of cultivation 517, 551, 612

Though not sufficient in the matter of residence to warrant patent under section 2291, R. S., may be accepted as authorizing commutation 45

DESERT LANDS.

Actual irrigation of the land is the essential requisite 573

If crops are not shown, other evidence of a satisfactory character to establish the fact of reclamation must be furnished 113

No authority in the Land Department to extend the time within which to submit 432

Where submitted after the statutory period and found insufficient new proof may be made, and if found sufficient the entry referred to the Board of Equitable Adjudication 573

May be equitably considered, on due explanation, though submitted after the expiration of the statutory period 432

HOMESTEAD.

May be made before the proper officer of any court of record in the judicial district within which the land is situated 509

Proof under section 2291 R. S., may be made where commutation proof has been rejected with right to submit new proof .. 85, 547

If not made within the statutory period, the final entry should be submitted to the Board of Equitable Adjudication 626

If submitted after the statutory life of the original entry, and found insufficient, new proof may be made, in the absence of bad faith, and if found sufficient the entry may be sent to the Board of Equitable Adjudication 614

Page.

PRE-EMPTION.

Notice of intention to submit, does not operate to prevent the allowance of a homestead entry, for the land covered by the filing 226

Published notice of application to make, so far reserves the land as to prevent its being properly entered by another, pending consideration thereof........ 406, 414

The statutory period within which it should be made for unoffered land begins to run from the expiration of the three months after settlement........ 393, 417

Failure to submit and make payment within the statutory period will not defeat the right of entry in the absence of an adverse claim........ 417

When made after the statutory period the entry should be sent to the Board of Equitable Adjudication........ 355

Inferior character of improvements not evidence of bad faith, if commensurate with claimant's means........ 353, 639

The degree and condition in life of the entryman may be considered in determining whether he has shown good faith 645

The submission of, a few days prior to the expiration of the requisite six months' residence does not in the absence of protest call for new proof where the land is held by a subsequent purchaser without notice 638

Failure to submit within six months after Osage filing does not render the claim subject to the adverse right of a subsequent settler.—Rogers *v.* Lukens overruled. 110

TIMBER CULTURE:

Trees not required to attain any specific height or size to warrant approval of........ 191

Florida.

See *States and Territories* and *Swamp Lands*.

Hearing.

See *Practice*.

Homestead.

See *Alienation*, *Entry*, *Final Proof*, *Mineral Land*, *Residence*, *Settlement*.

Right enlarged by the act of May 14, 1880 286

Right acquired by settlement may be perfected by widow, heirs, or devisee of deceased settler, the same as though based on formal application to enter........ 286

Section 2291, and the act of May 14, 1880, should be construed together 286

The period within which the right of entry is protected under the act of May 14, 1880, begins to run from the date when the land is declared to be open to entry in the published notice of the filing of the township plat........ 207

Page.

Right to initiate a claim is conferred upon one "who has filed his declaration of intention" to become a citizen 289

Right exhausted where title to a portion of the land is consummated by commutation 53

Right as enlarged by the act of March 2, 1889. (Circular of March 8, 1889) 314

Right may be exercised the second time by way of a transmuted pre-emption claim under the act of March 2, 1889 422

Right can not be accorded to one who is at the same time maintaining a pre-emption claim for another tract........ 96, 200, 461

That the claimant had not at the time of entry, received final certificate on pre-emption proof submitted for another tract will not impair his right if he was then entitled to such certificate........ 268

Claim for land chiefly valuable for its timber should be carefully scrutinized 526

Right of Indians controlled by specific legislation........ 55

ACT OF JUNE 15, 1880.

Land entered prior to said act may be purchased on payment of government price, if free from adverse claims........ 75

Purchase should be allowed in the absence of intervening adverse claims, if the land was subject to the original entry........ 403

Cancellation of the original entry no bar to purchase........ 403

Purchase is not a consummation of the original entry relating back to the date of such entry, but a private entry operative from the date thereof 532

An intervening entry made after the passage of the act and canceled on relinquishment, is no bar to purchase 75

An intervening entry, canceled on relinquishment before application to purchase, is no bar thereto 403

Purchase made under existing rulings and direction of the Commissioner, by a transferee holding under certificate of additional right issued to a member of the Missouri Home Guard, not disturbed........ 235

Right of purchase suspended by intervening contest 463, 579, 595

An entryman who has sold his interest in the land covered by the original entry, is not entitled to the right of purchase........ 330

Right of purchase can not be exercised by one who has voluntarily relinquished the original entry........ 606

Application to purchase lands not subject thereto for want of public offering should be suspended pending such offering........ 532

Purchase of land (Ala.) returned as valuable for coal before the act of March 3, 1883, not permissible until after public offering.. 532

Does not authorize a purchase under a homestead entry made by an Indian who is not a citizen 55

Page.

ADDITIONAL.

Under the act of March 3, 1879, limited to original entries on even sections, made before said act, and where the entry was restricted to eighty acres 428

Right to make, under the act of March 2, 1889 (circular of March 8, 1889) 314

Entry of contiguous tract authorized by the act of March 2, 1889, if the original was for less than one hundred and sixty acres, and the entryman still owns and occupies the land covered thereby 428

COMMUTATION.

Is the consummation of the homestead right 566

SOLDIERS.

To secure the right initiated by a declaratory statement, settlement, improvement, and entry must follow the filing within six months 200

Filing declaratory statement will not be held to exhaust the homestead right in case of entry made prior to the circular of December 15, 1882 547

Declaratory statement filed while the claimant is residing upon and claiming a different tract under the pre-emption law, for which proof is afterwards made, is illegal, and will not protect the homesteader as against the intervening settlement of another 200

SOLDIERS' ADDITIONAL.

See act of June 15, 1880, *supra*.

The right to make, is personal and non-assignable 608

Is illegal, where the application is nominally by one acting as agent for the soldier, but in fact for himself, and without any intention on the part of the soldier to comply with the law 608

Right of entry does not extend to members of the Missouri Home Guard 235

Improvements.

See *Final Proof*, under *Commutation* and *Pre-emption*.

Indemnity.

See *Railroad Grant, School Land.*

Indians.

See *Homestead.*

Indian Lands.

See *Alienation, Final Proof* (under *Pre-emption*), *and Settlement.*

Under section 4, act of February 8, 1887, allotments are provided for non-reservation Indians and their minors under the same restrictions as enacted for reservation Indians, with the additional requirement of actual settlement 647

Page.

Orphan children under eighteen years of age not entitled to the benefits of section 4, act of February 8, 1887 647

Allotment to a minor child under section 4, act of 1887, need not be contiguous to that made to the head of the family 647

Allotments are made by legal sub-divisions of the section without respect to the actual area included in such sub-division 647

Contiguity of the tracts should be required in case of allotments outside of a reservation 647

Proof of actual settlement not required in allotments under section 4 of the act of 1887, to minors 647

The prohibition against the final disposition of lands included within the act of July 4, 1884, extends to entries made prior to said act 409

Act of March 2, 1889, opening to entry Seminole and Muscogee lands, and providing for Commission to treat with the Cherokee Nation for the purchase of certain lands 338

Instructions and Circulars.

See tables of *Cited* and *Construed*, page xv.

Jurisdiction.

See *Practice* under *Notice.*

The Department will not assume, on the relinquishment of a patentee executed under protest in order to protect his rights on appeal 70

Retained over the question where the decision of the Department is suspended 243

Of the Land Department under the pre-emption law 269

Want of, in the General Land Office, will not limit the authority of the Department. 463

Is conferred upon the General Land Office to control the action of the surveyor-general in issuing certificates of location under the act of June 2, 1858 463

Land Department.

See *Jurisdiction.*

The receiver has no authority to receive money as the agent of an applicant for public land, and such action creates no obligation against the government 77

Louisiana.

See *School Land.*

Michigan.

See *School Land.*

Military Reservation.

See *Reservation.*

Mineral Land.

Hearing to determine character of land not ordered in the absence of application to appropriate the same 30

Page.

Failure to appeal from finding of local officers as to character of land renders their decision final 30

Mineral claimant for land returned as agricultural must show, as a present fact, that mineral can be obtained therefrom in such quantities as to make the land more valuable for mining than agriculture 440

May be segregated from land returned as agricultural at the expense of the mineral claimant 440

Segregation survey may be ordered if found necessary to set apart the mineral from the agricultural land in a 40-acre tract 443

Effect of the act of March 3, 1883, on a homestead entry for lands of known mineral character (Alabama) 532

Land returned as valuable for coal prior to the passage of the act of March 3, 1883, not subject to purchase under the act of June 15, 1880, until after public offering (Alabama) 532

Land returned as valuable for coal, and offered prior to the act of March 3, 1883, is not subject to entry if not offered since the passage of said act 74

Land not known as, covered by settlement and filing made before the act of March 3, 1883, need not be "offered" before the allowance of pre-emption entry (Alabama) .. 297

Homestead entry on, initiated by settlement prior to the act of 1883, though not then of record may be patented under said act (Alabama) 448

Mining Claim.

See *Survey*.

Circular of March 24, 1887, as to proof required on application for patent 505

Non-compliance with paragraph 5, circular of December, 14, 1885, may be waived if the proof is in conformity with prior regulations 516

Failure of the proof to show the requisite work or expenditure may be made good by supplemental proof 516

The affidavit required of an applicant can not be made by agent or attorney if the applicant is a resident of, and at date of application is within the land district. 223

Not allowed on an application wherein the land, on which are situated the discovery shaft and improvements, is expressly excluded, and the proof shows no mineral on the claim as entered, or the requisite expenditure for the benefit thereof 602

In a survey that conflicts with a prior lode claim, where the ground in conflict is excluded, the applicant is limited to a line passing through the point where the lode intersects the exterior line of the senior location 361

Page.

A mining company, on application for patent, must show that it has complied with local requirements in the matter of filing its articles of incorporation 195

If the last day of publication comes on Sunday, an adverse claim filed on the succeeding Monday is in time 430

Proof of posting in the local office should be furnished by the register, and in the absence thereof, evidence of such posting may be submitted by the applicant 457

If the published notice is not as explicit in description as the notice posted on the claim, the defect is the fault of the register, and may be cured by reference to the Board of Equitable Adjudication 457

If an adverse proceeding is pending in the courts, when application for patent is made, the adverse claimant need not commence new action after filing protest 437

If the protest shows that an adverse proceeding is pending in the courts, action should be suspended by the local office, until final disposition of such proceeding, though it may have been begun before the application for patent 437

On determination of judicial proceedings patent may issue to the applicant for such part of the claim as he may appear to rightfully possess, if a vein or lode has been discovered thereon 437

A protestant, who claims an adverse interest, is entitled to be heard on appeal, where he alleges that proper action was not taken to bring him within the statutory limitation as to the period accorded for presenting an adverse claim 122

A protestant, who alleges no claim present or prospective, that is recognized under the law is not entitled to the right of appeal. 439

Survey of a mill-site need not be connected with a mineral monument, or corner of the public surveys, if connection is shown with the lode claimed in conjunction therewith .. 195

If the applicant for a mill-site is the owner of a lode, and the mill-site is located in connection therewith, patent can issue without a showing of $500 expenditure on the mill-site 195

Non-mineral character of land claimed as a mill site must be shown 195

Mill-site must be used or occupied for mining or milling purposes 195

If work is renewed on a claim, after it has been open to re-location, but before such relocation the rights of the original owners stand as though there had been no default. 388

Patent for, should not contain a clause reserving the right of a townsite 602

Minnesota.

See *Swamp Land*.

Missouri Home Guard.

See *Homestead*, under *Soldiers' Additional*.

Page.

Montana.

See *School Land, States* and *Territories.*

Mortgage.

See *Alienation.*

Naturalization.

See *Final Proof.*

A declaration of intention, filed by the father, inures, if he dies prior to becoming a citizen, to the benefit of his minor son, who may avail himself thereof by taking the final oaths 60, 289

The statement of a settler as to the time when he filed his declaration of intention to become a citizen, accepted in the absence of record evidence 520

Notice.

See *Practice.*

Oklahoma.

Circular regulations with respect to opening the public lands to entry, and President's proclamation 336

Osage Lands.

See *Alienation, Final Proof* (under *Preemption*), *Settlement.*

Patent.

Jurisdiction of the Department over the land ceases on the issuance of 70, 471

Certification, equivalent to 24, 471

Application to enter patented land confers no right upon the applicant to question the validity of the patent by which title passed 24

If regularly issued and recorded, title passes though the patent may not be delivered to the grantee 70

Proceedings to vacate will not be advised where title passed under a full knowledge of all the facts, and has remained undisturbed for a long term of years, and is now held by purchasers in good faith 165

For mineral claim should not contain town-site clause 602

Practice.

See *Contest, Evidence, Jurisdiction, Res judicata.*

GENERALLY.

Right of the government to be heard in contest proceedings 2, 598

Procedings on report of special agent 283, 306, 526

Decisions should not be rendered piecemeal 612

Page.

To avoid delay the Department may determine a case on its merits, if the record is complete and the parties in court, though the questions presented were not passed upon below 595

Where the rights of several parties are involved in a case the claims of each should be disposed of in the decision of the General Land Office 279

After transmitting the record in a contest the local officers should await instructions before taking any action affecting the status of the land 121

After decision by the local officers they can take no action involving the disposition of the land until instructed by the Commissioner 559

The local officers may, after due notice to the parties, inspect the land involved in contest 38

An inspection made by the register without notice and after the case was closed, is not the proper basis for a final decision, but may warrant an order for rehearing 38

Failure of the contestant to appear on the day to which the case was continued justifies the dismissal thereof 395

Where a motion to dismiss has been sustained the entry should not thereafter be canceled on the evidence already submitted without affording the entryman further opportunity to furnish testimony 395

Objection to an officer appointed to take testimony should be made before the testimony is submitted 534

Concurring decisions of the local officers and General Land Office on questions of fact will not be disturbed unless clearly against the weight of evidence 440

A stranger to the record not entitled to be heard as an intervenor without first disclosing his interest under oath 578

AMENDMENT.

Of contest affidavit can not be permitted in the presence of an intervening adverse right 446

Motion for review may be amended if no party in interest is injured thereby 248

APPEAL.

See *Mining Claim.*

Not the proper means of presenting new questions 294

Will not lie from an order of the Commissioner requiring an additional affidavit in support of an entry, only from his final action, on the refusal or failure to comply with such order 73

Not defeated by failure to file specifications of error within the required time, where such failure was caused by the appellant's inability to secure a copy of the decision 192

Page.

Should be allowed from a decision canceling an entry on a special agents' report, when the facts as shown therein are not denied ... 306
Will not lie from a decision of the Commissioner ordering a hearing ... 372, 444
Right of, should be accorded to the heirs of a deceased pre-emptor from a decision awarding the land to an adverse claimant ... 405
Must be taken within the prescribed time by a transferee who has notice of a decision adverse to the entryman ... 485
Ten additional days allowed for, when notice of the decision is given through the mails by the local office ... 46
In absence of, the decision of the local office becomes final ... 30
Failure of the contestant to take, from a decision of the local office dismissing his contest, will not preclude a subsequent assertion of his right thereunder, if the record does not affirmatively show due notice of such action ... 595
Failure of the State to appeal from a decision o the local office, on a question under the swamp grant, will not defeat its right to appeal from the Commissioner's decision therein ... 64
During the pendency of, from action of the local office, it has no jurisdiction over the case or land involved therein ... 559
Unperfected, is no bar to a hearing on the subsequent application of the appellant ... 544
Will not be dismissed on the motion of a former attorney of the appellant, who at the date of the motion had ceased to represent the appellant ... 192
Objection to the sufficiency of, will not be considered if raised for the first time on review ... 470

CONTINUANCE.

Application for, that depositions of witnesses who refuse to attend may be procured, is in time if made on the day of trial ... 197

COSTS.

The local officers may require a deposit to cover the cost of taking testimony in a contest ... 493

HEARING.

The ordering of, rests in the sound discretion of the Commissioner ... 444
The exercise of discretionary authority in ordering, will not be interfered with, unless an abuse of such authority is clearly shown ... 444
Will not be ordered on the report of a special agent, if the facts as shown therein are not denied ... 306
Will not be ordered on an unverified statement to determine a question of priority alleged in the face of an adverse record ... 294
Should be ordered when a pre-emptor alleging prior settlement offers to file for entered land ... 528

Page.

NOTICE.

Must be shown affirmatively of record to confer jurisdiction ... 578
Mailing copy of, by registered letter thirty days before date of hearing an essential in service by publication ... 558
Publication of, without the affidavit required as the basis for such form of service, confers no jurisdiction ... 452
Posting on the land is an essential in service by publication ... 578
Misstatement as to date of posting will not defeat the service where the error is corrected by special affidavit and testimony of the contestant ... 46
Objection as to that given the entryman can not be heard from a transferee who was duly notified ... 46
Transferee who is duly served with, and is represented at the trial, can not be heard to object that the heirs of the deceased entryman were not properly served ... 197
Insufficiency of, may not be alleged by one who has secured a continuance of the case to a day certain ... 524
Should be given the sole devisee of a deceased timber culture entryman in attacking the entry ... 452
Of timber culture contest should be served upon the heirs or legal representatives of deceased entryman ... 452
Diligence to ascertain the names and last known address of the heirs or legal representatives of deceased timber culture entryman required ... 452
Of cancellation, to a successful contestant, sent by unregistered letter is not sufficient ... 477
Of all action affecting the land should be given a transferee who has notified the local office of his interest ... 641

REHEARING.

May be ordered on the report of the local officers based on an inspection of the land involved ... 38
Should be allowed where evidence was introduced and considered on an issue not raised on the hearing as originally ordered ... 159

REVIEW.

The motion should set forth affirmatively the specific error alleged ... 331
Motion for, should be accompanied by an affidavit that the application is in good faith and not for the purpose of delay ... 331
Will not be granted if the decision is warranted by evidence independently of the alleged erroneous finding of fact ... 331
Not granted on the ground that the decision is not supported by the evidence, if fair minds might reasonably differ as to the conclusion that should be drawn from the evidence ... 331

Page.

On the ground that the decision is against the weight of evidence, only allowed where such decision is clearly against the palpable preponderance of the evidence.......248, 331

Not granted on newly discovered evidence which goes only to impeach the credit or character of a witness 331

On motion for, the Department may examine any material question which it appears from the record was not considered in the original decision. 400

Decision denying a writ of certiorari not subject to 423

Application for, before the tribunal rendering the decision, should be made when new matter is relied upon to set aside such decision.................................... 294

Motions for second consideration should not be allowed 111

Not a proper ground for re-review that the decision on review was prepared by the writer of the original decision.... 111

After disposition of a case on review, suggestions of fact or law not previously considered may be presented by petition for such action as may be deemed appropriate ...111, 443

Petition for re-review will be denied unless it presents some new question, or suggests ground for the exercise of supervisory authority 443

Preference Right.

See *Contestant.*

Pre-emption.

See *Alienation, Entry, Filing, Final Proof, Residence, Settlement.*

How initiated and perfected 433

Right of, not dependent upon declaratory statement 433

A person can not legally acquire the right while at the same time asserting a claim under the homestead law for a different tract........... 200

No rights acquired until there has been full compliance with the law, and payment made for the land......................... 269

Final proof and payment only secure the right to a patent in the event that it is finally determined that the facts warrant its issuance 269

Rights not affected by delay in issuing final certificate if there has been actual compliance with the law 268

The second inhibition of section 2260, R. S., does not apply to one who, prior to settlement or filing, sold in good faith that portion of his homestead on which he formerly resided 132

Joint ownership in land is sufficient under section 2260, R. S., to preclude removal therefrom to reside upon public land in the same State or Territory...................... 367

Page.

The inhibition in the second clause of 2260, R. S., is against one who abandons residence on his own land "to reside" on the public land, and does not apply if the pre-emptor had in good faith sold the land on which he formerly resided before establishing his actual residence on the pre-emption claim 502

Deed from husband to wife, executed in good faith, prior to the establishment of actual residence, removes the bar under the second clause of section 2260, R. S 502

Right of, extends to timber lands, but the final proof should show that the land was taken in good faith for a home and not for the value of the timber alone.......... 641

Land "settled and improved" by a pre-emptor only becomes "subject to the entry of any other purchaser" where it was open to private entry at date of settlement 346

Heirs of a deceased pre-emptor entitled to be heard as against an adverse claimant ... 405

An intervening settlement right, set up to defeat a pre-emptor in default as to proof and payment within the statutory period, must be based on substantial acts of improvement 417

Claim may be transmuted to homestead under act of March 2, 1889, if initiated prior to said act, though the pre-emptor may have perfected a homestead entry 422

Private Claim.

See *Jurisdiction, Survey.*

The mistaken classification of a claim in the report of the register and receiver as among those already confirmed by law will not bring it within the confirmatory provisions of the act of May 11, 1820........... 80

There is no authority for the issuance of scrip under section 3, act of June 2, 1858, if the basis had not been confirmed by Congress 80

The claim for which indemnity is sought under section 3, act of June 2, 1858, must be shown to have been confirmed by Congress, and not located or satisfied in whole or in part.. 391

If a claim depends for confirmation upon section 3 of the act of March 3, 1819, the confirmee or his legal representative must identify the land.......... 391

Indemnity under section 3, act of June 2, 1858, will only issue to the owner of the claim to which title has failed, and if the applicant has parted with a portion of the land alleged as a basis, he can only receive indemnity for the part yet owned.............. 463

Private Entry.

See *Contestant.*

Public lands withdrawn from, by act of March 2, 1889. (Circular of March 8, 1889.). 314

Lands which have been reduced in price should be re-offered at the reduced price before opened to.............................. 87

Page.

Lands which have been once offered, then temporarily withdrawn, and afterwards restored, should not be sold at private sale without restoration notice 87

An entry which is voidable for want of restoration notice may be confirmed by the Board of Equitable Adjudication 87, 189

Void for want of re-offering must be canceled 189

The case of Eldred *v.* Sexton cited and distinguished 87

Lands affected by the repeal of the act of June 21, 1866, not subject to, until offered. (Arkansas.) 155

Not permissible for lands affected by the repeal of section 2303, R. S., until after offering 514

Made in good faith, of land included within an indemnity withdrawal, may be referred to the Board of Equitable Adjudication, where the withdrawal is subsequently revoked and no adverse claim exists 410

Allowed for land included within a prior swamp land claim, should be suspended, with the right to show that the land did not pass under the swamp grant. If such fact is shown the entry should be sent to the Board of Equitable Adjudication 644

Though illegally allowed is, while of record, an appropriation of the land 514

Protestant.

See *Mining Claim.*

Public Land.

See *Desert Land.*

The grant to the Northern Pacific expressly limits the increase in price to the "reserved alternate sections," and such increase does not, therefore, extend to odd-numbered sections excepted from the grant. 58

Price of, within forfeited railroad grants, and lands excepted from such grants, reduced to single minimum by the act of March 2, 1889. (Circular of March 8, 1889.) 314

Covered by the settlement of a pre-emptor prior to the filing of the map of general route (Northern Pacific) is not enhanced in price as against the settler 318

All lands subject to entry within the limits of the Texas Pacific grant were double minimum in price from the date of withdrawal on general route to the passage of the act of March 2, 1889 530

Authority of the Commissioner to order into market isolated tracts of unoffered land not abridged by the act of July 15, 1870. 421

Purchaser.

See *Alienation, Final Proof, Homestead* (act of June 15, 1880), *States and Territories.*

Railroad Grant.

See *Final Proof, Railroad Lands, Right of Way.*

Page.

GENERALLY.

The construction of a grant, adopted and followed for many years in its adjustment, becomes a rule of property and should not be changed 255

The company required to "list" its granted lands 30

The failure of the company to "list" lands within the granted limits will not defeat proceedings had to determine the mineral or non-mineral character of the land... 30

The non-mineral character of the lands being shown, title thereto passes under the grant. (Central Pacific.) 30

Lands within an unforfeited grant not subject to entry 589

Land granted does not revert after condition broken until a forfeiture thereof has been declared either through judicial proceedings or legislative enactment 589

The deduction required from the lands granted by the act of July 27, 1866, in so far as the road located thereunder was upon the same line as that provided for in the grant of 1852, should be made from the aggregate amount of the later grant 165

The odd sections within the primary limits of the grant of June 10, 1852, excepted therefrom, but withdrawn under said grant, having been "offered" after the adjustment thereof, and before the grant of July 27, 1866, were not reserved from the operation of the latter 165

The provision in section 2, act of March 3, 1863, with respect to settlement rights "on any of the reserved sections," refers to the even numbered sections, not granted.. 570

The number of roads provided for in the grant of June 3, 1856 (Alabama), considered. 33

The grant to Minnesota in aid of a road "from Stillwater, with a branch via St. Cloud and Crow Wing," is in effect an entirety and indivisible (St. Paul, Minneapolis and Manitoba Railway) 255

Under section 2, act of February 8, 1887, lands occupied by actual settlers at definite location of the road (New Orleans, Baton Rouge and Vicksburg), and still remaining in their possession are excepted from the grant 377

The New Orleans, Baton Rouge and Vicksburg Company, its mortgagees or bond holders, have no standing in the Department to object to the issuance of patents to the New Orleans and Pacific, if the latter company has complied with the act of 1887. 25

The grant to the New Orleans and Pacific took effect when the Secretary of the Interior was notified that the company had accepted the provisions of February 8, 1887, and attendant obligations 25

Settlement claims protected under the act of February 8, 1887, will not be affected by the fact that the land was included within a grant to another company where such grant was subsequently forfeited 377

Page.

ACT OF JUNE 22, 1874.

Acceptance of relinquishment by the local office does not amount to an approval of the selections based thereon 472

Selections not authorized on relinquishment of indemnity lands to which the right of the company had not attached 472

ACT OF APRIL 21, 1876.

A pre-emption claim initiated before notice of withdrawal on general route was received, excepts the land from such withdrawal 318

ACT OF MARCH 3, 1887.

Circular instructions of February 13, 1889. 348

The act is remedial and should be construed liberally in favor of the bona fide settler 324

In order to sustain a suit under said act it is necessary to show that the land has been erroneously certified or patented under the grant 570

If part of an entry has been erroneously canceled on account of a railroad grant, it should, under this act, be re-instated, and patent issued thereon if the settler has shown due compliance with law 318

It is the duty of the Secretary of the Interior to re-adjudicate cases whenever it appears that the pre-emption or homestead entry of a bona fide settler has been erroneously canceled on account of a railroad grant 318, 382

Plea of *res judicata* can not be interposed to relieve the company from proceedings under the act 318

A judicial decree awarding possession to a purchaser from the company will not prevent the Department from taking jurisdiction under said act......................... 382

The right to re-instatement conferred upon the settler is superior to that of a bona fide purchaser from the company 382

Section 3 of said act authorizes re-adjudication where an application to file or enter has been erroneously rejected by the local office 382

The act entitles a settler to perfect a homestead entry for the entire tract originally applied for notwithstanding the issuance of patent to him under the homestead law for a part of said tract. 382

The right to re-instatement under said act is defeated by a voluntary abandonment of the claim before the grant attached........ 588

A relinquishment executed on notice that the entry had been suspended is not such a "voluntary" abandonment as will bar re-instatement under the act.................... 324

INDEMNITY.

No right prior to selection............... 21

The joint resolution of May 31, 1870, created a second indemnity belt (Northern Pacific) 13

Page.

Selections may be made within the first indemnity belt, irrespective of State or Territorial lines (Northern Pacific) 13

Selections of unsurveyed lands not allowed 307

Selections should be made from lands nearest the granted sections in which the loss is alleged............................... 373

If the indemnity provided for one of the lines or branches (St. Paul, Minneapolis and Manitoba Railway) prove insufficient therefor, the deficiency may be supplied from the indemnity limits of the other lines or branches 255

May not be selected within the granted limits of another road, though such road was not constructed within the period fixed by the statute, but was definitely located, and the grant therefor remains unforfeited. 33

Expired filing of record does not bar selection of the land, unless it be shown that the pre-emptor had not in fact abandoned the land (St. Paul, Minneapolis and Manitoba Railway)............................. 291

On application to select land covered by an expired filing, a hearing should be had to determine the status of the land (St. Paul, Minneapolis and Manitoba Railway).. 291

Withdrawals for the Memphis and Little Rock Company and the Madison and Portage Company revoked 427

LANDS EXCEPTED.

Settlement claim existing when the grant becomes effective excepts the land embraced therein..................................362, 365, 378

Pre-emption filing made the same day the map of general route was filed, and of record when the order of withdrawal was made thereon, excepts the land included therein from the withdrawal............... 542

Land included within an expired filing is not excepted from the grant of May 15, 1856 (Iowa), in the absence of a pre-emption right at definite location.......................... 516

An unexpired filing of record at date of definite location excepts the land covered thereby from the grant (Northern Pacific). 380

Under the grant to the St. Paul, Minneapolis and Manitoba Company, the existence of a filing, when the grant became effective, will raise a presumption of right, which, in the absence of proof to the contrary, is conclusive as against the grant.... 380

The existence of homestead and settlement rights at the date of the attachment of the grant excepts the land therefrom.... 58

A claim resting on settlement, residence, and improvement, existing when the grant becomes effective, excepts the land covered thereby from the operation of the grant. 520, 542

Does not take effect upon land within a *prima facie* valid homestead entry......... 378

Page.

Land not free from "pre-emption or other claims or rights" does not pass, and the validity of such claims is not material (Northern Pacific.) 378

A claim resting on settlement, residence, and improvement, existing when the grant becomes effective is within the excepting phrase "occupied by homestead settlers" (Northern Pacific.) 362

Land within the subsisting granted limits of the Atlantic and Pacific, when the map of the designated route of the Southern Pacific was filed, is excepted from the grant to the latter company 282

The abandonment of a settlement claim after withdrawal does not render the land subject thereto 542

WITHDRAWAL.

Procedure on revocation of indemnity withdrawal 237

Under the order revoking its indemnity withdrawal, the "right of the company to make selection" should be determined by the land office, in cases of unapproved selections covered by applications to file or enter 237

An executive withdrawal should be given effect only to the extent intended by the Department 21

The revocation of an indemnity withdrawal takes effect as soon as issued, and a settlement on land within such withdrawal, existing at the date of revocation, will be protected as against a subsequent selection 355

The company will not be heard to object to a settlement claim within its indemnity limits, after revocation of the withdrawal and in the absence of a selection 355

A settlement within an indemnity withdrawal is unavailing as against the company's right of selection 355

A *prima facie* valid entry for land withdrawn as indemnity is relieved from conflict with the grant on revocation of the withdrawal, if the land has not been selected 243

On general route for a branch line will not reserve lands for the main line. (Northern Pacific.) 365

An unauthorized indemnity withdrawal is no bar to a homestead application, and such application will defeat a subsequent selection 282

Entry allowed, under an existing practice, for land within an indemnity withdrawal is not illegal, though subject to the rights of the company 243

Entry within an existing withdrawal is invalid as against the grant 570

An expired filing, in the absence of a settlement right claimed thereunder, does not except the land covered thereby from the operation of a withdrawal 570

Page.

A settlement right existing at the date of indemnity withdrawal excepts the land covered thereby from the effect of such withdrawal 21

A filing, based on settlement prior to survey, made when it was held that an indemnity withdrawal did not take effect upon unsurveyed land, is good as against the withdrawal 21

Prima facie valid filing of record excepts the land covered thereby from withdrawal on general route. (Sioux City and Pacific). 292

A homestead entry of record at date of indemnity withdrawal excepts the land therefrom 588

A claim based on settlement, residence, and improvement existing at the date of withdrawal on general route, excepts the land included therein from such withdrawal. (Northern Pacific.) 362

Railroad Lands.

Circular instructions of February 13, 1889, under the act of March 3, 1887 348

Section 4 of the act of March 3, 1887, confers a preference right upon purchasers in good faith from the company 570

Method of procedure and proof required under application for the right of purchase as provided in section 5, act of March 3, 1887 ...... 27, 348

Land excepted from a railroad grant and consequently not withdrawn for its benefit not subject to purchase under the act of January 13, 1881 344

Purchaser under the act of January 13, 1881, must show actual settlement, and that he can not acquire title under the pre-emption, homestead, or timber culture law 344

Receiver.

See *Land Department.*

Record.

Integrity of, not impeached by an unverified statement 294

Rehearing.

See *Practice.*

Relinquishment.

See *Application, Jurisdiction.*

Effectually divests the entryman of all claims under the entry 606

To be effective must be the voluntary act of the entryman 192

Filed after the beginning of a contest can not defeat the right of the contestant 357

Does not inure to the benefit of a contestant unless it be found that it was the result of the contest 357

Filed pending contest, and as the result thereof, inures to the benefit of the contestant 400

Page.
Of a desert land entry when filed opens the land at once to settlement and entry. 371, 605
Made by the entryman after mortgaging the land will not defeat the right of the mortgagee to show that the entryman was entitled to patent 618
Made by the entryman after he has parted with his interest in the land is null and void. 641

Repayment.

Not allowed in the absence of statutory authority 102, 462
Not allowed if the entry can be confirmed. 462
A decision denying the right of, and long acquiesced in will not be re-opened 134
Application for, should be made when second entry is allowed, instead of asking credit on second entry for fees paid on first. 239
Right of, not impaired by relinquishment filed under the advice of the General Land Office.............................. 423
Not allowed on claim of excess, where double minimum price was paid for lands within the Texas Pacific grant prior to the act of March 2, 1889 530
May be allowed of double minimum excess erroneously charged for land reduced in price by the act of March 2, 1889 583
Will not be allowed of money deposited with the receiver as agent of the applicant. 77
Can not be allowed of money deposited to cover the cost of office work on the survey of a mineral claim, though the deposit is not expended 102
An entry allowed by the local office on testimony afterwards rejected as insufficient by the General Land Office and the Department, is an entry "erroneously allowed" for which repayment may be accorded in the absence of bad faith..................... 423
Desert land entry allowed on insufficient evidence of reclamation, is an entry "erroneously allowed," and if subsequently relinquished on account of inability to show reclamation, repayment may be allowed in the absence of bad faith........................ 491
Allowed where through mistake the settlement and improvements of the entryman were not on the land covered by the entry and it was accordingly canceled 188
Right of, recognized where the entry was allowed on final proof irregularly submitted, and the entryman can not make new proof as required 636
May be allowed in case of graduation entry erroneously allowed for land that passed under the swamp grant 621
May be allowed where commutation proof, made in good faith, is found insufficient in the matter of residence, and the entryman not being able to show further compliance, relinquishes his claim to the land 162, 423

Page.
With the right to thereafter submit ordinary homestead proof can not be allowed to one whose commutation proof is found insufficient, but whose entry is not canceled. 84
Not allowed to one who as assignee under a graduation entry made cash payments in lieu of settlement and cultivation.......... 134
Will not be allowed if the entry is canceled on account of its fraudulent character 322
One who procures an entry through false testimony is not entitled to; and a transferee under such an entry has no better right than the entryman 140
The transferee holding the present interest in the land to which title has failed is the party entitled to............................ 636

Reservation.

Disposition of abandoned military, not affected by the act of March 2, 1889. (Act of that date and circular thereunder) 314

Residence.

See *Final Proof, Settlement.*

GENERALLY.

Leave of absence permissible under the act of March 2, 1889. (Circular of March 8, 1889) 314
Temporary absences may be properly excused if the good faith of the settler is apparent 60
Acquired where presence upon the land is with the intent to make it a permanent home to the exclusion of one elsewhere 248
Temporary absences for the purpose of earning a livelihood do not authorize a presumption of abandonment 517, 639
After the establishment of, absences caused by sickness may be excused........ 353
Inhabitancy not impeached by temporary absences to secure means for the improvement and purchase of the land............ 645
Credit for, from the time it actually began may be allowed to one who procures the cancellation of a prior entry covering the land 227
Intention to leave the land after making final proof may be compatible with good faith 508
Continuity of, not broken by forcible ouster from the land, and subsequent compulsory absence therefrom 591
Not incumbent upon a settler who has been wrongfully ejected from his land to make a new settlement on that part of the claim not in dispute, pending judicial proceedings to recover possession.............. 593
Of a married man held to be where his family resides, in the absence of proof to the contrary 615, 629

Page.

After the establishment of, absence caused by official duties will not work a forfeiture of the settler's rights 85

Conclusive presumption of abandonment not raised by the fact that the claimant, while absent on account of sickness, voted in the precinct where he had been taken for treatment 353

Not acquired by one who goes upon public land with the fixed intention of leaving the same, after colorable compliance with the law, and in the mean time substantially maintains a home elsewhere 615

Not acquired or maintained by going upon or visiting land for the purpose of complying with the mere letter of the law 248, 285, 331

On a tract covered by the entry of another is unavailing if it is abandoned prior to the cancellation of said entry and not resumed until after the intervention of an adverse right 584

COMMUTED HOMESTEAD.

A period of six months inhabitancy immediately preceding entry required as a test of good faith; but temporary absences caused by poverty or ill health will not impair such inhabitancy 634, 639

Six months' presence on the land for the purpose of carrying out the letter of the departmental requirement, with the intent to discontinue inhabitancy at the end of that period, not accepted 285

HOMESTEAD.

Essential requirement of homestead law, dependent upon actual inhabitancy of the land to the exclusion of a home elsewhere 576, 584

Must be established under homestead entry within six months from date thereof, and failure in this requirement is considered a defect requiring explanation 566

No one but the wife, during the life of the entry, may allege "desertion" in proof of abandonment 626

An absence to procure a support for the family, though covering several years, is not abandonment if the family lives on the land in the mean time 626

In computing military service in lieu of, credit should not be allowed twice for a period covered by two enlistments 227

A homesteader who takes title to the tract on which his house is situated by scrip location and removes to another part of the original claim can not be credited for residence on the first tract 547

Credit for, while the land was held under his previous timber culture entry, may be allowed a homesteader in the absence of an intervening claim 45, 192

Page.

PRE-EMPTION.

Absence in military service permissible if actual residence has been established ... 570

Res Judicata.

See *Jurisdiction.*

A decision long acquiesced in will not be disturbed 134

A ruling on a question not involved in the case is not conclusive 188

The final decisions of the head of a department are conclusive, with certain exceptions, upon his successor 255

Plea of, not good as against the proceedings directed by the act of March 3, 1887... 318

Review.

See *Practice.*

Revised Statutes.

See *Statutes*, also *Revised Statutes* cited and construed page XVI.

Right of Way.

The right to take material from the public land conferred by the acts of 1872 and and 1875, as defined by the word "adjacent" does not extend beyond the tier of sections through which the right of way passes, and an additional tier of sections on either side. 41

The act of March 3, 1875, is applicable to the Denver and Rio Grande Railroad Company and not inconsistent with the act of 1872 41

Timber may not be taken from lands adjacent to one part of the road for the purposes of constructing another part 41

Depots, station houses, etc., not included in the term "railroad" 41

Privilege does not attach on the filing and acceptance of the articles of incorporation and proofs of organization, but on definite location, either by actual construction or filing a map 115

A map of definite location not required to secure, if a road has been actually constructed by a company which has observed the preliminary requirements 115

The notation of the company's right on the entry papers is not authorized where the road is constructed over unsurveyed land, and an entry is afterwards allowed for land through which the road extends 115

A statement reserving the right of the company may be placed in a patent issued under an entry allowed for lands over which a road was previously constructed and at a time when the lands were unsurveyed 115

Opinion of the Attorney-General requested on the authority of the Department to revoke an allowance of right-of-way privileges 374

School Land.

Grant of, compared with the swamp grant 308

Page.

Confirmatory provisions of the act of March 1, 1877, considered (California) 4

Indemnity selections certified prior to the act of March 1, 1877, for losses alleged in townships made fractional by the segregation of swamp lands, will not be disturbed (California.) 4, 24

Right of purchase under the act of March 1, 1877, not defeated by the erroneous cancellation of a selection 326

The rejection of an application to purchase under the act of March 1, 1877, will not bar a second application by the same party based on a different claim 326

An applicant for the right of purchase under the act of March 1, 1877, is "an innocent purchaser" if his vendor held without notice of defect in the State's title 326

If one who has settled prior to survey subsequently thereto abandons the land the title of the State attaches to the school section as of the date of survey, and the right of the State to select indemnity ceases 495

Settlement on, prior to and existing at survey excepts the land from the grant, and entitles the State to select indemnity so long as the claim of the settler exists 495

A purchase after survey of the possessory right of one who settled prior thereto, confers no right as against the grant....... 495

If the State makes a selection in lieu of land covered by settlement at survey, the reservation is transferred from the basis to the indemnity; and by the same act the claim to the basis is relinquished and the land opened to entry 394

Title acquired by valid selection will not be impaired in the hands of the State's grantee by a subsequent duplication of the basis 480

Irregular selections of lands sold to innocent purchasers prior to the act of July 23, 1866, confirmed by section 1 of said act (California) 480

A selection improperly allowed, because of a prior pending claim, may be allowed to stand on the removal of such claim from the record 72

A selection made on a valid basis, but including in part lands excluded therefrom, may be approved as to the tract subject to selection 72

The State is entitled to select indemnity of the character and class it would have received had there been no deficiency 32

Where the basis would have been double minimum, if it had not been reserved for school purposes, the State (Minnesota) is entitled to select double minimum land.... 31

Double minimum land may be taken in lieu of double minimum loss, but not for single minimum loss (Louisiana) 126

Irregularity in the form and place of section 16, arising from the survey of the township, will not defeat the grant......... 560

A legislative reservation of, not defeated by a subsequent executive reservation of the land for military purposes (Michigan) . 560

The selections authorized by the act of May 20, 1826, are not "lieu" selections..... 563

Under the act of 1826 the State (Louisiana) is not entitled to indemnity for sections in place, but covered by private grants 126

The act of 1826 includes selections for "radiating" and other irregular surveys (Louisiana) 126

If full compensation has been received on account of a fractional township, further selections will not be allowed on the ground that the basis in the original selection was improperly described as a part of sections 16 and 36; and this rule applies whether such selections were made before or after the act of March 1, 1877 (California) 307

The act of August 9, 1888, does not authorize the Secretary of the Interior to recognize settlement rights acquired after survey and require the Territory (Wyoming) to select indemnity therefor................ 495

An act reserving lands in a Territory (Wyoming) has the same force, so far as the reservation goes, as a grant for the same purpose to a State.......................... 495

Scrip.

See *Private Claims.*

Commissioner may order a hearing to determine the validity of a location 207

Validity of claims may be passed upon where adverse claimants voluntarily appear at a hearing.................................. 207

Adjustment of a location to the lines of the public survey does not validate a location theretofore invalid 207

Sioux half-breed, is not subject to transfer 207

Transfer of Sioux half-breed effected through powers of attorney will not be recognized 207

Issued to the Sioux half-breed, requires in location on unsurveyed land a showing of improvements made for his benefit......... 207

Improvements made for the benefit of one claiming the right of location under a power of attorney are not within the intent of the law 207

A location made in accordance with the law passes title out of the United States... 207

Location by one holding scrip in violation of law, confers no title........................ 207

Selections.

See *Railroad Grant, School Land, States and Territories, Swamp Land.*

Seminole Lands.

See *Townsite.*

Circular of April 1, 1889.................. 336

Page.

Settlement.

See *Entry, Filing, Residence, School Land.*

Acts constituting, considered and defined. 417

Rests on acts performed in person by the party claiming the benefit thereof. 623

And residence not the same. 502

Right can not be acquired or maintained on different tracts at the same time. 96, 200, 461

Prior to survey confers no vested interest in the land. 541

Priority of right determined on hearing as between pre-emptor and homesteader. 528, 623

Conflicting rights acquired prior to survey adjusted through agreement of the parties. 536

Rights are not acquired by the purchase of the possessory rights and improvements of another. 623

And improvement before survey on land included within the known settlement right of another are invalid as against the prior settler. 630

Upon land covered by the entry of another confers no right as against the entryman who complies with the law. 227

Land covered by final homestead entry not subject to. 243

In good faith on land covered by the entry of another, will not deprive the settler of the benefit of the act of May 14, 1880, where no adverse claim exists. 448

Rights not acquired by one who enters upon and retains possession of land under contract of purchase from another. 207

On cancellation of an entry under contest a bona fide settler then on the land is entitled to the right of entry as against every one except the successful contestant. 597

Of an alien, on unsurveyed land, protected through his subsequent declaration of intention to become a citizen, and declaratory statement filed when the land became subject thereto. 536

OSAGE LANDS.

If the settlement is not bona fide, but for the benefit of another, the settler is not an "actual settler" under the act of May 28, 1880. 173

An "actual settler" under the act of May 28, 1880, is one who goes upon the land intending to make it his home, and does some act thereon indicating such intention, and sufficient to give notice thereof to the public. 173

Soldiers' Homestead.

See *Homestead.*

States and Territories.

See *School Land, Swamp Land.*

A "purchaser in good faith" under section 7, act of July 23, 1866, defined (California). 144

Page.

The conditions under which the right of purchase is accorded by section 7, act of July 23, 1866, specified (California). 144

The conveyance of an undivided interest does not carry the right of purchase under the act of 1866. 144, 279

Right of purchase under section 7, act of July 23, 1866, is only conferred upon one who purchased from Mexican grantees a definite tract of land (California). 144, 279

The right of purchase under section 7 does not relate back to former claimants, but extends to those then holding lands, purchased in good faith before the rejection of the grant, and who had from date of purchase to the passage of the act continued in actual possession thereof within definite boundaries (California). 144

By the act of June 9, 1880, the right of the State (Florida) to select indemnity is confined to "vacant unappropriated public lands". 380

The Department controls selections under the university grant until they are approved, and may authorize the change of a selection which embraced a bona fide settlement claim made without notice of the selections (Montana). 55

Statutes.

See *Acts of Congress* and *Revised Statutes* cited and construed pages XV and XVI.

Contemporaneous and uniform interpretation is entitled to weight in the construction of the law, and in cases of doubt ought to turn the scale. 17

Contemporaneous executive construction of a doubtful and ambiguous law entitled to great respect. 93

Rights acquired under an existing construction of the law will not be impaired by a later and different interpretation. 104, 399

Executive construction of, should not be changed except for cogent reasons. 255, 279

Acts *in pari materia*, though passed at different times, and not referring to each should be taken and construed together. 368

Survey.

See *Accounts, Entry.*

Returns presumptively correct. 440, 467

Return of, a pre-requisite to the acquisition of vested rights under the settlement laws. 541

Character of streams that should be meandered. 158

Augmented rates allowed where the lands are mountainous or covered with dense timber or underbrush. 255, 364

Section 2411, R. S., providing per diem rates, applicable only to California and Oregon. 254

Appropriation for, confined to "lands adapted to agriculture and lines of reservations" is available for survey of a private claim, the extent of which has been finally settled, and a survey thereof directed. 254

Page.

Subdivisional surveys in "No Man's Land" may be made from the appropriation of October 2, 1888, if such money is not required for the survey of townships occupied by actual settlers 613

Money deposited for the cost of office work on a mineral survey, and remaining unexpended, may be applied on new 102

Swamp Land.

General character and scope of the grant considered 308

Swamp grant compared with the school grant 308

Right of the State to be heard before the Department on the final adjudication of a claim 64

Selections of unsurveyed lands by estimated areas may be patented if they can be designated by an accurate description (Florida) 65

Selections of unsurveyed lands made in accordance with existing regulations and reported prior to the act of March 3, 1857, held to be confirmed by said act 65

Selections, by estimated areas, of unsurveyed lands permissible, in the absence of conflict with other claims, if the entire body of land is of the character granted 369

Selections of unsurveyed, must be governed by the facts in each case 369

The exception of settlement rights in the act of 1857, is not applicable to the State of Florida 65

A list of selections finally rejected prior to the act of March 3, 1857, is not confirmed by said act 387

Issuance of patent under the grant, defeats confirmation of sale as provided by act of March 2, 1855 621

A *prima facie* valid claim under the swamp grant reserves the land covered thereby from sale or other disposition 644

The finding of a commission, mutually agreed upon, that a certain tract is of the character granted does not preclude the Department from reviewing such finding or resorting to other evidence (Minnesota) 555

Though the field notes may show the land to be of the character granted, it will not pass to the State if the falsity of the returns is shown (Minnesota) 179

The burden of proof is with the State if the returns do not *prima facie* show the swampy character of the land 555

The greater part of a 40-acre tract should appear to be of the character granted in order to sustain the claim of the State... 555

Lands temporarily reserved for the benefit of the government at the date of the grant are not excepted therefrom, but pass, as of the date of the grant, on being relieved from the reservation (Michigan) 308

Lands segregated by the State (California) as swamp, before the act of July 23, 1866, by surveys in conformity with the system adopted by the government, were confirmed to the State by said act 78

Page.

Timber Culture.

See *Contest, Entry, Final Proof.*

The eight years of cultivation must be computed from the time the full acreage is planted 191

Non-compliance with law not excused on the plea that the land is too wet for the cultivation of trees, if the character of the land was known at entry, and no effort was made thereafter to improve its condition... 511

That the trees have not reached a particular height or size will not warrant cancellation, if the entryman has been diligent in cultivation 535

No particular height or size of trees required prior to the issuance of patent 191

Failure to secure the requisite growth of thrifty trees warrants cancellation, if such condition is the result of negligence and bad faith in the matter of cultivation 601

Timber and Stone Act.

To except land from entry under said act it must appear that crops can be raised profitably thereon 159

In a hearing to determine the priority of right between an applicant and an alleged prior settler, the character of the land may be also placed in issue 159

An application to purchase under said act should not be rejected on account of a temporary order of reservation made by the General Land Office after the application was filed and notice thereof given 412

If the character of the land is called in question a hearing should be ordered 412

Timber lands may be taken under the settlement laws 641

Timber Trespass.

See *Right of Way.*

Right of recovery as against a railroad company for timber taken from odd sections within indemnity limits not defeated by a subsequent selection of the lands 359

Civil and criminal proceedings advised where timber was taken by a railroad company prior to application for right of way privileges, and not for the purposes contemplated by law 374

Town Site.

See *Mining Claim.*

Entries in Oklahoma restricted by statute; circular of April 1, 1889 336

The act of March 2, 1889, with respect to entries under sections 2387 and 2388 does not extend to a corporation seeking to locate and enter prospective townsites (Oklahoma) 425

Transferee.

See *Alienation, Final Proof.*

Wyoming.

See *School Land.*