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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, 1890, TO JUNE 30, 1890.

VOLUME X.

Edited by S. V. PROUDFIT.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1890.

DEPARTMENT OF THE INTERIOR,
Washington, D. C.

This publication is held for sale by the Department at cost price, as follows :

| | |
|--|----------|
| Volume 1, from July, 1881, to June, 1883 | \$1. 05. |
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TABLE OF CASES REPORTED.

| | Page. | | Page. |
|---|-------|---|----------|
| Ackerson v. Dean..... | 477 | Blanchet, Dahon v..... | 61 |
| Adair, Joseph M. (on review)... | 642 | Bogue, Northern Pacific Railroad Company v..... | 386 |
| Aldrich, Frank..... | 587 | Boos v. Whitcomb..... | 584 |
| Alexander v. Ellsbury..... | 482 | Bottomly, Waldroff v..... | 133 |
| Amador and Sacramento Canal Company, Anderson v..... | 572 | Bowker, Edward..... | 548 |
| Anderson, Sapp v. (on review) .. | 566 | Boyd, Connelly v. (on review) .. | 489 |
| Anderson v. Tannehill <i>et al</i> | 388 | Boyd v. State of Oregon..... | 315 |
| Angell, Erasmus D..... | 421 | Boyer v. Union Pacific Railway Company..... | 568 |
| Anrys, Northern Pacific Railroad Company v. (on review)..... | 258 | Brecheisen, Vaughn v..... | 585 |
| Arkansas, State of, Forbes <i>et al</i> v. | 163 | Brennan v. Hume..... | 160 |
| Arkansas, State of, v. St. Louis, Iron Mountain and Southern Railway Company..... | 165 | Broste, Svenneby v..... | 108 |
| Arkansas, St. Louis, Iron Mount- ain and Southern Mountain Railway Company v..... | 45 | Brown, Northern Pacific Rail- road Company v..... | 662 |
| Atterbery, United States v. (on review)..... | 36 | Brown, Quam v..... | 664 |
| Atlantic and Pacific Railroad Company (on review)..... | 214 | Brunner v. Lux..... | 352 |
| Arnold v. Cooley..... | 551 | Buckley, John..... | 297 |
| Bailey, Cone v..... | 546 | Bundy v. Fremont Townsite (on review)..... | 595 |
| Baird v. Chapman's heirs <i>et al</i> ... | 210 | Burgess v. Hogaboom..... | 470 |
| Ball <i>et al</i> ., Robertson v..... | 41 | Burns, Frank..... | 365, 628 |
| Barry, James W..... | 634 | Cady v. Queen <i>et al</i> . (on review). . | 575 |
| Bass, Central Pacific Railroad Company..... | 499 | Cage, Chinn v..... | 480 |
| Bassett, Caroline B..... | 13 | California, State of, Harvey <i>et al</i> v | 217 |
| Bay State Gold Mining Company v. Trevillion..... | 194 | Callanan <i>et al</i> v. Chicago, Mil- waukee and St. Paul Railway Company..... | 285 |
| Beal, Missouri, Kansas and Texas Railway Company v..... | 504 | Cameron, Helen M..... | 195 |
| Beck, William K..... | 296 | Cameron Lode, Erie Lode v..... | 655 |
| Bennett, Dickson v..... | 45i | Canning v. Fail..... | 657 |
| Berdan, Green v..... | 294 | Canon, John R..... | 78 |
| Bernhard, Thatcher v..... | 485 | Capricorn Placer..... | 641 |
| Bickel <i>et al</i> v. Irvine..... | 205 | Carnes v. Smith..... | 100 |
| Binum, Ravezza v..... | 694 | Carson v. Finity..... | 532 |
| Black, Largey, <i>et al</i> v..... | 156 | Cass County, Illinois..... | 22 |
| Blake v. Marsh..... | 612 | Central Pacific Railroad Com- pany (on review)..... | 439 |
| | | Central Pacific Railroad Com- pany v. Bass..... | 498 |
| | | Central Pacific Railroad Com- pany, Icard v..... | 464 |

| | Page. | | Page. |
|--|-------|---|----------|
| Central Pacific Railroad Com- pany, Plaetke <i>v</i> | 317 | Dahon <i>v</i> . Blanchet | 61 |
| Central Pacific Railroad Com- pany <i>et al.</i> , <i>v</i> . Rees | 281 | Dailey, Hornback <i>v</i> | 318 |
| Central Pacific Railroad Com- pany, Showell <i>v</i> | 167 | Danford <i>v</i> . Ellsworth | 341 |
| Ce tral Pacific Railroad Com- pany, United States <i>v</i> | 466 | Davis <i>v</i> . Kaminsky | 346 |
| Champaign County (State of Illinois) | 121 | Davison <i>v</i> . Gabus <i>et al</i> | 114 |
| Chapman's Heirs <i>et al.</i> , Baird <i>v</i> .. | 210 | Dayton, Lyman C | 159 |
| Chapman <i>v</i> . Patterson | 129 | Dean, Ackerson <i>v</i> | 477 |
| Chicago, Milwaukee and St. Paul Railway Company, Callanan <i>et al.</i> , <i>v</i> | 285 | Dean, John J | 446 |
| Chicago, Milwaukee and St. Paul Railway Company <i>v</i> . Mellbrath | 684 | De Celle, M. H. (on review) | 81 |
| Chicago, St. Paul, Minneapolis and Omaha Railway Company, Shire <i>et al.</i> , <i>v</i> | 85 | Dermody, Michael | 419 |
| Chicago, St. Paul, Minneapolis and Omaha Railway Company | 147 | Devereux, Huntoon <i>v</i> | 408 |
| Childs, Walter C | 173 | Dickinson, G. T | 449 |
| Childs <i>v</i> . Southern Pacific Rail- road Company (on review) | 630 | Dickson <i>v</i> . Bennett | 451 |
| Chinn <i>v</i> . Cage | 480 | Diehl, Tripp <i>v</i> | 591 |
| Chillson <i>v</i> . Mahan | 20 | Diemer, Lewis <i>et al.</i> | 577 |
| Church, William L | 336 | Diggins, Rohrbough <i>v</i> | 136 |
| Clearwaters <i>et al.</i> , Linville <i>v</i> | 59 | Dougherty, James | 79 |
| Clement, Edward C | 338 | Douglas, John W | 116 |
| Cline, Southern Pacific Railroad Company <i>v</i> | 31 | Douglas County, State of Illinois | 446 |
| Clyatt, Stowell <i>v</i> | 339 | Dox <i>v</i> . State of Wisconsin | 39 |
| Cobby <i>v</i> . Fox (on review) | 483 | Dronberger, Emily M | 88 |
| Cole <i>v</i> . Reed | 588 | Dubuque and Pacific Railroad Company, Prindeville <i>v</i> | 575 |
| Colfer, Spalding <i>v</i> . (on review) .. | 21 | Dunn <i>v</i> . Shepherd <i>et al</i> | 139 |
| Collier <i>v</i> . Wyland | 96 | Durham, Samuel P | 557 |
| Collins Heirs <i>v</i> . Winslow | 569 | Eads, Weaver <i>v</i> | 279 |
| Colorado, State of | 222 | Eaton, Edwin J | 598 |
| Colton, Joseph L | 422 | Edmondston, Raney <i>v</i> | 387 |
| Cone <i>v</i> . Bailey | 546 | Eisemann, Albert | 539 |
| Connely <i>v</i> . Boyd (on review) | 489 | Elling, Lyman <i>v</i> | 474 |
| Continental Gold and Silver Min- ing Co. <i>v</i> . Gage | 534 | Elliott <i>v</i> . Ryan (on review) | 491 |
| Cook, Thomas C | 324 | Ellsbury, Alexander <i>v</i> | 482 |
| Cooley, Arnold <i>v</i> | 551 | Ellsworth, Danford <i>v</i> | 341 |
| Costello <i>v</i> . Jansen | 10 | Elmore, Henry | 400 |
| Coy, John G | 495 | Emblen, Reeves <i>v</i> . (on review) .. | 600 |
| Crane <i>v</i> . Stone | 216 | Emerson, Roots <i>v</i> | 169 |
| Crawford <i>v</i> . Furguson | 274 | English, Jacob E | 409 |
| Crawford, Ott <i>v</i> | 117 | Epley <i>v</i> . Trick (on review) | 3 |
| Curtis, C. S | 188 | Erie Lode <i>v</i> . Cameron Lode | 655 |
| Cushman, Mead <i>v</i> | 253 | Ertel, Iowa Railroad Land Com- pany <i>v</i> | 176 |
| Cyr <i>et al.</i> <i>v</i> . Fogarty | 616 | Evans, Joseph | 603 |
| | | Evans, Lunsford <i>v</i> | 211 |
| | | Everitt <i>v</i> . Zimmermann <i>et al.</i> | 437 |
| | | Ewing <i>v</i> . Rourke | 297 |
| | | Fail, Canning | 657 |
| | | Farley, Jacob | 661 |
| | | Ferguson <i>v</i> . Snyder | 234 |
| | | Finity, Carson <i>v</i> | 532 |
| | | Finnerty, Warner <i>v</i> | 433 |
| | | Fish, Mary | 606 |
| | | Flagstaff Townsite, Gonzales <i>v</i> .. | 348, 651 |
| | | Fletcher <i>v</i> . Roode | 250 |

TABLE OF CASES REPORTED.

V

| | Page. | | Page. |
|--|----------|---|-------|
| Fogarty, Cyr, <i>et al.</i> v | 616 | Harvey <i>et al.</i> v. State of California | 217 |
| Forbes <i>et al.</i> State of Arkansas v | 163 | Hartzell, Thomas B. | 681 |
| Fountain, Abram W | 260 | Hastings and Dakota Railroad | |
| Fouts v. Thompson (on review) | 649 | Company, Olney v | 136 |
| Fox, Cobby v. (on review) | 483 | Hauck, John C., <i>et al.</i> | 391 |
| Franceway <i>et al.</i> v. Griffiths | 691 | Hausen v. Ueland | 273 |
| Franklin v. Murch | 582 | Hay v. Yager, <i>et al.</i> | 105 |
| Fremont townsite, Bundy v. (on | | Headen, Lingle v | 153 |
| review) | 595 | Heirs of Partridge, Thompson v. | 107 |
| Fugelli, Northern Pacific Rail- | | Hellekson, Christopher | 229 |
| road Company v | 288 | Henderson, Thomas E | 266 |
| Furguson, Crawford v | 274 | Hermann, George F | 326 |
| | | Herre, Susan | 166 |
| Gabus <i>et al.</i> , Davisson v | 114 | Herriott, George, <i>et al.</i> | 513 |
| Gage, Continental Gold and Sil- | | Higday, C. L. | 385 |
| ver Mining Company v | 534 | Higgins, Rohrbough v | 136 |
| Galbraith, Isaac M | 62 | Hinds, Wharton v | 152 |
| Gale v. Northern Pacific Railroad | | Hogaboom, Burgess v | 470 |
| Company | 307 | Hone, John C | 493 |
| Gamble v. Sault Ste. Marie | 375 | Hopkins, Henry St. George L... | 472 |
| Gardner v. Spencer <i>et al.</i> | 398 | Hornback v. Dailey | 318 |
| Garnsey, Charles L. | 340 | Huerfano Valley Ditch and Reser- | |
| Ganger, Henry | 220 | voir Company | 171 |
| Gerold, Russell v | 18 | Huling, Lewis C. | 83 |
| Glafcke, Yates v | 673 | Hume, Brennan v | 160 |
| Glenn v. Owens | 461 | Huntoon v. Devereux | 408 |
| Goldstein, Louisa | 155 | Hurd, Northern Pacific Railroad | |
| Gonzales v. Flagstaff Townsite.. | 348, 651 | Company v | 683 |
| Goode, Wilber v. | 527 | | |
| Goodwin, Wood v | 689 | Icard v. Central Pacific Railroad | |
| Grand Rapids and Indiana Rail- | | Company | 464 |
| road Company | 676 | Illinois, State of | 398 |
| Green v. Berdan | 294 | Illinois, State of (Cass County) .. | 22 |
| Greene, McWeeney v. (on review) | 147 | Illinois, State of (Champaign | |
| Gregg v. Hallock | 373 | County) | 121 |
| Griffin v. Pettigrew | 510 | Illinois, State of (Douglas Coun- | |
| Griffiths, Franceway <i>et al.</i> v | 691 | ty) | 446 |
| Grunsfeld, Alfred | 508 | Iowa Railroad Land Company v. | |
| Gulbranson, Hagen v | 238 | Ertel | 176 |
| | | Irvine, Bickel <i>et al.</i> v | 205 |
| Hagen v. Gulbranson | 238 | | |
| Hallock, Gregg v | 373 | Jackson, McFarland v | 405 |
| Halvorson, Northern Pacific Rail- | | Jackson, W. S. | 12 |
| road Company v | 15 | Jacobson v. Remender | 256 |
| Hamilton, Alexander | 351 | Jansen, Costello v | 10 |
| Hannibal and St. Joseph Rail- | | Jaramilla, McDonald v | 276 |
| road Company | 610 | Johnson, Andrew | 681 |
| Hansen, Mulligan v | 311 | Johnson, Milum v | 624 |
| Hardin, James A | 313 | Jones, Milton | 468 |
| Harrington v. Stockham <i>et al.</i> | 402 | Jones, United States v | 23 |
| Harris v. Northern Pacific Rail- | | | |
| road Company | 264 | Kaminsky, Davis v | 346 |
| Harten, Thomas D. | 130 | Kaufman <i>et al.</i> , Puckett v | 410 |
| Hartley v. Young | 181 | Keigan, William H | 651 |
| | | Kellem v. Ludlow | 560 |

| | Page. | | Page. |
|--|-------|---|-------|
| Kennedy v. Lowdell | 268 | Merrill, F. H. | 364 |
| Kerry, Northern Pacific Railroad Company v. | 290 | Meyer, Lewis F. J. | 492 |
| Keys v. Rumsey | 558 | Meyer, Southern Pacific Railroad Company v. | 444 |
| Killgore, McKenzie v. | 322 | Miller v. Knuttson | 593 |
| Kline v. Stephan | 343 | Milum v. Johnson | 624 |
| Kneeland <i>et al.</i> v. Norton | 271 | Mississippi, State of | 393 |
| Knuttson, Miller v. | 593 | Missouri, Kansas and Texas Rail- way Company v. Beal | 504 |
| Kopperud, J. H. | 93 | Morey, George H. | 325 |
| Lane v. Southern Pacific Rail- road Company | 454 | Moore, Richardson v. | 415 |
| Lamb v. Ullery | 528 | Moore, Sweetzer v. | 555 |
| Largey <i>et al.</i> v. Black | 156 | Morrison, Thomas | 418 |
| Lasell, Ryckman v. | 620 | Morton, Willamette Valley Wagon Road Company v. | 456 |
| Lea, J. C. | 652 | Moylan v. State of Oregon | 321 |
| Lewis v. Smith | 459 | Mulligan v. Hansen | 311 |
| Linville v. Clearwaters <i>et al.</i> | 59 | Murch, Franklin v. | 582 |
| Lindberg, A. | 110 | Nelson, Tucker v. (on review) ... | 3 |
| Lingle v. Headen | 153 | Newman, Stiles v. | 491 |
| Lone Dane Lode | 53 | New Orleans Pacific Railway Company, Victorien v. (on re- view) | 637 |
| Loughrey <i>et al.</i> , Webb v. (on review) | 302 | Nil Desperandum Placer | 198 |
| Lowdell, Kennedy v. | 268 | Northern Pacific Railroad Com- pany v. Anrys (on review) | 258 |
| Ludlow, Kellem v. | 560 | Northern Pacific Railroad Com- pany v. Brown | 662 |
| Lunsford v. Evans | 211 | Northern Pacific Railroad Com- pany v. Bogue | 386 |
| Lux, Brunner v. | 352 | Northern Pacific Railroad Com- pany v. Fugelli | 288 |
| Lydon, Michael | 553 | Northern Pacific Railroad Com- pany, Gale v. | 307 |
| Lyman v. Elling | 474 | Northern Pacific Railroad Com- pany v. Halvorson | 15 |
| Magnuson, Alfred | 43 | Northern Pacific Railroad Com- pany, Harris v. | 264 |
| Mahan, Chillson v. | 20 | Northern Pacific Railroad Com- pany v. Hurd | 683 |
| Manitoba Mortgage and Invest- ment Company | 566 | Northern Pacific Railroad Com- pany v. Kerry | 290 |
| Marsh, Blake v. | 12 | Northern Pacific Railroad Com- pany v. Roberts | 427 |
| Maske, Jefferson D. (on review) .. | 579 | Northern Pacific Railroad Com- pany, Spicer <i>et al.</i> v. | 440 |
| Maze, Nancy M. | 208 | Northern Pacific Railroad Com- pany v. Stovenour | 645 |
| McClurg, Emma | 629 | Norton, Kneeland <i>et al.</i> v. | 271 |
| McDonald, C. R. | 213 | Norton v. Thorson <i>et al.</i> | 261 |
| McDonald v. Jaramilla | 276 | Ohio, State of (on review) | 394 |
| McFarland v. Jackson | 405 | Olney v. Hastings and Dakota Railway Company | 136 |
| McFerrin, Wade | 140 | | |
| McHarry v. Stewart (on review) .. | 579 | | |
| McIntyre, Archibald | 337 | | |
| McKenzie v. Killgore | 322 | | |
| McMicken, Herbert, <i>et al.</i> | 97 | | |
| McWain v. Stone | 57 | | |
| McWeeney v. Greene (on re- view) | 147 | | |
| Mead v. Cushman | 253 | | |
| Mease, Frank L. | 183 | | |
| Mellbrath, Chicago, Milwaukee and St. Paul Railway Com- pany v. | 684 | | |

TABLE OF CASES REPORTED.

VII

| | Page. | | Page. |
|---|-------|---|----------|
| Oregon, State of..... | 498 | Roots v. Emerson..... | 169 |
| Oregon, State of, Boyd v..... | 315 | Rosenthal, Elias..... | 596 |
| Oregon, State of, Moylan v..... | 321 | Rourke, Ewing v..... | 297 |
| Ott v. Crawford..... | 117 | Rumsey, Keys v..... | 558 |
| Owens, Glenn v..... | 461 | Russell v. Gerold..... | 18 |
| Owen, West v. (on review)..... | 199 | Ryan, Elliott v. (on review)..... | 491 |
| | | Ryckman v. Lasell..... | 620 |
| Page, Frank N..... | 17 | | |
| Pannell, South and North Ala- bama Railroad Company v..... | 306 | St. Louis, Iron Mountain and Southern Railway Company v. Arkansas..... | 45 |
| Patterson, Chapman v..... | 129 | St. Louis, Iron Mountain and Southern Railway Company, State of Arkansas, v..... | 165 |
| Pearce v. Wollscheid..... | 678 | St. Paul, Minneapolis and Mani- toba Railway Company v. Thompson..... | 507 |
| Peirano <i>et al</i> v. Pendola..... | 536 | St. Paul and Sioux City Railroad Company..... | 50 |
| Peru Lode and Mill Site..... | 196 | St. Paul and Sioux City Railroad Company, Randall v..... | 54 |
| Peterson v. Van Hollen..... | 190 | St. Paul and Sioux City Railroad Company, United States v..... | 609 |
| Pettigrew, Griffin v..... | 510 | Sapp v. Anderson (on review)... | 566 |
| Pike's Peak Lode..... | 200 | Sault Ste. Marie, Gamble v..... | 375 |
| Plaetke v. Central Pacific Rail- road Company..... | 317 | Sewell v. Rockafeller..... | 232 |
| Platora Townsite v. Redifer's Heirs..... | 424 | Sigafus, Solitaire Mining and Milling Company v..... | 270 |
| Prindeville v. Dubuque and Pa- cific Railroad Company..... | 575 | Sioux Indian Lands..... | 328, 562 |
| Puckett v. Kaufman <i>et al</i> | 410 | Shepherd <i>et al</i> . Dunn v..... | 139 |
| | | Shire <i>et al</i> . v. Chicago, St. Paul, Minneapolis and Omaha Rail- way Company..... | 85 |
| Quam v. Brown..... | 664 | Shobar, Frank M..... | 447 |
| Queen <i>et al.</i> , Cady v..... | 575 | Showell v. Central Pacific Rail- road Company..... | 167 |
| Querbach, Eberhard..... | 142 | Smith, Charles E..... | 150 |
| | | Smith, Carnes v..... | 100 |
| Randall v. St. Paul and Sioux City Railroad Company..... | 54 | Smith, Frank H..... | 301 |
| Raney v. Edmondston..... | 387 | Smith, George H. <i>et al.</i> (on re- view)..... | 184 |
| Rathbun v. Warren..... | 111 | Smith, Lewis v..... | 459 |
| Ravezza v. Binum..... | 694 | Smith, Wilson v..... | 91 |
| Redifer's Heirs, Platora Town- site v..... | 424 | Snyder, Ferguson v..... | 234 |
| Reed, Cole v..... | 588 | Solitaire Mining and Milling Company v. Sigafus..... | 270 |
| Rees, Central Pacific Railroad Company <i>et al</i> . v..... | 281 | South and North Alabama Rail- road Company v. Pannell..... | 306 |
| Reese, Hugh..... | 541 | Southern Pacific Railroad Com- pany, Childs v. (on review)... | 630 |
| Reeves v. Emblen (on review)... | 600 | Southern Pacific Railroad Com- pany v. Cline..... | 31 |
| Remender, Jacobson v..... | 256 | Southern Pacific Railroad Com- pany, Lane v..... | 454 |
| Richardson v. Moore..... | 415 | | |
| Riggs, Rosa B..... | 526 | | |
| Rinehart, L. B..... | 303 | | |
| Robbins, David H..... | 3 | | |
| Roberts, Northern Pacific Rail- road Company v..... | 427 | | |
| Robertson v. Ball <i>et al</i> | 41 | | |
| Rockafeller, Sewell v..... | 232 | | |
| Rogers, Horace B., <i>et al</i> | 29 | | |
| Rohrbough v. Diggins (on re- view)..... | 136 | | |
| Roode, Fletcher v..... | 250 | | |

| | Page. | | Page. |
|--|-------|--|-------|
| Southern Pacific Railroad Company <i>v.</i> Meyer..... | 444 | Thompson, J. H..... | 34 |
| Southern Pacific Railroad Company, Titamore <i>v.</i> | 463 | Thompson, James G..... | 622 |
| Spalding <i>v.</i> Colfer (on review)..... | 21 | Thompson, William..... | 501 |
| Spencer <i>et al.</i> , Gardner <i>v.</i> | 398 | Thompson, Fouts <i>v.</i> (on review) .. | 649 |
| Spicer <i>et al.</i> <i>v.</i> Northern Pacific Railroad Company..... | 440 | Thompson <i>v.</i> Heirs of Partridge .. | 107 |
| Spracklen, Clement..... | 9 | Thompson, St. Paul, Minneapolis and Manitoba Railway Company <i>v.</i> | 507 |
| Staltz <i>v.</i> White Spirit <i>et al.</i> | 144 | Thorson <i>et al.</i> , Norton <i>v.</i> | 261 |
| State of Arkansas <i>v.</i> Forbes <i>et al.</i> | 163 | Titamore <i>v.</i> Southern Pacific Railroad Company | 463 |
| State of Arkansas <i>v.</i> St. Louis, Iron Mountain and Southern Railway Company..... | 165 | Trainer <i>v.</i> Stitzel (on review) ... | 305 |
| State of Arkansas and Southern Railway Company <i>v.</i> | 45 | Trevillion, Bay State Gold Mining Company <i>v.</i> | 194 |
| State of California, Harvey <i>et al.</i> <i>v.</i> | 217 | Trick, Epley <i>v.</i> (on review)..... | 413 |
| State of Colorado..... | 222 | Tripp <i>v.</i> Diehl..... | 591 |
| State of Illinois..... | 398 | Toombs, Arthur T..... | 192 |
| State of Illinois (Cass County) .. | 22 | Town site of Flagstaff, Gonzales <i>v.</i> | 348 |
| State of Illinois (Champaign County)..... | 121 | Tucker <i>v.</i> Nelson (on review) ... | 3 |
| State of Illinois (Douglas County)..... | 446 | Ueland, Hausen <i>v.</i> | 273 |
| State of Mississippi..... | 393 | Ullery, Lamb <i>v.</i> | 528 |
| State of Ohio (on review)..... | 394 | Union Pacific Railway Company, Boyer <i>v.</i> | 568 |
| State of Oregon..... | 498 | United States <i>v.</i> Atterbery (on review) | 36 |
| State of Oregon, Boyd <i>v.</i> | 315 | United States <i>v.</i> Central Pacific Railroad Company..... | 466 |
| State of Oregon, Moylan <i>v.</i> | 321 | United States <i>v.</i> Jones..... | 23 |
| State of Wisconsin, Dox <i>v.</i> | 39 | United States <i>v.</i> St. Paul and Sioux City Railroad Company..... | 609 |
| Steffen, Lizzie..... | 615 | Van Hollen, Peterson <i>v.</i> | 190 |
| Stephan, Kline <i>v.</i> | 343 | Vaughn <i>v.</i> Brecheisen..... | 585 |
| Stewart, McHarry <i>v.</i> (on review)..... | 579 | Victorien <i>v.</i> New Orleans Pacific Railway Company (on review)..... | 637 |
| Stiles <i>v.</i> Newman..... | 491 | Waldroff <i>v.</i> Bottomly..... | 133 |
| Stitzel, Trainer <i>v.</i> (on review)..... | 305 | Walker, John M. (on review).... | 354 |
| Stockham <i>et al.</i> , Harrington <i>v.</i> | 402 | Warner <i>v.</i> Finnerty..... | 433 |
| Stone, Crane <i>v.</i> | 216 | Warren, Rathbun <i>v.</i> | 111 |
| Stone, McWain <i>v.</i> | 57 | Weaver <i>v.</i> Eads..... | 279 |
| Stovenour, Northern Pacific Railroad Company <i>v.</i> | 645 | Webb <i>v.</i> Loughrey <i>et al.</i> (on review) | 302 |
| Stowell <i>v.</i> Clyatt..... | 339 | Weber, Peter..... | 392 |
| Stukel, Delila..... | 47 | West <i>v.</i> Owen (on review)..... | 199 |
| Summerfield, Alice..... | 372 | Wharton <i>v.</i> Hinds..... | 152 |
| Svenneby <i>v.</i> Broste..... | 108 | Whetstone, Alice C..... | 263 |
| Sweeney <i>v.</i> Wilson <i>et al.</i> | 157 | Whitcomb, Boos <i>v.</i> | 584 |
| Sweetzer <i>v.</i> Moore..... | 555 | White Spirit <i>et al.</i> , Staltz <i>v.</i> | 144 |
| Swisher, Wise <i>v.</i> | 240 | Wilber <i>v.</i> Goode..... | 527 |
| Tannehill <i>et al.</i> , Anderson <i>v.</i> | 388 | Willamette Valley Wagon Road Company <i>v.</i> Morton..... | 456 |
| Tate, Sarah J..... | 469 | Williamson, Angie L..... | 30 |
| Taylor, George C..... | 1 | | |
| Taylor <i>v.</i> Yates <i>et al.</i> (on review)..... | 242 | | |
| Thatcher <i>v.</i> Bernhard..... | 485 | | |

TABLE OF CASES REPORTED.

IX

| | Page. | | Page. |
|--|-------|---|-------|
| Wilson, Benjamin L..... | 524 | Woods, John..... | 230 |
| Wilson v. Smith..... | 91 | Woolsey, Henry D..... | 119 |
| Wilson <i>et al.</i> , Sweeney v..... | 157 | Wyland, Collier v..... | 96 |
| Wing, Hiram..... | 602 | Yager <i>et al.</i> , Hay v..... | 105 |
| Winslow, Collins' Heirs v..... | 569 | Yates v. Glafke..... | 673 |
| Wisconsin Central Railroad Com- pany..... | 63 | Yates <i>et al.</i> , Taylor v. (on review) | 242 |
| Wisconsin, State of, Dox v..... | 39 | Young, Hartley v..... | 181 |
| Wise v. Swisher..... | 240 | Zimmerman <i>et al.</i> , Everitt v..... | 437 |
| Wollscheid, Pearce v..... | 678 | | |
| Wood v. Goodwin..... | 689 | | |

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's Mining Laws and Decisions; and "C. Cls.," to the Court of Claims.]

| | Page. | | Page. |
|---|-------------|--|------------------------------|
| Aanrud, Peder Olsen; 7 C. L. O., 103 | 116 | Beecher v. Wetherby; 5 Otto, 517 | 287 |
| Aiken, James; 1 L. D., 462 | 103 | Bell v. Bolles; 9 L. D., 148 | 20 |
| Alabama and Chattanooga Railroad Company; 3 L. D., 242 | 429 | Benedict v. Heberger; 5 L. D., 273 | 80 |
| Alabama and Chattanooga Railroad Company v. Clabourne; 6 L. D., 427 | 307 | Bennett, Peter W.; 6 L. D., 672 | 530 |
| Anderson, John W.; 8 L. D., 517 | 527 | Bergan, Ole K.; 7 L. D., 472 | 104, 327, 603 |
| Alexander v. Ellsberry; 10 L. D., 482 | 531 | Bishop, George S.; 1 L. D., 69 | 412 |
| Alice Placer Mine; 4 L. D., 314 | 159, 187 | Blenkner v. Sloggy; 2 L. D., 267 | 192 |
| Allen v. Baird; 6 L. D., 298 | 448 | Blodgett v. Central Pacific Railroad Company; 6 L. D., 309 | 283 |
| Allen v. Cooley; 5 L. D., 261 | 192 | Bodie Tunnel; 1 L. D., 584 | 159 |
| Allen v. Leet; 6 L. D., 669 | 274 | Bohall v. Dilla; 114 U. S., 47 | 81 |
| Allman v. Thulon; 1 C. L. L., 690 | 25, 38, 512 | Boorey v. Lee; 6 L. D., 641 | 19 |
| American Investment Company; 5 L. D., 603 | 447, 568 | Boulware v. Scott; 2 L. D., 263 | 232 |
| Anderson v. Anderson; 5 L. D., 6 | 553 | Bouret, Alexander; 5 L. D., 298 | 526, 588 |
| Andas v. Williams; 9 L. D., 311 | 130, 393 | Bowker, Edward; 7 L. D., 34 | 549 |
| Andrews v. Cory; 7 L. D., 89 | 108 | Box v. Ulstein; 3 L. D., 143 | 14 |
| Anderson v. Bailey; 7 L. D., 513 | 463 | Boyle, Albert S.; 6 L. D., 509 | 19 |
| Antediluvian Lode and Mill Site; 8 L. D., 602 | 54 | Brady v. Southern Pacific Railroad Company; 5 L. D., 407 | 684 |
| Arnold v. Hildreth; 7 L. D., 500 | 113 | Brakken v. Dunn et al.; 9 L. D., 461 | 107, 257 |
| Arnold v. Langley; 1 L. D., 439 | 85 | Brassfield v. Eshom; 8 L. D., 1 | 62, 276 |
| Arter, Maria C.; 7 L. D., 136 | 512, 624 | Bridges v. Curran; 7 L. D., 395 | 189, 337 |
| Atchison, Topeka and Santa Fé Railroad Company v. Mecklim; 23 Kansas, 167 | 260 | Bright, James F.; 6 L. D., 602 | 494 |
| Atherton v. Fowler; 96 U. S., 513 | 217, 278 | Bright et al. v. Elkhorn Mining Company; 8 L. D., 122 | 447, 514 |
| Atlantic and Pacific Railroad Company; 5 L. D., 269 | 639 | Brown v. Central Pacific Railroad Company; 8 L. D., 589 | 318 |
| Atlantic and Pacific Railroad Company; 6 L. D., 84-92 | 87 | Brown v. Manning; 6 Ohio, 298 | 302 |
| Atlantic and Pacific Railroad Company; 8 L. D., 165 | 655 | Browne v. Ryan; 3 L. D., 468 | 140 |
| Aurrecochea v. Bangs; 114 U. S., 381 | 32 | Bundy v. Fremont Townsite; 9 L. D., 276 | 409 |
| Ayers v. Buell; 2 L. D., 257 | 562 | Burns, George T.; 4 L. D., 62 | 89, 90 |
| Baca Float No. 3; 5 L. D., 705 | 226 | Burns, J. B.; 7 L. D., 20 | 116, 525 |
| Bachman v. Smith; 5 L. D., 293 | 562 | Burns, Thomas C.; 9 L. D., 432 | 527 |
| Baker v. Hurst; 7 L. D., 457 | 414 | Burton, Jennie; 7 L. D., 451 | 527 |
| Barkley et al. v. California; 6 L. D., 699 | 304 | Burton v. Stover; 2 L. D., 585 | 237 |
| Banks, Nathaniel; 8 L. D., 532 | 142 | Butts v. Northern Pacific Railroad Company; 119 U. S., 55 | 265, 308, 428, 430, 647, 664 |
| Barnes, Julia A.; 6 L. D., 522 | 88 | Buxton v. Traver; 130 U. S., 135 | 371 |
| Barnes v. Badger; 41 Barb., 98 | 225 | Bykerk v. Oldemeyer; 2 L. D., 51 | 130 |
| Barney v. Keokuk; 94 U. S., 338 | 368 | Byrne v. Dorward; 5 L. D., 104 | 512, 618 |
| Becker et al. v. Sears; 1 L. D., 577 | 202 | Caldwell v. Missouri, Kansas and Texas Railway Company et al.; 8 L. D., 570 .. | 88, 649 |
| | | California v. Pierce; 1 L. D., 442 | |
| | | Call v. Swain; 3 L. D., 46 | |

| | Page. | | Page. |
|--|--------------|---|---------------|
| Campbell, Mary; 8 L. D., 331..... | 39, 312, 487 | Deakins v. Matheson; 6 L. D., 269..... | 666 |
| Candido v. Fargo; 7 L. D., 75..... | 192 | Deffebach v. Hawke; 115 U. S., 406..... | 204 |
| Carey v. Curry; 7 L. D., 27..... | 335 | Dinwiddie v. Florida Railway and Navigation Company; 9 L. D., 74..... | 318 |
| Carpenter, Chauncey; 7 L. D., 236..... | 360 | Distilled Spirits, The; 11 Wall., 356..... | 71 |
| Carrick, Robert; 3 L. D., 558..... | 95 | Dobbs Placer Mine; 1 L. D., 565..... | 160 |
| Caste, Nancy Ann; 3 L. D., 169..... | 312 | Doe v. Wilson; 23 How., 457..... | 518 |
| Cedar Rapids Railroad Company v. Herring; 110 U. S., 27..... | 178 | Donley v. Spring; 4 L. D., 542..... | 323 |
| Central Pacific Railroad Company; 9 L. D., 613..... | 440 | Donovan, Michael; 8 L. D., 382..... | 311 |
| Central Pacific Railroad Company v. Rees; 10 L. D., 281..... | 466 | Dorame v. Towers; 2 C. L. O., 131..... | 530 |
| Central Pacific Railroad Company v. Shepherd; 9 L. D., 213..... | 466 | Doud <i>et al.</i> v. Slocomb; 9 L. D., 532..... | 650 |
| Central Pacific Railroad Company v. Wadman; 4 L. D., 341..... | 432 | Douglas, Alexander; 6 L. D., 548..... | 600 |
| Cincinnati v. White; 6 Pet., 431..... | 382 | Downey, Owen D.; 6 L. D., 123..... | 279 |
| Chamberlin, T. L.; 8 L. D., 421..... | 616 | Doyle, Edward J.; 7 L. D., 3..... | 238 |
| Chandler, L. D.; 7 L. D., 356..... | 363 | Doyle v. Wilson; 2 L. D., 28..... | 473 |
| Charles River Bridge v. Warren Bridge; 11 Pet., 420..... | 429 | Drew, William; 8 L. D., 399..... | 192 |
| Cherokee Nation, v. Georgia; 5 Pet., 1..... | 518 | Dubuque v. Maloney; 9 Iowa, 451..... | 382 |
| Chow Heong v. United States; 112 U. S., 536..... | 227 | Dubuque and Pacific Railroad Company v. Litchfield; 23 How., 66..... | 398, 429 |
| Chicago, St. Paul, Minneapolis and Omaha Railway Company; 6 L. D., 195..... | 148 | Dunphy, Elijah M.; 8 L. D., 102..... | 12 |
| Chicago, St. Paul, Minneapolis and Omaha Railway Company; 6 L. D., 195; 9 <i>id.</i> , 221, 483..... | 69 | Dwyer, Isabella M.; 6 L. D., 32..... | 49 |
| Chichester v. Allen; 9 L. D., 302..... | 97 | Early v. State of California; 7 L. D., 347..... | 33, 220 |
| Choate, E. L.; 8 L. D., 162..... | 35 | Eddy v. England; 6 L. D., 530..... | 182 |
| Chrisinger, R. M.; 4 L. D., 347..... | 80 | Edens, Jacob H.; 7 L. D., 229..... | 475 |
| Clark, Judith M.; 7 L. D., 485..... | 231 | Edwards, Edwin; 8 L. D., 429..... | 585 |
| Clark v. Timm; 4 L. D., 175..... | 323 | Elliot v. Ryan; 7 L. D., 322..... | 414 |
| Cleary v. Smith; 3 L. D., 465..... | 530 | Elmer v. Bowen; 4 L. D., 337..... | 25 |
| Cleaves v. French; 3 L. D., 533..... | 80 | Elson, William C.; 6 L. D., 797..... | 116, 525, 588 |
| Clement v. Heney; 6 L. D., 641..... | 113 | Emigrant Company v. Wright County; 7 Otto, 339..... | 396 |
| Cleveland v. Banes; 4 L. D., 534..... | 561 | Emily Lode; 6 L. D., 223..... | 20 |
| Cliff, Henry; 3 L. D., 216..... | 43 | Emmerson v. Central Pacific Railroad Company; 3 L. D., 117 and 271..... | 293, 388 |
| Coleman v. Winfield; 6 L. D., 826..... | 238 | Emmert v. Kilpatrick; 2 L. D., 230..... | 666 |
| Colorado Coal and Iron Company v. United States; 123 U. S., 307..... | 27, 157, 451 | Empire City Bank; 18 N. Y., 200..... | 224 |
| Conly v. Price; 9 L. D., 490..... | 43, 97 | Ervine, Thomas; 4 L. D., 420..... | 448 |
| Conrad v. Emick; 7 L. D., 331..... | 592 | Fairbrother v. Shaw; 4 Iowa, 570..... | 105 |
| Cook, Skiddie V.; 7 L. D., 309..... | 530 | Farmer v. Moreland; 8 L. D., 446..... | 107, 690 |
| Cornwall, Albert, H.; 9 L. D., 340..... | 44 | Field, William C.; 1 L. D., 68..... | 488 |
| Council, Lafayette; 5 L. D., 631..... | 526, 588 | Filkins, Charles W.; 5 L. D., 49..... | 146 |
| Counterman v. Missouri, Kansas and Texas Railway Company; 8 L. D., 237..... | 505 | Fisher v. Salmonson; 4 L. D., 538..... | 263 |
| Coyne v. Townsite of Crook; 6 L. D., 675..... | 208 | Flemington v. Eddy; 3 L. D., 482..... | 323 |
| Creswell Mining Company v. Johnson; 8 L. D., 440..... | 538 | Fonts v. Thompson; 6 L. D., 332..... | 692 |
| Crosier, Frank E.; 7 L. D., 195..... | 448 | Foreman v. Wolf <i>et al.</i> ; 9 L. D., 314..... | 405 |
| Crow Dog; 109 U. S., 556..... | 227 | Forget, Margaret; 7 L. D., 280 (over-ruled)..... | 629 |
| Crowston v. Seal; 5 L. D., 213..... | 390 | Foster v. Breen; 2 L. D., 232..... | 275 |
| Cunningham, Melissa J.; 8 L. D., 433..... | 630 | Foster, Frank, <i>et al.</i> ; 2 L. D., 730..... | 424 |
| Cushing <i>et al.</i> v. Michigan; 4 L. D., 415..... | 287 | Foster v. Neilson; 2 Pet., 314..... | 518 |
| Cutting v. Reininghans <i>et al.</i> ; 7 L. D., 265..... | 538 | Fox v. Southern Pacific Railroad Company; 2 L. D., 558..... | 88 |
| Davidson v. Kokojan; 7 L. D., 436..... | 104 | Frank, Samuel M.; 2 L. D., 628..... | 512 |
| Davidson v. Parkhurst; 3 L. D., 445..... | 473 | Fraser v. Ringgold; 3 L. D., 69..... | 674 |
| Davis v. Fairbanks; 9 L. D., 530..... | 114 | Fraser v. O'Connor; 115 U. S., 102..... | 633 |
| Dayton v. Dayton; 6 L. D., 164..... | 481 | Freeman v. Lind; 8 L. D., 163..... | 171 |
| Dayton v. Dayton; 8 L. D., 248..... | 19, 252, 312 | Freise v. Hobson; 4 L. D., 580..... | 113, |
| Dayton v. Hause <i>et al.</i> ; 4 L. D., 263..... | 20, 615 | 130, 228, 251, 392, 413, 679 | |
| | | French v. Edwards; 13 Wall., 506..... | 224 |
| | | French, William; 2 L. D., 235-7..... | 360 |
| | | Frisbie v. Whitney, 9 Wall., 187..... | 371 |
| | | Funk, Mary E.; 9 L. D., 215..... | 167, 630 |
| | | Gahan v. Garrett; 1 L. D., 137..... | 323 |
| | | Galbreath v. Maguire; 9 L. D., 350..... | 303 |

TABLE OF CASES CITED.

XIII

| | Page. | | Page. |
|--|-------------|--|--|
| Gale v. Northern Pacific Railroad Company; 10 L. D., 307..... | 428 | Houck v. Bettelyoun; 7 L. D., 425..... | 560 |
| Gardner, Sylvester; 8 L. D., 483..... | 183 | House, Jonathan; 4 L. D., 189..... | 189, 337 |
| Garrigues v. Atchison, Topeka and Santa F6 Railroad Company; 6 L. D., 543..... | 203, 696 | Howard, Prestina B.; 8 L. D., 286..... | 640 |
| Geer v. Farrington; 4 L. D., 410..... | 278 | Huck v. Heirs of Medler; 7 L. D., 267.... | 80 |
| Gilbert v. Spearing; 4 L. D., 466..... | 130 | Hughes v. Tipton; 2 L. D., 834..... | 272 |
| Gilchrist, David; 8 L. D., 48..... | 497 | Hunter v. Trustees of Sandy Hill; 6 Hill, N. Y., 407..... | 382 |
| Gilmore v. Shriner; 9 L. D., 269..... | 400 | Iddings v. Burns; 8 L. D., 359..... | 679 |
| Gleeson, Martin; 9 L. D., 283..... | 301 | Independence Lode; 9 L. D., 571..... | 54 |
| Gohrman v. Ford; 8 C. L. O., 6..... | 130 | Iowa Railroad Land Company; 9 L. D., 370..... | 178 |
| Graham, Martin; 6 L. D., 767..... | 327, 448 | Iowa Railroad Land Company v. Sloan; 9 L. D., 597..... | 696 |
| Graham v. Hastings and Dakota Railway Company; 1 L. D., 362..... | 146 | Iron King Mine and Mill Site; 9 L. D., 201..... | 197 |
| Graves, Croghan; 9 L. D., 463..... | 463 | Iron Silver Mining Company v. Mike and Starr Gold and Silver Mining Company; 6 L. D., 533..... | 202, 270 |
| Gray v. Ward <i>et al.</i> ; 5 L. D., 412..... | 160 | Irvine v. Marshall; 20 How., 561..... | 368 |
| Green, H. C.; 5 L. D., 557..... | 424 | Isaak, Christian; 9 L. D., 624..... | 94, 410 |
| Greer v. Brown; 5 L. D., 229..... | 114 | Jackson <i>et al.</i> v. State of California; 4 C. L. O., 87..... | 32 |
| Griffith v. Bogert; 18 How., 158..... | 621 | Johansen, John; 5 L. D., 408..... | 351 |
| Griffin v. Central Pacific Railroad Company; 5 L. D., 12..... | 293 | Johnson, William; 4 L. D., 397..... | 571 |
| Griffin v. Marsh; 2 L. D., 28..... | 473 | Johnson v. Towsley; 13 Wall., 72..... | 387 |
| Griffin v. Forsyth; 6 L. D., 791..... | 104 | Jones v. Campbell; 7 L. D., 404..... | 696 |
| Griffin v. Pettigrew; 10 L. D., 510..... | 618 | Jones, Joseph W.; 9 L. D., 195..... | 360 |
| Grigsby v. Smith; 9 L. D., 98..... | 24, 38, 144 | Kamanski v. Riggs; 9 L. D., 186..... | 528 |
| Groom v. Missouri, Kansas and Texas Railway Company, 9 L. D., 264..... | 409, 596 | Kansas Pacific Railroad Company v. Atchison, Topeka and Santa F6 Railroad Company; 112 U. S., 414..... | 76 |
| Guyton v. Prince; 2 L. D., 143..... | 275 | Kansas Pacific Railway Company v. Dunmeyer; 113 U. S., 629... 56, 285, 569, 576, 648, 686 | 470, 621, 192, 97, 484, 14, 464, 83, 209, 400, 114, 533, 542, 361, 643, 107, 302 |
| Haggin, J. B.; 7 L. D., 287..... | 360 | Keen, James C.; 8 L. D., 239..... | 470 |
| Hair, James; 8 L. D., 467..... | 14, 191 | Kelly v. Grameng; 5 L. D., 611..... | 621 |
| Hall v. Dearth; 5 L. D., 172..... | 488 | Kelly v. Halvorson; 6 L. D., 225..... | 192 |
| Hall v. Fox; 9 L. D., 153..... | 476 | Kelley v. Moran; 9 L. D., 581..... | 97, 484 |
| Harkness v. Hyde; 98 U. S., 479..... | 171 | Kelley v. Thorpe; 5 L. D., 689..... | 14 |
| Harford v. United States; 8 Cranch, 109.. | 227 | Kelly v. Quast; 2 L. D., 627..... | 464 |
| Harper v. Bell; 8 L. D., 197..... | 481 | Kibling, C. A.; 7 L. D., 327..... | 83 |
| Harris, Adams S.; 8 L. D., 45..... | 278 | Kimbrel v. Henry; 9 L. D., 619..... | 209 |
| Harrison, James A.; 8 L. D., 98..... | 10 | Kingsbury v. Holt; 7 L. D., 9..... | 400 |
| Hartley v. Young; 10 L. D., 181..... | 407 | Kincaid v. Jefferson; 3 L. D., 136..... | 114 |
| Hartman v. Lea; 3 L. D., 584..... | 592 | Kiser v. Keech <i>et al.</i> ; 7 L. D., 25..... | 533 |
| Hastings and Dakota Railway Company v. Whitney; 132 U. S., 357..... | 15, 33, 336 | Knaggs, Annie; 9 L. D., 49..... | 542 |
| Hatfield, Smith <i>et al.</i> ; 6 L. D., 557..... | 360 | Knight v. Leary; 54 Wis., 459..... | 361 |
| Hawkins v. Lamm; 9 L. D., 18..... | 113, 690 | Krichbaum v. Perry; 5 L. D., 403..... | 643 |
| Hay v. Yager <i>et al.</i> ; 10 L. D., 105..... | 400 | Kurtz v. Summers; 7 L. D., 46..... | 107, 302 |
| Hedenskay, Adolphine; 2 C. L. O., 83.... | 209 | Laity v. Northern Pacific Railroad Company; 8 L. D., 378..... | 433 |
| Heir of John Love; 2 L. D., 386..... | 203 | Lake Warner; 5 L. D., 369..... | 196 |
| Hejrs of Mainville; 3 L. D., 177..... | 201 | Laney, Thomas J.; 9 L. D., 83..... | 201 |
| Hemsworth v. Holland; 8 L. D., 400..... | 109 | Lansdale v. Daniel; 10 Otto, 113..... | 663 |
| Herre, Susan; 10 L. D., 166..... | 630 | Leavenworth, Lawrence and Galveston Railroad Company v. United States; 92 U. S., 745..... | 367, 397, 429 |
| Hessong v. Burgan; 9 L. D., 353..... | 414, 626 | Lee v. Johnson; 116 U. S., 48..... | 81, 615 |
| Hewitt, Frank W.; 8 L. D., 566..... | 89 | Lee v. Goodmanson; 4 L. D., 363..... | 140, 404 |
| Hoffman v. Barnes; 8 L. D., 608..... | 360 | Le Franchi, Geovanni; 3 L. D., 229..... | 350 |
| Hoffman v. Hindman; 9 L. D., 82..... | 44 | Lehman, Charles; 8 L. D., 486..... | 144 |
| Holden v. Joy; 17 Wall., 211..... | 518 | Leonard, Mary R.; 9 L. D., 189..... | 94, 138 |
| Hollants v. Sullivan; 5 L. D., 115..... | 251 | Leon v. Grijalva; 3 L. D., 362..... | 531 |
| Holliday v. Harlan; 7 L. D., 264..... | 21 | | |
| Holmes v. Northern Pacific Railroad Company; 5 L. D., 333..... | 430 | | |
| Homestead Company v. Valley Railroad; 17 Wall., 163..... | 76, 519 | | |
| Hooper, Henry; 6 L. D., 624..... | 92, 501 | | |
| Horton v. Wilson; 9 L. D., 560..... | 547 | | |
| Hosmer v. Wallace; 97 U. S., 575..... | 248 | | |

| | Page. | | Page. |
|--|---------------|--|--------------------|
| Leslie, Andrew; 9 L. D., 204 | 497 | Moss v. Quincey; 7 L. D., 373..... | 14 |
| Lewis v. Clark; 9 L. D., 3 | 410 | Mounger, John C.; 9 L. D., 291 | 401 |
| Lindback, John M.; 9 L. D., 284 | 94, 410, 502 | Mullan v. United States; 118 U. S., 271 ... | 157 |
| Lindsey v. Hawes; 2 Black, 662 | 90 | Mullen v. Wine; 26 Fed. Rep., 206 | 361 |
| Lingle v. Headen; 10 L. D., 153 | 472 | Mulligan v. Hansen; 10 L. D., 311 | 652 |
| Little Pauline v. Leadville Lode; 7 L. D., 506 | 159 | Myers v. Croft; 13 Wall., 296 | 506 |
| Logan, A. C., et al.; 8 L. D., 2 | 20 | Nanney v. Weasa; 9 L. D., 606 | 621, 666 |
| Long v. Knotts; 5 L. D., 150 | 447 | Neilson v. Shaw; 5 L. D., 358 and 387 | 20, 115, 312 |
| Lord v. Perrin; 8 L. D., 542 | 238 | Neilson v. Northern Pacific Railroad Com- pany; 9 L. D., 402 | 506 |
| Lowe, Rob. rt., 5 L. D., 541 | 7 | Newhall v. Sanger; 92 U. S., 761 | 367, 648 |
| Lyons v. O'Shaughnessy; 5 L. D., 606 ... | 113 | Newman, E. S.; 8 L. D., 450 | 278 |
| Lytle v. Arkansas; 22 How., 193 | 25, 38, 583 | New Orleans v. United States; 10 Pet., 662 | 382 |
| Magalia Gold Mining Company v. Fergu- son; 6 L. D., 218 | 144 | Nickel, John R.; 9 L. D., 388 | 160 |
| Mainville, Heirs of Joseph; 3 L. D., 177 .. | 604 | Nita v. Wisconsin; 9 L. D., 385 | 41 |
| Malone v. Union Pacific Railway Com- pany; 7 L. D., 13 | 283, 289, 648 | Niven v. State of California; 6 L. D., 439 .. | 33, 220 |
| Mankato v. Willard; 97 Am. Decs., 208 .. | 382 | Nuttle v. Leach; 7 L. D., 325 | 413 |
| Manning, Patrick; 7 L. D., 144 | 492 | Norris, Alexander; 9 L. D., 376 | 420 |
| Mapes, George W., 9 L. D., 631 | 600 | Northern Pacific Railroad Company v. Al- lers; 9 L. D., 452 | 15 |
| Marceau, Odillon; 9 L. D., 554 | 351 | Northern Pacific Railroad Company v. Anrys; 8 L. D., 362, 10 id., 258 | 310, 386, 443 |
| Marsh v. Chestnut; 14 Ill., 223 | 225 | Northern Pacific Railroad Company v. Burt; 3 L. D., 490 | 430 |
| Martel, Israel; 6 L. D., 566 | 84 | Northern Pacific Railroad Company v. Evans; 7 L. D., 131 | 265, 310, 433, 443 |
| Martin v. Marks; 7 Otto, 345 | 396 | Northern Pacific Railroad Company v. Flaherty; 8 L. D., 542 | 430 |
| Marshall, James H.; 3 L. D., 411 | 214, 493 | Northern Pacific Railroad Company v. Gjuve; 8 L. D., 380 | 648 |
| Mathews v. Shores; 24 Ill., 27 | 654 | Northern Pacific Railroad Company v. Johnson; 7 L. D., 357 | 430 |
| Mathiessen and Ward v. Williams; 6 L. D., 95 | 275 | Northern Pacific Railroad Company v. Miller; 7 L. D., 100 | 289, 442 |
| Maxwell Land Grant Case; 121 U. S., 325 .. | 27, 450 | Northern Pacific Railroad Company v. Stovenour; 10 L. D., 645 | 636 |
| McClellan v. Biggerstaff; 7 L. D., 442 | 107 | Northern Pacific Railroad Company v. Wiley; 7 L. D., 354 | 648 |
| McCool v. Smith; 1 Black, 470 | 70 | Noyes v. Mantle; 127 U. S., 328 | 201 |
| McComb, Joseph H.; 5 L. D., 295 | 525, 588 | O'Connell v. Rankin; 7 L. D., 245 | 276 |
| McDonald v. Fallon; 3 L. D., 56 | 463 | O'Donald v. State of California; 6 L. D., 696 | 499 |
| McIntosh, Daniel R., 8 L. D., 641 | 83 | Olathe Placer Mine; 4 L. D., 494 | 202 |
| McKallor, Charles W.; 9 L. D., 580 | 39, 651 | Orr v. Breach; 7 L. D., 292 | 144 |
| McLaughlin v. United States; 127 U. S., 428 | 32 | Osmundson v. Norby; 2 C. L. L., 645 ... | 192 |
| McMillan, John; 7 L. D., 181 | 540 | Owen, Eben, et al.; 9 C. L. O., 111 | 201, 604 |
| McMurdie v. Central Pacific Railroad Company; 8 C. L. O., 36 | 464 | Owen v. Stevens et al.; 3 L. D., 401 | 246 |
| Meadows, Paris et al.; 9 L. D., 41 | 18, 189, 339 | Overton v. Hoskins; 7 L. D., 394 | 20, 135 |
| Melcher v. Clark; 4 L. D., 505 | 115 | Palms, Francis, et al.; 7 L. D., 146 | 95 |
| Meigs v. McClung; 9 Crauch, 11 | 518 | Paours, Wenzel; 8 L. D., 475 | 144 |
| Meyhok v. Ladshoff; 9 L. D., 327 | 21 | Parker v. Castle; 4 L. D., 84 | 182, 621, 666 |
| Middle Ground, The; 7 L. D., 255 | 203 | Parker v. Gamble; 3 L. D., 390 | 255 |
| Miller v. Stover; 2 L. D., 150 | 237 | Parris v. Hunt; 9 L. D., 225 | 405 |
| Millican v. Northern Pacific Railroad Com- pany; 7 L. D., 85 | 648 | Parson v. Hughes; 8 L. D., 593 | 553 |
| Milne v. Dowling; 4 L. D., 378 | 171 | Payne v. Atlantic and Pacific Railroad Company; 7 L. D., 405 | 648 |
| Mimbres Mining Company; 8 L. D., 467 .. | 199 | Pearce v. Morrice; 2 A. and E., 94 | 224 |
| Miner, Abraham L.; 9 L. D., 408 | 420 | Pella v. Scholte; 24 Iowa, 283 | 383 |
| Mining Company v. Consolidated Mining Company; 102 U. S., 167 | 350, 368 | People v. Cook; 8 N. Y., 67 | 224 |
| Missionary Society v. Dalles; 107 U. S., 336 | 155 | People v. Dawson; 25 N. Y., 299 | 225 |
| Mitchell, Joseph W.; 8 L. D., 268 | 144 | People v. Murray; 15 Cal., 221 | 226 |
| Mobile v. Eslava; 16 Pet., 234 | 369 | | |
| Moffat v. United States; 112 U. S., 24 | 663 | | |
| Molyneaux v. Young; 2 C. L. L., 560 | 217 | | |
| Morehouse v. Carey; 4 L. D., 111 | 14 | | |
| Moore v. Horner; 2 L. D., 594 | 255 | | |
| Moore v. Robbins; 96 U. S., 530 | 204, 696 | | |
| Morrow v. Lawler; 9 L. D., 95 | 191 | | |
| Morton v. Nebraska; 21 Wall., 660 | 224 | | |

TABLE OF CASES CITED.

XV

| | Page. | | Page. |
|--|--------------------|---|---------------|
| People v. Peck; 11 Wend., 604 | 224 | Rose v. Wood and Lumber Company, 78 Cal., 385 | 361 |
| People v. Schermerhorn; 19 Barb., 558 | 225 | Ruland, Heirs of John C.; 2 L. D., 241 | 360 |
| Perkins v. Central Pacific Railroad Company; 1 L. D., 336 | 293 | Ryan v. Railroad Company; 99 U. S., 382 | 505 |
| Perry v. Ashby; 4 C. L. O., 63 | 209 | St. John v. Raff; 8 L. D., 552 | 476 |
| Peter v. Spaulding; 1 L. D., 77 | 80 | St. Louis, Iron Mountain and Southern Railway Company v. Arkansas; 10 L. D., 46 | 164 |
| Pfaff v. Williams; 4 L. D., 455 | 193, 257, 512, 533 | St. Louis, Iron Mountain and Southern Railway Company v. McGee; 115 U. S., 469 | 318 |
| Phelps v. Rape; 7 L. D., 47 | 343 | St. Paul and Sioux City Railroad Company; 10 L. D., 50 | 610 |
| Pierpoint v. Stalder; 9 L. D., 390 | 130, 392 | St. Paul, Minneapolis and Manitoba Railway Company; 8 L. D., 255 | 655 |
| Pike's Peak Lode; 10 L. D., 200 | 604 | St. Paul, Minneapolis and Manitoba Railway Company v. Chadwick; 6 L. D., 128 | 508 |
| Plugert v. Empey; 2 L. D., 152 | 80 | St. Paul, Minneapolis and Manitoba Railway Company v. Gjuve; 1 L. D., 331 | 429 |
| Pollard v. Hagan; 3 How., 212 | 368 | St. Paul, Minneapolis and Manitoba Railway Company v. Moling; 7 L. D., 184 | 508 |
| Pomeroy v. Wright; 2 L. D., 164 | 130, 251 | St. Paul, Minneapolis and Manitoba Railway Company v. Morrison; 4 L. D., 300 and 509 | 508 |
| Pond v. Negus; 3 Mass., 232 | 224 | St. Paul, Minneapolis and Manitoba Railway Company v. Northern Pacific Railroad Company; 4 L. D., 426 | 429 |
| Powers v. Courtney et al.; 9 L. D., 480 | 418 | St. Paul, Minneapolis and Manitoba Railway Company v. Vannest; 5 L. D., 205 | 573 |
| Poweshiek County; 9 L. D., 124 | 123 | Sandford, George E.; 5 L. D., 535 | 111, 130, 393 |
| Pratt, Henry A., et al.; 5 L. D., 185 | 95 | Sanford, Alfred E.; 6 L. D., 103 | 189, 494, |
| Premo, George; 9 L. D., 70 | 222, 324 | Sanford v. Burbank; 6 L. D., 773 | 592 |
| Price v. Conly; 9 L. D., 490 | 19 | Sapp v. Anderson; 9 L. D., 165 | 547 |
| Prindeville v. Dubuque and Pacific Railroad Company; 10 L. D., 575 | 686 | Sayles, Henry P.; 2 L. D., 88 | 63, 525 |
| Pueblo of San Francisco; 5 L. D., 483 | 203 | Saunders v. Baldwin; 9 L. D., 391 | 20 |
| Purmort v. Zerfing; 9 L. D., 180 | 155, 472 | Schetka v. Northern Pacific Railroad Company; 5 L. D., 473 | 432 |
| Quigley, T. H.; 8 L. D., 551 | 527 | Schnabelin, John; 8 L. D., 474 | 79 |
| Ramage v. Central Pacific Railroad Company; 5 L. D., 274 and 616 | 293, 465 | Schulenberg v. Harriman; 21 Wall., 44 | 318, 664 |
| Rancho San Rafael de la Zanja; 4 L. D., 482 | 95 | Schweitzer v. Ross; 8 L. D., 70 | 203, 696 |
| Randall v. Sioux City Railroad Company; 10 L. D., 54 | 569, 686 | Scott v. Kjing; 9 L. D., 299 | 661 |
| Rashaw, Orrin C.; 6 L. D., 570 | 494 | Sears v. Almy; 6 L. D., 1 | 49, 674 |
| Raymond, J. B.; 2 L. D., 854 | 189, 337, 540, 635 | Seitz v. Wallace; 6 L. D., 299 | 476 |
| Rector v. Gibbon; 111 U. S., 234 | 431 | Selby et al. v. State of California, 3 C. L. O., 89 | 33 |
| Redding v. Riley; 9 L. D., 523 | 276 | Sellman v. Redding; 2 L. D., 270 | 14 |
| Reed v. Buffington; 7 L. D., 154 | 414 | Sellmeyer, Frank H., 6 L. D., 792 | 327, 603 |
| Reed v. Casner; 9 L. D., 170 | 160 | Semer, Jacob; 6 L. D., 345 | 373 |
| Read, Gilbert E.; 5 L. D., 314 | 21 | Sewell v. Rockafellar; 10 L. D., 232 | 453 |
| Read, John H.; 6 L. D., 563 | 222 | Shanessy, Mary A.; 7 L. D., 62 | 338 |
| Reed, Clayton M.; 5 L. D., 413 | 448, 604 | Shaw, C. G.; 1 C. L. L., 309 | 525 |
| Reeves v. Emblen; 9 L. D., 584 | 253 | Shepley v. Cowan; 91 U. S., 330 | 228 |
| Renner, Sarah; 2 L. D., 43 | 193 | Shinnes v. Bates; 4 L. D., 425 | 294 |
| Reynolds v. Iron Silver Mining Company; 116 U. S., 687 | 202 | Shonbar Lode; 1 L. D., 551, and 3 id., 388 | 200 |
| Rice v. Bissell; 8 L. D., 606 | 590 | Silver v. Ladd; 7 Wall., 225 | 90 |
| Rice v. Minnesota and Northwestern Railroad Company; 1 Black, 380 | 429 | Sim v. McGrew; 2 L. D., 324 | 140 |
| Rice v. Sioux City and St. Paul Railroad Company; 110 U. S., 698 | 429 | Sims v. Busse et al.; 4 L. D., 369 | 21 |
| Richmond Mining Company v. Rose et al.; 114 U. S., 576 | 186 | Simrall, William H.; 8 L. D., 581 | 301 |
| Riggan v. Riley; 5 L. D., 595 | 560 | Sioux City and Pacific Railroad Company v. Lewis et al.; 8 L. D., 92 | 648 |
| Riley v. Wells; Vol. 19, Lawyer's Ed., U. S. Reports, p. 648 | 88 | Shidell v. Grandjean; 111 U. S., 437 | 429 |
| Rinehart v. Willamette Valley Wagon Road Company; 5 L. D., 650 | 457 | Smith, George H., et al.; 10 L. D., 184 | 601 |
| Roberts, Oscar T.; 8 L. D., 423 | 514 | Smith v. Mayland; 7 L. D., 381 | 113 |
| Roberts v. Mahl; 6 L. D., 446 | 113, 251, 679 | Smith v. Howland; 9 L. D., 648 | 160 |
| Robinson v. Roydor; 1 L. D., 564 | 202 | | |
| Rockwell v. Indian Widows; 1 L. D., 90 | 203 | | |
| Reschlaub v. Union Pacific Railway Company; 6 L. D., 750 | 430, 439 | | |
| Rogers v. Lukens; 6 L. D., 111 | 414, 539 | | |
| Rohrbough v. Diggins; 9 L. D., 308 | 153 | | |

| | Page. | | Page. |
|--|----------|---|---------------|
| Smith <i>et al.</i> v. Van Clief <i>et al.</i> ; 6 C. L. O., 2 | 158 | Stone v. Banegas <i>et al.</i> ; 2 L. D., 104 | 237 |
| Smoke House Lode; 4 L. D., 555 | 202 | Strawn v. Maher; 4 L. D., 235 | 295, 474 |
| Snody, Duthan B.; 1 L. D., 532 | 554 | Swain v. Call; 9 L. D., 22 | 512 |
| Sohn v. Texas and Pacific Railway Com- pany; 3 L. D., 122 | 283 | Swanson v. Wisely's Heir; 9 L. D., 31 | 530 |
| Solaiza, José Maria; 6 L. D., 20 | 189, 337 | Swift v. California and Oregon Railroad Company; 2 C. L. L., 733 | 576 |
| Sorenson v. Becker; 8 L. D., 357 | 107, 302 | Talbert v. Northern Pacific Railroad Com- pany; 2 L. D., 536 | 430 |
| Southern Minnesota Railway Company v. Gallipean; 3 L. D., 166 | 473 | Talbot, Thomas F.; 8 L. D., 495 | 351 |
| Southern Pacific Railroad Company v. Burlingame; 5 L. D., 415 | 283 | Talkington's Heirs v. Hempfing; 2 L. D., 46 | 85 |
| Southern Pacific Railroad Company v. California; 3 L. D., 88 | 33, 220 | Tarr, Jennie M.; 7 L. D., 67 | 111 |
| Southern Pacific Railroad Company v. Dooley; 5 L. D., 380 | 429 | Tauer v. Heirs of Walter A. Mann; 4 L. D., 433 | 530 |
| Southern Pacific Railroad Company v. Lopez; 3 L. D., 130 | 259, 432 | Tavener, L. A.; 9 L. D., 426 | 267 |
| Southern Pacific Railroad Company v. Rahall; 3 L. D., 321 | 90 | Taylor, Albert; 10 L. D., 1 | 184 |
| Southern Pacific Railroad Company v. Saunders; 6 L. D., 98 | 433, 464 | Taylor <i>et al.</i> v. State of California; 2 C. L. O., 19 | 32 |
| Southern Pacific Railroad Company v. Wiggins and Keller; 2 C. L. L., 937 | 432 | Taylor v. Southern Minnesota Railway Company; 2 L. D., 557 | 88 |
| Spalding v. Colfer; 8 L. D., 615 | 295 | Texas Pacific Railroad Company v. Gray; 3 L. D., 253 | 293 |
| Spithill v. Gowen; 2 L. D., 631 | 272 | Thomas, David; 4 L. D., 331 | 549 |
| Stanton v. Howell; 9 L. D., 644 | 233, 593 | Thompson, Sidney F.; 8 L. D., 285 | 80 |
| Stark v. Barrett; 15 Cal., 361 | 249 | Tiffany, Mary L.; 7 L. D., 480 | 111 |
| Starkweather v. Atchison, Topeka and Santa F6 Railroad Company; 6 C. L. O., 19 | 283 | Tilton, Daniel G.; 8 L. D., 368 | 542 |
| State of Arkansas; 4 C. L. O., 63 | 165 | Tingley, Henry C.; 8 L. D., 205 | 116 |
| State of California v. Pierce; 1 L. D., 442 | 189, 337 | Trepp v. Northern Pacific Railroad Com- pany; 1 L. D., 380 | 432 |
| State of California; 1 L. D., 312; 2 <i>id.</i> , 644 | 287 | Tripp <i>et al.</i> v. Stewart; 7 C. L. O., 39 | 269 |
| State of California; 3 L. D., 521 | 322 | Tucker v. Nelson; 9 L. D., 520 | 14 |
| State of Florida; 8 L. D., 65 | 46, 164 | Tuohy v. Chase; 30 Cal., 524 | 226 |
| State of Kansas; 5 L. D., 243 | 95 | Two Sisters Lode and Mill Site; 7 L. D., 557 | 197 |
| State of Illinois; 1 L. D., 504 | 124 | United States v. Arredondo; 6 Pet., 729 | 95, 429 |
| State of Iowa v. Cedar Rapids Railroad Company; 3 C. L. O., 84 | 165 | United States v. Aterbery; 8 L. D., 173, 10 <i>id.</i> , 36 | 583, 640, 652 |
| State of Kansas v. United States; 5 L. D., 712 | 367 | United States v. Brooks; 10 How., 442 | 518 |
| State of Louisiana; 1 L. D., 510 | 46, 165 | United States v. Bank of Metropolis; 15 Pet., 401 | 95 |
| State of Minnesota; 2 L. D., 642 | 166 | United States v. Conner <i>et al.</i> ; 5 L. D., 647 | 481 |
| State of Minnesota v. St. Paul Railroad Company; 3 C. L. O., 99 | 165 | United States v. Colton Marble and Lime Company; 39 Fed. Rep., 132 | 76 |
| State of Nebraska v. Dorrington; 3 C. L. O., 122 | 33 | United States v. Dickson; 15 Pet., 165 | 428 |
| State of Oregon; 3 L. D., 595; 9 <i>id.</i> , 303 | 95 | United States v. Edwards <i>et al.</i> ; 33 Fed. Rep., 104 | 27 |
| State of Oregon; 4 L. D., 225, 9 <i>id.</i> , 360 | 126 | United States v. Flint; 4 Saw., 43 | 612, 655 |
| State of Oregon; 3 L. D., 334 | 317 | United States v. Forty-three Gallons of Whisky; 93 U. S., 192 | 518 |
| State of Oregon; 2 L. D., 651 | 322 | United States v. Freeman; 3 How., 565 | 335 |
| State v. Trask; 27 Am. Decs., 554 | 382 | United States v. Hill; 120 U. S., 169 | 361 |
| State of Wisconsin v. Wolf; 8 L. D., 555 | 41 | United States v. Illinois Central Railroad Company; 2 Biss., 174 | 382 |
| Stayton v. Carroll; 7 L. D., 98 | 476, 621 | United States v. Iron Silver Mining Com- pany; 128 U. S., 673 | 205 |
| Stearns, George F.; 8 L. D., 573 | 600 | United States v. Jenks; 14 C. L. O., 61 | 560 |
| Steel v. Smelting Company; 106 U. S., 447 | 696 | United States v. Leathers; 6 Saw., 20 | 519 |
| Steele, Lydia; 1 L. D., 460 | 630 | United States v. Pacheco; 2 Wall., 590 | 370 |
| Steeemerson, John; 6 L. D., 39 | 437 | United States v. Payne; 2 McCrary, 289 | 518 |
| Stein <i>et al.</i> v. Fisher; 5 L. D., 671 | 573 | United States v. Reed; 28 Fed. Rep., 482 | 538 |
| Stephens v. Ray; 5 L. D., 133 | 643 | United States v. Scott Rhea; 8 L. D., 578 | 113 |
| Stewart v. Carr; 2 L. D., 249 | 269 | United States v. Schurz; 102 U. S., 373 | 204, 694 |
| Stewart v. Jacobs; 1 L. D., 636 | 581 | United States v. Stone; 2 Wall., 535 | 201, 604 |
| Stinka v. Wisconsin Central Railroad Company; 4 L. D., 344 | 306 | | |

TABLE OF OVERRULED AND MODIFIED CASES.

XVII

| | Page. | | Page. |
|--|---------------|---|----------|
| United States v. Throckmorton; 98 U. S., 61 | 612 | Wells, Henry T.; 3 L. D., 196 | 94 |
| United States v. Union Pacific Railway Company; 91 U. S., 79 | 329 | Wells v. Nickles; 104 U. S., 144 | 524 |
| United States v. Walker; 109 U. S., 258 .. | 680 | West v. Owen; 4 L. D., 412 | 474, 531 |
| United States v. Woodbury; 5 L. D., 303. | 24, 38 | Western Pacific Railroad Company v. United States; 108 U. S., 510 | 157 |
| Union Pacific Railway Company v. Haines; 9 L. D., 595 | 648 | Wheeler, Cyrus; 9 L. D., 271 | 542 |
| Union Insurance Company v. Hoge; 21 How., 35 | 654 | White Butte; 32 Iowa | 105 |
| Upman v. Northern Pacific Railroad Company; 7 L. D., 298 | 420 | Whitney v. Maxwell; 10 C. L. O., 104 | 180 |
| Van Brunt v. Hammon; 9 L. D., 561 | 447, 621 | White v. McGurk et al.; 6 L. D., 268 | 21, 407 |
| Vandivert v. Johns; 9 L. D., 609 | 21 | Widdicombe v. Childers; 124 U. S., 404 .. | 615 |
| Van Ostrum v. Young; 6 L. D., 25 | 80 | Wilcox v. Jackson; 13 Pet., 498 | 336, 367 |
| Van Wyck v. Knevals; 106 U. S., 360 ..76, 138, 576 | 155, 323 | Williams v. Baker; 17 Wall., 144 | 76 |
| Vargason v. McClellan; 6 L. D., 829 | 176 | Willis, L. W.; 6 L. D., 772 | 14 |
| Veta Grande Lode; 6 L. D., 718 | 203 | Winona and St. Peter Railroad Company; et al.; 6 L. D., 544 | 576, 610 |
| Voght, John P. S.; 9 L. D., 114 | 679 | Winona and St. Peter Railroad Company; 9 L. D., 649 | 52, 576 |
| Wade v. Sweeney; 6 L. D., 234 | 261 | Winona and St. Peter Railroad Company; 117 U. S., 228 | 52 |
| Waite, Fred G.; 8 L. D., 638 | 43 | Wingvist, Lars; 4 L. D., 323 | 360 |
| Walker v. Mack; 5 L. D., 183 | 666 | Wisconsin Central Railroad Company; 10 L. D., 63 | 148 |
| Wallace v. Schooley; 3 L. D., 326 | 104 | Wisconsin Central Railroad Company v. Stinka; 4 L. D., 344 | 203, 575 |
| Ware v. Bishop; 2 L. D., 616 | 390, 621 | Wisconsin Farm Mortgage Company; 5 L. D., 81 | 73 |
| Waterhouse, William W.; 9 L. D., 131 | 351 | Wolcott v. Des Moines Company; 5 Wall., 681 | 74, 519 |
| Watson, Thomas E.; 4 L. D., 169, 6 id., 71. | 621, 666 | Wolsey v. Chapman; 101 U. S., 755 | 76, 88 |
| Watson v. Morgan et al.; 9 L. D., 75 .. | 423 | Wood, Levi; 5 L. D., 481 | 496 |
| Watson v. Missouri River Railroad Company; 2 C. L. L., 902 | 383 | Worcester v. Georgia; 6 Pet., 515 | 518 |
| Waugh v. Luch; 28 Ill., 448 | 107, 228, 257 | Worthington v. Watson; 2 L. D., 301 | 182 |
| Webb v. Loughrey; 9 L. D., 440 | 81 | Wright v. Maher; 6 L. D., 758 | 19 |
| Weber, Peter; 9 L. D., 150 | 222, 562 | Wright v. Woods; 1 C. L. L., 304 | 90 |
| Welch v. Duncan; 7 L. D., 186 | 97, 484 | Wurlitzer, Rudolph; 6 L. D., 315 | 547, 573 |
| Weldon v. McLean; 6 L. D., 9 | 527 | Yosemite Valley case; 15 Wall., 77 | 371 |
| Welo, Caroline, 8 L. D., 612 | | | |

TABLE OF OVERRULED AND MODIFIED CASES.

[From 1 to 10 L. D., inclusive.]

| | |
|--|---|
| Bailey, John W., et al., (3 L. D., 386); modified, 5 L. D., 513. | Cornell v. Chilton (1 L. D., 153); overruled, 6 L. D., 483. |
| * Baker v. Hurst (7 L. D., 457); overruled, 8 L. D., 110. | Devoe, Lizzie A. (5 L. D., 4); modified, 5 L. D., 429. |
| Barlow, S. L. M.; (5 L. D., 695); modified, 6 L. D., 648. | Dudymott v. Kansas Pacific R. R. Co. (5 C. L. O., 69); overruled, 1 L. D., 345. |
| Bartch v. Kennedy (3 L. D., 437); modified, 6 L. D., 217. | * Elliott v. Ryan (7 L. D., 322); overruled, 8 L. D., 110. |
| Bivins v. Shelley (2 L. D., 282); modified, 4 L. D., 583. | Epley v. Trick (8 L. D., 110); overruled, 9 L. D., 353. |
| Blenkner v. Sloggy (2 L. D., 267); modified, 6 L. D., 217. | Ewing v. Rickard (1 L. D., 146); overruled, 6 L. D., 483. |
| Box v. Ulstein (3 L. D., 143); modified, 6 L. D., 217. | Florida Rwy. and Navigation Co. v. Miller (3 L. D., 324); modified (6 L. D., 716); overruled, 9 L. D., 237. |
| Bundy v. Livingston (1 L. D., 152); overruled, 6 L. D., 284. | Forget, Margaret (7 L. D., 280); overruled, 10 L. D., 629. |
| Burkholder v. Skagen (4 L. D., 166); overruled, 9 L. D., 153. | Freeman v. Texas Pacific R. R. Co. (2 L. D., 559); overruled, 7 L. D., 18. |
| Buttery v. Sprout (2 L. D., 293); overruled, 5 L. D., 591. | Gallagher, Maria (8 C. L. O., 57); overruled, 1 L. D., 57. |
| Christofferson, Peter (3 L. D., 329); modified, 6 L. D., 284, 624. | |
| Colorado, State of (7 L. D., 490); overruled, 9 L. D., 408. | |

XVIII TABLE OF OVERRULED AND MODIFIED CASES, ETC.

| | |
|---|---|
| Garrett, Joshua (2 C. L. L., 1005); overruled, 5 L. D., 158. | *Reed v. Buffington (7 L. D., 154); overruled, 8 L. D., 110. |
| Gates v. California and Oregon R. R. Co. (5 C. L. O., 150); overruled, 1 L. D., 336. | Rico Townsite (1 L. D., 556); modified, 5 L. D., 256. |
| Gohrman v. Ford (8 C. L. O., 6); overruled, 4 L. D., 580. | Rogers v. Atlantic and Pacific R. R. Co. (6 L. D., 565); overruled, 8 L. D., 165. |
| Hickey, M. A. and Edward (3 L. D., 83); modified, 5 L. D., 256. | *Rogers v. Lukens (6 L. D., 111); overruled, 8 L. D., 110. |
| Holland, G. W. (6 L. D., 20); overruled, 6 L. D., 639. | Sayles, Henry P. (2 L. D., 88); modified, 6 L. D., 797. |
| Hooper, Henry (6 L. D., 624); modified, 9 L. D., 86, 284. | Serrano v. Southern Pacific R. R. Co. (6 C. L. O., 93); overruled, 1 L. D., 380. |
| Jones, James A. (3 L. D., 176); overruled, 8 L. D., 448. | Shineberger, Joseph (8 L. D., 231); overruled, 9 L. D., 202. |
| Kniskern v. Hastings and Dakota Rwy. Co. (6 C. L. O., 50); overruled, 1 L. D., 362. | Sipchen v. Ross (1 L. D., 634); modified, 4 L. D., 152. |
| Lindberg, Anna C. (3 L. D., 95); modified, 4 L. D., 299. | Spencer, James (6 L. D., 217); modified, 6 L. D., 772, and 8 L. D., 467. |
| Louisiana, State of (8 L. D., 126); modified on review, 9 L. D., 157. | State of California v. Pierce (3 C. L. O., 118); modified, 2 L. D., 854. |
| Mangham, George W. (1 L. D., 25); overruled, 7 L. D., 94. | Sweeten v. Stevenson (3 L. D., 249); overruled, 3 L. D., 248. |
| Morgan v. Craig (10 C. L. O., 234); overruled, 5 L. D., 303. | Taylor v. Yates <i>et al.</i> (8 L. D., 279); reversed on review, 10 L. D., 242. |
| Nyman v. St. Paul, Minneapolis and Manitoba Rwy. Co. (5 L. D., 396); overruled, 6 L. D., 750. | Traugh v. Ernst (2 L. D., 212); overruled, 3 L. D., 218. |
| Papina v. Alderson (1 B. L. P., 91); modified, 5 L. D., 256. | Tripp v. Stewart (7 C. L. O., 39); modified, 6 L. D., 795. |
| Patterson, Charles E. (3 L. D., 260); modified, 6 L. D., 284, 624. | Tupper v. Schwarz (2 L. D., 623); overruled, 6 L. D., 623. |
| Phelps, W. L. (8 C. L. O., 139); overruled, 2 L. D., 854. | Turner v. Lang (1 C. L. O., 51); modified, 5 L. D., 256. |
| Rancho Alisal (1 L. D., 173); overruled, 5 L. D., 320. | Watson, Thomas E. (4 L. D., 169); modified, 6 L. D., 71. |
| | Weber, Peter (7 L. D., 476); overruled on review, 9 L. D., 150. |
| | Wilkins, Benjamin C. (2 L. D., 129); modified, 6 L. D., 797. |
| | Willingbeck, Christian P. (3 L. D., 383); modified 5 L. D., 408. |

* The cases marked with a star are now authority. See *Hessong v. Burgan*, 9 L. D., 353.

TABLE OF CIRCULARS AND INSTRUCTIONS.

| | Page. | | Page. |
|---|-------|---|-------|
| January 3, 1890. Disposition of records in contests dismissed by the local office.. | 2 | March 25, 1890. Sioux Indian lands | 562 |
| January 6, 1890. Official returns, and letters from the local office..... | 2 | May 9, 1890. Homestead entry; minor heirs..... | 543 |
| February 20, 1890. Surveyors' accounts.. | 199 | May 24, 1890. Oklahoma town sites..... | 604 |
| March 13, 1890. Equitable adjudication.. | 299 | June 18, 1890. Oklahoma town sites..... | 666 |
| March 20, 1890. Sioux Indian lands, act of | | June 25, 1890. Entry and final proof; amendment of section 2294, R. S. | 687 |
| March 2, 1889, sec. 21 | 328 | | |

TABLE OF CIRCULARS AND INSTRUCTIONS, CITED AND CONSTRUED.

| | Page | | Page |
|--|----------|--|----------|
| June 13, 1872.—Soldiers' additional homestead; 1 C. L. L., 263 | 357 | July 6, 1883.—Mineral entry; 2 L. D., 725 | 642 |
| March 28, 1873.—Soldiers' additional homestead; 1 C. L. L., 277 | 357 | September 22, 1884.—Disposition of records in contest cases; 3 L. D., 120 | 2 |
| November 3, 1873.—Soldiers' additional homestead; 1 C. L. L., 278 | 357 | June 24, 1885.—Surveys, sec. 3; 3 L. D., 599 | 578 |
| August 5, 1874.—Soldiers' additional homestead; 1 C. L. L., 279 | 357 | July 23, 1885.—Indemnity school selections; 4 L. D., 79 | 351 |
| May 23, 1876.—Soldiers' additional homestead; 2 C. L. L., 488 | 358 | July 9, 1886.—Town sites; 5 L. D., 265 | 605 |
| July 10, 1876.—Soldiers' additional homestead; 2 C. L. L., 480 | 358 | November 6, 1886.—Town site, par. 9; 5 L. D., 265 | 208 |
| March 10, 1877.—Soldiers' additional homestead; 2 C. L. L., 478 | 358 | April 26, 1887.—Osage land; 5 L. D., 581 | 38, 414 |
| May 17, 1877.—Soldiers' additional homestead; 2 C. L. L., 479 | 359 | May 21, 1887.—Timber land (July 16, 1887); 6 L. D., 114 | 47, 272 |
| August 12, 1878.—Swamp land; 2 C. L. L., 1042 | 22 | June 27, 1887.—Desert land; 5 L. D., 708 | 560, 600 |
| July 1, 1879.—Entry of occupied land; 6 C. L. O., 92 | 613 | June 27, 1887.—Timber culture; 6 L. D., 280 | 409, 501 |
| September 1, 1879.—Soldiers' additional homestead; 2 C. L. L., 485 | 360 | November 22, 1887.—Railroad lands; 6 L. D., 276 | 265 |
| October 17, 1881.—Coal land; 1 L. D., 540 | 423 | January 1, 1889.—Repayment, Gen. Cir., 66 and 67 | 554 |
| February 7, 1882.—Proceedings against desert entries | 657 | January 1, 1889.—Repayment, Gen. Cir., 68 | 36 |
| July 31, 1882.—Coal land; 1 L. D., 687 | 163, 423 | March 8, 1889.—A additional entry under act of March 2, 1889; 8 L. D., 314 | 682 |
| July 31, 1882.—Coal land, sec. 9 | 539 | July 16, 1889.—Timber culture; 9 L. D., 86 | 93 |
| July 31, 1882.—Coal land, sec. 28 | 539 | July 17, 1889.—Final proof, rule 2; 9 L. D., 123 | 419 |
| July 31, 1882.—Coal land, sec. 31 | 509 | July 17, 1889.—Final proof, rule 9; 9 L. D., 123 | 296, 597 |
| July 31, 1882.—Coal land, sec. 32 | 539 | December 3, 1889.—Final timber culture proof; 9 L. D., 672 | 502 |
| February 13, 1883.—Soldiers' additional homestead; 1 L. D., 654 | 354 | December 4, 1889.—Accounts, witness fees; 9 L. D., 666 | 385 |
| March 20, 1883.—Final proof; 1 L. D., 656 | 373 | | |

ACTS OF CONGRESS CITED AND CONSTRUED.

| | | | |
|---|----------|--|--------------------|
| May 18, 1796 (1 Stat., 464), salt springs | 223 | June 3, 1856 (11 Stat., 18) | 637 |
| April 30, 1802 (2 Stat., 173), salt springs | 223 | June 3, 1856 (11 Stat., 20) | 63, 147 |
| April 23, 1812 (2 Stat., 716) | 98 | June 3, 1856 (11 Stat., 21) | 676 |
| April 19, 1816 (3 Stat., 289), salt springs | 223 | March 3, 1867 (11 Stat., 195) | 686 |
| August 19, 1825 (7 Stat., 272), treaty | 287 | March 3, 1857 (11 Stat., 251), 45, 121, 163, 393, 394 | 606 |
| May 24, 1828 (4 Stat., 348) | 394 | March 3, 1859 (11 Stat., 425) | 168 |
| July 4, 1836 (5 Stat., 107), sec. 14 | 98 | June 21, 1860 (12 Stat., 70) | 616 |
| September 4, 1841 (5 Stat., 453) | 55 | June 22, 1860 (12 Stat., 87) | 168, 281 |
| September 4, 1841 (5 Stat., 453), sec. 8 | 217 | July 1, 1862 (12 Stat., 489), Union Pacific | 467, 569 |
| March 3, 1843 (5 Stat., 619) | 55 | March 11, 1863 (12 Stat., 1249) | 5 |
| September 20, 1850 (9 Stat., 466) | 393 | May 5, 1864 (13 Stat., 66) | 63, 147 |
| September 27, 1850 (9 Stat., 496) | 513 | May 7, 1864 (13 Stat., 695) | 5 |
| September 28, 1850 (9 Stat., 519) | 285, 333 | June 2, 1864 (13 Stat., 95) | 176 |
| February 14, 1853 (10 Stat., 158), sec. 9 | 522 | June 7, 1864 (13 Stat., 119) | 676 |
| March 5, 1853 (10 Stat., 244) | 542 | July 2, 1864 (13 Stat., 356), Union Pacific | 168, 281, 467, 569 |
| May 10, 1855 (10 Stat., 1053) | 697 | July 2, 1864 (13 Stat., 365), Northern Pacific, sec. 3 | 258, 427, 645 |
| July 17, 1854 (10 Stat., 305), sec. 6 | 522 | sec. 6 | 307, 542, 645, 663 |
| July 22, 1854 (10 Stat., 308) | 652 | June 21, 1866 (14 Stat., 66), sec. 2 | 545 |
| December 26, 1854 (10 Stat., 1132), Indian treaty | 513 | June 21, 1866 (14 Stat., 360) | 68 |
| February 22, 1855 (10 Stat., 1165) | 4 | July 4, 1866 (14 Stat., 87) | 685 |
| March 2, 1855 (10 Stat., 634) | 121 | July 5, 1866 (14 Stat., 89) | 456 |
| March 3, 1855 (10 Stat., 684) | 168 | | |
| May 15, 1856 (11 Stat., 9) | 176, 575 | | |

| | Page. | | Page. |
|---|--------------|--|---------------|
| July 23, 1866 (14 Stat., 218), | 218 | June 15, 1880 (21 Stat., 237), sec. 2..... | 111 |
| sec. 7 | 242 | 129, 392, 410, 588, 678 | |
| sec. 8 | 630 | June 16, 1880 (21 Stat., 287)..... | 12, 554 |
| July 25, 1866 (14 Stat., 236), Missouri, Kan- sas and Texas Railway..... | 504 | January 13, 1881 (21 Stat., 315)..... | 437 |
| July 25, 1866 (14 Stat., 239), California and Oregon grant..... | 499 | March 28, 1882 (22 Stat., 36) | 563 |
| July 27, 1866 (14 Stat., 292)..... | 215 | March 3, 1883 (22 Stat., 487) | 141 |
| April 29, 1868 (15 Stat., 635), treaty..... | 329 | July 4, 1884 (23 Stat., 89)..... | 4 |
| May 31, 1870 (16 Stat., 378), joint resolution | 16 | July 5, 1884 (23 Stat., 103)..... | 489, 602 |
| July 14, 1870 (16 Stat., 277) | 637 | February 8, 1887 (24 Stat., 391), sec. 2 and 4..... | 637 |
| July 14, 1870 (16 Stat., 279), pre-emption... 56, 569 | 56, 569 | March 3, 1887 (24 Stat., 556)..... | 29, 50 |
| March 3, 1871 (16 Stat., 564), treaty..... | 330 | 54, 166, 568, 576, 609, 610 | |
| March 3, 1871 (16 Stat., 573), sec. 22..... | 638 | March 3, 1887 (24 Stat., 556), sec. 3..... | 264, 307 |
| April 4, 1872 (17 Stat., 49)..... | 355 | April 30, 1888 (25 Stat., 94), treaty..... | 330 |
| April 5, 1872 (17 Stat., 649) | 365 | May 14, 1888 (25 Stat., 622), joint resolu- tion | 351 |
| June 1, 1872 (17 Stat., 197) | 240 | July 16, 1888 (25 Stat., 626), joint resolu- tion | 351 |
| June 8, 1872 (17 Stat., 333) | 355, 692 | August 13, 1888 (25 Stat., 439)..... | 437 |
| March 3, 1873 (17 Stat., 605), homestead... 355 | 355 | January 14, 1889 (25 Stat., 642) | 3 |
| March 3, 1873 (17 Stat., 607), coal land..... | 509 | February 13, 1889 (25 Stat., 668), town site of Flagstaff..... | 348 |
| June 22, 1874 (18 Stat., 194) | 50, 264, 609 | February 22, 1889 (25 Stat., 676)..... | 365 |
| March 3, 1875 (18 Stat., 420), Indian home- stead, sec. 15 | 443 | March 2, 1889 (25 Stat., 850), forfeiture of wagon-road grant | 456 |
| March 3, 1875 (18 Stat., 474), Colorado, sec. 11..... | 222 | March 2, 1889 (25 Stat., 854), homestead, etc. | 79 |
| March 3, 1875 (18 Stat., 511), Wisconsin Central..... | 68 | sec. 2..... | 192, 351 |
| April 21, 1876 (19 Stat., 35), sec. 1..... | 136 | sec. 5..... | 78, 681 |
| sec. 3..... | 306 | sec. 6..... | 661 |
| July 31, 1876 (19 Stat., 102) | 579 | sec. 7..... | 231, 301, 596 |
| January 12, 1877 (19 Stat., 221)..... | 222 | March 2, 1889 (25 Stat., 888), Sioux lands. | 562 |
| February 28, 1877 (19 Stat., 254), treaty... 330 | 330 | March 2, 1889 (25 Stat., 888), sec. 21 | 328 |
| March 3, 1877 (19 Stat., 377) | 49, 542 | March 2, 1889 (25 Stat., 939), surveys.... 578 | |
| June 14, 1878 (20 Stat., 113), sec. 1..... | 681 | March 2, 1889 (25 Stat., 1004), Oklahoma.. 666 | |
| sec. 2 | 302 | March 2, 1889 (25 Stat., 1008), forfeiture of railroad grant | 29 |
| sec | 268 | May 2, 1890 (26 Stat.), Oklahoma..... | 605, 668 |
| June 3, 1878 (20 Stat., 89)..... | 47, 271 | sec. 22..... | 673 |
| May 14, 1880 (21 Stat., 140), sec. 1..... | 674 | May 14, 1890 (26 Stat.), Oklahoma town- site | 604, 666 |
| sec. 2, 141, 257, 398, 413, 562, 565 | 562, 565 | May 26, 1890 (26 Stat.), amending 2294 R. S. | 687 |
| sec. 3 | 431 | | |
| May 28, 1880 (21 Stat., 143)..... | 23, 36, 602 | | |

REVISED STATUTES CITED AND CONSTRUED.

| | | | |
|-------------------|------------------------------|-------------------|--------------------|
| Section 449..... | 99 | Section 2297..... | 113, 643, 691 |
| Section 452..... | 97 | Section 2301..... | 209, 333 |
| Section 453..... | 99 | Section 2305..... | 531 |
| Section 914..... | 240 | Section 2306..... | 355, 692 |
| Section 2079..... | 330 | Section 2307..... | 355, 424, 531, 548 |
| Section 2238..... | 333 | Section 2318..... | 204 |
| Section 2258..... | 204, 650 | Section 2319..... | 641 |
| Section 2259..... | 628 | Section 2321..... | 642 |
| Section 2260..... | 103, 117, 208, 326, 447, 461 | Section 2324..... | 158, 534 |
| Section 2262..... | 551, 635 | Section 2325..... | 159, 205, 270, 657 |
| Section 2263..... | 431 | Section 2326..... | 185, 194, 205, 535 |
| Section 2264..... | 388, 431, 652 | Section 2332..... | 202 |
| Section 2265..... | 387, 431, 647 | Section 2333..... | 200 |
| Section 2267..... | 216, 614, 630, 647 | Section 2337..... | 194, 196 |
| Section 2271..... | 234 | Section 2339..... | 171 |
| Section 2289..... | 100, 423, 488, 579, 635, 650 | Section 2340..... | 171 |
| Section 2291..... | 209, 275, 333, 543 | Section 2347..... | 540 |
| Section 2292..... | 543 | Section 2349..... | 162 |
| Section 2294..... | 687 | Section 2350..... | 162, 509, 539 |

RULES OF PRACTICE CITED AND CONSTRUED.

| | Page. | | Page. |
|--------------------|----------|--------------------|-------|
| Section 2351 | 539 | Section 2414 | 357 |
| Section 2357 | 542, 652 | Section 2423 | 357 |
| Section 2387 | 348, 667 | Section 2455 | 615 |
| Section 2388 | 348 | Section 2457 | 299 |
| Section 2389 | 208, 348 | Section 2479 | 46 |
| Section 2392 | 204 | Section 2482 | 446 |
| Section 2395 | 391 | Section 2484 | 46 |

RULES OF PRACTICE CITED AND CONSTRUED.

| | | | |
|---------------|----------|----------------|----------|
| Rule 1 | 399 | Rule 53 | 16, 679 |
| Rule 5 | 695 | Rule 54 | 628, 680 |
| Rule 9 | 274, 479 | Rule 55 | 625, 680 |
| Rule 10 | 274 | Rule 56 | 628, 680 |
| Rule 13 | 621 | Rule 60 | 268 |
| Rule 14 | 621, 664 | Rule 77 | 414 |
| Rule 15 | 388 | Rule 81 | 252 |
| Rule 20 | 481 | Rule 82 | 573, 595 |
| Rule 24 | 480 | Rule 83 | 252, 690 |
| Rule 30 | 340 | Rule 84 | 573, 690 |
| Rule 35 | 433, 480 | Rule 85 | 690 |
| Rule 41 | 628, 680 | Rule 86 | 409 |
| Rule 48 | 680, 690 | Rule 88 | 547 |
| Rule 51 | 679 | Rule 93 | 409, 547 |
| Rule 52 | 679, 690 | Rule 114 | 690 |

DECISIONS

RELATING TO

THE PUBLIC LANDS.

FINAL PROOF—SUPPLEMENTAL EVIDENCE.

GEORGE C. TAYLOR.

It is the duty of the General Land Office to require supplemental proof, where the testimony, as submitted, is evasive and incomplete.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 7, 1890.

I have considered the case of Geo. C. Taylor on his appeal from your office decision of November 20, 1888, rejecting his final proof for his pre-emption cash entry for W. $\frac{1}{2}$ NE. $\frac{1}{4}$ and E. $\frac{1}{2}$ NW. $\frac{1}{4}$ Sec. 22 T. 119 N., R. 55 W., Watertown, Dakota.

Proof was rejected for the reason "that the improvements and cultivation shown are not conclusive of good faith," but claimant was allowed sixty days in which to furnish "new proof without publication, satisfactorily showing full compliance with law in good faith."

Claimant made no attempt to comply with said order but appealed instead to this Department. The ground of his appeal is substantially that his final proof is sufficient.

The answers on final proof are as brief as it was possible to make them. In reply to the question "What improvements have you made on the land since settlement, and what is the value of the same?" claimant answered—"House eight by ten, five acres under cultivation." He does not say what kind of a house, nor does he give any value. The house might be a very poor dug-out, a very temporary sod house, or a frame shanty of the most flimsy description for all that the proof shows to the contrary, and your office might well consider his failure to fully describe the house or to fix a value on the improvements as an evasion which required explanation.

Again he answered that he had used the land for agricultural purposes and yet in reply to the question "How much of the land, if any,

have you broken and cultivated since settlement, and what kind and quantity of crops have you raised?" he answered "five acres," again evading a full reply to the question.

Not only is your office justified in requiring supplemental proof in cases where such evasions and incomplete answers are given, but it is your duty to do so.

Claimant's uncorroborated affidavit filed with his appeal can not in any sense be considered as a compliance with your order.

Your said decision is affirmed.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., January 3, 1890.

Registers and Receivers.

Referring to instructions to the local officers at Huron, S. D., dated September 22, 1884 (3 L. D., 120), you are hereby directed to discontinue the practice of forwarding to this office the records of contests dismissed by you for want of prosecution, except in cases in which hearings have been ordered by this office or final proof has been offered, or the charges are of such a character that, in your judgment, they should be investigated in the interest of the government.

Papers retained by you in accordance herewith must be carefully preserved so that those relating to any particular case can be forwarded if deemed material to the proper adjudication of any matter arising in relation to such case.

Respectfully,

LEWIS A. GROFF,
Commissioner.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., January 6, 1890.

The following circular is re-issued for the benefit of those concerned.

LEWIS A. GROFF,
Commissioner.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 16, 1885.

Register and Receiver.

Gentlemen: All official returns, communications, and letters on business of every kind sent to the General Land Office, will be folded in the form of this circular and indorsed in a plain, neat handwriting, with the name of the office, date of transmis-

sion, by whom sent, *i. e.*, Register or Receiver, or Register and Receiver, with a brief statement of the contents.

Duplicates for patents delivered, relinquishments, contested cases, and all other matter not pertaining to your monthly or quarterly returns, must be sent up by separate letter and not inclosed in the same package with returns.

The official inconvenience found to result from the practice of embracing more than one subject in a letter induces me to direct that in every case hereafter you will make each subject the contents of a separate letter. Do not occupy too much space in giving contents of letters. In transmitting contested cases always give the names of the parties in the brief, instead of the number of the entry, but in the letter itself you should give name, number, and description of land, and state the nature of the claim. The same in forwarding applications for repayment, to change or amend an entry, etc. Leave sufficient space at the top and bottom for our number and date of receipt.

Although instructions have heretofore been forwarded to your office, communications continue to arrive without being briefed. This circular is intended to cover all communications, and you are expected to comply strictly with its requirements.

As all papers received at this office are systematically filed, you can not be too careful in following all instructions. You will find inclosed a paper folded and spaced for your guidance.

Very respectfully,

WM. A. J. SPARKS,

Commissioner.

TUCKER *v.* NELSON.

Motion for the review of the departmental decision rendered in the above entitled case October 26, 1889, 9 L. D., 520, denied by Secretary Noble, January 9, 1890.

MILLE LAC INDIAN LANDS—ACT OF JANUARY 14, 1889.

DAVID H. ROBBINS.*

The cession by the Indians of their right of possession or occupancy is a condition precedent to the right of proceeding, under the proviso to section 6, act of January 14, 1889, with entries made on lands covered by said right; and no steps can be taken toward perfecting such entries, or disposing of said land until such cession has been obtained, and accepted and approved by the President.

Secretary Noble to the Commissioner of the General Land Office, January 8, 1890.

May 25, 1883, David H. Robbins made "soldiers and sailors" homestead entry (Revised Statutes, 2304), No. 3273, for lots 1, 2 and 3, and the NW: $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Sec. 28, T. 43 N., R. 27 W., Taylor's Falls district, Minnesota. This entry conflicted as to said lot 1 with the prior homestead entry of Show-Vash-King, No. 6239, on which final certifi-

* This decision was rendered on the recall of the departmental decision of April 10, 1889, 8 L. D., 409.

cate had been issued September 2, 1879, and because of this conflict, your office, by letter of May 15, 1886, directed the local officers to "inform Robbins, that he will be allowed sixty days to show cause why his entry should not be canceled to the extent in conflict."

In response to a notice served on him, pursuant to said direction of your office, Robbins, July 10, 1886, filed with the local officers a paper, entitled as follows:

BEFORE THE U. S. LAND OFFICE,
Taylor's Falls, Minn.

In the matter of *appeal* and *showing cause* why the claimant's title should not be canceled to the extent of lot 1 embraced within his homestead entry.

In said paper it is not claimed that your office erred in requiring the claimant to show cause, but several reasons are assigned why the entry of Robbins should not be canceled as to lot 1, and among them, that Show-Vash-King had not improved and resided upon the land embraced in his entry as required by law. Said paper, therefore, although entitled an "appeal," as well as a "showing cause," is not in fact an appeal from the order of your office to show cause, but a compliance therewith. The matter set up in said paper, as "cause why" the entry of Robbins should not be canceled to the extent of the said conflict, is ground for contest of the entry of Show-Vash-King, and, if presented by affidavit, duly corroborated, a hearing should be ordered thereon, after notice according to law. The entry of Show-Vash-King, being a subsisting entry of record, segregated from the public domain the land covered by it, and, until duly canceled on proceedings instituted for that purpose, no part of said land was open to another entry.

It is recited, however, in your said office letter, that the lands involved in this case are "within the Mille Lac Indian Reservation, the lands in which were withdrawn from disposal of any kind by letter of August 1, 1884, pursuant to a clause in the act of July 4, 1884, until after further legislation by Congress." The papers in the case have been transmitted to this Department and among them is an argument by the attorneys for Robbins, in which it is contended, that the act of January 14, 1889 (25 Stat., 642), is the "further legislation" referred to in your office letter and that said act, so soon as it became a law, removed the bar created by the act of July 4, 1884, to the patenting or other disposal of said lands. While, as above seen, the case is not regularly before this Department on appeal, yet as it is important that there should be a speedy determination of the operation of the act of 1889 as to entries on said lands, I will proceed to consider the same, as it is competent and proper for this Department to do in the exercise of its supervisory authority over all proceedings instituted to acquire portions of the public lands.

The "Mille Lacs" are a band of the Chippewas, and the "Mille Lac" Indian reservation in Minnesota was created by treaty concluded, February 22, 1855 (10 Stat., 1165) with the Mille Lacs and other bands of

Chippewas. The lands embraced in said reservation were set apart by said treaty as a "permanent home" for the "Mille Lacs," but subsequently by the treaty of March 11, 1863 (12 Stat., 1249), said reservation (and others established by the treaty of 1855) were ceded to the United States. By said treaty of 1863 other lands were reserved for said Indians in lieu of those ceded and there were various stipulations therein as to clearing lands, building houses for chiefs, etc., in consideration of said cession.

By still another treaty, entered into May 7, 1864 (13 Stat., 695), in consideration of the cession aforesaid, additional lands were set apart and the sums of money to be expended by the government for the Indians were particularly set forth. By the twelfth article, however, of both the treaty of 1863 and that of 1864, it is provided :

That owing to the heretofore good conduct of the Mille Lac Indians, they shall not be compelled to remove so long as they shall not in any way interfere with or in any manner molest the persons or property of the whites.

By letter, addressed to Secretary Teller, under date of April 26, 1882, Honorable Hiram Price, Commissioner of Indian Affairs, explains the "good conduct" of the Mille Lacs, referred to in said proviso, as follows:

At the time of the outbreak of the Chippewas in 1862, under the famous chief Hole-in-the-day, resulting from the efforts of southern secession agents, operating through Canadian Indians and fur-traders, when the devastation of the whole country there was threatened, and the massacre of the entire population, the Mille Lac bands being urged to join with Hole-in-the-day, positively refused, and not only remained loyal to the government, but assisted so far as they found it within their power to prevent a general Indian war. (House Ex. Doc., No. 148, 48th Cong., 1 Sess.)

It is to be noted, that both said last named treaties were made during the progress of the late war (one in 1863 and the other in 1864), and the consideration on which the Mille Lacs were granted immunity from removal, was not only the consideration already performed of their past ("heretofore") good conduct, but the consideration to be performed in the future, namely, the continuance of that good conduct. Their good conduct prior to the treaties of 1863 and 1864 consisted in not interfering with or molesting the persons or property of the whites by joining in the outbreak with the remainder of the tribe in 1862, and "in assisting to prevent a general Indian war," and their future good conduct stipulated for, it is reasonable to suppose, was the continuance of their past good conduct in not so interfering or molesting. The war lasted about two years after the original treaty of cession in 1863, and neither during that time (when their good conduct was most important to the government), nor since, does it appear that they have acted in such a manner as to justify a forfeiture of their right of continued possession or occupancy of their original reservation guaranteed to them under said treaties. (Letter of Commissioner Morgan of July 12, 1889, filed with papers in this case.)

Two views have been expressed as to who are the "whites" to whom

reference is made in said proviso to article twelve of said treaties. Commissioner Price, in his letter mentioned above, says:—

Manifestly, I think, reference was intended to the white settlers occupying the surrounding country, their neighbors especially, for there could have been no whites lawfully living upon the reservation at that time, and it was hardly intended in anticipation of the entry and settlement of the whites upon the reservation, and with a view of their protection; for the Indians being in occupation, the introduction of whites into their midst would unquestionably result in conflict at once; indeed, it is not difficult to see that such common occupancy by Indians and whites would be quite impossible. The Indians were there, and until they were removed, either by their own consent, or by reason of the forfeiture of their right of occupancy, the whites manifestly must keep out.

On the other hand, Secretary Chandler, in the case of Frank W. Folsom (decided March 1, 1877, but not reported), says:

That said proviso did not in his judgment, "exclude said lands from sale and disposal by the United States. It was anticipated, evidently, that these lands would be settled upon by white persons; that they would take with them their property and effects; and it was provided that so long as the Indians did not interfere with such white persons or their property they might remain, not because they had any right to the lands, but simply as a matter of favor."

The fact before adverted to, that the treaties were made during the war and long before it closed and the said proviso therein in favor of the Mille Lacs was in part consideration of their past good conduct in not interfering with the persons and property of whites who evidently lived outside their reservation, tends, in addition to the reasons assigned by Commissioner Price, to support the view expressed by him, that the future good conduct stipulated for by the government was in reference to the persons and property of whites living outside the reservation. Secretary Schurz seems to have been of this opinion, as by letter of May 19, 1879, entries which had been allowed in large numbers under the decision in the Folsom case were directed to be canceled. Subsequently, however, Secretary Teller, by letter of May 10, 1882, stated, that he felt "constrained to substantially adhere to the decision made by Secretary Chandler" (Folsom case), and, August 7, 1882, ordered the re-instatement of said entries canceled by order of Secretary Schurz. Your office, then, by letter of August 15, 1882, instructed the local officers to re-instate said entries, and, in a letter from Commissioner McFarland to Secretary Teller, under date of April 25, 1884, in response to a resolution of the House of Representatives of March 21, 1884, calling on this Department for information as to the status of the Mille Lac lands, after giving the history of said reservation up to said letter of August 15, 1882, it is said:

No order or instructions appear to have been issued by this office to the local office regarding the allowance of entries or filings on said lands, save the letter addressed to them August 15, 1882, re-instating the soldiers additional entries above referred to, and it would seem therefore that from the entries and filings allowed by them in 1882, 1883 and during the current year, that without waiting for instructions from this office in the premises and as previously ordered, said officers have been acting upon their own judgment. (House Ex. Doc., 148, 48th Cong., 1st Sess.)

Congress thereupon, in view of the condition of affairs disclosed by said response to said resolution provided by the act of July 4, 1884 (23 Stat., 89), that said lands "shall not be patented or disposed of in any manner until further legislation by Congress." (Robert Lowe, 5 L. D., 541). By this act, Congress did not undertake to annul or set aside entries made on said lands or divest rights (if any) acquired therein, but only directed, that the *status quo* be maintained "until further legislation." The power of Congress to do this and the propriety of so doing under the circumstances, can not be successfully questioned. As said by Commissioner Price, in his letter of April 26, 1882,

That their (the Mille Lacs') position since the cession of their reservation in 1863, has been an anomalous one is manifest. . . . The feeble tenure by which they have held their lands has been a great obstacle to their advancement. Their present reservation, being rich in pine lands, is the envy of the lumber men, and as long as the Indians occupy their present anomalous position, the pressure for their removal will continue, and it is to be feared the evil influences that have heretofore been brought to bear upon them to effect a forfeiture of their rights will also continue, until they are reduced to a state of utter depravity and helplessness. . . . The attention of the Department and of Congress has been from time to time called to their condition with a view to securing their removal or, in case of their remaining, such legislation as shall secure to them a proper share of the reservation in severalty . . . They have ever manifested the strongest objection to removal . . . Possibly, a liberal reward would induce them to yield, and the effort should be made.

By the first section of the act of January 14, 1889, the President is directed within sixty days after the passage of the act, to appoint three commissioners, "whose duty it shall be, as soon as practicable after their appointment, to negotiate with all the different bands or tribes of Chippewa Indians in the State of Minnesota, for the complete cession and relinquishment in writing of all their title and interest in and to all the reservations of said Indians in the State of Minnesota, except, etc." It is then provided in said section one, that "such cession and relinquishment shall be deemed sufficient, if assented to in writing by two-thirds of the male adults over eighteen years of age" of each band occupying a reservation, and, "for the purpose of ascertaining whether the proper number of Indians assent," that a census be taken, and "the acceptance and approval of such cession and relinquishment by the President of the United States shall be deemed full and ample proof of the assent of the Indians, and shall operate a complete extinguishment of the Indian title." The census having been taken and the cession and relinquishment "obtained, approved and ratified, as specified in section one, provision is then made in section three for the removal of the Indians. Section four provides for the survey, after cession, of the lands ceded, and the examination and classification thereof as "pine" and "agricultural" lands. By section five, it is directed, that the "pine" lands be disposed of by sale at public auction, or by private cash sale where not bid off at such auction, and by section six, that

the "agricultural" lands "be sold to actual settlers only under the provisions of the homestead law," with the proviso—

That nothing in this act shall be held to authorize the sale or other disposal under its provision of any tract upon which there is a subsisting, valid pre-emption or homestead entry, but any such entry shall be proceeded with under the regulations and decisions in force at the date of its allowance, and if found regular and valid, patents shall issue thereon.

(The remainder of the act provides for the appropriation of the proceeds of the disposal of the lands under its provisions for the benefit of the Indians.)

It is contended, that under this proviso entries on said lands may be at once proceeded with. This contention, in my opinion, can not be sustained. Taken by itself, the language of the proviso might authorize such an interpretation, but it must be construed as a part of and in connection with the entire act and in the light of the treaty obligations of the government, which are fully recognized by the provisions of section one of the act. By providing in said section one for "the complete cession and relinquishment of all their title and interest," Congress recognizes that the cession by the treaty of 1863 was not a "complete" cession, but that the Mille Lacs still retained an interest, the right of occupancy during good behavior, by virtue of the proviso to that effect to section twelve of said treaty. While the condition in said treaty proviso as to continued good conduct, is not limited to the period of the war, yet it is probable, from the fact said treaty was made during the war and two years before its close, that Congress had primarily in view in said proviso the maintenance of the attitude of friendly neutrality to the United States during the continuance of the war, which these Indians had prior to said treaty voluntarily assumed in opposition to the remainder of their tribe. Congress by the elaborate provisions in section one of the act of 1889 for the cession and relinquishment by these Indians of their remaining interest, shows clearly that in enacting said law it was mindful of the obligation incurred in time of need and that the government will not, when the exigency has passed, repudiate an obligation entered into under such circumstances and on such a consideration.

I am, therefore, of the opinion, that the cession by these Indians, as provided for under section one of said act, of their remaining interest in these lands, namely, the right of possession or occupancy during good behavior toward the whites, is a condition precedent to the right to proceed, under the proviso to section six of said act, with entries made on said lands, and that no steps can be taken towards perfecting said entries, or otherwise disposing of said lands, until said cession has been obtained, "and accepted and approved by the President." (It is not necessary herein to pass upon the question of the validity or present status of said entries as affected by the right of occupancy of the Indians.)

By letter of Hon. T. J. Morgan, Commissioner of Indian Affairs, dated July 8, 1889, papers regarding the proposed construction by certain lumber-men of a canal through sections 17, 20 and 29, T. 42 N., R. 26 W., which is a part of the "Mille Lac" reservation, "the object being to raise the water in Rum river for logging purposes," have been referred to this Department, with request that they be considered in connection with this case. It appears from these papers, that said proposed canal would lower the water in Mille Lac lake about four feet and greatly injure its beauty, and lessen, if not destroy, its utility, and is bitterly opposed by both the Indians (Mille Lacs) and the white settlers near it. There seems to be no pretence of authority for digging this canal. It is, therefore, directed that the proper Indian agent be instructed to at once give this matter his personal attention, and take the necessary steps to protect the rights of the Indians and all parties concerned.

HOMESTEAD—SECOND ENTRY.

CLEMENT SPRACKLEN.

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

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 9, 1890.

This is an appeal by Clement Spracklen from your office decision of December 4, 1888, refusing his application to amend his homestead entry, made December 28, 1887, for the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, Sec. 25, T. 29 N., R. 50 W., Chadron, Nebraska.

By said application, dated April 24, 1888, sworn to and corroborated, Spracklen asks that his entry be so amended as to include, in lieu of the tracts named, the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, Sec. 33, the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, Sec. 28, in the same town and range.

The said application sets out that he (Spracklen) went to the land described in his said entry in December, 1887, and found a house thereon, but was informed that one Frank Pinkerton, who had built said house, had allowed the three months following his settlement to elapse without filing for said land; that he then went to the local office, and finding that the plat book showed the same to be vacant, made the said entry; that when he went to improve said land "he for the first time found that the plat book was erroneous, as the said Pinkerton showed his receiver's receipt, dated June 25, 1887;" that upon again going to the local office he found that "the other records showed Pinkerton's filing to be in range 49, except one book shows the filing to be in range 50, the same as the receiver's receipt;" that Pinkerton has complied

with the law "in the matter of settlement and residence;" that he (Spracklen) has neither abandoned, relinquished, nor agreed to relinquish in the interest of another his said entry; that he would not have made the same, if the claim of Pinkerton had been of record, and that he applies in good faith to amend.

The register and receiver certify by endorsement "that the applicant and his witness are credible persons," and that "the statements as to the plats and tract-book are correct," although Pinkerton's original filing can not be found in the local office. They recommend that, if said filing "covers the land described, this application should be granted."

It appears by the decision appealed from that the records of your office show that Frank E. Pinkerton filed pre-emption declaratory statement June 25, 1887, alleging settlement the day before, upon the tracts described in Spracklen's entry, and that the land which he seeks to enter in lieu thereof is vacant.

The case at bar is in all material respects parallel to that of James A. Harrison (8 L. D., 98). In that case the Department held that the right to make a second homestead entry should be accorded when the first, through no fault of the entryman, was made for a tract covered by a prior *bona fide* pre-emption claim.

The application of Spracklen is in effect an application to make second homestead entry. In the absence of a valid adverse claim, and under the authority cited, the same should be allowed.

Spracklen's existing entry will therefore be canceled without prejudice, and he will be permitted, within a reasonable time after notice hereof, to enter, in lieu of the land covered by said entry, the tracts described in his said application.

The decision appealed from is reversed.

TIMBER CULTURE CONTEST—CULTIVATION—PLANTING.

COSTELLO *v.* JANSEN.

No fixed rule can be laid down as to what shall constitute satisfactory cultivation. The character of the soil, the nature of the season, the age and kind of trees planted, as well as various other conditions are entitled to due consideration in each case.

Though subsequent transplanting may be necessary in order to secure the requisite growth and number of trees, such fact does not warrant a finding of either bad faith or improper planting.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 9, 1890.

I have considered the case of John Costello *v.* Anders Jansen upon appeal of the former from your office decision of June 30, 1888, dismissing his contest against the timber culture entry of the latter for SE. $\frac{1}{4}$ Sec. 3 T. 102 N., R. 68 W., Mitchell, Dakota land district.

The entry in controversy was made December 30, 1881, and on January 6, 1886, affidavit of contest was filed.

Hearing was concluded April 3, 1886, and the local officers decided in favor of contestant. Your office on appeal reversed their decision.

The affidavit of contest alleged "that during the third year after entry claimant failed to plant five acres on said tract in a workmanlike manner, and that during the fourth year after entry he failed to cultivate the first five acres planted to seeds and also failed to plant to trees seeds or cuttings the second five acres broken, and up to date hereof."

The evidence is somewhat conflicting, but upon the first charge, viz: that claimant failed to plant the first five acres in a workman-like manner, the evidence is conclusive that it was planted to box elder seeds in hills about four feet apart each way and that the ground was at the time in a good condition, and that 2500 or more of these seeds grew and were at the time of the contest of various sizes from two to twenty-six inches high, so that it may be said the evidence fails to sustain this charge.

The next charge is that during the fourth year after entry he failed to cultivate this first five acres. In regard to this, contestant and several witnesses state that upon an examination of the ground, made just before contest, it did not show any indication of cultivation, and several of them say they passed over or by the land one or more times during the summer of 1885, but noticed no cultivation. On the other hand claimant's agent and each of his witnesses testify to the fact of its cultivation, the agent fixing June 16th and 17th as the days upon which he cultivated it with a two horse cultivator, and it further appears that the trees were in a thrifty condition and, considering the unusually dry season, had made a good growth. No certain rule can be fixed for the kind of cultivation which must be governed largely by the character of the soil, the kind of season, the age and kind of trees and various other contingencies, but it is obvious that if following an unusually dry season, trees planted as seeds the fall before, are found to have been cultivated at all and have made a good growth, are all alive, and that there is a stand of from two to four thousand on five acres, the cultivation has not been so defective as to warrant the cancellation of the entry.

The testimony shows that the agent for claimant had employed another to plow the second five acres which had been sowed to flax, but he failed to do so until after the ground froze up, but the ground having thawed out in the latter part of December the said agent went there with several men and plowed six strips across said five acres, each about five feet wide, and in a furrow marked out in the center of each strip he drilled in, quite thickly, box elder seeds. These strips were separated from each other by spaces of flax stubble from twelve to fifteen feet wide.

The second five acres cannot of course be allowed to remain in the condition shown by the evidence, for final proof showing timber grown

in rows a rod or more apart, and with the trees so close together as shown by the evidence in this case would not be accepted, but the evident intention is to plow out these spaces in the spring and the super-numerary trees which may come up in the rows may then be transplanted in such a manner that the proper growth and number of trees may be had by the time in which it is required that final proof be made. Claimant's agent after learning that the land had not been plowed as per contract, evidently made an earnest effort to get the second five acres planted.

Nothing impeaching claimant's good faith has been shown in the record, and I am of the opinion that the evidence does not sustain the charges made in the affidavit of contest.

Your said decision is accordingly affirmed.

REPAYMENT—DESERT ENTRY.

W. S. JACKSON.

Return of the first installment paid on a desert entry cannot be allowed on the ground that water for the purpose of irrigation is not obtainable, where no effort looking toward reclamation is shown.

First Assistant Secretary, Chandler to the Commissioner of the General Land Office, January 9, 1890.

October 24, 1885, William S. Jackson made desert land entry, for Sec. 6, T. 13, R. 60, Cheyenne district, Wyoming Territory.

August 29, 1888, he applied for repayment of \$160.28, part of the purchase money of said land paid by him as required by law on making said entry, and as ground for said application states, under oath, that when he made said entry

He had only been in said Territory a few days not over three or four, and during that time he met and became acquainted with a number of land locating agents, who argued, persuaded and induced him to believe that any of the lands in said Territory could be reclaimed by the most superficial irrigation, and that the same had been and could be done by erecting small wind-mill pumps over driven wells in the center of each quarter section of said land, together with the slightest cultivation; that said land is located at least several miles from any living stream of water and it would be impossible to irrigate the same except by a regular system of water works or wells with some kind of power pumping apparatus; and that after ascertaining the true intent of said law (the desert land act of March 3, 1877,) he wholly abandoned the idea of attempting to irrigate said land.

Your office by decision of October 31, 1888, denied the application and held the entry for cancellation, and from the denial of the application Jackson now appeals to this Department.

Repayments cannot be allowed by this Department in the absence of statutory authority therefor. (Elijah M. Dunphy, 8 L. D., 102; Ambrose W. Givens, ib., 462.) By the second section of the act of June

16, 1880 (21 Stat., 287), repayments are authorized to be made in cases of desert land and other entries canceled for conflict, or where "from any cause" they have been "erroneously allowed and cannot be confirmed." The land in this case appears to have been unappropriated public land of the character subject to desert land entry, and Jackson, a qualified entryman and to have complied on making entry with all the requirements of the law. The entry was not therefore "erroneously allowed."

In the declaration filed by him under oath as required by law on making the entry, Jackson sets forth, that he is "by occupation a lawyer" and "became acquainted with the land by personal examination." The alleged representations of the location agents were general, relating to "any of the lands in said Territory," and did not refer specifically to the land entered, and the truth or falsity of said representations would seem to have been readily ascertainable. He did not before entry make any actual investigation as to what was necessary in order to reclaim the land entered, and he does not allege that he has since entry made any experiment for that purpose by boring wells or otherwise. He states that "after ascertaining the true intent of the law, he wholly abandoned the idea of attempting to irrigate the land." How soon after entry he acquired this knowledge is not stated. He waited, however, two years and ten months after entry, when the three years had nearly expired, in which the law requires proof of reclamation and final payment to be made, before making his present application, and during all that time the land had been kept by his entry segregated from the public domain, and, so far as his affidavit discloses, he had done nothing whatever towards reclaiming or attempting to reclaim the land.

The action of your office in denying the application and canceling the entry is affirmed.

TIMBER CULTURE ENTRY—"DEVOID OF TIMBER."

CAROLINE B. BASSETT.

A natural growth of timber excludes land from timber culture entry, though such growth may require protection from fire to render it valuable.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 9, 1890.

I have considered the appeal of Caroline B. Bassett from the decision of your office, dated June 6, 1888, holding for cancellation her timber culture entry, of the SW. $\frac{1}{4}$ of Sec. 30, T. 107 N., R. 64 W., 5th P. M. made January 27, 1888, at the Mitchell, Dakota, land office.

Your office held said entry for cancellation, because, from the statement of the claimant, the land is not "prairie land" or land "devoid of timber," and, hence, not subject to timber culture entry. The rea-

son given is that there are ten or eleven acres of white ash and oak timber on said land.

The appellant insists that she has the right to enter said land, for the reason that said timber cannot be made valuable, unless it is protected from fire, and that it would be as expensive to do this, as it would be to raise timber from the tree seeds, seedlings or young trees, planted in accordance with the provisions of the timber culture act of Congress approved June 14, 1878 (20 Stat., 113).

It is quite evident that this contention of the appellant cannot be maintained. The plain provision of the law is, that the land entered thereunder must be exclusively "prairie lands, or other lands devoid of timber," and the applicant is required "to plant, protect and keep in a healthy, growing condition" the land so entered.

In the case of *Sellman v. Redding* (2 L. D., 270), Mr. Secretary Teller held, that—

If the tract at any time was not subject to entry on account of the natural growth of the timber on that section, the act of removing the timber would not bring the land under the operation of the timber culture laws.

In the case of *Box v. Ulstein* (3 L. D., 143), Acting Secretary Joslyn decided that, because "many trees are small, and others burned off, or cut off, does not change the fact that nature has already done for the section what the timber culture law was designed to do." See also *Morehouse v. Carey* (4 L. D., 111); *Kelley v. Thorpe* (5 L. D., 689); *L. W. Willis* (6 L. D., 772); *Moss v. Quincey* (7 L. D., 373); *James Hair* (8 L. D., 467); *Tucker v. Nelson* (9 L. D., 520).

The appellant asks that, in case she is not permitted to acquire title to said land under the timber culture law, she may be allowed to change her entry to some other tract, that her said entry may be canceled, her right restored, and fees, already paid, returned.

Said application is returned herewith for appropriate action by your office.

The decision appealed from must be, and it is hereby, affirmed.

RAILROAD GRANT—INDEMNITY SELECTION—ENTRY.

NORTHERN PACIFIC R. R. CO. *v.* HALVORSON.

The right to select indemnity is not defeated by the fact that the land is within the primary limits of another grant if the land is excepted from such grant, and vacant public land at date of selection.

Land within the second indemnity belt, if subject to selection, may be selected, if a proper *prima facie* basis is shown therefor, without waiting for the final adjustment of the grant within the primary limits and first indemnity belt.

The pendency of an appeal from the rejection of an indemnity selection excludes from entry the land covered thereby.

Secretary Noble to the Commissioner of the General Land Office, January 13, 1890.

I have considered the appeal of the Northern Pacific Railroad Company from the decision of your office, dated April 30, 1886, rejecting its selection of the NE. $\frac{1}{4}$ of Sec. 31, T. 131 N., R. 40 W., 5th P. M., Fergus Falls land district, Minnesota.

The record shows that said tract is within the six mile, granted, limits of the grant for the benefit of the St. Paul, Minneapolis and Manitoba (formerly St. Paul and Pacific, St. Vincent Extension, Railway Company, by act of Congress approved March 3, 1857 (11 Stat., 195). At the date of the definite location of its line of road (December 19, 1871), the land in question was covered by homestead entry, No. 247, made June 15, 1869, by Sjur Sjurdsen, which was canceled by your office on June 11, 1877. This entry excepted the land from said grant. *Hastings and Dakota Ry. Company v. Whitney* (132 U. S., 357).

The tract is also within the forty mile, or second indemnity belt, withdrawn by your office letter, dated December 26, 1871, received at the local land office on January 10, 1872.

On December 29, 1883, the Northern Pacific Railroad Company applied to select said tract, which application was refused by the local officers, because the tract was within the granted limits of the first named company. From this action of the local officers an appeal was duly filed by the company. Afterwards, and while said appeal was pending, to wit: on April 4, 1884, the local officers allowed one Liv. Halvorson to enter said tract under the homestead laws, upon which entry No. 8161 final certificate No. 3230 issued.

The ruling of your office that one company can not select land as indemnity within the limits of a grant to another company, if excepted therefrom, was erroneous. The contrary was expressly ruled in the case of the Northern Pacific Railroad Company *v.* Allers (9 L. D. 452).

It is stated in said decision of your office rejecting said company's selection—

That any selection of lands within the second indemnity limits, under the joint resolution made prior to an adjustment of the grant, the ascertainment of the quantity lost from the grant, the quantity of lieu lands selected or remaining subject to selec-

tion within the first indemnity limits, and the precise extent of the deficiency, if any, existing within the limits prescribed by the original granting act, must be premature. . . . In the absence of absolute knowledge of a deficit within the original limits, selections within the second indemnity limits are not only premature, but illegal.

It is insisted by the company that under the terms of the joint resolution of May 31, 1870 (16 Stat., 378), there are but two conditions relative to the character of the lands to be selected, namely: 1st, They must be in the odd numbered sections, and, 2d, That they must belong to the United States. It is urged that said tract is of the character described, and, therefore, properly subject to selection.

Said joint resolution of May 31, 1870, provides (*inter alia*), 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 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.

It is further contended by the company that by the direction of this Department, dated July 11, 1883 (Vol. 41, Land and Railroad Records, p. 283), it was required to make its selections in Minnesota as far as possible, "within both the primary and secondary indemnity limits at once," and in accordance with such instructions, said selection was made.

The instructions of my predecessor, Mr. Secretary Teller, above referred to, required your office "to give immediate notice that all selections must be made in those States (Wisconsin and Minnesota), within three months from the time you shall give such notice," and it was further stated, that "at the end of that time all orders of withdrawals heretofore made of indemnity lands within those States, whether lying within the first or second indemnity limits, will be revoked and set aside, and all such lands will be restored to the public domain and opened to settlement under the laws relating to the public lands."

The company concedes that the selection of said land does not *ipso facto* vest the title in the company. It, however, contends that the selection operates to segregate the land selected until the question whether it has suffered loss from its grant, claimed as the basis of the selection, shall be finally determined by the land department. If the land selected is of the right kind and character, there seems to be no good reason why the company should not be allowed to select the same, upon a proper *prima facie* basis being shown. The time when the right to indemnity accrues, under said joint resolution, is "at the time of the final location thereof," and while it is true that the company must exhaust the lands in the first indemnity before it can obtain title to lands in the second indemnity belt, it by no means follows that it can not select lands, designating a proper basis therefor, until the final adjustment of the grant.

The appeal of the company was pending when said homestead entry was improperly allowed. (Rule of practice, No. 53.) It will, therefore, be suspended to await the final action of your office and the Department upon said selection. You will accordingly direct the local officers to accept said application of said company as of the date when presented, and, if, upon the final adjustment of the railroad grant in said State, it shall appear that the company is entitled to the land, the selection will be approved and the entry canceled, unless it be mineral land within the meaning of the reservation made by this statute. The decision of your office is modified accordingly.

PRE-EMPTION—SECOND FILING.

FRANK N. PAGE.

The right to make a second filing should be accorded, where failure to perfect title under the first was due to the ill health of the pre-emptor.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 13, 1890.

I have before me the appeal of Frank N. Page from your office decision of December 12, 1888, holding for cancellation his pre-emption cash entry No. 1203, made July 23, 1887, for the E. $\frac{1}{2}$, SW. $\frac{1}{4}$, and lots 3 and 4 in Sec. 6, T. 7 N., R. 26 E., Santa Fe district, New Mexico.

The ground for your said decision was that "said Page had previously exhausted his pre-emption rights"—to wit, by filing a declaratory statement in August, 1881, for a tract of land in section 22, T. 8 N., R. 25 E.

The fact is not denied by Page; but it satisfactorily appears in avoidance thereof, *first*, that his claim under the first filing proved incapable of being perfected and had to be abandoned, owing to circumstances in no way involving fault upon his part; *second*, that, in offering his second filing, the claimant "distinctly mentioned the fact of his prior filing, and submitted a surgeon's certificate showing that for nearly a year subsequent to his first filing, he was confined to his bed and in fact was for a considerably longer period physically unable to comply with the requirements of the law in regard to said filing, and requested the register to return fees enclosed with second filing if the latter was inadmissible;" lastly, that in his final proof upon making the cash entry now in question, he, Page, unequivocally admitted the making of the prior filing. In a "supplemental affidavit" dated July 16, 1887, Page set forth the following facts:—

That he is the same Frank N. Page who filed a pre-emption declaratory statement in August, 1881, for a tract of land in Sec. 22, T. 8 N., R. 25 E. That he did not continue residing there on account of his ill health—his life soon after having been despaired of. That soon after he was obliged to leave that part of the country on account of his health, having had some twenty-five hemorrhages of the lungs and no competent medical attendance at hand. That he went to Texas, where he was sick

for several months. That on his return there were other persons in possession of the land he had filed on, which land has since been entered by one Valencia. That under the adverse circumstances it was utterly impossible for him to perfect his claim to the land filed on, and that he is now and has since making his final proof for the land embraced in his D. S. No. 1461 on the 5th day of July, 1887, resided on the land for which proof was made.

It seems to me that in view of these circumstances, the case falls clearly within the principle of the departmental ruling in the case of *Parjs Meadows et al.* (9 L. D., 41):

The right to make a second filing will be recognized where through no fault or neglect of the pre-emptor, consummation of title was not practicable under the first.

Your said office decision is accordingly reversed.

PREFERENCE RIGHT—INTERVENING ENTRY.

RUSSELL v. GEROLD.

Two entries for the same tract of land should not be allowed of record at the same time.

An entry, made subject to the preference right of a successful contestant, should not be canceled without due notice to the entryman and opportunity accorded to be heard in defense of the entry.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 13, 1890.

I have considered the appeal of Nettie Russell from the decision of your office, dated November 15, 1887, holding for cancellation timber culture entry, No. 4562, of the NW. $\frac{1}{4}$ of Sec. 7, T. 5 S., R. 33 W., made April 2, 1886, at the Oberlin land office, in the State of Kansas.

The record shows that your office, on February 12, 1887, directed the local officers to allow the application of John E. Gerold to make timber culture entry, No. 5457, of said tract, for the reason that he had contested and procured the cancellation of a former entry of said tract. Said application of Gerold was rejected by the local officers, for the reason that the entry contested by him was canceled on the record of the local office, December 18, 1885, notice of which in writing was sent to said Gerold at Sappaton, Rawlins county, Kansas, the post office nearest the land, and another notice was also sent to Atwood, Kansas; that, after the land had been entered by Miss Russell, and six months after the former contested entry had been canceled, said Gerold applied to enter said land; that there was no attorney noted upon the record, and that the alleged attorney of Gerold was frequently in the local office and could have ascertained, if he so desired, that said entry had been canceled.

Gerold filed with his application to enter *ex parte* affidavits, alleging that neither he nor his attorney had any written notice of said cancel-

lation, and that as soon as he learned that the entry had been canceled, he made application to exercise his preference right of entry.

The local officers refused his application, and your office directed them to allow it, as aforesaid. But your office took no action with reference to Miss Russell's entry, thus leaving two entries of record at the same time. This was error. Subsequently, Miss Russell applied for a hearing, upon the ground that she made said entry more than four months after the cancellation of the contested entry, and while the land was vacant and unappropriated, as appeared from the records of the local land office; that the right of said Gerold to enter said tract was being offered for sale prior to the cancellation of said contested entry, and after the entry of Miss Russell had been allowed by the local officers.

The application for a hearing was refused by the local officers, for the reason that the matter had already been adjudicated by your office. Thereupon, Miss Russell appealed, and your office, on November 15, 1887, held her entry for cancellation, but made no reference to her application for a hearing. From this action an appeal has been taken by Miss Russell, through her attorney.

Objection is made to said appeal by the attorney for Gerold, on the ground that the application for the hearing is made by the attorney of Miss Russell and is not sworn to; that the application does not state specifically what facts she expects to prove at the hearing, and, hence, the appeal and application are defective.

These objections are not sustained by the record. The application for a hearing, made by Miss Russell to the local officers, was signed by her and duly verified. Besides, she was entitled to notice before the entry of Gerold could go of record. *Albert S. Boyle* (6 L. D., 509); *Boorey v. Lee* (id., 641); *Wright v. Maher* (id., 758); *Price v. Conly* (9 L. D., 490).

It is clear that Miss Russell is entitled to a hearing, as a matter of right, and the same should be accorded to her, in accordance with the rules of practice. The entry of Gerold will be suspended, and Miss Russell will be allowed to show cause why his entry should be canceled and her entry allowed to remain of record. If the record shows that Gerold made application to enter said tract within due time after notice of the cancellation of the contested entry, then the burden of proof will be upon Miss Russell to show some other valid cause why Gerold's entry should be canceled. *Dayton v. Dayton* (8 L. D., 248); *Conly v. Price* (supra). If, however, the record shows due notice to Gerold and that he did not make his application to enter said land until after the expiration of the time allowed by law and the regulations thereunder for the exercise of his preference right, then the burden of proof will be upon him to show that the record is wrong, and that he is entitled to exercise his preference right of entry.

It must be remembered that good faith is required of every applicant for any part of the public domain, and that in every contest the

government is interested in seeing that the requirements of the law are faithfully observed. *Dayton v. Hause et al.* (4 L. D., 263); *Neilson v. Shaw* (5 L. D., 361 and 387); *Emily Lode* (6 L. D., 223); *Overton v. Hoskins* (7 L. D., 394); *A. C. Logan et al.* (8 L. D., 2); *Bell v. Bolles* (9 L. D., 148); *Saunders v. Baldwin* (id., 391).

The decision of your office is accordingly modified, and you will direct the local officers to order a hearing in accordance with the views herein expressed. Upon receipt of the testimony taken at said hearing together with the report of the local officers, your office will read-judicate the case.

The papers in the case are herewith returned.

TIMBER CULTURE CONTEST—SPECULATIVE ENTRY.

CHILLSON *v.* MAHAN.

Proof of the sale, and removal from the land, of a small quantity of stone will not warrant cancellation of a timber culture entry.

Proof of an offer to sell does not, in itself, justify a conclusion that the entry was not made in good faith.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 13, 1890.

I have considered the case of *Waters Chillson v. Russell B. Mahan*, as presented by the appeal of Chillson from the decision of your office, dated August 7, 1888, dismissing his contest against timber culture entry, of the NE. $\frac{1}{4}$ Sec. 34, T. 13, R. 5 W., made December 22, 1883, by said Mahan at the Salina, Kansas, land office, on December 22, 1883.

The record shows that a contest was initiated by said Chillson upon the charge that the claimant "has removed stone from the above described tract of land and sold the same; that he is not holding the land in good faith, but for the purpose of speculation; that he executed a contract with Denton, Cable and Hill, agreeing to pay them a commission, if they would effect a sale of the said land."

A hearing was duly had, at which both parties were present and offered testimony. Upon the evidence submitted, the local officers found that the claimant made his said entry in good faith; that all of his subsequent action, with the exception of his offer to sell his claim, shows that he has acted in good faith, and that the offer of sale did not, under the decisions of the Department, warrant the cancellation of his said entry.

On appeal, your office affirmed the action of the local office and dismissed the contest.

The appellant insists that the decision of your office was erroneous, in not holding that the offer of sale, as shown by the evidence, was

sufficient proof that the claimant made said entry for speculative purposes, and that the entry should be canceled.

There was no charge that the claimant had not complied with the requirements of the timber culture law, as to planting and cultivation of trees, and the evidence educed shows, that he had complied with said requirements in good faith. But the offer of sale, made long after the entry, does not warrant the conclusion that the entry was made for speculation.

The case of *Meyhok v. Ladehoff* (13 C. L. O., 33), cited and relied upon by counsel for contestant in his oral argument before the local officers and referred to by them in their written opinion, was reversed by this Department on appeal (see 9 L. D., 327), wherein it was held that a charge that an entry was made with speculative intent is not established by evidence showing a contract of sale executed after three years' compliance with law. In the case at bar, there was no contract of sale, only an offer to sell, and under the decisions of the Department, this will not, of itself, warrant the cancellation of said entry. *Sims v. Busse et al.* (4 L. D. 369); *Gilbert E. Read* (5 L. D., 314); *White v. McGurk et al.* (6 L. D., 268); *Holliday v. Harlan* (7 L. D., 264); *Meyhok v. Ladehoff* (9 L. D., 327); *Vandivert v. Johns* (id., 609).

Besides, there does not appear to be any especial equity in favor of the contestant. He attempted to purchase the claim, and, because the claimant would not sell it for half what it was worth, he contests the claim, upon the ground that the claimant removed some stone, which he had sold to one neighbor to construct a cellar and to another for the purpose of fixing a ford, receiving for the whole the sum of three dollars. The other allegation is that he is holding the land for speculation. The first charge seems to have been abandoned. It clearly comes within the spirit if the maxim *de minimis non curat lex*. The second charge, as we have seen, is insufficient, and the evidence does not warrant the cancellation of the entry.

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

Your attention is called to the omission of the receiver to sign the receiver's receipt.

SPALDING *v.* COLFER.

Motion for review of departmental decision of June 15, 1889, 8 L. D., 615, in the above entitled cause denied by Secretary Noble, January 14, 1890.

SWAMP LAND—ADJUSTMENT OF GRANT.

STATE OF ILLINOIS (CASS COUNTY).

An adverse finding and report by a special agent of the government is not conclusive against the State, in the absence of final testimony submitted by the State.

Secretary Noble to the Commissioner of the General Land Office, January 14, 1890.

Isaac R. Hitt, swamp-land agent for the State of Illinois, has appealed from your office decision of August 7, 1886, holding for rejection the claim of the State of Illinois to indemnity for certain lands in Cass county, "for the reason that evidence on file in" your "office shows that said lands are not of the character contemplated by the act of September 28, 1850."

Illinois is one of the States which elected not to accept the field-notes of survey as the basis for determining what lands passed to them under the grant, but to make selection by their own agents, and present proof that the lands selected were of the character contemplated by the grant.

Your office circular of August 12, 1878, approved by the Department August 20, 1878 (the provisions of which are still in force), prescribes the proceedings to be taken in the selection of lands and the presentation of proof, as follows (Copp's Public Land Laws, Ed. of 1882, Vol. 2, p. 1042):

The governor, or other duly authorized officer or agent, of the State claiming indemnity, will be required to furnish this office with a list of the lands for which indemnity is claimed. As soon as practicable after the receipt of this list an agent will be appointed to make an examination in the field of each of the tracts therein described, and secure such reliable information as to the character thereof as can be obtained from personal examination and observation and by inquiry of the owner or resident thereon, if any there be, and of persons residing in the vicinity having personal knowledge of the past and present character of the land.

From the record transmitted by your office in the case of Cass county, it would appear that the State had made the claim and furnished the list above required, and that the agent had made the prescribed preliminary examination. But State Agent Hitt bases his appeal upon the allegation that the following requirements, prescribed by the same regulations, have not been fulfilled in relation to the tracts selected:

Upon the completion of this examination at least thirty days' notice will be given the State, or claimants under the State, of the time and place when and where testimony will be received touching the character of the lands described in the list filed in this (your) office. At the times and places thus fixed the agent of this office will attend for the purpose of examining witnesses and adopting such other measures as may be necessary to protect the interests of the government. The evidence offered by the State, or its agent, must be the testimony of at least two respectable and disinterested persons who have personal and exact knowledge of the condition of the land during a series of years, extending to the date of the swamp-grant (September 28, 1850), or extending as near to the date of the grant as possible.

The above circular instructions are in accordance with, and evidently based upon, departmental letter of June 6, 1878, instructing your office

as to the method of making proof for indemnity lands in the State of Illinois.

Your office transmits Special Agent Walker's report, dated April 20, 1886, embracing his statement and opinion relative to the tracts involved; but I find no record of any examination by the State of Illinois or its agent, no waiver by the State or its agent of any of the tracts involved, or of the right to make examination regarding them, no notice to the State of the time and place of such examination. In short, the condition of the record as transmitted would indicate that the State agent is correct in his statement that "the evidence has never been completed by the State." And if such be the fact, the further fact alleged by him is clear, that "the finding and report of the special agent is not conclusive against the State in the absence of final testimony by the State." Your office letter of August 7, 1886, states that the lands described are "held for rejection for the reason that evidence on file in" your "office shows that said lands are not of the character contemplated by the act of September 28, 1850." Whatever the evidence may be upon which you render said decision, it is not such evidence as is demanded by departmental decision of June 6, 1878, or your office circular of August 20, 1878—taken by the State or claimants thereunder, and consisting of the testimony of two respectable and disinterested witnesses having personal and exact knowledge of each tract. In the absence of such evidence, I can not concur in your conclusion rejecting the claim of the State. This, however, is not to be construed as confirming said claim, but simply as refusing to render a decision before being placed in the possession of such facts as the regulations require to be furnished, and as are absolutely necessary for an intelligent consideration of the case.

I would suggest the propriety of obtaining such evidence as the State of Illinois may desire to offer touching the character of the lands here in controversy, and completing the adjustment of the grant as regards Cass county, at as early a date as practicable.

—

OSAGE LANDS—ACT OF MAY 28, 1880.

UNITED STATES *v.* JONES.

By section 2, act of May 28, 1880, the only conditions pre-requisite to an entry thereunder are that the entryman should be an "actual settler" and possess the qualifications of a pre-emptor.

That the claimant is in fact an "actual settler," must be shown by residence following the alleged act of settlement and preceding the entry.

Secretary Noble to the Commissioner of the General Land Office, January 14, 1890.

The land involved in this case is the N. $\frac{1}{2}$ of NE. $\frac{1}{4}$, Sec. 35, T. 27 S., R. 9 E., Independence district, Kansas, and is part of the Osage Indian trust and diminished reserve lands.

November 18, 1883, Thomas W. Jones made Osage cash entry, No. 1892, for said land, and said entry having been held for cancellation on the report of a special agent, a hearing was ordered, and, after several continuances, was finally had, January 22, 1887.

It appears from the testimony adduced at said hearing, that Jones went upon the land in January, 1883, and built a "board house, ten by twelve feet, about five feet high, shed roof covered with boards not battened, one door and one window, no floor, worth about fifteen or twenty dollars" and furnished with bedding but nothing else; that he also erected on the land about two hundred and forty rods of wire fence, worth about one hundred and twenty-five dollars and broke four or five acres, which he did not cultivate; that the land was valuable only as pasture land and was used for that purpose by Jones and his father and brother; that Jones never cooked or ate upon the land but boarded at his father's house on the adjoining quarter section on the south, where he also slept, with the exception of twenty or thirty nights, which he spent on the land during the six months preceding his entry. On cross-examination, in answer to the question, "Is it not a fact that you never intended at the time you made your entry of this land to make the same a home or place of residence?", he replied, "Yes sir, I entered it simply for pasture land." The special agent examined the land about two years after the entry, at which time the house had disappeared, and the only improvements then on the land were the four or five acres of breaking, the fencing and a large watering trough with pipes leading to it from a spring. Jones at the time of the entry was a citizen of the United States, over twenty-one years of age, and single, but, when the hearing was held, had married, and was living with his family on an adjoining tract, in connection with which he used the land in dispute as a pasture.

The local officers found in favor of Jones, and recommended that his entry be "re-instated and passed to patent." Your office, by decision of October 20, 1888, held the entry for cancellation, on the ground, substantially, that Jones not having gone on the land for the purpose of making it a home, had not made a *bona fide* settlement or become an "actual settler" within the meaning of the law. From this decision, he now appeals to this Department.

By section two of the act of May 28, 1880 (21 Stat., 143), it is provided that lands of the class to which the land involved in this case belongs "shall be subject to disposal" (in quantities not exceeding one quarter section) "to actual settlers only having the qualifications of pre-emptors." By this act the only conditions prerequisite to an entry thereunder on these lands are, that the entryman shall be an actual settler with the qualifications of a pre-emptor. (*United States v. Woodbury*, 5 L. D., 303; *Grigsby v. Smith*, 9 L. D., 100). Jones, it appears, possessed the qualifications of a pre-emptor, and the only question in this case is, whether under the facts above recited as established at

the hearing he was an "actual settler" within the meaning of those words as used in the act.

While Jones made a pretence or show of residence by building a small house on the land, furnishing it with bedding and sleeping in it twenty or thirty nights during the six months preceding his entry, he yet candidly admitted on the hearing, that at the time he made his entry he did not intend to make the land his home or place of residence, but "entered it simply as a pasture land." By the townsite law (Sec. 2382, Revised Statutes), as in the act of May 28, 1880, a right of entry is given to any "actual settler" without express requirement that the settlement should be followed by residence before entry, but in the case of *Elmer v. Bowen* (4 L. D., 337), it is held that residence must be shown to establish the right accorded to the "actual settler" under the former law, and, it is said in that connection, "It has become a well settled rule, that wherever settlement is required of a claimant to the public land, under any law relating to the disposal of the public domain, residence must follow before entry."

When the act of May 28, 1880, was passed, the words "actual settler," as applied to the general settlement laws (homestead and pre-emption), had acquired a well defined meaning, namely, that such settler is one who goes upon the public land with the intention of making it his home and does some act in execution of that 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). There is nothing in said act to authorize a meaning to be given those words as used therein different from that which they had then acquired under the laws in general and contrary to the well established policy of the government to reserve the public domain as far as possible for homes for actual settlers thereon. On the contrary, the provisions of said act, as well as of the prior acts in reference to said lands, show clearly that Congress has throughout carefully maintained said policy. Said act of 1880 is entitled, "An act for the relief of settlers on" said lands "and for other purposes." By the first section "all actual settlers under existing laws," who were in default under said laws, were granted further time for proof of compliance with law and payment. Under the then "existing laws" relating to the settlement of said lands, the settler was expressly required to be "residing thereon at the time of completing his entry." (Act of August 11, 1876, 19 Stat., 127; act of May 9, 1872, 17 Stat., 90; act of July 15, 1870, 16 Stat., 362; joint resolution of April 10, 1869, 16 Stat., 55). Settlement under the first section of the act of 1880 was therefore unquestionably required to be followed by residence before entry. The second section of the act (under which the land is claimed in the present case) provides for the future disposal of all said lands remaining unappropriated under the first section "to actual settlers only having the qualifications of pre-emptors." Provision is then made by the third section for the public sale of the lands mentioned in

the first and second section after the default of the actual settlers thereon has continued for ninety days, and for private cash entry of such of said land as remain unsold after being offered at public sale. It thus appears, that the act, before allowing purchase at public or private sale, gives a preference in the acquisition of said lands, not only to actual settlers under existing laws at the date of the act, but to such persons as might become actual settlers thereafter with the qualifications of pre-emptors. Such settlers are, moreover, accorded liberal terms of payment, being required to pay only one-fourth the purchase money (\$1.25 per acre, the minimum price established by law for public lands) at date of entry, and the balance in three equal annual installments. This preference given actual settlers in the acquisition of the land and discrimination in their favor as to terms of payment, are, doubtless, in furtherance of the beneficent policy of the government above referred to and with a view of encouraging the actual occupancy of the land for purposes of residence. The maximum amount of land to be acquired under the act is, moreover, fixed at one hundred and sixty acres, the same as under the general settlement laws, and the scrupulous regard of Congress for actual residents on the public domain and spirit of indulgence which pervades all its legislation in regard to them, are manifested particularly in the first section of the act, where "actual settlers under existing laws," who are in default in not making proof and payment (but not as to residence) as required by those laws, are given *further time* to make such proof and payment.

In the case of the United States *v. Woodbury et al.*, *supra* (cited by counsel for appellant), while it is held that entries under the second section of the act of 1880 are not subject to *all* the requirements and conditions of the general pre-emption laws, yet it is distinctly laid down that "the claimant must be an actual settler on the land at date of entry," and, it seems to be further recognized, that residence at that date is necessary to constitute such actual settler. On this latter point, the following language is used in the decision in said case:—

That Robey was an actual settler within the meaning of *this act* (act of 1880), and that he had the qualifications of a pre-emptor can not be questioned. He had settled upon, built a house, and otherwise improved said tract for more than six months before final proof, and in fact was living on the tract for a much longer period. In the contract made with the townsite company, he reserved one lot for a home and another for a place of business, showing his intention to continue his residence on the tract.

The case of *Grigsby v. Smith* (9 L. D., 98) holds that the doctrine, well established as to entries in general, applies also to purchases or entries under the second section of the act of May 28, 1880, namely, that a purchaser or entryman thereunder, "having complied with the law and received his final certificate, may lawfully remove from the land and sell and convey it." In order to comply with the law, however, it is distinctly laid down, that the claimant must be an "actual settler" at date of entry, and it appears from the recital of facts in the opinion, that the claimant (*Grigsby*) "settled on the land, August 1, 1884," and

had thereon a house, stable, chicken-coop, and twelve acres of breaking, and that from the date of settlement until March 1, 1885 (a month after he had made final proof), he "together with his family resided upon the land."

The case of the United States *v. Edwards et al.* (33 Fed. Rep., 104), is cited in *Grigsby v. Smith* and also in the argument of counsel for appellant. That case involved fifteen suits by the United States "to set aside the patents to as many different tracts of land in the county of Harper," Kansas, said lands being a part of the "Osage Indian Trust and Diminished Reserve Lands." Proof and payment had been made by the fifteen entrymen and final receipts given them, after which a third party had bought from them and paid for the tracts entered, and to this purchaser the patents had been issued. The ground alleged in each case was "fraud in obtaining patent," in that the entryman had never established residence upon the land.

At the outset of the opinion, the court adopts as its "guide" in the consideration of the case, the rule to be observed and the amount of evidence requisite in cases of suits "to set aside patents," as laid down in the Maxwell Land-Grant Case (121 U. S., 325), viz:

In this class of cases, the respect due to a patent, the presumptions that all the preceding steps required by the law had been observed before its issue, the immense importance and necessity of the stability of titles dependent upon these official instruments, demand that the effort to set them aside, to annul them, or to correct mistakes in them, should only be successful when the allegations in which this is attempted are clearly stated and fully sustained by proof.

It will not be contended that the same rule is applicable, when a case comes up for consideration by this Department on the question of compliance with law by the entryman, as in suits to annul a patent.

The court, also, in said case of United States *v. Edwards et al.*, states as one ground of the decision, that the proceedings in the land office were regular on their face, and there was no "evidence of collusion or conspiracy between the purchaser and the entrymen." While it is well settled that a purchaser from an entryman prior to patent only takes such title as the entryman had to convey and whatever right is acquired by the purchase is subject to the subsequent action of this Department, and, therefore, the plea that the purchase was made *bona fide* for value without notice, will not avail a purchaser of such title; yet, after he has acquired the *legal* title by patent issued to him, it would seem that this defense may be set up to a bill in equity to cancel the patent, solely (as in the Edwards case) on the ground that the original entryman had not complied with the law as to his entry. (Colorado Coal and Iron Co. *v.* United States, 123 U. S., see p. 322.)

The opinion, it is true, is expressed in said case of United States *v. Edwards et al.*, that the "primary object" of the government in the act of 1880 was "to realize as soon and as much as possible" from said lands, and that "it might properly" (under the trust) "ignore the questions of improvement or length of occupation." This first proposi-

tion is inconsistent with the provisions of the act hereinbefore commented on, giving actual settlers not only preference over cash purchasers in the acquisition of the land, but more liberal terms both as to price and payment. If the government had been bound by the terms of the trust, to realize as soon and as much as possible from these lands, and such was "its primary object," the obvious course would have been to at once "offer the lands at public sale and allow speculators to buy without limit or restriction." In expressing the opinion that the government might under the trust as to said lands "properly ignore the question of length of occupation," it does not appear to have been the intention of the court to hold that *no* residence was necessary under the act. As to residence and the evidence relating thereto in said case, the court says:

"If six months' continuous residence was requisite, I should have no doubt that the government had clearly shown a lack of such residence, but when it comes to the question whether they never did for a short time actually make a residence, I think in most of the cases the government has failed to prove the negative. After the purchase price had been paid, and the receipts issued and conveyances made by the parties entering" to their vendee, "it appears some question arose as to the validity of these entries. A hearing was ordered before the land office at Wichita, but was indefinitely postponed; and thereupon" the purchaser from the entrymen "went to Washington, and applied for a hearing before the Commissioner of the land office, which was granted, and upon such hearing the entries were sustained, and patents thereafter issued. Not one of the parties who made the several entries has been found, or his testimony procured. The testimony of the government is mainly that of witnesses to the effect that these various parties, during the summer and fall of 1882, were generally about the town of Harper, or employed in the Indian Territory, from which it is inferred that they never established any residence upon the lands."

The court then holds that, within the rule laid down by the supreme court in the Maxwell Land-Grant case, *supra*, as to the amount of evidence required in a suit to annul a patent, the government had not "clearly and satisfactorily shown that it had been defrauded in these entries," and directed a decree to be entered dismissing the bill.

I am of the opinion that Jones under the evidence in this case was not "an actual settler" within the meaning of the second section of the act of May 28, 1880, and, therefore, the decision of your office, holding his entry for cancellation, is affirmed.

RAILROAD LANDS—ACT OF MARCH 3, 1887.

HORACE B. ROGERS ET AL.

Title is passed by certification, and an application to enter land thus disposed or must be rejected.

Proceedings for the recovery of title should be instituted under the act of March 3, 1887, in the case of certified lands opposite the uncompleted portion of the Marquette, Houghton & Ontonagon railroad.

Secretary Noble to the Commissioner of the General Land Office, January 14, 1890.

I have considered the separate appeals of Horace B. Rogers, Arno Jaehug, Henry J. Atkinson, Jacob Smith, Stephen Lauctot, David Lauctot and Nicholas Kutschied from the decision of your office of July 31, 1888, affirming the action of the local officers in rejecting their applications to enter under the homestead law the tracts applied for by the several applicants respectively, and described in your said decision. Said applications were rejected upon the ground that the tracts described therein are within the limits of the grant to the Marquette Houghton and Ontonagon R. R. Company, and have been certified to the State of Michigan for the benefit of said company. Said lands having been disposed of prior to said applications, were not subject to entry, hence there was no error in your decision rejecting them.

Since the decision of your office was rendered Congress by act of March 2, 1889 (25 Stat., 1008), has declared forfeited all the lands theretofore granted to the State of Michigan to aid in the construction of said road, lying opposite to and coterminous with the uncompleted portion of said road, and has resumed title to the same. The lands embraced in these several applications are opposite the uncompleted portion of the Marquette, Houghton and Ontonagon Railroad, and have therefore been forfeited by said act, but as these lands have been certified to said State for the benefit of said company, and title is now outstanding, suit should be brought to cancel said certification unless the company will reconvey said lands upon application. You will therefore make demand of said company for a reconveyance of the lands opposite to and coterminous with the uncompleted portion of said road, and upon their failure to reconvey, you will make report to the Department that suit may be instituted to cancel said certification.

These applications are rejected without prejudice to the rights of the several applicants to renew them whenever the government may recover the title.

HOMESTEAD ENTRY—FINAL PROOF—RESIDENCE.

ANGIE L. WILLIAMSON.

Final proof should be explicit in all details necessary to establish the fact of residence in good faith upon the land.

The home of a married woman is presumptively with her husband.

On submission of supplemental proof a special agent may be present and cross-examine the witnesses.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 14, 1890.

I have considered the appeal of Angie L. Williamson, formerly Angie L. Morse, from the decision of your office dated November 14, 1888, holding for cancellation her commuted homestead entry for the S. $\frac{1}{2}$ NE. $\frac{1}{4}$ Sec. 4, T. 106 N., R. 54 W., Mitchell land district, South Dakota.

On December 31, 1883, claimant made homestead entry for said described tract alleging that she made settlement thereon December 15, 1883, and was then (December 31, 1883) actually residing on the land in a frame house of the value of \$35.

On September 13, 1884, in accordance with published notice she offered commutation proof before the clerk of the district court of Lake county, at Madison, which was approved by the register and receiver, and final cash certificate issued for said land October 13, 1884. In her final proof she stated that her age was twenty-eight years, she was a native born citizen and established actual residence on the land December, 1883; that since she made said homestead entry she has married. "My husband is all the family I have. I have resided continuously on the land since first establishing residence thereon, and my husband with me since our marriage. I have only been absent a portion of the time attending to household duties in my husbands house on a farm near this homestead of mine." She also alleged that her improvements consisted of a frame house ten by twelve feet, and five acres of breaking, value fifty dollars; that she never made any other homestead entry; that the land is more valuable for agricultural than for mineral purposes, and that she had not sold, conveyed or mortgaged any portion of the land.

On November 14, 1888, Assistant Commissioner Anderson decided that—

The proof here shows that the claimant's alleged residence upon the tract was subsequent to her marriage, and at which time she must be considered as living with her husband on his farm near this tract, and as having no legal residence upon said tract; therefore the proof is rejected and the entry held for cancellation.

On January 14, 1889, claimant appealed to this Department.

The final proof in this case fails to show the date of claimant's marriage which may have occurred the day after the homestead entry was made. The presumption is that claimant's home after her marriage

was with her husband. The proof also fails to show whether the house on the tract covered by her entry was ever supplied with necessary household furniture or made habitable; or whether she ever ate or slept therein, nor does it state the number of weeks or months she occupied said land as her home.

As there does not appear to be any adverse claimant for the tract in dispute, claimant may be permitted to submit within ninety days after notice of this decision, supplemental proof duly corroborated, clearly showing the date of her said marriage, and that she continued in good faith to live on and improve the tract covered by her entry up to the date of her final proof. Such proof should be made before the local officers who should be instructed to carefully cross examine the claimant and her witnesses with a view to eliciting all the facts in regard to her marriage and residence thereafter, as well as all other facts that may be of service in determining whether said claimant did in good faith comply with the law and regulations of the Department. If it shall be deemed desirable by your office or the local officers a special agent should be present at the taking of such proof to conduct the cross-examination, and represent the interests of the government. The local officers should forward to your office such proof as may be submitted in accordance herewith with their opinion thereon. Upon receipt of such proof as may be submitted in accordance with this decision you will consider the same in connection with that already submitted, and make such disposition of the matter as the facts thus disclosed seem to demand. If the claimant fails to furnish such proof within the time specified, the proof heretofore submitted will be rejected and the entry canceled.

The decision appealed from is accordingly modified.

RAILROAD GRANT—EXECUTIVE WITHDRAWAL.

SOUTHERN PACIFIC R. R. Co. *v.* CLINE.

A voidable school selection of record excepts the land covered thereby from the operation of an executive withdrawal for indemnity purposes.

A settlement right within indemnity limits, acquired after revocation of the withdrawal, and prior to selection, excludes the land covered thereby from selection.

Secretary Noble to the Commissioner of the General Land Office, January 14, 1890.

The case of the Southern Pacific Railroad Company *v.* Wilbert E. Cline is before me on appeal by said company from the decision of your office, dated October 18, 1888, rejecting its application to select the SE. $\frac{1}{4}$ of Sec. 5, T. 14 S., R. 22 E., Mount Diablo meridian, California, for land lost within the primary limits of its grant.

The described tract is within the indemnity limits of the grant of July

27, 1866, "granting land to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast" (14 Stat., 292), and an executive withdrawal of certain lands within said limits was made for the benefit of said company on March 26, 1877. Prior to this withdrawal, to wit: on February 10, 1872, the State of California selected said tract as indemnity for a supposed deficiency in the grant to the State for school purposes. This selection was of record at the date of said withdrawal, and remained of record until May 15, 1878, when it was canceled, because said supposed deficiency had been made good to the State by prior approved selections.

On April 27, 1883, the defendant, Cline, entered the tract in controversy under the homestead laws, and, on April 11, 1887, he commuted his homestead entry, paid two hundred dollars for said tract, and received a final certificate, which *prima facie* entitles him to a patent for the same. On October 4, 1887, appellant applied, "per list 27," to select said tract.

Your office found that the selection of the tract in controversy by the State of California was invalid, but, notwithstanding this fact, held that, so long as said selection was of record and uncanceled, it was such an appropriation of the tract by the State as prevented any other disposition of it by the government, and, therefore, that such selection excepted it from the operation of appellant's grant.

For the reason stated, your office rejected appellant's application, and directed the local officers to notify Cline that, if said decision became final, action would be taken looking to the confirmation of his entry.

The errors assigned by appellant are as follows :

1. Error in holding the invalid State selection was a bar to the withdrawal or selection of the said land by the company.
2. Error in holding Cline's entry could be confirmed.
3. Error in holding the company's selection for cancellation.
4. Error in not canceling Cline's entry and approving the company's selection.

In argument, appellant, by its attorney, insists that the selection of the land in controversy by the State of California was illegal and void from its inception, and in no manner interfered with the right of the government to dispose of said land as a part of the public domain.

As supporting this position, appellant cites: Taylor *et al.* v. State of California (2 C. L. O., 19); Jackson *et al.* v. State of California (4 C. L. O., 87); Aurrecochea v. Bangs (114 U. S., 381), and McLaughlin v. United States (127 U. S., 428).

I can discover no analogy between the case of McLaughlin v. United States and the case under consideration. That case, it seems to me, is clearly not in point. In each of the other three cases (*supra*) State selections had been made of lands which, at the time of selection, were embraced in the claimed limits of unadjusted Mexican grants, or alleged grants, and were subsequently restored to the public domain, because, in one case, the claim of the alleged Mexican grantee was finally

rejected as invalid, and in the other cases the lands, by final survey, were found not to be within the limits of the grant.

The United States supreme court and this Department, respectively, in the cases above cited, held these selections by the State to be of no effect, null, and void, because the lands, when selected, were claimed under a Mexican grant. The Department, in the cases cited, held, that lands so claimed, until the claim was finally adjudicated, were in a state of reservation, and were not subject to disposition under the land laws. In other words, that an *invalid* claim to land, asserted under the laws of the United States, reserves such land from disposition under the general land laws, so long as the invalid claim remains of record and unadjudicated.

These cases, instead of supporting appellant's assignments of error, seem to me to be in harmony with the decision of your office. The same principle runs through and controls all of these cases. The land selected by the State in this case was beyond question subject to disposition at the time it was selected, and therein consists the difference in this case and the cases above cited.

Appellant also cites Selby *et al. v. State of California* (3 C. L. O., 89) and State of Nebraska *v. Dorrington* (*ib.*, 122). In the case of Selby *et al. v. State of California*, the selections there under consideration were not treated by the Department as being void from the inception of the State's claim, but only as being voidable. The pre-emptors in that case were required to regularly contest these selections and procure their cancellation, before the pre-emption entries were allowed. And said selections, though held to have been made prematurely and without authority of law, were still held to have been rendered valid by the approval of the Secretary of the Interior. A selection, entry, or other claim to land absolutely void from its inception can not be rendered valid by executive authority. That case, therefore, is not in conflict with your office decision herein.

The case of the State of Nebraska *v. Dorrington* (*supra*), decided August 3, 1876, seems to me to be the only case cited which countenances and supports the position contended for by appellant, and as that case was decided by the same Secretary (Hon. Z. Chandler) who decided the case of Selby *et al. v. State of California*, and in the same month, it may well be doubted whether it was intended to go any further than the latter case. At all events, the decision of your office herein is in harmony with the more recent decisions of this Department. See Southern Pacific R. R. Company *v. State of California* (3 L. D., 88), and cases cited, Niven *v. State of California* (6 L. D., 439), and Early *v. State of California* (7. L. D., 347). The decision of the United States supreme court in the case of the Hastings and Dakota R. R. Company *v. Julia D. Whitney and John Whitney* (132 U. S., 357), is to the same effect.

The conclusion reached herein, therefore, is, that the said selection

of the land in dispute, though invalid, was not absolutely void, but was only voidable, and that, while it remained intact upon the record, it was a bar to any other disposition of said land by this Department; and, consequently, that said selection excepted the tract in dispute from the withdrawal made for appellant's benefit.

In addition to this, it may be remarked, that appellant's application to select said tract—made October 4, 1887—came too late to be available against a prior *bona fide* settler thereon, as the withdrawal aforesaid was revoked by my predecessor in office (Secretary Lamar) on August 15, 1887. See note, 6 L. D., 92.

The decision of your office herein is affirmed.

REPAYMENT—RELINQUISHMENT—HOMESTEAD.

J. H. THOMPSON.

Where it is impracticable for the claimant to comply with an order requiring new final proof to be made, and good faith is apparent, repayment may be allowed. A relinquishment filed with an application for repayment is in accordance with departmental regulations and does not defeat the right of repayment.

Secretary Noble to the Commissioner of the General Land Office, January 14, 1890.

Your office, by letter of July 13, 1889, transmitted a motion, by J. Hurd Thompson, for a review of departmental decision denying his application for return of purchase money paid by him on his commuted homestead entry for lots 3 and 4 and the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 112, R. 61, Huron land district, Dakota.

Said departmental decision was rendered July 24, 1888; notice of the same was sent by your office to the local office (with directions to notify the entryman), August 3, 1888. The motion for review bore no date, but the argument attached was dated, "Huron, July 2, 1889." It appeared sufficiently certain from the face of the record, that the motion was not filed within thirty days from receipt of notice by the applicant, and the motion was therefore dismissed.

But now comes S. M. West, attorney for said Thompson, and files affidavit that notice of said adverse decision was not given him until "June 4, 1889"—bearing that date—and that his motion for review was filed July 2, 1889, within the thirty days demanded by the rule.

The Department of course could not presume that it would require nearly eight months for the local officers to notify an attorney residing in the same village with them of the substance of a decision affecting his client.

It now appearing that the appeal was filed in time, the same will be considered upon its merits.

Said Thompson, on March 22, 1883, applied to enter the NW. $\frac{1}{4}$ of Sec. 6, T. 112, R. 61, Huron land district, Dakota. This was a fractional quarter-section, embracing one hundred and seventy-four acres. He was informed that he must relinquish a portion of the tract, and was allowed to amend his entry by omitting one subdivision; his application, thus amended, describing, "the NW. $\frac{1}{4}$ quarter and lots 3 and 4, Sec. 6, T. 112, R. 61." Commutation proof was offered, and final certificate No. 10,125 issued for the tract last described.

Long afterward, when your office, in the regular course of business, reached said proof for examination, it was disclosed that the local officers had furnished the newspaper, for advertisement of intention to offer said commutation proof, the erroneous description, "the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ " of said Sec. 6. By letter of April 9, 1885, the proof was suspended by your office; and afterward, by your office letter of January 22, 1886, was rejected, and the cash entry held for cancellation—the entryman being informed that upon publishing notice properly describing the land, he would be allowed to submit new proof. By the same letter he was allowed to amend his entry, if he so desired, so as to include the entire NW. $\frac{1}{4}$ of said Sec. 6.

By this time, however, Thompson had left the land and engaged in business elsewhere. Under the construction then given by your office to the homestead law—requiring six months uninterrupted residence on the tract immediately preceding proof—he could not make such proof as your office demanded. Indeed, if he had understood that it would be permitted, the condition of his business was such that it would have involved great loss for him to return and make six months' residence on the tract. So (January 5, 1887,) he applied to your office to be permitted to relinquish the land and be repaid the fees and purchase money paid thereon.

Your office accepted the relinquishment, and directed the entry to be canceled; but refused to return the fees and purchase money, on the ground that "the law governing the return of purchase money does not provide for repayment in cases where parties voluntarily relinquish or abandon their entries."

Thompson appealed to the Department, which, on July 24, 1888, affirmed said decision.

Your office decision of February 2, 1887, and that of this Department, July 24, 1888, were in accordance with the construction of the law relative to repayments then held by your office and the Department. But since then it has been deemed by the Department that a more liberal construction of said law would be both justifiable and just.

In the case of E. L. Choate (S. L. D., 162,) the proof—commutation proof, as in the case at bar—was suspended by your office, and he was required to make new proof, showing "that he had for a period of six months maintained an actual, *bona fide*, continuous residence" on the tract. Before the rendition of said decision, however, appellant had

found employment as locomotive engineer; to return and reside upon the tract—if, indeed, your decision could have been interpreted as permitting him to do so—would have involved the forfeiture of his position on the railroad, and great pecuniary loss. The Department held that he was entitled to a return of his fees, commissions, and purchase money.

The equities in the case at bar would seem to be even stronger than in the case of Choate; for your office held that Choate's residence was insufficient to satisfy the requirements of the law; in the case at bar there is no question as to Thompson's residence, nor is failure in any other respect to fulfill the law alleged; the trouble resulted mainly from the carelessness of the local officers in furnishing the newspaper that printed the notice an erroneous description of the tract upon which he desired to make proof.

Thompson's application is made in accordance with the requirements of your office circular of January 1, 1889 (p. 68):

In the case of application for the repayment of fees, commissions, etc., on canceled homestead and other entries, under the second section of the act (of June 16, 1880), the duplicate receipt must be surrendered, with a relinquishment of all right, title, and claim in and to the land described in the receipt endorsed thereon, etc.

It would seem hardly the proper practice to officially direct an entryman to file a relinquishment of a tract as a prerequisite to the return of his purchase money, and thereafter refuse to return said purchase money because in obedience to official direction he had filed the relinquishment.

In accordance with the ruling in the case of E. L. Choate (*supra*), and others of recent date, departmental decision of July 24, 1888, in the case of J. Hurd Thompson, is hereby recalled and revoked, and the repayment asked for by him is directed to be made.

OSAGE LANDS—ACT OF MAY 28, 1880—PRACTICE—REVIEW.

UNITED STATES *v.* ATTERBERY ET. AL. (ON REVIEW).

The only condition and qualification required to authorize an entry under the act of May 28, 1880 is that the claimant must be an actual settler and have the qualifications of a pre-emptor.

The proof required to establish the fact of an actual settlement under said act is no less in degree than the proof required under the pre-emption law.

The fact that the evidence is such that fair minds might reasonably differ as to the conclusion that should be drawn therefrom will not warrant a review.

Secretary Noble to the Commissioner of the General Land Office, January 14, 1890.

This is a motion by R. J. Simpson, transferee, for review and reconsideration of departmental decision of February 6, 1889, in the case of the United States *v.* Robert W. Atterbery *et al.*, (8 L. D. 173).

The decision complained of is an affirmance, on appeal, of a decision of your office of May 9, 1889, holding for cancellation five Osage cash entries, made in September or November 1882, by Robert W. Atterbery, Wilbur L. Fogleman, William L. Stanley, Samuel R. Moore, and Louis H. Moore, for as many different tracts of land of one quarter section each, four of which are situated in section 28, and one in section 33, of T. 34 S., R. 6 W., in the Wichita land district in the State of Kansas.

By your said office decision it was held, in effect, that these entries were fraudulently made, and that the several entrymen were not actual settlers on the lands covered thereby at the respective dates thereof. Such, substantially, was also the finding of the local officers before whom a hearing was had in the case of each entry, for the purpose of determining certain questions raised by the report of a special agent, as to the validity of the same.

The motion for review alleges simply that the Department erred in holding that these entrymen "were not actual settlers, as contemplated by the act of May 28, 1880."

The several cases appear to be essentially the same in all material respects, and for this reason they were heard together by the local officers, and by your office, and also by this Department on the final appeal. The decision of the Department contains a lengthy summary of the evidence in the Atterbery case, and also a full statement of the facts shown by the final proof papers in the several cases. The record has been re-examined with patience and care, and it is found that the facts material to the issue presented by the motion, are set forth in said decision with substantial accuracy, and it is unnecessary that they should be herein restated. There is no denial that the facts are in the main correctly stated, nor is there in the motion for review, any allegation of newly discovered evidence, or of any material fact not considered in the original decision. It is earnestly contended by counsel, however, that the facts do not justify the conclusion reached in the various decisions (which have been in effect uniform throughout), but that under the law, if properly applied to those facts, the several claimants must be held to have been *actual settlers* on their respective claims at the dates when their entries were made.

The lands involved are a part of the Osage Indian trust and diminished reserve lands, and the rights of claimants thereto are to be considered and determined under the act of May 28, 1880, (21 Stat., 143) which makes special provision for the sale and disposal of those lands. The second section of that act provides :

That all of the said Indian lands shall be subject to disposal to actual settlers only, having the qualification of pre-emptors not exceeding one quarter section each.

The now well established departmental construction of this section of said act is that the only qualification and condition required to au-

thorize an entry thereunder is that the claimant must be an actual settler on the land at the date of the entry, and must have the qualification of a pre-emptor. *Grigsby v. Smith* (9 L. D., 98); *United States v. Woodbury et al.*, (5 L. D., 303); Departmental Circular of April 26, 1887, (5 L. D., 581). It is not questioned that these entrymen had the qualifications of pre-emptors, and the only matter to be determined is whether they were "actual settlers" under the law.

In the original decision it was held that "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." Also that the "act of settlement must be personal and can not be made by an agent." It was further stated, in effect, that the same proof would be required to show actual settlement under the act of May 28, 1880, as under the pre-emption laws.

The contention of counsel is that this holding is erroneous, and that it is not in accord with the doctrine announced in the cases of *United States v. Woodbury et al.*, and *Grigsby v. Smith*, above referred to.

I do not think this contention can be sustained. The term "actual settler" is a technical term, which, as used in the public land laws of the United States had acquired a well defined meaning prior to the passage of the act now under consideration. See, 4 Ops. Atty. Genl., 493; *Lytle v. Arkansas*, 22 How., 193; *Allman v. Thulon*, 1 C. L. L., 690. These authorities establish the principle that an actual settler under the public land laws, is one who, in his own proper person, goes upon a tract of the public land, with the intention of remaining there and of acquiring title thereto, or, in other words, of making the same his home. It is to be presumed that Congress well understood the meaning of the term "actual settler," as thus defined, when it used the same in said act. Certainly there is nothing in the act itself to indicate the contrary, or that the term was used in any different or restricted sense.

I do not understand the decision complained of as going further than this, nor do I think the same is in conflict with the *Woodbury* case, or with the ruling in *Grigsby v. Smith*. It was distinctly declared in both these cases that a claimant under the act of May 28, 1880, must be an actual settler on the land at the date of his entry. It also appeared that the entryman in each case had resided on the land claimed for six months or more prior to his entry thereof, and that he continued to reside thereon for sometime after entry, thus showing that his settlement was made with the intention of making the land his home.

While it is true, as has been frequently held, that entries of the Osage diminished reserve lands, are not now required to be made in accordance with the general provisions of the pre-emption laws, yet it has never been held, nor do I see any reason in the contention, that a lesser degree of proof is required to show actual settlement under the act of May 28, 1880, than under the pre-emption law. That an actual

personal settlement is required in each case is unquestioned, and there can be no difference, in my judgment, in the character or degree of the proof necessary to show such actual settlement under the one act, from that which is required to show it under the other. Neither can a person who makes settlement through collusion with, and for the benefit of another, be considered an actual settler under the act of May 28, 1880, any more than under the pre-emption law. Such a settlement would, in my opinion, be an evasion of the law alike in either case.

And now, applying these principles to the facts disclosed by the record, I see no reason to justify a revocation of the decision complained of. The very elaborate statement of the facts contained in that decision shows that the record was originally considered with great care, and even if it be conceded that the evidence is such that fair minds might reasonably differ as to the conclusion which should be drawn therefrom, that fact would not furnish a sufficient ground for sustaining the motion for review. *Mary Campbell* (8 L. D., 331); *Chas. W. McKallor* (9 L. D., 580). But I am of the opinion that the conclusion of the original decision, that these entrymen were not "actual settlers" under the law at the dates of their entries, is fully sustained by the facts, and also that the evidence strongly supports the further conclusion that the entries were made through collusion with, and for the benefit of the transferee, *Simpson*. The motion for review furnishes no sufficient grounds for disturbing the uniform findings in these respects, of the local office, and of your office, and the Department, and the same is therefore denied.

SWAMP LAND—FIELD NOTES OF SURVEY—ENTRY.

DOX v. STATE OF WISCONSIN.

The fact that the returns do not show the land to be of the character granted is not conclusive as against the State even though the field notes of survey have been adopted as the basis of adjustment.

The decision of a Commission, appointed by the State and the General Land Office, as to the character of a tract of land, is subject to review, and does not preclude the Department from resorting to other evidence in order to reach a satisfactory conclusion.

An entry made in good faith, but found to embrace a tract of swamp land, may stand intact as to the remainder, or be canceled with the right to repayment.

Secretary Noble to the Commissioner of the General Land Office, January 15, 1890.

March 22, 1880, Stephen Dox made adjoining farm homestead entry for the S. $\frac{1}{2}$ of NW. $\frac{1}{4}$, Sec. 17, T. 23 N., R. 13 E., Menasha district, Wisconsin.

It appears that forty acres of said tract (the SW. $\frac{1}{4}$ of said NW. $\frac{1}{4}$) was selected in 1881 by the State of Wisconsin as swamp land under the swamp land grant of September 28, 1850 (9 Stat., 519), and Dox

and his witnesses in making final proof, March 3, 1887, testified that the tract was swamp land and that, with the exception of two acres of marsh which he had cleared and upon which he had raised hay each year since entry, it was of little or no value. The improvements of Dox on said tract consisted of said two acres of clearing, valued at from \$25.00 to \$30.00. The local officers rejected the proof, because it appeared therefrom that the land was swamp and subject to the claim of the State.

Dox acquiesced in said action of the local officers, and, November 16, 1888, made application to your office for "repayment of the fees and commissions paid" by him on making said entry. Your office, by decision of December 5, 1888, held that:

The character of lands in Wisconsin, as to their swampy or non-swampy condition, is not determined from the testimony of witnesses in the final proof made on a homestead entry, but from the field notes of the United States survey.

It is then stated in said office decision that "The field notes of the United States survey on file in" your "office do not show that the greater part of said tract is swamp or over-flowed land," and the claim of the State is thereupon "held for rejection," and the local officers are directed to advise Dox "that his application for repayment of fee and commissions can not now be considered, there being no recognized, valid, adverse claim for the land in question."

From this decision of your office the State appeals to this Department, and with said appeal files the affidavit of C. F. Fricke, chief clerk of the Commissioners of Public Lands for the State of Wisconsin, setting forth:

That on August 13, 1881, by a commission appointed by the Commissioner of the General Land Office and the Governor 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 of September 28, 1850,, the *SW. ¼ of NW. ¼ of Sec. 17, T. 23 N., R. 13 E., 4 P. M. of Wisconsin*, was decided to be swamp land within the meaning of said act, the record of which is now on file in Division 'K' of the General Land Office, and that said decision was final.

It is, also, claimed in said affidavit that "according to the rules laid down by the Commissioner of the General Land Office as a guide for" said commission appointed by him and the Governor of Wisconsin, the said forty acre tract is more than half swamp and therefore subject to the grant.

If it was intended to be held by your office that the field notes of survey are conclusive as against the State of Wisconsin in respect to the swampy or non-swampy character of the land, this was error. It was held by this Department in *Wisconsin v. Wolf*, that, while the State of Wisconsin had "elected to take the field notes of survey as a basis for determining what land passed to the State under the grant," yet the field notes were only "*prima facie* evidence of the character of the land," and, accordingly, although the field notes in that case did not show that

the land involved therein was swamp land within the meaning of the grant, a hearing was ordered to determine the character of the land. (*Nita v. Wisconsin*, 9 L. D., 385; *Wisconsin v. Wolf*, 8 L. D., 555.)

The contention of the State, that the decision of August 13, 1881, by the commission appointed by your office and the governor of Wisconsin was final, is also untenable. Such decision is subject to review and does not preclude this Department from resorting to other evidence in order to determine the character of the land. (*Wisconsin v. Wolf*, and *Nita v. Wisconsin*, *supra*.)

In the present case, it is unnecessary to order a hearing, as it is shown by Dox's proof and appears to be conceded, that the quarter-quarter section (SW. $\frac{1}{4}$ of NW. $\frac{1}{4}$) claimed by the State is in fact swamp and subject to the grant.

The remaining quarter-quarter section (SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$) of the tract embraced in the entry is not claimed by the State and from the field notes and plats of survey furnished by both your office and the State of Wisconsin there appear to be little, if any, swamp land thereon. This subdivision is contiguous to the original farm on which Dox bases his entry, and the fact that the other subdivision of the tract entered was swamp land and not subject to entry did not, in itself, authorize the rejection of the proof as to the whole tract. Dox might have been and it is directed that he now be allowed, if he so desire, to perfect his entry as to said quarter-quarter section not claimed by the State. If, however, he prefer that the money paid by him on making his entry be refunded, you are instructed (in view of his manifest good faith) to allow his application therefor. He will be required to make his election within thirty days after notice of this decision.

The decision of your office is reversed.

PREFERENCE RIGHT—INTERVENING ENTRY.

ROBERTSON *v.* BALL ET AL.

After the expiration of the period accorded a successful contestant, an entry by another of the land involved is *prima facie* valid, and the contestant should not thereafter be allowed to exercise his preference right of entry without due notice to the intervening entryman.

A successful contestant is entitled to thirty days from the receipt of notice of cancellation within which to exercise the preference right of entry.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 16, 1890.

I have considered the appeal of Jay Barnett from the decision of your office, dated June 30, 1888, allowing appellee, Pleasant Robertson, thirty days to exercise preference right, and holding Barnett's entry subject thereto, upon the NE. $\frac{1}{4}$ of Sec. 15, Tp. 32, R. 42 W., Chadron, Nebraska.

This land, it appears, was entered first by James J. Ball, homestead

entry No. 2668 (Valentine series), on November 7, 1884. On a contest instituted by appellee, Pleasant Robertson, Ball's entry was canceled, by your letter of November 14, 1887. This decision was not appealed from, and, therefore, the successful contestant, Robertson, became entitled to his preference right of entry.

On December 8, 1887, the register notified the contestant, Robertson, in registered letter, of the cancellation of Ball's entry, but the register's letter, containing this information, was returned to the register, "*uncalled for.*"

Appellant, John Barnett, sixty-nine days after the mailing of said notice to Robertson, and on February 15, 1888, made homestead entry of said tract, by homestead entry No. 746.

The post-office addresses of both Barnett and Robertson were the same—namely: Gordon, Sheridan county, Nebraska.

It appears from the affidavit of Robertson, sworn to February 24, 1888, nine days after Barnett's entry, that Robertson never knew of the decision of your office (November 14, 1887,) and of his preference right of entry of said tract, until he was told by Barnett, that he, Barnett, had made homestead entry upon said tract. The affidavit further discloses that Robertson, who had contested Ball's entry, and was waiting to make entry of the same, after obtaining the above information from Barnett, began to inquire into the cause of his not being notified and given an opportunity to enter said tract. That by a visit to the United States land office at Chadron he learned, for the first time, that the register had, on December 8, 1887, sent to him a registered letter, notifying him of the cancellation of Ball's entry of said tract and of his preference right of entry as successful contestant; and that said letter had been returned to the United States land office at Chadron, Nebraska, by the post-master at Gordon, "as not called for." The affidavit further states, that Robertson was in the habit of calling for his mail twice or three times a month; and, after the date of the mailing of said registered letter: namely, December 8, 1887, he called for his mail at the post-office, Gordon, Nebraska, on the following dates, viz: December 20, and 28, 1887, and January 11, and 23, 1888; that at such times he received other mail and inquired about an expected valuable letter from the land office, and the answer was, "nothing from the land office."

The petitioner asks for the cancellation of Barnett's entry of said tract "as illegal from its inception," and that petitioner may be permitted to exercise his preference right of entry.

Six witnesses, also, make oath that each knew personally of Robertson's "vigilant watch for mail respecting the result of his contest."

If Robertson made the several inquiries, sworn to by him, for his "expected valuable letter from the land office," the postmaster at Gordon, or his assistant, would most likely have recollected it; and it would have been better to have had the postmaster's statement respecting such inquiries filed with his own affidavit.

When Barnett made his entry, February 15, 1888, the time had fully elapsed in which Robertson could have exercised his preference right, had the latter been duly notified of Ball's cancellation. Barnett's entry was, therefore, *prima facie* valid; and the action taken by the local office in permitting Robertson to enter the same tract, August 4, 1888, was irregular. Henry Cliff, 3 L. D., 216, and cases there cited. But from the showing made by Robertson, taking his evidence as true, he never received the notice of Ball's cancellation. Robertson was entitled to thirty days from the receipt of the notice of cancellation within which to exercise his preference right of entry. Walker v. Mack (5 L. D., 183).

The law presumes official acts to be rightly done; in the absence of positive proof to the contrary, it would presume that the register's letter from Chadron, Nebraska, to Gordon, Nebraska, addressed to Pleasant Robertson, and containing the information of Ball's cancellation, had reached its destination, and was properly delivered; but such presumptions count for nothing, in view of the established fact that such letter was never delivered, but returned to the office, whence it came.

After Barnett had entered this tract, his entry being *prima facie* valid, it was error in your office to allow Robertson thirty days within which to make entry of the tract, without notice to Barnett, the intervening entryman. (Conly v. Price, 9 L. D. 491, and cases there cited.) But inasmuch as Robertson entered said tract August 4, 1888, you will cause Barnett to be duly notified, and that he show cause why his entry of February 15, 1888, should not be canceled.

Your said office decision is accordingly modified.

PRACTICE—MOTION FOR REVIEW.

ALFRED MAGNUSON.

A motion for review must be accompanied by an affidavit that it is made in good faith and not for the purpose of delay.

Review will not be granted in the absence of specific allegations of error.

Testimony as to facts that occurred after the hearing cannot be considered as newly discovered evidence in support of a motion for review.

The time allowed for filing a motion for review, except in case of newly-discovered evidence, is limited to thirty days after notice of the decision.

Secretary Noble to the Commissioner of the General Land Office, January 17, 1890.

William Plankington, mortgagee, has filed a motion for review of departmental decision of October 27, 1888, in holding for cancellation the pre-emption cash entry of Alfred Magnuson for the SW. $\frac{1}{4}$ of Sec. 31, T. 109, R. 58, Watertown land district, South Dakota. The motion is not accompanied by the affidavit (required by Rule 78 of Practice) that it is made in good faith, and not for the purpose of delay.

The principal error alleged is that the decision is not in accordance with the evidence. In the language of the mortgagee's affidavit:

The deponent has had all of the evidence upon which said cancellation was based carefully examined by an attorney, who has had large practice in such cases, and deponent is informed by his said attorney, and verily believes, that on a rehearing it can be fully shown that the said Alfred Magnuson fully complied with the pre-emption law in securing said land, as well as with the rules and regulations of the Commissioner of the General Land Office relating thereto.

So far as this allegation is concerned, the motion for review might properly be dismissed. "It is not enough for counsel to make sweeping assertions that there is no evidence warranting a conclusion arrived at in the decision sought to be revoked. He must go further and state that the evidence is upon the question, and show that the finding of the Department is against the palpable preponderance of the evidence" (see *Hoffman v. Hindman*, 9 L. D., 82; also *Albert H. Cornwall*, ib., 340).

Nevertheless, it may not be amiss to refer briefly to the testimony of the claimant as given at the hearing.

Q. Where did you keep your oxen and cows after you filed on your land and up till you made proof?—A. They were at father's.

Q. How far does your father live from this land?—A. About half a mile. . . .

Q. Did you board at your father's at that time when in the neighborhood?—A. Yes, sir.

Q. Did you sleep there also at the same time?—A. Yes; when I did not sleep on my claim.

Q. How often did you sleep on your own claim?—A. As near as I can remember, twice a month * * * *

Q. What did you do between the time when you quit working for your father and the 22d of November, 1883?—A. I worked at mason-work in Carthage, about seven miles from my land; and also in Howard, about twenty-five miles.

Q. During that time, state if you were on your claim; if so, how much, day and night?—A. I was on the claim and slept there about twice a month * * * *

Q. Could you not have staid on your land during the time you were working for your father?—A. I could not, for I had not at that time money enough to start boarding myself.

It does not appear from anything in the testimony that the entryman ever ate a meal in his house. He alleges that he was absent earning money with which to improve his claim; but the only money he expended prior to making final proof was, according to his own account, between nine and ten dollars for lumber and the hauling of the lumber in his house. He and his father did some breaking and other work on the land, but it is his residence, and not his cultivation of the tract, that is questioned.

The departmental decision review of which is asked was rendered October 27, 1888; the motion for review bears date December 17, 1889. Appellant seeks to avoid the rule requiring that motion for review shall be filed within thirty days from receipt of notice by alleging that the motion is based upon "newly discovered evidence"—to wit:

"That deponent is reliably informed that claimant, immediately after said additional proof was submitted"—

This must refer to the "proof" of the entryman and his witnesses "submitted" at the hearing:

Not only continued to reside upon and cultivate said land, but also made other and valuable improvements, so that at the time of the cancellation of said entry, in December, 1888, the claimant was residing upon said land, with his family—he being a single man when he made final proof, and married afterward—and had nearly the whole of the land under cultivation.

Certainly, if these statements as to the acts of the entryman after the hearing be true, they can not be considered as "newly discovered evidence." A decision properly rendered in view of and in accordance with the facts disclosed in a given record is not to be invalidated by facts which did not occur until after the record was complete which formed the basis of said decision.

In view, therefore, of these considerations: that the motion for review is not accompanied by an affidavit that it is made in good faith, and not for purpose of delay; that it is vague and general, and not specific, in its allegations of error; that, nevertheless, an examination of the testimony shows that the decision complained of is sustained by the evidence taken at the hearing; that the motion is not made within the time required by departmental rules and regulations; that the evidence alleged to be "newly discovered" can not in any proper sense of the term be considered such, inasmuch as it refers to acts performed at a date subsequent to the hearing which formed the basis of the decision complained of, and as said evidence is not submitted, but as affiant simply alleges that he is "reliably informed" that it might be obtained—said motion must be dismissed.

SWAMP SELECTIONS—ACT OF MARCH 3, 1857.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RY. CO. *v.* STATE OF ARKANSAS.

Swamp selections of vacant unappropriated lands reported to the Commissioner of the General Land Office prior to the act of March 3, 1857, were confirmed to the State by the provisions of said act.

Secretary Noble to the Commissioner of the General Land Office, January 20, 1890.

The case of the St. Louis, Iron Mountain and Southern Railway Company *v.* The State of Arkansas is before me on appeal by said company from the decision of your office, dated May 22, 1888, rejecting its claim to the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 11, T. 6 S., R., 14 W., Little Rock land district, Arkansas.

It appears from your office decision that said company is the successor to the Cairo and Fulton Railroad Company and that it claims the above described tract of land under the acts of February 9, 1853 (10 Stat.,

155) and July 4, 1866 (14 Stat., 83), granting lands to the States of Arkansas and Missouri for railroad purposes, and selected the same June 9, 1872.

It further appears that said tract is claimed by the State of Arkansas under the swamp land act of September 28, 1850 (Sec. 2479 R. S.), and that it was selected as swamp and overflowed land by said State, "and the selection thereof reported to the Commissioner of the General Land Office prior to the passage of the confirmatory act of March 3, 1857," (Sec. 2484 R. S.).

It is also stated in the decision appealed from—and the fact is not questioned by appellant—that at the date of said confirmatory act "said tract was vacant and unappropriated, and not interfered with by an actual settlement under any existing law of the United States."

In view of the foregoing facts, your office held that said selection was confirmed to the State by said act of March 3, 1857, and consequently rejected the company's claim to said tract.

Appellant assigns the following errors:

1. In holding that said land inured to the said State of Arkansas by the confirmatory act of March 3, 1857; said act not being operative upon lands granted to said railroad company.

2. In holding that lands claimed by the State under the swamp grant were by such claim excepted from the railroad grant. The excepting clause of such railroad grant operating on and including lands in fact swamp.

In addition to the facts stated in the decision appealed from—and which are undisputed—an inspection of the records of your office shows that the land in controversy was on January 18, 1853, certified by the surveyor-general of Arkansas as being swamp land. And such inspection further shows that said land is not within the primary limits of the grant of February 9, 1853, or of July 4, 1866 (*supra*), but is within the indemnity limits of the latter grant. It is, therefore, clear that no right of the company could have attached to said land prior to the passage of the act of July 4, 1866.

It is well settled, also, that under the foregoing state of facts the land in dispute was confirmed to the State of Arkansas by the act of March 3, 1857, whether the same was in fact swamp land or not. State of Louisiana (1 L. D., 508); State of Louisiana (1 L. D., 509); State of Florida (8 L. D., 65).

The decision of your office is accordingly affirmed.

TIMBER AND STONE ACT—MARRIED WOMAN.

DELILA STUKEL.

The right to make an entry under the timber and stone act of June 3, 1878, may be exercised by a married woman, acting in her own interest, if she possesses the requisite qualifications of citizenship.

The restrictions imposed by the circular of May 21, 1887, are intended to prevent an entry by a married woman for the benefit of her husband, but not to limit the right of entry in any State or Territory in which the act is applicable, and where title would not vest in the husband by virtue of marital rights.

Secretary Noble to the Commissioner of the General Land Office, January 20, 1890.

By letter of April 20, 1889, your office held for cancellation the entry of Delila Stukel made under the act of June 3, 1878 (20 Stat., 89), for the SE. $\frac{1}{4}$, SW. $\frac{1}{4}$, Sec. 22, T. 40 S., R. 10 E., Lakeview, Oregon, on the ground that "a married woman can not make an entry under said act, in the State of Oregon."

Claimant appealed.

I am now in receipt of your letter of the 20th inst. in which you state that some doubt exists as to the correctness of said decision, and as "more than fifty cases have arisen involving the same question" you request an early decision in the premises.

It appears from the record that said Delila Stukel made said entry No. 417, on June 10, 1885. In an affidavit she stated that she is a native born citizen of the United States over the age of twenty-one years and a married woman, the wife of Stephen Stukel, and that she purchased said land with her separate money.

In said decision of your office the local officers were advised that the fifth clause of the circular of May 21, 1887 [approved July 16, 1887] provides that a married woman may make an entry under the act of June 3, 1878, when the laws of the State or Territory permit her to purchase and hold real estate as a *feme sole* (6 L. D., 114). After an examination of the laws of Oregon touching the rights of married women in their separate estates, your office concluded that these laws negative the idea that a married woman in that State has "control over her property as a *feme sole*," and accordingly held the entry for cancellation.

The provision of the law on the question in issue is as follows :

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 or association of persons, at the minimum price of two dollars and fifty cents per acre.

The allegation of claimant that she is a citizen of the United States is nowhere denied, so in that regard she seems to be within the class of persons authorized to make such entry. On its face the statute confers this right generally on "citizens of the United States." It does not prefer one description of citizens and reject another. Nor is it shown or alleged that there is any ambiguity in the language of the statute. The ordinary rule is that the intent of the statute is found in its words. No reason appears for departing from this well established rule of construction. Least of all is it to be supposed that the scope of the congressional act is defined by the statutes of the different States passed without reference to the question of citizenship or to this act. Had it been the intention of Congress to restrict this right to a certain class of citizens, such intention would readily have found expression in other and appropriate words. As in the pre-emption law which confers the right of entry on certain conditions, on any person "being the head of a family, or widow, or single person over the age of twenty-one years, and a citizen of the United States, or having filed a declaration of intention to become such;" so in the homestead law which restricts the right to a "person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States or who has filed his declaration to become such." These laws are older than the act of June 3, 1878. The omission from the later act of the words "head of a family," must be assumed to have been made with a purpose, and the obvious purpose is that Congress did not propose to restrict the right as in the former acts.

A similar question arose in this Department in 1880, under the desert land act. That act provided for the sale of desert lands in certain States and Territories to "any citizen of the United States, or any person of requisite age 'who may be entitled to become a citizen and who has filed his declaration to become such.'" (19 Stat., 377). In respect to this act Secretary Schurz in a letter to your office dated December 15, 1880, said:

You concluded that any woman born in the United States, and of the age of twenty-one years or upwards, whether married or single or any woman of foreign birth of such age who has declared her intention to become a citizen, or has married a citizen of the United States and who might herself be lawfully naturalized, is entitled to make an entry under said (desert land) act.

I concur in your opinion for it seems to me that the act is couched in such language as to preclude any other construction. (9 C. L. O., 222).

This ruling as to such entries by married women was followed by Secretary Lamar in a letter to your office dated June 23, 1887, returning a draft of a proposed circular in reference to desert land entries as follows:

In section two you say that a married woman can not make a desert land entry. This is changing the established rule of the Department. Secretary Schurz on the 15th of December, 1880, ruled expressly that a married woman may make a desert land entry, if she in other respects be duly qualified. (9 C. L. O., 222). This rule

was followed in the recent case of *Sears v. Almy*, decided here June 3, 1887 (6 L. D., 1). Although this question was not made a point in this last case, the record distinctly showed that the party to whom the land was awarded was a married woman at the date of her application, and also when the entry was allowed. I can see nothing in the statute forbidding such entry. The desert land act does not, like the homestead, pre-emption and timber-culture laws, restrict entries under its provisions to the heads of families, but it says that 'any citizen of the United States, or any person of requisite age, who may be entitled to become a citizen,' etc., may make entry, etc. (6 L. D., 114).

It will be observed that the provision of the desert land act, as far as the question at issue is involved is identical with that of the act of June 3, 1878. Both provide for sales to citizens of the United States. Unless there is something showing a different intent, this expression, used in two statutes *in pari materia*, should receive a like construction in both. In the case of *Isabella M. Dwyer*, which apparently followed said circular of May 21, 1887, *supra*, Acting Secretary Muldrow held that a married woman (in California), who by the laws of the State is authorized to purchase and hold realty as a *feme sole*, and independently control her separate property, is entitled to make timber purchase under the act of June 3, 1878 (6 L. D., 32).

There is nothing in the laws of Oregon forbidding a married woman from purchasing and holding realty in her own name, and, hence, the ruling of the Department in the case of *Isabella M. Dwyer* is applicable alike to the State of Oregon, as well as California.

You held that a married woman can not make entry under the act of June 3, 1878, for the reason that the laws of said State require the husband to join with the wife in the conveyance of her real estate, and the supreme court of said State has held that "A married woman can only convey her real property by joining her husband with her in the deed, and that a conveyance by her alone, or in pursuance of a power executed by her is void." But, while these restrictions as to the power of alienation have been provided for by law, it does not in any manner abridge or limit the right of the wife to hold realty in her own name and right. The right to hold property both real and personal, free from the debts and control of the husband, is guaranteed by the constitution of said State, and sections 2992, 2993 and 2998 of the Code of Oregon provides as follows:

2992. The property and pecuniary rights of every married woman at the time of her marriage, or afterwards acquired by gift, devise, or inheritance, shall not be subject to the debts or contracts of her husband, and she may manage, sell, convey, or devise the same by will to the same extent and in the same manner that her husband can property belonging to him.

2993. The property, either real or personal, acquired by any married woman during coverture, by her own labor, shall not be liable for the debts, contracts, or liabilities of her husband; but shall in all respects be subject to the same exemptions and liabilities as property owned at the time of her marriage or afterwards acquired by gift, devise, or inheritance.

2998. All laws which impose or recognize civil disabilities upon a wife which are not imposed or recognized as existing as to the husband are hereby repealed: *provided*,

that this act shall not confer the right to vote or hold office upon the wife, except as is otherwise provided by law; and for any unjust usurpation of her property or natural rights she shall have the same right to appeal in her own name alone to the courts of law or equity for redress that the husband has.

The desert land act and the timber and stone act both provide for sales to citizens of the United States, and both acts restrict the purchaser to one entry.

If the laws of the State in which the entry is made allow a married woman to purchase and hold realty, she is entitled equally with her husband, as a citizen of the United States, to make entry under the act of June 3, 1878, because her holding will be separate and independent of that of her husband, and will not violate that provision of the act which authorizes the sale in quantities, not exceeding one hundred and sixty acres, "to any one person or association of persons."

The circular of the Department of May 21, 1887 (6 L. D., 114), has very wisely adopted a rule to enable the land office to determine whether an entry, made by a married woman, is made *bona fide* and for her sole and separate use and benefit, or whether the entry is made for the benefit of her husband, but it does not restrict the right of a married woman to make entry in any State or Territory in which the act is applicable and where the title of the government would not vest in the husband by virtue of his marital rights.

If claimant brings herself within the rules prescribed by the act, she is entitled to make the purchase. The question of good faith in this, as in other cases, is one of fact, to be determined by proper proceedings.

I am of the opinion that the rule announced by Secretary Schurz, and consistently followed, should govern the disposition of this case. And this conclusion seems to be in line with the contemporaneous construction of this Department and of your office. I have caused the records to be examined and fail to find that the right of a married woman to make such entry was ever denied prior to 1887.

Said decision is accordingly reversed, and if claimant be found otherwise qualified, the entry will pass to patent.

RAILROAD GRANT—ACT OF JUNE 22, 1874.

ST. PAUL AND SIOUX CITY R. R. CO.

Lands within the indemnity limits of a grant do not afford a basis for relinquishment and selection under the act of June 22, 1874.

A certification on such a basis is erroneous, and proceedings for the recovery of title should be instituted under the act of March 3, 1887.

Secretary Noble to the Commissioner of the General Land Office, January 23, 1890.

By letter of January 10, 1888, your office transmitted two lists of lands, stated to have been erroneously certified to the State of Minnesota for

the benefit of the Winona and St. Peter and the St. Paul and Sioux City Railroad Companies, under the grants of land to that State, for railroad purposes, made by the act of March 3, 1857 (11 Stat., 195), and amendments.

List "B" in said letter comprised lands in the even sections lying along said roads, which had been so certified in lieu of other lands, in the odd sections relinquished, and claimed to be within the purview of the relinquishment act of June 22, 1874, (18 Stat., 194).

On February 21, 1888, your office was instructed to lay a rule upon the companies to show cause why proceedings should not be taken in accordance with the provisions of the adjustment act of March 3, 1887, (24 Stat., 557), to secure the restoration of said lands to the government, and to report the showing made by the company and the opinion of your office thereon, to this Department (6 L. D., 544).

By letter of September 15, 1888, report was made on the showing of the St. Paul and Sioux City Railroad Company, in response to a rule in respect to thirteen described tracts of the class contained in list "B."

It appears from said report and the answer of the company, that all thirteen of the relinquished tracts, which were claimed as bases under the act of 1874 for the certification in question, were outside of the granted and within the indemnity limits of said road, and were not formally selected at any time as indemnity lands by the company, in lieu of any lost in place to its grant.

The company asserts, however, that its waiver of claim to these lands, by relinquishment, was, in effect, a selection thereof, a waiver of claim being "tantamount in law to the assertion of the claim." This "assertion of claim," if there was one, it is to be observed, was not made until long after said tracts were covered by the settlement claims.

In its answer the company avers that "The withdrawal of lands for the benefit of this respondent was made long prior to the allowance of the entries shown by the record" upon the relinquished tracts.

In answer to this, in the report from your office, the dates of the indemnity withdrawals for the company are given, as well as the dates of the respective entries and initiation of the settlement claims upon the relinquished tracts; and it is thus made apparent that the claims and entries existed prior to the time when the indemnity lands were withdrawn by executive order for the benefit of said company.

This fact being ascertained by the official records is conclusive of the case, in any aspect in which it is presented by the ingenious answer and argument in behalf of the company, and makes discussion thereon unnecessary; for if, as claimed, but not conceded, the company could acquire vested rights before selection in lands withdrawn for indemnity purposes, it could have no such rights in any portion of the public lands before their withdrawal, certainly none to the prejudice of the actual settlers. Nor can the company be permitted, after withdrawal, to use lands to which prior claims had attached as bases for a claim to select other lands under said relinquishment act.

But beyond this, it is apparent, that the lands relinquished were not of that class contemplated by said act, which applies only where some of the lands "granted" are found in the possession of an actual settler, whose entry or filing was allowed "*subsequent* to the time at which, by the decision of the land office, the right of said road was declared to have attached to such lands." The lands in question lacked two essential characteristics of those described in the act: they were not of the class recognized as "granted;" and the settlement claims thereto were not filed *subsequent* to the time when the right of the company was declared to have attached to them. As to the distinction in legislation between "granted" and "indemnity" lands, in the case of *Barney v. Winona & St. Peter Railroad Company* (117 U. S., 228-232), 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.

Finding that the relinquished tracts did not come within the purview of the act of 1874, it follows that the certification over of other land in lieu thereof was erroneous and without authority of law; and the grant to said company being shown by the records of your office to be "unadjusted," it becomes my duty, under the construction of the adjustment act of March 3, 1887, *supra*, adopted by me, and recently expressed in the case of the Winona and St. Peter Railroad Company (9 L. D. 649), to initiate proceedings to restore the certified lands to the government.

You are therefore directed to demand from the St. Paul and Sioux City Railroad Company a reconveyance of the twelve tracts described in said report and admitted by that company to have been received from the State of Minnesota; and, if the company neglects or fails to make such conveyance within ninety days after demand, you will prepare and transmit to this Department a report of the facts, and a record of all the proceedings in relation to the matter, to be forwarded to the Attorney General that he may take proper action in accordance with the last recited act.

As to the other tract of land, described in said report, but which the company insists has never been conveyed to it by the State of Minnesota, you are directed to communicate with the proper authorities of that State, setting forth the circumstances of the case, and to ascertain if the statement of the company is correct. If so, you will request a reconveyance of said tract from the State; and, if otherwise, demand it from said company.

MINING CLAIM—EXCLUDED GROUND.

LONE DANE LODGE.

A patent will not issue on an application that expressly excludes therefrom the land upon which are situated the discovery shaft and improvements, and where the proof fails to show the discovery of mineral on the claimed ground or the requisite expenditure for the benefit thereof.

Secretary Noble to the Commissioner of the General Land Office, January 23, 1890.

This is an appeal by the Trophy Mining Company from your office decision of November 3, 1888, holding for cancellation its mineral entry No. 1354, made November 4, 1882, for the Lone Dane lode claim, lot No. 1507, consolidated Ten Mile mining district Leadville, Colorado.

On June 5, 1882, the said company filed its application for patent for said mining claim.

From the said application the ground in conflict between the said claim and nine other lots, surveys, or claims was expressly excepted.

The receiver's receipt and register's final certificate excepted and excluded from the sale and entry all that portion of the ground in conflict between the Lone Dane and the said nine several mining claims. The mining claim so entered embraced 0.953 acres and the receipt is for five dollars.

The approved plat of survey shows that the improvements consisting of the discovery shaft the basis of the Lone Dane location is within the space in conflict between the Lone Dane and Hitchcock lode claims.

The "Hitchcock" is one of the said nine claims which conflict with the Lone Dane.

The ground containing the said discovery shaft which is the sole improvement upon the Lone Dane location is therefore as stated expressly excepted from the said application and entry.

By office letter of December 10, 1884, your office required of the Lone Dane claimants "a certified copy of each of the location notices of said Hitchcock claim," but no action appears to have been taken by said claimants in this regard.

On May 25, 1886, your office required the claimant within sixty days to furnish "satisfactory evidence showing whether a vein or lode has actually been discovered within the "claimed grounds," and "an additional certificate by the surveyor general that five hundred dollars have been expended upon the claim as entered" and also a continuation of the abstract of title from May 27, 1882, to and including June 3, 1882.

By office letters of February 6 and July 17, 1888, your office allowed the claimant "additional time in which to furnish the required evidence." Thereupon an affidavit corroborated by a United States deputy mineral surveyor was, October 23, 1888, together with the required continuation of the abstract of title, filed in the local office by Herbert R. Smith "one of the principal stockholders in and trustee for said Trophy Mining Company." This affidavit sets out that the said dis-

covery shaft "constituting the improvements" upon the Lone Dane claim "although within the boundaries of the Hitchcock lode survey No. 1196, is well worth five hundred dollars and was intended for said Lone Dane lode and for no other," that the Trophy Mining Company is the owner of both of said claims; that it has "caused work to be done and improvements put upon each of said claims to the full value of five hundred dollars; that on or about April 1, 1882, ores containing silver, iron, and other metals were discovered in said discovery shaft in rock in place and that "the course of said vein in which said mineral bearing ores were discovered corresponds to the general course of said Lone Dane lode namely, a northeasterly course."

Your office by the decision appealed from found that the evidence submitted "utterly fails to show the discovery of mineral in the claimed ground, or that the vein or lode discovered in said shaft situated within the lines of said Hitchcock Lode claim extends in its onward course or strike through or into the land embraced in this entry."

It also appears by the said decision that the claimant failed to furnish the said additional certificate required by your office, to show "that the statutory expenditure has been made upon the claim as entered."

The Department has held that 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 proofs fail to show the discovery of mineral on the claim as entered, or the requisite expenditure for the benefit thereof. Antediluvian Lode and Mill Site (8 L. D., 602). See also Independence Lode (9 L. D., 571).

The record showing the land upon which all the improvements claimed for the Lone Dane entry to have been expressly excluded from the claimant's application for patent and there being no satisfactory proof of the discovery or existing of mineral on the claim as entered the case at bar comes squarely within the rule laid down in the case cited.

The decision appealed from is accordingly affirmed.

RAILROAD GRANT—ACT OF MARCH 3, 1887.

RANDALL *v.* ST. PAUL AND SIOUX CITY R. R. Co.

A *prima facie* valid and unexpired pre-emption filing of record at the date when the right of the company attached excepts the land covered thereby from the operation of the grant.

A certification of land thus excepted from the grant is erroneous, and proceedings for the recovery of title under the act of March 3, 1887, should be accordingly instituted.

The defense set up by the company to such action, that the land has passed into the hands of a *bona fide* purchaser, is one that must be made in the courts, as under said act the Department is not authorized to consider the same.

Secretary Noble to the Commissioner of the General Land Office, January 23, 1890.

On October 4, 1856, Boyd W. Randall, claiming settlement August 1, 1856, filed pre-emption declaratory statement for the S. $\frac{1}{2}$ of NW. $\frac{1}{4}$ of

Sec. 29, T. 111 N., R. 25 W., Tracy, Minnesota, which was then unoffered land. This tract fell within the six mile or primary limits of the grant to the State of Minnesota, for the benefit of what is now the St. Paul and Sioux City Railroad, made by the act of March 3, 1857 (11 Stat., 195); the map of definite location of the road, opposite to this land, was filed February 20, 1858. On September 3, 1859, said tract, among others, was advertised for public sale by notice No. 646 (not proclamation 643, as stated), whereby parties having pre-emption rights were required to make proof thereof and payment before October 9, 1859, otherwise their rights would be forfeited.

Randall did not make proof before the day of sale; the land was then offered, but not sold; it was thereafter, on August 26, 1864, certified to the State for the benefit of said road, as of its granted lands, the pre-emption filing not appearing to have been canceled on the record.

Notwithstanding this certification, the settler was allowed to purchase the land, and, on making payment therefor, cash entry certificate was issued to him, on April 28, 1866, which, however, was canceled on November 19, following; and an application for re-instatement of said entry was denied, on the ground that the certification divested this Department of all jurisdiction in the premises.

On this state of facts your office called upon the railroad company to show cause why proceedings should not be taken in accordance with the provisions of the adjustment act of March 3, 1887 (24 Stat., 556), to secure the restoration of said land to the United States. By office letter of September 15, 1888, was transmitted the answer of the company, to the effect that the certification carried complete title from the United States to the State and to the company, and that the land had been sold by the latter to an innocent purchaser for a valuable consideration, which sale, it is claimed, is a flat bar to any right to recover said land on account of error in the certification.

The pre-emption act of September 4, 1841 (5 Stat., 453), though authorizing entries upon unoffered lands, did not require a declaratory statement to be filed as to them; nor that proof and payment should be made within any fixed time, further than section fourteen thereof declared that nothing in said act should delay the sale of public lands beyond the day appointed for such sale; and that the provisions of said act should not be made available to any person who failed to make proof and payment before the day appointed for commencement of the sales.

The act of March 3, 1843 (5 Stat., 619), amended the former, and required that declaratory statement should be filed as to unoffered lands; and, also, whilst not repealing the forfeiture of the pre-emption claim, contained in the former act, gave to the defaulting pre-emptor, by its last section, "the right allowed by law to others to purchase the same (tract of land) by private entry, after the expiration of the right of pre-emption."

It was not until the passage of the act of July 14, 1870 (16 Stat., 279), that there was any limitation of time fixed within which pre-emptors were required to make proof and payment where the claim was for un-offered land.

It results then, that on February 20, 1858, the date when the rights of the railroad company might have attached to the tract in question, it was covered by a *prima facie* valid and unexpired pre-emption filing, whereby in the language of the granting act "a pre-emption right had attached to the same," and excepted the land from the grant. As stated by the supreme court, the filing of the map furnished the means of determining what lands a pre-emption claim "had attached to," for, by examining the plats in the land office, it could readily be seen if such a claim was of record and had attached to any, and what, lands within the primary limits of the grant. *Kansas Pacific Railway Company v. Dunmeyer* (113 U. S., 629, 640).

Being so excepted from the grant at that time, the land could not thereafter pass to the company, upon reverting to the public domain, either because of abandonment by the settler, or of his failure to prove up within proper time, which in this case was prior to the public offering. (*Ib.*, 641.)

Randall having failed to prove up as pre-emptor, was entitled to purchase the land in question by virtue of the proviso in section nine of the act of 1843, before mentioned. But failing to exercise this right of purchase until after the land had been certified over to the State, whereby the United States was divested of jurisdiction, his cash entry was properly canceled. What, if any, rights he acquired by his continued occupation of the land until 1882, when he was ejected by the company's alleged transferee, will be matter for determination by this Department when the legal title to the land is restored to the government.

This case clearly comes under the second section of the adjustment act of 1887, for unquestionably the tract in controversy was erroneously certified for the use and benefit of said company under the congressional grant to aid in the construction of its road.

The defense of *bona fide* purchaser, set up by the company, is one which will have to be made by it in court, as this Department is not authorized under the adjustment act either to take cognizance of it or accept a naked plea thereof; nor is it provided with proper machinery for ascertaining the facts necessary to sustain or defeat such a plea, even if receivable here.

The railroad grant in this case being shown by the records of your office to be "unadjusted," I deem it my plain duty, under the construction of the adjustment act of 1887, adopted by me, and expressed in the case of the Winona and St. Peter Railroad Company (9 L. D., 649), to initiate proceedings to restore the land to the government.

To this end, you are directed to demand from said company a reconveyance of the tract in question, and if it fails or refuses to make said

reconveyance within ninety days after demand, you will prepare and transmit to this Department a report of the fact, and a record of all proceedings, in relation to the matter, to be sent to the Attorney General that he may take proper action in the premises, in accordance with the provisions of the last cited act.

TIMBER CULTURE CONTEST—ADVERSE POSSESSION.

MCWAIN *v.* STONE.

A charge of non-compliance with law must fail where it is shown that the alleged failure was due to the illegal and adverse possession of another.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 23, 1890.

I have considered the case of *W. J. McWain v. Austin T. Stone* on appeal of the former from your office decision of May 12, 1888, dismissing his contest against the latter's timber culture entry for SE. $\frac{1}{4}$, Sec. 3, T. 101 N., R. 59 W., Mitchell, Dakota, land district.

It appears from the record that Stone made timber culture entry for said land August 7, 1878, and this contest was initiated by affidavit filed September 10, 1884.

One George A. McWain had initiated contest against said entry June 21, 1883, but the same was dismissed by the local officers, then re-instated by your office on appeal and again dismissed by the local officers for default of contestant.

On December 16, 1884, the local officers dismissed the contest in the case at bar upon the ground that the contest affidavit did not allege a cause of action and on appeal to your office a rehearing was ordered which was finally had January 11, 1886, and upon the evidence the local officers found in favor of contestant but your office on appeal reversed their decision.

It was alleged in the affidavit of contest that claimant had failed to plant tree seeds or cuttings during the year ending August 7, 1884, and up to date of filing of said affidavit and had not cultivated any portion of said tract during the sixth year after entry and up to date and that there were at the time not more than two dozen living trees growing upon said land.

Claimant admitted that between August 7, 1883, and September 10, 1884, there had been no planting of trees, seeds, or cuttings upon the tract, but in explanation says that in April and May, 1879, he had twenty acres broken and in the fall he had the same backset. That in the spring of 1880, he had the same sowed to wheat and five acres more were broken. In 1881 he had five acres of trees planted and the remainder of the plowed land sowed to wheat.

That in the spring of 1883 he contracted with one Laekner to cultivate said tract and to plant to tree seeds ten acres thereof one Blakesly

having pulled up all the trees upon the first five acres planted and removed the same to his own timber culture claim. That in the spring of 1884, he wrote to said agent and directed him to have said ten acres replanted after properly preparing the ground. That said agent sent him an estimate of the cost of so doing and upon receipt thereof he immediately wrote him to be sure and have said work done and he would forward the money to pay for it, and he heard nothing more from him until he learned that contest affidavit had been filed. That he attended the hearing on November 11, 1884, and that he procured teams, had ten acres properly plowed and prepared and planted to tree seeds, this was done about the middle of November, 1884, and in the spring of 1885, he caused to be set out upon said ten acres planted to seeds, between fifteen thousand and twenty thousand cottonwood cuttings.

That in March, 1882, he received notice that one Blakesly had been permitted by the local officers to file a declaratory statement for said land over his entry and that upon coming from his home in Michigan to see about it, he found Blakesly established thereon in a shanty which he had erected and was informed by him that the local officers had told him there was no entry marked on their books. Claimant says he then rented to one Hunter his homestead land adjoining said timber culture claim and contracted with him to cultivate the five acres of trees already planted and to plant at the proper time in 1882 the additional five acres required by law and thought he had every thing satisfactorily arranged, but in a short time he received word that Blakesly refused to permit Hunter to come upon the land to do said work and that he did not succeed in getting Blakesly to leave until October, 1882.

The claimant is corroborated by several other witnesses, and contestant does not attempt to contradict any of his statements.

After a careful examination of the whole record I concur in your said decision.

There is nothing in the record impeaching the good faith of entryman. It was through no fault of his that Blakesly was allowed to file his declaratory statement, take possession of the premises and destroy the five acres of trees then growing on the claim, and as soon as entryman again obtained possession, in 1883, he caused ten acres of ash seed to be planted; he made a reasonable effort to procure the replanting of the same in the spring of 1884, and his agent not being able to procure any one to do the work he finally succeeded in getting the planting done in the fall of 1884, and to make sure of a sufficient number of trees, he proceeded to set out from 15,000 to 20,000 cuttings in the spring of 1885.

Cultivation in 1884 could have been of no benefit as the tree-seeds planted in 1883 failed to grow and there was nothing to cultivate until he could succeed in getting the tract planted again.

I cannot find that the evidence shows such failure to comply with the law as to require cancellation of claimant's entry.

Your decision is accordingly affirmed.

TIMBER CULTURE CONTEST—INTERVENING HOMESTEAD RIGHT.

LINVILLE *v.* CLEARWATERS ET AL.

A homestead entry made on land covered by the prior timber culture entry of another not of record, and under which no right of possession was asserted or acts in compliance with law performed, is good as against every one except the timber culture entryman, and the right of a third party to contest said timber culture entry is excluded thereby.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 23, 1890.

I have considered the case of A. J. Linville *v.* D. W. Clearwaters and J. W. Williams on appeal of the former from your office decision of July 24, 1888, suspending his contest against the timber culture entry of said Clearwaters for the NW. $\frac{1}{4}$ Sec. 15, T. 1 N., R. 3. E. Tucson, Arizona, land district.

It appears from the record that on July 18, 1878, said Clearwaters made timber culture entry for said tract but the local officers neglected to enter the same upon the tract books of the office or to indicate thereon in any manner that such entry had been made, and on April 25, 1883, John W. Williams made homestead entry for the same land. Williams immediately established a residence upon said land with his family and has remained thereon ever since making valuable improvements estimated to be of the value of three thousand dollars.

It is shown that in fact Clearwaters never did anything whatever upon this land after entry, broke no land and there was nothing upon the land to indicate to Williams that there was any adverse claim to the land and the first knowledge the local officers had of Clearwaters' entry was the receipt of your office letter of September 22, 1885, holding Williams' entry for cancellation for conflict therewith.

The local officers attempted to give notice to Williams but directed the same to J. D. Williams and in consequence no appeal was taken and by your letter of January 21, 1886, his entry was canceled.

On August 13, 1886, Williams filed an application to have his entry re-instated alleging in an affidavit that he had with his family resided upon said land ever since his entry made April 25, 1883, and had made valuable improvements thereon. That from 1877 until the date of his entry he had lived within one mile of said land and that during all that time neither said Clearwaters nor any one else had ever made any attempt to cultivate or plant timber on any part of it and that the first knowledge or intimation of any conflicting claim or entry received by him was a letter from the register of the local office dated August 7, 1886, and received by him August 8.

This affidavit was corroborated by three others made by persons who lived near the land, and were to the effect that Clearwaters had never done anything whatever upon the land and that Williams had main-

tained a continuous residence thereon and had made valuable improvements upon the same.

On July 29, 1886, the appellant A. J. Linville initiated contest against the same timber culture entry of Clearwaters alleging failure to break or plant said land or any part of it to timber, and October 11, 1886, was set by the local officers for hearing and on the evidence the local officers found that Clearwaters had made no effort to comply with the timber culture law and recommended the cancellation of the entry and that said Linville be allowed the preference right of entry subject to whatever intervening right said Williams might have by reason of his application to re-instate his homestead entry.

By your office letter of December 10, 1887, the application of Williams to have his entry re-instated was denied but Williams was allowed for thirty days a preference right of contest against the entry of Clearwaters for thirty days after notice. Williams was notified by registered letter of December 16, 1887, in regard to said decision but did not file contest affidavit until March 14, 1888, which was rejected because not filed in time and upon appeal of Williams your office rendered the decision now complained of, which held that as Williams was allowed thirty days after the decision of your office became final he was allowed at least ninety days in which to file contest affidavit.

From a letter of the receiver transmitted with the record, it appears that Clearwaters filed relinquishment November 16, 1887.

I cannot concur in your conclusion that upon equitable grounds Williams should be given the preference right to contest the entry of Clearwaters because I know of no law or rule of the Department giving such preference right. I am of the opinion, however, that the rights of Williams are superior to those of Linville, and that for the reason that under the circumstances his entry was good against all persons except Clearwaters from the first.

The land was not at the time of entry in a state of reservation by reason of any act of Congress, it was not settled upon, improved by, or in the possession of another, nor was there upon the land itself any indication that any adverse claim existed. The records of the local office were silent as to any adverse claim or entry and as to all parties except Clearwaters the land was public land at the date of Williams' entry.

Clearwaters has relinquished and the entry of Williams should be re-instated.

Williams has since appeal filed certain affidavits tending to explain an erroneous entry by him under the homestead law and asking that his claim be transmuted to a pre-emption and that he be allowed to make final proof thereon. These papers I return for your action under the law and regulations governing such matters.

Your said office decision is modified as above indicated.

HOMESTEAD ENTRY SECTION 2294 REVISED STATUTES.

DAHON *v.* BLANCHET.

The defect in a homestead entry caused by the failure of the entryman to establish the residence required as a prerequisite, where the preliminary affidavit is executed before a clerk of court, is cured by the establishment of residence prior to the intervention of an adverse right.

A contest against the entry, filed after residence is thus established will not defeat the right of the entryman to amend his entry by filing a supplemental affidavit.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 23, 1890.

I have considered the appeal of Lucien Dahon, from the decision of your office dated September 5, 1888, in the case of said Dahon *v.* Oliver Blanchet, dismissing Dahons contest against Blanchet's homestead entry for the W. $\frac{1}{2}$ SW. $\frac{1}{4}$ Sec. 31, T. 11 S., R. 5 E., New Orleans land district, Louisiana.

On September 12, 1881, Blanchet made homestead entry for said described tract; and on March 15, 1886, Dahon initiated a contest against said entry alleging that said Blanchet had—

Failed to cultivate the land embraced in his homestead entry within a period of six months next succeeding the making of said entry; that said entry was not settled upon and cultivated by said party as required by law; that said Oliver Blanchet, jr., was not residing upon or cultivating said land as required by law, at the time he made his entry, as sworn to by him in his homestead affidavit No. 6135; that at the time he swore he was residing upon and cultivating said land, he was living upon and cultivating land owned by his father, and did not move upon said land until after the 8th day of October A. D. 1881.

A hearing was ordered and had. Both parties appeared in person and by their respective attorneys, and on August 2, 1886, the local officers found in favor of contestant and recommended that the entry be canceled.

On December 27, 1886, claimant appealed, and on September 5, 1888, your office reversed the findings of the local office and dismissed the contest, whereupon contestant appealed.

It clearly appears from the evidence adduced in the case at bar, that within thirty days after claimant had made his said homestead affidavit and the same was filed in the local office, he built a dwelling house on the land covered by his entry, and established his residence therein, which was continuous; that every year since 1881, up to the initiation of this contest, he broke, cultivated and cropped a portion of said land and made other improvements thereon.

The facts thus established satisfactorily show the good faith of the entryman in the premises. It is true that the entry made upon an affidavit sworn to before some officer other than the local officers and before the entryman had established a residence on the land

claimed was defective. This defect was not however necessarily fatal but was one that might be cured by the establishment of a residence prior to the intervention of an adverse claim. In view of the fact that the entryman established his residence before the intervention of an adverse claim, that he has acted in good faith and that the contestant does not assert any claim other than that of a successful contestant, I am of the opinion that the entryman should be allowed to cure the defect in his entry by filing a supplemental affidavit. *Brassfield v. Eshom* (8 L. D., 1) and authorities there cited.

You will therefore direct the local officers to notify claimant that he will be allowed thirty days from receipt of notice hereof within which to file said supplemental affidavit.

The decision appealed from is modified accordingly.

PRE-EMPTION ENTRY—APPROXIMATION.

ISAAC M. GALBRAITH.

A pre-emption entry embracing lands in different sections must approximate one hundred and sixty acres as nearly as practicable.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 24, 1890.

I have considered the appeal of Isaac M. Galbraith from your office decision of February 21, 1888, affirming the action of the register and receiver of the United States land office, at Seattle, Washington Territory, December 28, 1887, in rejecting said Galbraith's pre-emption declaratory statement for the N. $\frac{1}{2}$ of NE. $\frac{1}{4}$, Sec. 17, SW. $\frac{1}{4}$ of SE. $\frac{1}{4}$, and lot 9, Sec. 8, and lot 4, Sec. 9, T. 37 N., R. 5 E., containing one hundred and seventy-six acres.

The settlement on these lands is alleged to have been made November 1, 1883; the plat of the survey of the township, i. e., 37, was received with surveyor-general's letter of September 5, 1885. By reference to the plat of said lands, it is found that they are situated in three different sections, i. e., 8, 9 and 17, aggregating one hundred and seventy-six acres. Excluding the lot 4, in Sec. 9, there is still left one hundred and sixty-one. Appellant, therefore, has the right of entry to one hundred and sixty-one acres, by legal subdivisions, from the one hundred and seventy-six acres embraced in the tract described in the declaratory statement. It is obvious that he can not, under the law, enter the whole of said tract. But it appears that appellant's improvements, estimated at \$300.00, are situated on lot 4, in Sec. 9, which lot, by the survey, contains only fifteen acres. By relinquishing this lot, he can get from the residue one hundred and sixty-one acres. By retaining it and releasing one of the legal subdivisions, he can get but 136 acres.

Reference is made to the case of Henry P. Sayles (2 L. D., 88), as announcing the rule of this office, that, where the excess above one hundred and sixty acres is less than the deficiency would be should a subdivision be excluded from the entry, the excess may be included, and the contrary where the excess is greater than the deficiency; and the application of this rule is invoked in behalf of appellant in this case.

It can not apply in this case. There are five subdivisions in this proposed entry—four of them, of nearly forty acres each, amount to one hundred and sixty-one acres; one of them (lot 4, in Sec. 9, and containing his improvements) has only fifteen acres. There is no rule of approximation that will permit appellant to enter the fifteen acres and also the additional one hundred and sixty-one acres.

I find no error in your said office decision, which is accordingly affirmed. The papers in the case are herewith returned.

RAILROAD GRANT—ACTS OF JUNE 3, 1856, AND MAY 5, 1864.

WISCONSIN CENTRAL R. R. CO.

The grant of June 3, 1856, is not repealed by the act of May 5, 1864, only to the extent that the later act destroys the continuity of the line provided for, or made possible, under the former grant.

Lands reserved, by executive order, for indemnity purposes under the grant of June 3, 1856, are by the express terms of section 6, act of May 5, 1864, reserved and excluded from the grant made by section 3, of said act.

The act of 1864, operated upon the indemnity limits of the grant of 1856 so as to convert four miles of said limits into place limits under said act of 1864 in favor of the roads *common* to both grants, but it did not confer any rights upon this road where its grant overlaps the limits of the prior indemnity withdrawal under the grant of 1856, as the rights of said road date from, and exist only under the act of 1864.

Secretary Noble to the Commissioner of the General Land Office, January 24, 1890.

This is an appeal by the Wisconsin Central Railroad Company from your office decision of October 15, 1888, holding for cancellation certain lists (inappropriately styled "selections" in your said office decision) made by said company July 2, 1887, of lands claimed as a part of its grant under the act of May 5, 1864 (13 Stat., 66), to the extent that they included the following described tracts, situated in the Ashland land district, in the State of Wisconsin: [List omitted.]

These lands are within the ten miles, or primary limits of the grant of May 5, 1864, now owned by said Wisconsin Central Company, and are also within the fifteen miles, or indemnity limits of the grant (Bayfield Branch) under the act of June 3, 1856 (11 Stat., 20), now owned by the Chicago, St. Paul, Minneapolis and Omaha Railway Company.

The matters involved in the appeal make it necessary to refer, at

some length, to the provisions of these two acts of Congress, and the subsequent proceedings thereunder.

By the first section of the act of June 3, 1856, there was "granted to the State of Wisconsin, for the purpose of aiding in the construction of a railroad from Madison, or Columbus, by the way of Portage City to the St. Croix river or lake, between townships twenty-five and thirty-one, and from thence to the west end of Lake Superior, and to Bayfield; and also from Fond du Lac on Lake Winnebago, northerly to the State line, every alternate section of land designated by odd numbers for six sections in width on each side of said roads, respectively." "But," the act declares,

in case it shall appear that the United States have, when the lines or routes of said roads are definitely fixed, sold any sections or 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 State, to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tier 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 right of pre-emption has attached, as aforesaid which lands (thus selected in lieu of these sold, and to which pre-emption has 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 State of Wisconsin for the use and purposes aforesaid: *Provided*, That the lands to be so located shall in no case be further than fifteen miles from the line of the roads in each case, and selected for and on account of said roads;

and there was added the further proviso: "That any and all lands reserved to the United States by any act of Congress for the purpose of aiding in any object of internal improvement, or in any manner for any purpose whatsoever," should be reserved to the United States, and excepted from the operation of the act, except so far as necessary for the location of the routes of the said railroads, in which case the right of way only was granted.

The fourth section of the act, after prescribing the manner in which the lands thereby granted were to be sold by the State, to the end that the purpose of Congress relative to the construction of said roads might be accomplished, further provided that "if said roads are not completed in ten years, no further sales will be made; and the land unsold shall revert to the United States."

This grant was formally accepted by the State of Wisconsin on October 8, 1856, upon the terms and conditions contained in the act, assumed and the State and undertook the trust thereby granted.

On October 11, 1856, the State, by an act of its legislature, authorized the La Crosse and Milwaukee Railroad Company to construct and operate the roads described in the act of Congress, from Madison or Columbus, *via* Portage City to St. Croix river or lake, and thence to the west end of Lake Superior, and to Bayfield; and granted to that company, for the purpose of aiding such construction, and upon certain terms and conditions not necessary to be here set forth, all its interest and estate, present and prospective, in the lands granted by said act of

Congress for the benefit of the roads, between the points and along the routes named.

The La Crosse and Milwaukee Company promptly accepted the grant thus conferred by the State, upon the terms, conditions, etc., therein contained.

On October 22, 1856, the Commissioner of the General Land Office issued an order addressed to the registers and receivers of the land offices at Superior City, Hudson and Eau Claire, respectively, in the State of Wisconsin, in which he instructed them, among other things, as follows:

Upon the filing in your offices of the duly certified map of the line of route as 'definitely fixed,' of any of the roads referred to in the act entitled 'An act granting public lands to the State of Wisconsin, to aid in the construction of railroads in said State,' approved June 3, 1856, you will, without awaiting further instructions from this office, cease to permit locations or entries by pre-emption or for any purpose whatever of the lands within fifteen miles of said route.

In March, 1857, the La Crosse and Milwaukee Company, with the consent and approval of the State, obtained through another act of its legislature, transferred and conveyed to the St. Croix and Lake Superior Railroad Company all its rights and privileges relative to the construction of that portion of the road running northward from a point of intersection with the St. Croix river or lake, to the west end of Lake Superior, and to Bayfield, and in regard to the use and disposal of that portion of the congressional grant applicable to such construction, which had been conferred upon the grantor company by the State under the act of its legislature, of October 11, 1856. By the same instrument the St. Croix and Lake Superior Company agreed, on its part, to construct the designated roads north from St. Croix river or lake to the west end of Lake Superior, and to Bayfield, within ten years from June 3, 1856, the date of the congressional grant.

The map of definite location of that part of the main line of road from Madison *via* Portage City to the St. Croix river or lake, was filed by the La Crosse and Milwaukee Company September 7, 1857; the map of definite location of the main line north from St. Croix river or lake to the west end of Lake Superior was filed by the St. Croix and Lake Superior Company March 2, 1858, and the map of definite location of the Bayfield branch was filed by the same company July 17, 1858. These several maps of location were filed under the provisions of the act of June 3, 1856.

That part of the main line, running from Portage to Tomah—a distance of about sixty-one miles—was constructed by the La Crosse and Milwaukee Company in the spring of 1858, and has been used since April of that year for freight and passenger purposes.

It further appears that on March 1, 1859, the Commissioner of the General Land Office transmitted to the registers and receivers of the several land offices hereinbefore mentioned, "for their information in

the matter a diagram of the district of lands subject to sale" at their respective offices, upon which had been designated "the lines of route, and the lines of the six and fifteen miles limits of the 'St. Croix and Lake Superior,' and the Bayfield line of railroads, to aid in the construction of which a grant of lands was made to the State of Wisconsin by act of June 3, 1856," and instructed them that, "as all the vacant tracts in the *odd* numbered sections, outside of the six and within the fifteen miles limits of the roads, have been selected by the agent of the State, in lieu of the lands sold and pre-empted in the alternate sections granted by the above mentioned act, such tracts, you will, of course, *continue to reserve*, as heretofore, from sale or location for any purpose whatever."

This "selection" by the agent of the State was not a selection of specific tracts, in lieu of ascertained losses in the granted limits of the road, but appears to have been simply the exercise of a supposed option to take indemnity under the act of June 3, 1856, either from the odd or even numbered sections, inasmuch as that act did not specify which should be taken; and it was in view of this designation by the State of the odd numbered sections outside of the six and within the fifteen miles limits of the grant, as the source from which its indemnity for losses in the six miles limits should be supplied (and not their selection for losses already sustained), that the Commissioner ordered the local officers to "continue to reserve" such odd numbered sections "from sale or location for any purpose whatever." The designation was in fact made before the several maps of definite location of the roads were filed, and was apparently done merely as a matter of information to the Commissioner of the General Land Office, in order that he might know, when such maps of definite location should be filed, what lands to withdraw from sale or location, for the purpose of securing to the State the indemnity privileges granted by the act of Congress.

It also appears that after the main and branch lines of road were definitely located, a large amount of indemnity lands was selected and certified to the State, under the act of June 3, 1856, but no part of the main line, except the sixty-one miles aforesaid, from Portage to Tomah, nor of the branch line to Bayfield, was constructed until after the passage of the act of May 5, 1864, *supra*, the provisions of which we come now to notice.

By the first section of that act there was

granted to the State of Wisconsin, for the purpose of aiding in the construction of a railroad from a point on the St. Croix river or lake, between townships twenty-five and thirty-one, to the west end of Lake Superior, and from some point on the line of said railroad, to be selected by said State, to Bayfield, every alternate section of public land designated by odd numbers, for ten sections in width on each side of said road, deducting any and all lands that may have been granted to the State of Wisconsin for the same purpose, by the act of Congress of June three, eighteen hundred and fifty-six, upon the same terms and conditions as are contained in the act granting lands to the State of Wisconsin, to aid in the construction of railroads in said State, approved June three, eighteen hundred and fifty-six.

The second section provided for the construction of a railroad from Tomah to the St. Croix River or Lake, between townships twenty-five and thirty-one, making a like grant to the State for that purpose, of every alternate odd numbered section of public land, for ten sections in width on each side of said road, deducting any and all lands that may have been granted to the State for the same purpose by the act of June 3, 1856, upon the same terms and conditions as are contained in that act.

The two sections are almost identical in the language used, and make the same grant in aid of each road. The indemnity limits were increased from fifteen to twenty miles in each case, and the indemnity selections were to be made by the State in the same manner and upon like conditions, as were prescribed in the act of June 3, 1856. It was also provided that no selection or location should be made in lieu of lands received under the grant of June 3, 1856, but that such selection and location could be made for the benefit of the State, and for the purposes stated, to supply any deficiency under said grant of 1856, should any such deficiency exist.

By section three of the act there was granted to the State,

for the purpose of aiding in the construction of a railroad from Portage City, Berlin, Doty's Island, or Fond du Lac, as said State may determine, in a northwestern direction, to Bayfield, and thence to Superior, on Lake Superior, every alternate section of public land, designated by odd numbers, for ten sections in width on each side of said road, upon the same terms and conditions as are contained in the act granting lands to said State to aid in the construction of railroads in said State, approved June third, eighteen hundred and fifty six.

It will be observed that this section provided for the construction of an entirely new and distinct railroad, different from any of the roads mentioned in the act of 1856. Provision was made for indemnity selections within twenty miles of the line of the road, upon conditions similar to those prescribed in sections one and two of the act, except that no reference was made to deductions of lands granted by or received under the act of 1856, there having been no grant as to this road by that act.

By section five, the time limited for the completion of the roads under the act of June 3, 1856, was extended to a period of five years from and after the day of the passage of this act.

By section six, it was further enacted: That any and all lands reserved to the United States by any act of Congress for the purpose of aiding in any object of internal improvement, or in any manner for any purpose whatsoever, and all mineral lands, be and the same are hereby reserved and excluded from the operation of this act, except so far as it may be necessary to locate the route of such railroads through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States.

The ninth, and last section provided, that if the road mentioned in the third section was not completed within ten years from the passage of the act, no further patents should issue, or sales be made of the lands

granted in aid thereof, and that such lands, at that date unsold, should revert to the United States.

On March 20, 1865; the State formally accepted the grant of 1864, and the benefits of the same were subsequently conferred upon three different railroad companies, as follows: The St. Croix and Lake Superior Company, as to the road mentioned in the first section thereof; the Tomah and St. Croix Company, as to the road mentioned in the second section; and the Portage, Winnebago and Superior Company, as to the road mentioned in the third section.

The act of the State legislature, conferring the grant, as to the road described in said third section, upon the Portage, Winnebago and Lake Superior Company, required that company to construct the line of said road upon and along a route running from Portage, by the way of Ripon, in the county of Fond du Lac, and Berlin, in the county of Green Lake, to Stevens Point, and thence to Bayfield, and thence to Superior, on Lake Superior. Congress, by act of June 21, 1866 (14 Stat., 360), gave its assent to this requirement of the State, as to the location of the route of said road, and consented also to the application of the lands granted by said third section to the construction thereof. The road was definitely located by said Portage, etc., Company, on the line of route thus prescribed November 10, 1869. By act of March 3, 1875 (18 Stat., 511), Congress gave its further consent to a change in the route of said road between Portage and Stevens Point, so as to shorten the same. As thus shortened the road was finally constructed from Portage, direct to Stevens Point, and from thence to Ashland, on Lake Superior, and it is now owned, together with all benefits accruing under the third section of said grant of 1864, by the Wisconsin Central Railroad Company—the appellant here—which will, for convenience, hereinafter be referred to as the Central Company.

The St. Croix and Lake Superior Company filed no map of definite location under the act of 1864, but on April 22, 1865, the board of directors of that company accepted and adopted the old line as located under the act of 1856, as the definite location of its route under the act of 1864, both as to the main line from St. Croix river or lake to Superior, on Lake Superior, and as to the Bayfield branch. These roads have been constructed, and are now owned and operated by the Chicago, St. Paul, Minneapolis and Omaha Railway Company, hereinafter referred to as the Omaha Company.

The Bayfield branch of the Omaha road as it approaches Lake Superior in its northeasterly course, approaches in a lateral direction the line of the Central Company's road as it proceeds in a northwesterly course to Ashland on Lake Superior, so that there is an intersection, or overlapping of the primary and indemnity limits of the Central Company's road, with the primary and indemnity limits of said Bayfield branch of the Omaha road, both under the act of 1856, and under the act of 1864.

The lands here in question are within the ten miles granted limits of the Central Company's road, and also within that part of the fifteen miles indemnity limits under the act of 1856, of the Bayfield branch of the Omaha road, which lies outside of the enlarged limits (from six to ten miles) of that branch under the act of 1864. They were listed by the Central Company, as we have seen, on July 2, 1887, as having inured to it as a part of its grant under the act of 1864.

These lists were held for cancellation by your office upon the stated ground that the lands covered thereby, having been withdrawn for indemnity purposes under the act of 1856, prior to the passage of the act of 1864, were reserved for all purposes from the grant under the latter act to the Wisconsin Central Railroad Company; and the case of the Omaha Company, decided by this Department, October 7, 1887 (6 L. D., 195), is cited as authority for such action.

In that case, wherein the Wisconsin Central Company was not a party to the record, and was not heard upon the questions decided, it was held by my predecessor, Secretary Lamar,

that the lands within the fifteen miles limits of the withdrawal under the act of 1856 were reserved from the grant under the act of 1864, in favor of the Wisconsin Central Company, and that the Omaha Company is entitled to the whole of the designated sections within the six miles limits, and to be indemnified for losses therein out of the designated sections within the fifteen miles limits, to the exclusion of the other company, as fully as though the grant to it had never been made.

The alleged grounds of this appeal, substantially stated, are :

First : That the act of May 5, 1864, operated as a repeal of the act of June 3, 1856, except as to rights actually vested thereunder when the act of 1864 was passed, and that, in view of such repeal, the respective rights of the Omaha and Central Companies date from and exist only under and by virtue of the act of 1864.

Second : That when the line of the Central Company's road was definitely located in November 1869, the lands here in question, though having been previously withdrawn and reserved for indemnity purposes of the Bayfield branch of the Omaha road, under the act of 1856, were not for that reason in such a state of reservation as served to except and exclude them from the operation of the grant under the third section of the act of 1864.

It is proper here to state that on February 12, 1884, an agreement was made by the Omaha and Central Companies, a copy of which is on file in this record, by which an amicable adjustment was made of all controversy existing between the said companies, relative to the lands in the overlapping limits of the several grants under the acts of 1856 and 1864. By the twelfth section of that agreement, it is stipulated that the Central Company shall have all the lands in the overlap, lying east of the easterly ten miles limit of the Bayfield branch of the Omaha road and northeast of the westerly ten miles limit of the Central Company's road. The lands in question are covered by said twelfth section, and there is therefore no controversy between these companies relative

to the same. The controversy here is solely between the United States and the Central Company.

The case has been argued with great earnestness by counsel for the company, both orally and by printed brief, and I have sought to give it that careful consideration which is due to the importance of the questions presented.

It is reasonably clear, I think, that by the act of June 3, 1856, Congress intended to provide for the construction of one continuous line of railroad from Madison or Columbus, *via* Portage City and the St. Croix river or lake, to the west end of Lake Superior, and to Bayfield; or, at any rate, that the construction of such continuous line of road, by one company, was rendered possible by that act. It is also clear to my mind, that the act of 1864 was intended to destroy, and did destroy, the continuity of the line provided for or made possible by the act of 1856.

It should be stated in this connection, that prior to the passage of the act of 1864 the grant under the act of 1856, either by express grant from, or with the approval of the State, had been allotted to and the rights thereunder become vested in several different companies (over three in number) for the construction of as many separate and distinct portions of the line of road therein described.

Instead, therefore, of making an enlarged or additional grant for the one entire and continuous line described in the act of 1856, the act of 1864, apparently recognizing and approving the scheme theretofore adopted by the State, destroyed the continuity of the grant under the former act, and divided the whole line of road into three distinct parts; making enlarged grants of land, with increased indemnity limits, in aid of each of the two unconstructed parts, namely, from Tomah to the St. Croix river or lake, and from that point to Lake Superior, and to Bayfield, but not legislating as to the third part, from Madison to Tomah, the greater portion of which, as we have seen, had already been constructed.

There are no express words of repeal used in the act of 1864, nor is there in my judgment, such positive repugnancy between the essential provisions of the two acts, that they can not stand together. It is a well settled principle of the law, that repeals by implication are not favored, and are never allowed, except in cases where inconsistency and repugnancy are plain and unavoidable. Potter's *Dwarris on Statutes*, 156; *McCool v. Smith*, 1 Black (U. S.), 470. Ordinarily, express language is used when a repeal is intended, and in the absence of such express repeal none will be declared, unless the two acts are irreconcilably inconsistent; and then only to the extent of such irreconcilable conflict. The implication of repeal must be a necessary one, and when two acts can be reconciled by a fair and reasonable construction, it must be done. "If two statutes on the same subject can stand together without destroying the evident intent and meaning of the later one, there will be no repeal." *Sedgwick on Statutory Construction*, 98. In *McCool v. Smith*, *supra*, it was said by the supreme court, that "a repeal by im-

plication is not favored; the leaning of the courts is against the doctrine, if it be possible to reconcile the two acts of the legislature together." See also case of "The Distilled Spirits," 11 Wall., 356.

Applying to the act of 1864 the principle of construction thus enunciated, I see nothing in the provisions of that act so repugnant to, or irreconcilably inconsistent with the main features of the act of 1856, as to warrant me in holding that the one was intended by Congress to operate as a repeal of the other. On the contrary, the more natural and reasonable conclusion to be drawn from a careful comparison of the two acts is, it seems to me, that Congress intended the grant of 1864 to be auxiliary to, and in aid of the general and main purpose of the grant of 1856, as to the roads common to both; and, without impairing any rights acquired or vested under the act of 1856, to destroy for the future the continuity of the one line of road rendered possible of construction by that act, and to make the coterminous principle, except as to rights already vested, applicable to the unconstructed portions of such line. The act of 1864, if at all repugnant to the act of 1856, is only so to the extent that it abrogates the continuous principle which it was possible to have been applied to the grant under the former act, and substitutes instead thereof the coterminous principle as to the roads yet to be constructed. This, in effect, it may be said, had already been done by the State in conferring, in the manner stated, the grant of 1856 upon several different companies, for the construction of separate and distinct portions of the road therein described; and to that extent only, in my judgment, can it be held that the later act, by implication, repealed the former.

But, furthermore, it seems to me that the fifth section of the act of 1864 furnishes a conclusive argument against the theory of repeal by implication. By that section the time fixed and limited in the act of 1856 for the completion of the roads therein mentioned was extended for the period of five years from the date of the act. It will be observed that it was the *time* fixed and limited in the act of 1856 which was *extended* by the act of 1864. Now, it can not be reasonably claimed that, if Congress intended the act of 1864 to operate as a repeal of the act of 1856, and that the rights of the State as to all roads mentioned in the later act should, in common, date from and exist only under that act, it would, in the same breath, have "extended" the time fixed for the completion of the roads, in the very act intended to be repealed. It is hardly probable that Congress would in a repealing act undertake to *extend* the time fixed for the accomplishment of a certain purpose, in the act repealed. It is much more reasonable to suppose, in this instance, that if Congress had intended the act of 1864 as a repeal of the act of 1856, a new limitation of time for the completion of the roads, entirely distinct from and independent of that fixed in the act of 1856, would have been prescribed in the repealing act. But instead of this, Congress extended the time fixed in the act of 1856 for the completion of the roads men-

tioned in both acts, thus necessarily implying a continuance in force, as to those roads, of the material provisions of the act of 1856; while, as to the road mentioned only in the act of 1864 (now the Wisconsin Central), a new limitation of time is prescribed for its completion, to wit, ten years from the date of that act. (See Sec. 9, act 1864). The reasonable and, to my mind, almost irresistible conclusion, is that Congress did not intend by the act of 1864 to repeal the act of 1856, except probably to the extent hereinbefore indicated, but that by the later act an enlarged grant of lands, with increased indemnity limits, was given to the State for each of the roads common to both acts, and a distinct and independent grant was made to the State, with similar indemnity privileges, for the road not mentioned in the former act; that the rights of the State and its transferees, relative to the last mentioned grant, date from and exist only under the act of 1864, while the rights of the State and its transferees relative to the roads common to both acts, respectively, date from and exist under and by virtue of both acts.

Reference is made by counsel for the company to what is known as "The St. Croix Land Case" (Madison and Portage Railroad Company *v.* The North Wisconsin Railway Company and others not reported), decided in 1879, in the circuit court of the United States for the western district of Wisconsin, in which Mr. Justice Harlan, sitting with Judges Drummond and Bunn, delivered the opinion of the court. This opinion is referred to and relied upon, as having established in that case the principle now contended for. The case was carried to the supreme court on appeal, but the matters in dispute therein having been compromised by the parties, the appeal was not prosecuted to a final hearing.

I do not, however, understand the decision of the circuit court in that case as holding, that the act of 1864 operated as a repeal of that of 1856. True, some of the expressions used by Justice Harlan, in delivering the opinion, when considered by themselves, point in that direction, but, at the same time, other expressions were used in the opinion which point to the opposite conclusion, and it must be borne in mind that the precise question here presented was not involved in that case. The real contention in that case was that, notwithstanding the act of 1864, the continuous principle should be applied to the adjustment of the grant under the act of 1856, as to all lands embraced within the prescribed limits of that grant, in favor, as well of those portions of the main line of road constructed after the act of 1864, as of that portion from Portage to Tomah, which was constructed prior to the passage of that act. The court decided against this contention and dismissed the complainant's bill and the cross-bills filed in the case, holding

that the purpose of the act of 1864 was to break the continuity of the original main line, from Tomah *via* St. Croix River or Lake, to the west end of Lake Superior, and to Bayfield, and devote to the construction of separate and distinct portions of that line an increased quantity of lands beyond the amount granted by, or which could have been made available under the act of 1856;

and further, that by its acceptance of the grant of 1864, the State bound itself to an administration of the grant upon the coterminous theory, except as to rights acquired or vested by virtue of the act of 1856, and the proceedings subsequently had. The opinion does not in my judgment sustain the contention of counsel here, nor do I see anything in it which can be considered as really antagonistic to the views I have herein expressed. These views, moreover, are in harmony with the previous rulings of this Department in matters relating to the construction of said acts of 1856 and 1864 (Wisconsin Railroad Farm Mortgage Land Company, 5 L. D., 81; Chicago, St. Paul, Minneapolis and Omaha Ry. Co., 6 L. D., 195; case of the same company, 9 L. D., 221; and another case of the same company, 9 L. D., 483), and the conclusion arrived at is fully sustained, in my opinion, by the case of *Schulenberg v. Harriman*, 21 Wall., 44, in which the supreme court had under consideration the same two acts of Congress out of which the present controversy has grown, and wherein they are spoken of and treated by the court, as separate grants, the main provisions of which, respectively, were then (1874) still in force.

My conclusion, therefore, is that the act of 1856 is not repealed by the act of 1864.

This brings me to a discussion of the other question presented by the appeal, namely, as to whether the lands in controversy were reserved from the grant of 1864 to the Wisconsin Central road. It has been already shown that these lands were ordered withdrawn from entry or location by the Commissioner of the General Land Office, October 22, 1856; and that on March 1, 1859, after the routes of the roads had been definitely fixed under the act of June 3, 1856, a further order was made by the Commissioner, directing the local officers to "continue to reserve" as theretofore, the "vacant tracts in the odd numbered sections outside of the six miles and within the fifteen miles limits of the roads." These lands are covered by this order of reservation which was in full force when the act of 1864 was passed, and remains to this day unrevoked by executive direction.

It is earnestly contended by counsel that this was not such a reservation as served to exclude the lands embraced therein from the operation of the act of 1864; and in support of this contention it is argued that a withdrawal for indemnity purposes confers no vested right to the land, but only a right of selection, which may be defeated by a subsequent grant, and the right thus become "a mere barren right."

It may be fully conceded, so far as this case is concerned, that an executive withdrawal of lands for indemnity purposes, constitutes no bar to a subsequent grant by Congress of the same lands. That is not the question here presented. The question is whether Congress did not, by the sixth section of the act of 1864, expressly exclude and intend to exclude, the lands now in controversy from the operation of that act. By that section it was enacted "that any and all lands reserved to the

United States by any act of Congress, for the purpose of aiding in any object of internal improvement, or *in any manner for any purpose whatsoever,*" should be "reserved and excluded" from the operation of the act. Now while these lands, (being within the indemnity limits of the grant of 1856) had not been, at the date of the grant of 1864, strictly speaking, reserved by "act of Congress" for purposes of "internal improvement," they had been prior to that date, reserved by competent authority to the United States, in order that the purposes of the grant of 1856, might, in all respects, be fully accomplished. They were essentially "reserved lands" at the date of the grant of 1864. It is not necessary that they should have been reserved by "act of Congress," or, for purposes of "internal improvement." The excepting section of the act of 1864 was made so broad and comprehensive as to cover "all lands reserved" "*in any manner for any purpose whatsoever.*" It cannot be questioned that these lands were by competent authority *actually* "reserved to the United States," from sale, entry, or location, and that they were so reserved in consequence of the act of 1856, and for the purpose of securing to the State the indemnity privileges granted by that act. They were reserved to the government to enable it to carry into effect the provisions of the act of 1856, granting certain lands for railroad purposes, and the right to select indemnity for lands lost in place, and were therefore, in the full sense of that term, reserved for purposes of "internal improvement." Congress, when it made the grant of 1864, was, presumably perfectly familiar with all the proceedings prior to that date under the act of 1856 and must have known of said reservation for indemnity purposes under that act. The words used in the sixth section of the act of 1864 point almost directly to the grant of 1856 and the executive reservation thereunder. Certainly, more expressive or comprehensive words could not have been used if Congress had been legislating with special reference to such previous grant and reservation.

I must, therefore, hold that the lands in question, having been previously reserved in the manner stated, for indemnity purposes under the act of 1856, were by the sixth section of the act of 1864 expressly "reserved and excluded" from the grant made by the third section of that act. And the principle thus enunciated is not without high authority to sustain it.

The general doctrine that lands reserved, or otherwise disposed of or appropriated in any manner for any specific purpose by competent authority, are not to be considered as included in a subsequent grant by Congress, is old and well established. A long line of decisions by the supreme court support the doctrine, and it is needless here to refer to such decisions at length. As bearing directly, however, upon the precise question now under consideration, which is novel in respect to the purposes for which the reservation was made, the case of *Wolcott v. Des Moines Navigation and R. R. Co.* (5 Wall., 681), is one in point.

The question presented in that case involved the construction of a grant of lands made by Congress to the State of Iowa, May 15, 1856 (11 Stat., 9), for the purpose of aiding in the construction of certain railroads therein mentioned, which contained an excepting proviso couched in almost the identical language used in section six of said act of May 5, 1864. Prior to the date of that grant, to wit, on August 8, 1846, Congress had made a grant of certain lands to the Territory of Iowa for the purpose of aiding in the improvement of the Des Moines river "from its mouth to Raccoon Fork." The grant was of "one equal moiety, in alternate sections, of the public lands," to be "selected" within the territory, "in a strip five miles in width on each side of said river." The question arose as to whether the grant embraced lands along the whole length of the river, or only up to the point where the Raccoon Fork flowed into it. This question gave rise to great dispute and extended discussion, pending which the land department ordered a withdrawal from sale of lands above as well as below the Raccoon Fork. The question finally came before the supreme court in the case of *Dubuque and Pacific Railroad Company v. Litchfield* (23 How., 66), and it was there decided that the grant of 1846 did not extend above the Raccoon Fork. One of the roads under the grant of May 15, 1856, to the State of Iowa, was located through the lands above Raccoon Fork, which were embraced within the withdrawal previously made under the river grant of 1846. The question in the *Wolcott* case was whether the lands included in said withdrawal above the Raccoon Fork passed to the State under the railroad grant, as far as embraced within its limits, or whether they were excluded from the operation of that grant as "reserved lands" by reason of the excepting proviso therein. It was admitted that the railroad grant covered the tract there in question, unless excluded by this proviso. The court held that, notwithstanding the aforesaid withdrawal of the lands had been made under the wrongful supposition that they were embraced in the river grant, yet the withdrawal, having been made by competent authority, constituted such a reservation of the lands as served to exclude them from the railroad grant, by reason of the excepting proviso in the act making that grant.

It is contended by counsel, that this case is not an authority on the question here presented, because the withdrawal therein mentioned was not a withdrawal for indemnity purposes. But, in my judgment, this contention is unsound. True, that withdrawal was not made for indemnity purposes, but it was rendered none the more effective for that reason, as a reservation of the lands covered by it. It was a withdrawal of lands which Congress in fact had never contemplated should be withdrawn under the river grant, and was made only for a supposed purpose, or by reason of a grant supposed to exist, but which did not exist. In other words, it was a withdrawal improperly made, under a supposed grant which in fact had no existence. The withdrawal here in ques-

tion was in all respects properly made, and was for a specific purpose, under a grant, not merely supposed to exist, but which did exist. It seems to me, therefore, that the Wolcott case is authority directly in point, and must be considered as conclusive of this question. That case was decided in 1866, and the doctrine therein announced has been since repeatedly affirmed by the supreme court. *Williams v. Baker* (17 Wall., 144); *Homestead Company v. Valley Railroad* (Id., 153); *Wolsey v. Chapman* (101 U. S., 755); and numerous other cases. In each of these cases, specially cited, the Wolcott decision was discussed at some length, and the principle therein laid down expressly reiterated.

Reference is made by counsel to the *Kansas Pacific* case (112 U. S., 414), and the cases of *United States v. Southern Pacific Railroad Company*, and *United States v. Colton Marble and Lime Company*, recently decided in the circuit court of the southern district of California, and reported in 39 Fed. Rep., 132, as authority opposed to the views I have herein expressed. I do not so understand these cases. In the *Kansas Pacific* there was an order of withdrawal made in March, 1863, nearly three years before any location of the route of the road had been made, of lands lying within ten miles of certain lines marked on a diagram by the Commissioner of the General Land Office, as "the probable lines" of the road and its branches. As a matter of fact the withdrawal thus made did not cover the lands in controversy, and any reference thereto was therefore unnecessary to the decision in that case. The court, however, spoke of it as having "affected no rights which without it would have been acquired to the lands," and as in no way controlling the subsequent grant thereof, evidently treating it, because made at the time and in the manner stated, as not amounting to a withdrawal for any purpose, but being a mere nullity—having no effect whatever. And this is in accord with the doctrine announced in *Van Wyck v. Kuevals* (106 U. S., 360-366-7).

In the cases cited from 39 Federal Reporter, the question here presented was not considered or decided by the circuit court. The grants there under consideration were the grants to the Atlantic and Pacific Railroad Company, and to the Southern Pacific Railroad Company, made by the same act (July 27, 1866, 14 Stat., 292); and the grant to the latter company made by section twenty-three of the act of March 3, 1871 (16 Stat., 573), which latter act contains the proviso "that this section shall in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company, or any other railroad company." This was the proviso construed by the court in those cases, and in respect thereto it was held that it did not include unselected lands within the indemnity limits of the grant to the Atlantic and Pacific Company, because that company had no right, prior to selection, to any particular tract of land in such indemnity limits; and the lands there in question, never having been selected by the Atlantic and Pacific Company, were held not to have been excepted from the

grant to the Southern Pacific Company, by reason of anything contained in said proviso. That was a very different question from the one arising in this case.

The further contention of counsel is that if the act of 1864 operated upon the indemnity limits of the grant of 1856, so as to turn four miles of those limits into place limits under the grant of 1864, in favor of the roads common to both acts, it must also, in like manner, operate in favor of the Wisconsin Central road, which takes its grant only under the third section of the act of 1864, so as to turn the remaining five miles of those old indemnity limits embraced within the overlap or intersection of the ten miles limits of the latter road, into place limits under its grant. It is obvious that such a result does not necessarily follow from the premises stated. By the act of 1864, as we have seen, an enlarged grant was made for the roads common to that act and the act of 1856. Whereas, the place limits of the grant of 1856 were six miles and the indemnity limits fifteen miles, they were increased by the act of 1864, the place limits to ten miles and the indemnity limits to twenty miles. Congress must necessarily have intended that the grant of 1864 should thus operate, otherwise its object might have been wholly defeated, by the adoption of the old line under the act of 1856, as the line of road under the act of 1864. The acceptance of this increased grant of 1864 by the State amounted also to an express consent on its part that the grant should so operate. The State willingly took the four miles additional place limits, making ten miles in all, instead of six, and the five miles additional indemnity limits, making twenty miles in all, instead of fifteen. In lieu of the four miles of the old indemnity limits thus changed into place limits, Congress gave five miles additional indemnity limits. The purpose of the indemnity reservation under the act of 1856, as to those four miles, ceased to exist, therefore, upon the acceptance by the State of the grant of 1864; and at the date when the line of road became "definitely fixed" under that grant, there was really no reservation for indemnity purposes in force as to such four miles. This is true of all the roads which derive their rights from both acts, while as to the Wisconsin Central road, which takes its grant only under the third section of the act of 1864, an entirely different state of things exists, presenting a very different question. The rights of this road date from and exist only under and by virtue of the act of 1864, and must be determined by a construction of that act.

Entertaining these views, I must affirm the decision which is the subject of this appeal.

ADDITIONAL HOMESTEAD ENTRY—ACT OF MARCH 2, 1889.

JOHN R. CANON.

A homestead entry made in conformity with all legal requirements is sufficient to invest the entryman with the "ownership" requisite to an additional entry of contiguous land under section 5, act of March 2, 1889.

The right to make such additional entry, accorded upon a pending application, may be treated as a preferred right if exercised within a specified period after notice of decision.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 25, 1890.

I have considered your office decision of December 4, 1888, rejecting the application of John R. Canon to make adjoining farm homestead entry under section 2289, United States Revised Statutes, of the SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 8, T. 15 N., R. 1 W., Vancouver, Washington Territory.

It appears that Canon made homestead entry, No. 7242, March 9, 1885, for the S. $\frac{1}{2}$ NE. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, said Sec. 8, at the Olympia office, and it was for this reason that your office rejected his application, now before me on appeal.

It will be seen that the land proposed to be entered is contiguous to that of claimant's entry of March 9, 1885.

Section five of the act of March 2, 1889, provides as follows :

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.

The proviso in section five of this act states, that the benefit of this section shall not apply to or for any person who at the date of making application for entry does not "own and occupy" the lands covered by his original entry. But the first part of the section, using the words, namely: "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;" also that "if final proof of settlement * * * has been made for the original entry, when the additional entry is made, then the patent shall issue without proof"—indicates the meaning, and proper construction of the statute.

Taking the whole of section five together, the evident intendment of Congress on the passage of the act was that an entry duly made with

all formal requirements shall be considered as investing the entryman with the "ownership," as contemplated by the proviso to section five.

Without passing on the question raised by appellant, and in view of the above construction of section five, of the act of March 2, 1889, I can not concur in the decision reached by your office, in this case, which is hereby reversed. Canon will, therefore, be permitted to enter said tract—his right being treated as a preferred right. (John Schnabelin, 8 L. D., 474.) He will be allowed the preference right for ninety days, after notice of this decision, to make application for said land. And, when he shall have made final proof according to law of his homestead entry No. 7242, of March 9, 1885, patent should also issue for the tract in question should he exercise the preference right herein given.

HOMESTEAD ENTRY—ACT OF MARCH 2, 1889.

JAMES DOUGHERTY.

The government requires as a condition precedent that the applicant for public land under the homestead laws shall establish in good faith a residence thereon before he can acquire title to the same.

The exercise of the homestead right is restricted to the exclusive use and benefit of the entryman, and on the cancellation of his entry for failure to comply with law he can not re-enter the same tract under the act of March 2, 1888, in order to protect a transferee.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 25, 1890.

I have considered the appeal of James Dougherty from the decision of your office, dated September 20, 1888, holding for cancellation his cash entry, No. 929, commuted from homestead entry No. 1352 of the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 28, T. 19 N., R. 31 E., Santa Fe land district, New Mexico.

The record shows that said Dougherty made his original homestead entry on August 26, 1882, and on June 7, 1884, he commuted said entry to cash and received final certificate for the land.

On November 9, 1885, a special agent of your office reported that he had made a careful examination of said land, and found that the claimant never established a residence on said land as the law requires, and that, on July 8, 1884, he sold said land to the Dubuque Cattle Company for \$25,000.

On December 11, 1885, your office held said entry for cancellation, and on February 23, 1886, upon receipt of the letter of the local office, dated February 2, same month, transmitting the application of said claimant, a hearing was ordered and had, at which the claimant appeared in person and was represented by attorney.

Upon the evidence submitted, the local officers found that the claim-

ant from his own statement, as well as from other testimony offered in the case, never complied with the requirements of the law as to residence.

Your office, on appeal by the claimant, after fully setting out the record facts, sustained the action of the local officers in their conclusion as to the failure of the claimant to establish and maintain a residence upon said land. Your office further considered the exception taken by the claimant to the ruling of the local officers, requiring him to submit his testimony first, and held that this was error, citing the case of *George T. Burns* (4 L. D., 62). But your office also held that this action was error without injury, for the evidence introduced by the government made out a clear case against the entryman, and was strengthened by his own admissions on the stand.

In his appeal to the Department, claimant insists that the decision of your office is erroneous in holding that claimant never established a residence on the land, and that the action of the local officers was not such a flagrant violation of the rules of procedure as entitled him to a judgment of reversal of their decision against the validity of said entry.

In the brief filed by counsel for the claimant, it is insisted that it would be a hardship to cancel said entry, but, if the law so requires, then the claimant asks to be allowed to make another entry of said land under the provision of the act of Congress approved March 2, 1889 (25 Stat., 854), in order that he may protect his transferees.

In my judgment, it is clear that claimant never established a residence upon said land. By his own evidence, his home was not on the land, but was at Upper Mora, some considerable distance away, where he and his family lived, and where he carried on the business of merchandising during all the time covered by his final proof. The excuse that the country was wild and unfit for a residence for his family can not be accepted.

The government requires as a condition precedent, that the applicant for public land under the homestead laws shall establish a residence thereon in good faith, before he can acquire title to the same. That claimant established on said land, to use his own language, a "home cattle ranch," upon which he placed valuable improvement, and where he visited occasionally, may be conceded. But that claimant's actual home was at Upper Mora, and not on his cattle ranch, is clearly shown by the testimony, not only of the claimant and his witnesses, but, also, by the other witnesses in the case. This being so, it is evident that no good purpose could be subserved by remanding the case for a new hearing; for, upon the conceded facts as shown in the record, the claimant never complied with the requirements of the homestead law. *Peter v. Spaulding* (1 L. D., 77); *Plugert v. Empey* (2 L. D., 152); *Cleaves v. French* (3 L. D., 533); *R. M. Chrisinger* (4 L. D., 347); *Benedict v. Heberger* (5 L. D., 273); *Van Ostrum v. Young* (6 L. D., 25); *Huck v. The Heirs of Medler* (7 L. D., 267); *Sydney F. Thompson* (8 L. D., 285);

Peter Weber (9 L. D., 150); Bohall v. Dilla (114 U. S., 47); Lee v. Johnson (116 U. S., 48).

The request of counsel for the entryman, that he may be allowed sixty days within which to make a new entry of said land under the provisions of said act of March 2, 1889, in order to "protect his transferees," must be denied, for the reason that he can not make a homestead entry for the benefit of another, for the entry must be for his own exclusive use and benefit, and he must make affidavit (*inter alia*) "that no part of such land has been alienated." (Sec. 2291, U. S. Revised Statutes)

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

PRACTICE—REVIEW—TRANSFEREE.

M. H. DE CELLE. (ON REVIEW.)

A motion for review will not be granted on the application of a transferee who, with notice of the pendency of the case, fails to disclose his interest therein while it is under consideration.

Secretary Noble to the Commissioner of the General Land Office, January 27, 1890.

I have considered the motion filed in the local office, at Mitchell, Dakota, on June 25, 1889, by the attorney of F. D. Fitts, an alleged mortgagee, asking that homestead entry No. 5744, of the SE. $\frac{1}{4}$ of Sec. 25, T. 105, R. 53, made May 16, 1885, by Moses H. De Celle, be re-instated and that a hearing be duly ordered to determine the validity of the same.

The record shows that your office, on November 9, 1885, held said entry for cancellation, and, the local officers having reported that the claimant was duly notified of said decision and had made no response, your office, on July 9, 1886, directed the local officers to note the cancellation of said entry on their records, and advise the claimant thereof.

On December 3, 1886, one Charles B. Kennedy, as attorney for claimant, filed in the local office an appeal from said decision of your office, and the papers were transmitted to the Department by your office letter, dated February 28, 1887. On June 9, 1888 (6 L. D., 775), the Department considered said appeal, and found that the claimant did not set out such a state of facts as would entitle him to an appeal, and his appeal was accordingly dismissed.

The explanation offered by said attorney for failure to file the appeal within the usual time was, that the claimant did not receive notice of the decision of your office, dated November 9, 1885, until about a month prior to the date of filing said appeal, and in support of said allegation the attorney filed the envelope mailed by the local officers, showing that the notice was sent to the wrong post-office, and was subsequently sent to the dead letter office. But the Department found, upon inspec-

tion of said envelope, that it was mailed by the local officers on July 19, 1886, only ten days after the final decision of your office directing the local officers to note the cancellation of said entry upon their records, and the presumption was that the envelope contained the notice of the decision of July 9, 1886, rather than a notice of the decision of November 9, 1885, notice of which to the claimant was reported by the local officers on April 8, 1886.

The Department held that the statement relative to notice was not made by the claimant in person was not verified, and, hence, was insufficient to entitle him to an appeal.

The motion filed by the attorney for the mortgagee does not fully conform to Rule of Practice No. 78, which requires an affidavit "of the party or his attorney that the motion is made in good faith, and not for the purpose of delay."

The grounds of said motion are eight in number, but they may be condensed as follows: (1) that the mortgagee has never had any notice of the cancellation of said entry "until the present month;" and (2) that if a hearing is had, he can, and will show that the entryman acted in entire good faith and fully complied with the requirements of the homestead laws.

In support of said motion counsel filed the affidavit of said Fitts, alleging that, on May 22, 1885 (which was four days after the issuance of final certificate), he loaned said claimant a sum of money which now amounts to \$650, and took a mortgage on said land; that at the time of taking said mortgage said Fitts used due diligence to ascertain whether claimant had complied with the requirements of the homestead law, and believed then (and does now) that claimant "made full, complete, positive and absolute compliance with every letter of the homestead law," and that, if a hearing be ordered, he "can fully establish all facts to be true in claimant's proof, and greatly strengthen the same."

There is also filed a *copy* of an affidavit of the claimant, Moses H. De Celle, dated November 19, 1888, U. S. Land Office, Mitchell, Dakota Territory, and verified before Loyal N. Waterhouse, notary public, on November 28, 1888. No explanation is given for filing a copy, instead of the original affidavit.

Other affidavits were filed by the attorney for the mortgagee, alleging that claimant fully complied with the requirements of the homestead law.

Objections to the allowance of said motion have been filed by Charles A. Miller, who made homestead entry, No. 28402, of said land, on October 17, 1888. Miller alleges that he made said entry after the cancellation of said prior entry, and that the affidavits of William Lee, George H. Waskey, and Francis De Celle, filed by the attorney of the mortgagee in support of said motion, "are false and untrue, and were fraudulently obtained from said persons;" that said claimant never complied

with the requirements of the homestead law; that said claimant, on October 6, 1886, conveyed said land by warranty deed to Charles B. Kennedy, who assumed a "certain mortgage of \$450.00, dated May 22, 1885," the consideration mentioned in said deed being "one dollar and other valuable considerations." In support of his objections, said Miller filed the affidavits of said Lee, Waskey and De Celle; also, a certified copy of the record of said deed, and the affidavit of George J. Brenner, alleging that said claimant did not comply with the requirements of the homestead law.

It is evident from the foregoing, that very little reliance can be placed upon the ex-parte affidavits filed in the case. Three of those filed by the applicant for the motion are flatly contradicted by the same parties, who have subsequently made affidavits of a contrary character, and allege that they did not understand the first affidavits or that they were not read to them correctly.

Moreover, if the record can be believed, at the very time Charles B. Kennedy took the appeal for the claimant, namely: December 3, 1886, he had already accepted a deed of said land and assumed the mortgage given to Fitts, which deed was filed for record on December 6, 1883, three days after taking the appeal. No mention was made in his appeal of said mortgage, nor did the record show at the date of the rendition of said decision of your office and of the Department, that any one had any interest in said land, except the claimant, De Celle. Such being the case, the mortgagee must stand in the shoes of the claimant. He has no more rights, and his motion comes entirely too late. C. A. Kibling (7 L. D., 327); Daniel R. McIntosh (8 L. D., 641).

The decision of the Department was rendered on June 9, 1888, and the motion was filed more than a year afterwards. Said motion must, therefore, be, and it is hereby, denied.

PRE-EMPTION ENTRY—RESIDENCE.

LEWIS C. HULING.

Residence in good faith in a house supposed to be on the land claimed is constructive residence upon said land, and the discovery after entry that the house is in fact not on said land will not defeat the entry.

Secretary Noble to the Commissioner of the General Land Office, January 27, 1890.

I have considered the appeal of Lewis C. Huling from your office decision of October 5, 1888, holding for cancellation his pre-emption cash entry for W. $\frac{1}{2}$, NE. $\frac{1}{4}$, and SE. $\frac{1}{4}$, NE. $\frac{1}{4}$, Sec. 15, and SW. $\frac{1}{4}$, NW. $\frac{1}{4}$, Sec. 14, T. 30 N., R. 64 W., Cheyenne, Wyoming land district.

Claimant filed declaratory statement for said land January 26, 1885, alleging settlement January 1, 1885, and his final proof was submitted and entry made July 3, 1885.

After examination a special agent reported to the effect that the buildings supposed to have been upon the land in controversy were in fact upon adjoining land very close to the line and in consequence of this mistake the claimant had never resided upon the land included in his entry. Said special agent also reported that as claimant had conveyed the land to one Luke Voorhes on the same day upon which he made proof that he believed it might be developed at a hearing if one should be ordered that the entry was initiated for the benefit of said Voorhes.

Said entry was by your office held for cancellation and upon application of entryman a hearing was ordered.

Upon the testimony introduced the local officers found that there was no evidence to support the allegation that the entry was made in the interest of said Voorhes, but that it clearly appeared that the building in which claimant had maintained the residence upon which such cash entry was predicated was not in fact upon the land described in said entry and for that reason recommended the cancellation of the entry.

Upon appeal your office affirmed the decision of the local office for the reason that "His alleged residence was upon land not mentioned in his final proof or final proof certificate."

The evidence taken at the hearing shows that claimant established his residence in a house supposed to be upon the land which he purchased from a former claimant for \$300, and that after a continuous residence therein of more than six months, he made final proof and purchased said land.

It further appears that claimant consulted a surveyor who examined his township plat and told him that the house stood upon the claim; and he had no reason to suspect any mistake until in August or September after he had made final proof when a desert entry on adjoining land was being surveyed, and he then got a compass and "run a line to his claim and discovered that the buildings were just north of his line and upon the desert land entry of one Barthoff.

He further states that another surveyor ran the line and that it intersected the house in which he had lived.

He further states that had he learned of such mistake while living there or before he sold the land he would have moved the buildings the few feet necessary to place them upon the claim.

The whole question then seems to be this: If pre-emption claimant during his alleged residence upon the land claimed through mistake occupies a house situated a few feet from the line and upon another tract, and if this mistake is not discovered or even suspected until after he has made final proof and conveyed the land to another, should his entry be canceled for failure to reside upon the land entered for the six months next preceding his entry?

In case of Israel Martel (6 L. D., 566), and numerous other cases, it was held that six months residence upon a pre-emption claim, is not a

provision of the statute, but a rule of the department and "is for the purpose of testing the good faith of the claimant."

A *bona fide* pre-emption claim should not be rejected because claimant's house was by mistake beyond the lines of survey bounding his land. *Arnold v. Langley* (1 L. D., 439).

Where an entryman's house was by mistake built thirty yards outside of the lines of his claim but was occupied by him in good faith, it was held to be constructive residence upon the land. *Talkington heirs v. Hempfling* (2 L. D., 46).

Although no question is raised in your decision in regard to the improvements made by the entryman, the amount and character of these frequently tend to show good faith or the want of it. The record shows that in December, 1884, he purchased the improvements consisting of a frame house sixteen feet square with a log building adjoining, which contained two rooms, one eighteen by twenty-two feet and one twelve by sixteen feet, also a barn fourteen by twenty-six feet, an outside cellar and an ice house. For these improvements which were supposed to be upon the land entered, and for relinquishment of claim, entryman paid \$300. In addition claimant built some fence and broke five acres which were in crop when proof was made. His whole improvements were valued at \$400.

Under the evidence in this case it must be held that the residence of Huling was constructively upon the land described in his entry and your said decision is accordingly reversed.

RAILROAD GRANT--INDEMNITY WITHDRAWAL.

SHIRE ET AL. *v.* CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RY. CO.

No rights, either legal or equitable, as against a railroad grant are acquired by a settlement upon lands withdrawn by executive order for the benefit of such grant.

The order of August 17, 1887, revoking the indemnity withdrawals made in aid of the grants of June 3, 1856, and May 5, 1864, was suspended and the order of suspension remains in force.

Secretary Noble to the Commissioner of the General Land Office, January 27, 1890.

On October 30, 1889, you sent to me lists 13, 14, and 15, of lands to be approved for the benefit of the Chicago, St. Paul, Minneapolis and Omaha Railway Company, under the Congressional grants to the State of Wisconsin in aid of the construction of said railroad, of June 3, 1856 (11 Stat., 20), and of May 5, 1864 (13 Stat., 66). On the same day a protest was filed here, against the approval of certain of the listed lands in town 42 N., R. 4 and 5 W., and towns 47 and 48 N., R. 10 W.,

in behalf of Romaine Shire, Charles H. Houlton and others, claiming to be settlers upon the described tracts.

The matter of said protest has been fully argued, orally and on briefs, by counsel for protestants and the railway company; and, after a full consideration, I am of opinion that the claims of the protestants are without merit and said protest should be dismissed.

It appears from the papers filed with the protest, that at different times between April 15, and June 20, 1889, said parties presented respective applications, to the land office at Ashland, Wisconsin, to be permitted to file pre-emption declaratory statements upon tracts described. These applications were rejected, for the stated reason that the lands applied for were withdrawn for the benefit of said railway company, and had not been restored to the public domain. From this action of the local officers no appeal was taken, but protest filed here, as stated. Subsequently, the protestants, with two exceptions, made applications at the same office to file anew on the same tracts of land, and upon the rejection of their applications appealed to your office.

It is stated, substantially, in the protest as a reason why the listed lands objected to should not be approved to the company, that there are many settlers thereon, whilst there are thousands of acres of other land, already covered by the selections of the company, nearer the line of its road, which have not been, but ought to be, included in said lists, thus leaving the specified lands for the settlers, whilst complying with the terms of the grants for the company, which require the indemnity lands to be selected "from the lands of the United States nearest to the tier of sections" containing the granted lands.

From your report of November 2, 1889, upon this protest, it appears that instead of the foregoing allegations, as to the remoteness of the listed lands, being true, your office has endeavored, in listing the same, to carry out the requirements of the law in relation to contiguity; and, if, in any instance, the rule has been apparently relaxed, it was because of other and more pressing considerations.

As to the statement that the tracts specified have settlers upon them, there is nothing before me to sustain the allegation, further than what inference may be drawn from the applications to file pre-emption claims on the described tracts.

The records of your office show that all the odd numbered sections within fifteen miles of the line of said railroad were withdrawn, on May 29, 1856, and all the odd numbered sections within twenty miles were withdrawn on February 5, 1866, and have continued in reservation for the benefit of said road from said dates up to the present time.

It is true that on August 17, 1887, my predecessor, Secretary Lamar, in a communication to your office, revoked the withdrawals as to indemnity lands along the line of said roads, and directed that the same be restored to the public domain, subject to settlement under the general land laws, except as to certain lands covered by pending selections.

This order was to take effect as soon as issued, but filings and entries for the tracts embraced therein were not to be received, until after thirty days notice by public advertisement. Atlantic and Pacific R. R. Co., 6 L. D., 84-92. On August 31, 1887, your office issued orders to the local officers at Ashland, in pursuance of the above directions of the Secretary; but before any action was taken by those officers in the premises, on September 9, 1887, the order of restoration was suspended by telegram, which was supplemented by letter of same date. And this suspension has never been revoked.

An attempt has been made by counsel for protestants to show that the order of suspension is applicable only to the company's selections, then pending before the Department, and that in fact the order of revocation has never been suspended. This contention has for its only foundation the, perhaps, not critically appropriate use of a word by the Commissioner in his letter of instructions. In his telegram the Commissioner said:

As the right of the Chicago, St. Paul, Minneapolis and Omaha Railroad Company to indemnity lands will soon be adjusted, by direction of the Acting Secretary of the Interior, you will suspend the restoration of such lands until further orders. This will apply to both main line and Bayfield branches. Instructions by mail.

In his letter of the same date, he says:

Referring to my telegram of this date, directing the suspension of the restoration of the indemnity selections of the Omaha Company, I have to inform you that said action was taken under instructions from the Hon. Acting Secretary of the Interior, pending the final adjustment of said company's selections, which will soon be completed. You will accordingly continue the suspension until further orders.

It is seen that, in his telegram, the Commissioner plainly directs the suspension of the order restoring the "indemnity lands," whilst in his letter he refers to his telegram as "directing the suspension of the restoration of the indemnity selections." If we are to take this language literally, it is an absurdity. For, as no "indemnity selections" had been withdrawn, or taken away, they were none to "restore." And as there had been no restoration, there could be no "suspension of the restoration." What the Commissioner meant is plain. An order had been issued restoring the indemnity lands: he was instructed to suspend that order. He did so, by telegram, but in his letter, perhaps by a slip of the pen, he used the word "selections," when he should have used that of "lands," or used the word "selections," in that connection, as synonymous with "lands." The telegram contained the order, the letter merely referred to it by a misdescription, and directed the continuance of the order as given; did not modify it, and was not intended to. The contention in this respect does not sustain the claims sought to be based upon it. There is no doubt whatever in my mind that all the lands in question have been in reservation since February, 1866, for indemnity purposes, under the grants for the benefit of said roads.

This being so, it results that the protestants, claiming no settlements

prior to said withdrawals, if they did make subsequent settlement upon said tracts, as intimated, could acquire no rights, legal or equitable thereby, as against the railroad company under the rulings of this Department or of the supreme court. See circular, 2 L. D., 517; *Taylor v. Southern Minnesota Ry. Co.*, ib., 557; *Fox v. Southern Pacific R. R. Co.*, ib., 558-560; *Julia A. Barnes*, 6 L. D., 522; *Caldwell v. Missouri, Kansas and Texas Ry. Co.*, 8 L. D., 572. In the case of *Riley v. Wells*, the supreme court, speaking of settlement and entry upon a tract withdrawn by executive order, says that the settlement thereon was

without right, and the possession was continued without right, the permission of the register to prove up the possession and improvements, and to make entry under the pre-emption laws were acts *in violation of law and void*, as was also the issuing of the patents.

This case, though not reported in the official edition, is referred to and approved in *Wolsey v. Chapman*, 101 U. S., 755, and may be found, reported at length, in the Lawyers' Edition, Vol. 19, p. 648.

The protest is dismissed.

HOMESTEAD ENTRY—RESIDENCE—COMMUTATION.

EMILY M. DRONBERGER.

It is not a valid objection to the residence shown that the house of the homesteader is but partly on the land claimed, if good faith is apparent.

It is no evidence of bad faith that a house is built across the line between two claims.

If the good faith of an entryman is manifest, a commuted entry, in the absence of protest, may be referred to the board of equitable adjudication where residence is not commenced within six months from date of entry.

Secretary Noble to the Commissioner of the General Land Office, January 27, 1890.

I have considered the appeal of Emily M. Dronberger from the decision of your office, dated May 4, 1888, holding for cancellation her homestead entry No. 4385 of the NE. $\frac{1}{4}$ of Sec. 12, T. 25 N., R. 27 W., Valentine, Nebraska.

The record shows that said entry was made when claimant was a single woman, on August 14, 1885, and on November 3, 1887, the register gave due notice of claimant's intention to make final proof in support of her claim before the local officers on December 23, 1887.

The proof was made as advertised, and it shows that said land was subject to settlement and entry; that claimant first settled upon said tract some time in November 1885, when she built a sod house worth \$60; that she first commenced to live permanently on said land on May 7, 1887, and has continued to reside there since; that her actual residence and home during the time, from the date of said entry, prior to May 7, 1887, was at Oakland, Nebraska, and at Rapid City, Dakota;

that she married on February 3, 1886, and has lived on said claim since May 7, 1887, with her husband; that she was not able to go on to said land in 1885, because her house was built so late, and in the fall of 1886 and '87 she was taken sick; that she owns a house in Rapid City, Dakóta; that her sod house on the claim is twelve and a half by fifteen feet, tar papered, with door, and two windows, worth \$70, and the total value of her improvements—consisting of said house, stable, corral, ten acres of breaking, three hundred fruit trees and two hundred small fruit shrubbery—is \$275; that said house was built on the line between the NE. $\frac{1}{4}$ and the NW. $\frac{1}{4}$, covering half of each claim, the whole house being fifteen by twenty-five feet; that no one else but claimant and her husband occupied said house, but her brother lived in it prior to May 16, 1887, when he left; that she bought the improvements of her brother, and her husband has filed upon the adjoining claim; that she has raised crops on said land one season.

There was no adverse claim and no protest filed, but the local officers rejected said proof, "for the reason that the claimant did not establish a residence on the land within the time required by the rules of the Department, nor for more than one year after marriage, and further the house was built across the line between the claim of herself and brother, with the intent to make the one dwelling serve the purpose for proof on both claims." Your office held that:

The elements of good faith seem to be entirely wanting in this case, and three quarter sections are covered by the claims of this woman and her husband with the least possible improvement, and, to say the least, a very questionable compliance with law as to residence on the land. In the case of a commutation under section 2301, the law requires six months continuous residence and cultivation of the land, but it is not required that the settler should have established his residence within six months from the date of entry.

That "otherwise" the decision of the local officers was correct.

The decision of the local officers, that residence should be commenced within the period of six months, was correct, and your office decision holding the contrary was erroneous.

In the case of Frank W. Hewit (S L. D., 566), upon a full consideration of the law and practice of the Department, it was held that actual residence must be established upon land covered by a homestead entry within six months from date thereof, and that failure so to do required explanation. The Department also held that, if the good faith of the entryman is manifest, a commuted entry might be referred to the Board of Equitable Adjudication for consideration, 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. But the objection made by the local officers to the commutation proof because the house was built across the line is not tenable.

It has been decided by the courts and the Department that it is no evidence of bad faith that a house is built so as to cover two claims.

In the case of *Lindsey v. Hawes* (2 Black, Op. p. 562), the supreme court said :—

Assuming that Lindsey could not have a residence on both the northeast and southeast quarter sections at one time, and claiming that the case is to be governed by the analogies of a question of domicile in case of conflicting jurisdiction, he has made an apparently strong case out of the fact that the larger portion of the house is on the south side of the line. This, however, is not a case of domicile under different governments of conflicting jurisdiction. It is a question arising under the government of the United States, and concerns a construction of one of its most benevolent statutes, made for the benefit of its own citizens, inviting and encouraging them to settle upon its public lands. The government which made the law owned both quarter sections, and was indifferent as to which should be sold to Lindsey, provided it was legally done. Lindsey's house was on both quarter sections. He lived or resided in all that house. So far as mere personal residence is concerned, we think, he may be correctly said to have resided on both quarter sections. The law only required that he should personally reside on the quarter which he claimed to enter, and if he resided on both, then clearly he resided on this one.

The case of *Lindsey v. Hawes* was cited as authority by Mr. Justice Miller of the supreme court, in the case of *Silver v. Ladd* (7 Wall., 225), in which the learned Justice says :

In reference to the question of actual settlement and residence on the land, we have only to refer to the case of *Lindsey v. Hawes*, where this precise question is raised, and where it is said that a person residing in a house which is bisected by the line dividing two quarter sections, will be held to reside on both, and, consequently, on either of them, to which he may assert a claim.

In the case of *Wright v. Woods* (1 C. L. L., 304), Mr. Secretary Delano, upon the authority of said cases (*supra*), awarded the land to Woods. It appears from the record that four single men built a house, thirty-two feet square, and two stories high, in the center of a section, so that sixteen feet square stood on each quarter section. Woods bought out one of said parties, and lived in that portion of the house which was on the quarter section claimed by him. Secretary Delano said :

I think the facts show a legal residence by Woods, on the premises. His portion of the building was more extensive than the entire buildings of a majority of pre-emption settlers. It must be conceded that if each of these four settlers had built separate houses, sixteen feet square and two stories high, and located them just as this building was located, it would have been in compliance with the law. Does it make any difference, in principle, that the four houses were under one roof, and were so constructed as to allow ingress and egress one from the other? Was the building intended for and used as a dwelling for the applicants? If it were, and if it were also a suitable building to be used for that purpose, then the law was complied with.

To the same effect are the departmental decisions in *Southern Pacific R. R. Co. v. Rahall* (3 L. D., 321), *George T. Burns* (4 L. D., 62).

The question of the validity of the pre-emption claim of the husband of the appellant is not now before the Department for adjudication, and need not now be passed upon.

Should the claimant offer to make final proof in support of his pre-emption claim, he must show compliance in good faith with the require-

ments of the pre-emption law and the departmental regulations thereunder. It is alleged that he made said filing upon the advice of the local officers after the homestead claimant had resided upon her claim six months and had applied to commute the same. But it is well settled that a person can not maintain two claims at the same time under the settlement laws, and since the husband and wife can have but one legal residence at the same time, it follows that the husband and wife cannot both obtain government land by virtue of a residence together in the same house on the theory that the house is partly on both claims.

It does not necessarily follow, however, that because the husband has, under erroneous advice, filed said declaratory statement, his wife who made a homestead entry prior to her marriage and who has complied with the requirements of the law and the regulations of the Department relative to residence and cultivation, except that the residence was not established within six months, should not be permitted to commute her entry. The improvements are valuable, and the claimant swears that she has acted in good faith.

In the absence of any protest or adverse claim, it would seem that the proof should be accepted, certificate issued, and the entry referred to the Board of Equitable Adjudication for its consideration under the appropriate rule.

The decision of your office is modified accordingly.

PRACTICE—MOTION TO DISMISS—LOCAL OFFICERS.

WILSON *v.* SMITH.

The local officers in the exercise of a sound discretion may dismiss a contest for the want of diligence in prosecution, but their refusal to make such order on the motion of a stranger to the record is not an abuse of such discretion.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 30, 1890.

I have considered the case of Russell B. Wilson *v.* W. J. A. Smith on the appeal of the former from your office decision of September 12, 1888, refusing to dismiss the contest of said Smith against the timber culture entry of one Horace A. Ferguson for NE. $\frac{1}{4}$ Sec. 26, T. 1 N., R. 7 W., S. B. M., Los Angeles California land district.

It appears from the record that Smith filed contest affidavit against the entry of said Ferguson December 28, 1886, and hearing was at that time set for February 25, 1887. On the back of the contest affidavit are two endorsements in the hand writing of the register. The first is—"Continued to May 7, 1887," and the other—"Continued to Sept. 14, 1887, and new notice issued." For the first continuance no application appears of record, and the record contains no other reference thereto, but for the second there appears with the record the affidavit of one Edwin

Blake to the effect that during the months of March and April, 1887, he had made diligent search and inquiry for said Horace A. Ferguson for the purpose of serving upon him amended summons and notice in the contest of Smith *v.* Ferguson, at the request of said contestant, but was unable to find him. There is also the affidavit of said Smith to the effect that ever since December 28, 1886, he has made careful, thorough, and diligent inquiry and search for said Ferguson for the purpose of serving upon him notice and amended summons in said contest but was unable to find him or to learn his whereabouts, and that as he verily believes the said Ferguson was not within the State of California.

These affidavits were filed May 12, 1887, and on May 14, 1887, the register of the local office made an order, based upon said affidavit, directing service of said notice to be made by publication.

On May 11, 1887, said Wilson filed an affidavit of contest against the entry of said Ferguson upon practically the same allegations as were in that filed by Smith, on the back of said affidavit the register endorsed—"Filed May 11, 1887, subject to contest of W. A. J. Smith *v.* Ferguson filed Dec. 28, 1886." No objection on the part of Wilson to this endorsement appears, but on the same day he filed a motion to dismiss the contest of Smith for the reason that no service of notice either personal or by publication had been made upon said Ferguson although there had been ample time therefor since filing of contest affidavit; also because the said Smith had not complied with rule 12 of practice when he found service could not be made upon said Ferguson.

Upon the back of this motion is endorsed—

U. S. Land Office Los Angeles Cal., Aug. 14th 1887, motion denied and case of Smith *v.* Ferguson continued to Sept. 14, 1887.

Upon appeal your office sustained the decision of the local office denying said motion, and in said decision you say—

The appeal of Wilson is grounded on the claim that it was error to allow the former case of Smith *v.* Ferguson to be continued (as shown by the record) from February 25, 1887, to May 7, 1887, in the absence of proof that a motion for such postponement had been made, and to be further continued from May 7, to September 14, 1887, on motion of Smith filed May 12, 1887, after the day set for hearing and (after) appellant's contest had been filed.

The only party entitled to raise any objection to said continuances is the defendant in the case of Smith *v.* Ferguson. A motion to dismiss on these grounds made by the second contestant is therefore *dehors* the record and cannot be entertained.

While the local officers in the exercise of sound discretion might have dismissed the contest of Smith, had they become satisfied that his delay was willful and unnecessary, their refusal to do so upon the motion of appellant can not in the light of the whole record be considered an abuse of such discretion.

If there was any irregularity in the action of the local officers in the first continuance it was, so far as the appellant is concerned, error without prejudice, for he was not then in any sense a party in interest.

Your said decision is accordingly affirmed.

TIMBER-CULTURE ENTRIES—INSTRUCTIONS OF JULY 16, 1889.

J. H. KOPPERUD.

The departmental instructions of July 16, 1889, with respect to the rule to be observed in computing the statutory period of cultivation required under timber-culture entries, did not change decisions that had theretofore become final, or authorize the General Land Office to modify such decisions.

A final departmental decision is conclusive upon the General Land Office until changed in accordance with law, and the well-defined rules of practice.

First Assistant Secretary Chandler to the Commissioner of the General Land Office. January 30, 1890.

On June 2, 1888, the Department rendered a decision [unreported] affirming the action of your office and the local office rejecting the final proof of J. H. Kopperud in support of his timber-culture entry, No. 3002, of the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 10, T. 113 N., R. 48 W., "Sioux Falls (series), Dakota Territory."

The action of your office was affirmed, for the reason "that the planting of the first trees was not done until April 10, 1881, and, hence, the cultivation could not have been more than five years, three months and four days," citing as authority the case of Henry Hooper (6 L. D., 624).

On December 9, 1889, the Department received a letter from the attorney of said claimant, in which he states that—

an appeal was taken therefrom to the Honorable Secretary of the Interior, who decided that point in our favor, but, under date of June 2, 1888, rejected same under a different, subsequent, ruling (Henry Hooper, 6 L. D., 624) not in existence at the time of proof, and of which we consequently had no notice. Inasmuch, therefore, as our appeal was sustained, and the rejection reversed on the only issue involved, it seems an absurdity and an injustice that said proof should not pass to patent.

The attorney, therefore, asks that said decision be reconsidered and reviewed. This letter was, on the eleventh of said month, referred to your office. On the 21st instant, the Department received your office letter, dated the day previous, returning the letter of counsel for said claimant, and making the inquiry whether your office "is authorized, under the decision of July 16, 1889 (9 L. D., 86), modifying the Hooper case, to take action in the matter, or whether the decision of the Department in similar cases, and based on the Hooper decision, are to remain in full force."

It will be observed that the letter of counsel for claimant is not verified and was not filed within the time prescribed for filing motions for review. The Department did not sustain the appeal, because it did not pass upon the question whether a sufficient number of trees had been planted to comply with the requirements of the statute. It mentioned the number of trees which appear to be enough in quantity, and, if the findings of the local officers be correct, the claimant, apparently, had complied with the requirements of the timber-culture law as to planting, cultivating and growing timber thereon.

The allegation that the action of the Department is an "absurdity" can hardly be sustained, for the reason that the decision adverse to the claimant was made in accordance with the express rulings of the Department then in force.

The case of claimant is very similar to the Hooper case. Both entries were made in 1878. The final proofs, in support of both entries were rejected, for the reason that the trees have not reached the size required at the time said proofs were offered. If this be true, then, under the principle contended for by counsel, such rejection by the local officers was right, for he says that said proof was made "in compliance with all then existing decisions, rulings, etc., *except* as to the arbitrary 'size of the trees' *then required*, on account of which size his proof was rejected." The Department held in the Hooper case, that "The eight years of cultivation, required under the timber-culture law, must be computed from the time the required acreage of trees, seeds, or cuttings is planted." This ruling was modified by departmental instructions, dated July 16, 1889 (9 L. D., 83), wherein it was held that, although the decision in the Hooper case was a correct exposition of the law, yet, inasmuch as a rule of a department, until changed, has all the force of law, entries made prior to the circular of June 27, 1887 (6 L. D., 284, Par. 22), would be adjudicated under the former ruling, and claimants would be allowed to compute, as a part of the period required for cultivation, the time allowed by law for the preparation of the land and planting of the trees. This construction has been adhered to in the following cases: Mary R. Leonard (9 L. D., 189); John M. Lindback (*id.*, 284); Christian Isaak (*id.*, 624).

If the ruling in the Hooper case has the force of law until changed, then the departmental decision could not have been different in the Kopperud case, and was correct at the time it was rendered and not an "absurdity," as contended by counsel. Moreover, said decision was rendered by Mr. Secretary Vilas, and I am unaware of any rule of law that will warrant one head of a department to reverse the final action of his predecessor, except in certain well defined cases which are not present in the case at bar.

In the case of Henry T. Wells (3 L. D., 196), Mr. Secretary Teller said:

If, as I think was the fact, Wells' whole claim was before Secretary Delano and passed upon in his decision, then that decision was final and conclusive, and the present claim is *res judicata* so far as this Department is concerned. It matters not that that decision may have been erroneous, or that the Department has since held differently. It is sufficient that it was a decision.

The learned Secretary cited as authority for his decision the opinions of the Honorable Attorneys-General Wirt, Taney, Nelson, Toucey, Johnson, Black, Stanbery, Hoar, Akerman and Bristow (2 Op., 8, 464; 4 *id.*, 341; 5 *id.*, 124; 9 *id.*, 101, 301, 887; 12 *id.*, 355; 13 *id.*, 33, 387, 456). To the same effect are the departmental decisions in the

cases of Robert Carrick (3 L. D., 558); State of Oregon (id., 595); Henry A. Pratt *et al.* (5 L. D., 185); State of Kansas (id., 243); Francis Palms *et al.* (7 L. D., 146). In the last named case Mr. Secretary Vilas quoted, with approval, from the decision of Secretary Lamar, in the case of Rancho San Rafael de la Zanja (4 L. D., 482), wherein he said:

Unless the principle of *res judicata* is recognized, administrative action may become involved in chaos; the labors of the Department would become too cumbrous to admit of their intelligent discharge; uncertainty would cloud every inchoate title, and, in many instances, vested rights would be endangered.

See also State of Oregon—on review—(9 L. D. 363).

The authorities above cited are in harmony with the repeated decisions of the supreme court of the United States. In the case of the United States *v.* Arredondo (6 Peters, 729), Mr. Justice Baldwin said:

It is an universal principle that, where power or jurisdiction is delegated to any public officer or tribunal over a subject matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject matter; and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion within the authority and power conferred. The only questions which can arise between an individual claiming a right under the acts done and the public, or any person denying its validity, are, *power in the officer, and fraud in the party*. All other questions are settled by the decision made or the act done by the tribunal or officer, whether executive (1 Cranch, 170, 171), legislative (4 Wheat., 423; 2 Pet., 412; 4 Pet., 563), judicial (11 Mass., 227; 11 S. & R., 429; adopted in 2 Pet., 167, 168), or special (20 J. R., 739, 740; 2 Dow. P. Cas., 521, etc.), unless an appeal is provided for, or other revision, by some appellate or supervisory tribunal, is prescribed by law.

Again, in the case of United States *v.* Bank of Metropolis (15 Pet., 401), which arose upon the question whether the Honorable Postmaster General had the power to disallow certain items of credits for extra allowances, which, it was alleged, the former Postmaster General "was not legally authorized to allow," Mr. Justice Wayne, delivering the opinion of the court, said:

The successor of Mr. Barry had the same power, and no more, than his predecessor, and the power of the former did not extend to the recall of credits or allowances made by Mr. Barry, if he acted within the scope of official authority given by law to the head of the Department. This right in an incumbent of reviewing a predecessor's decision extends to mistakes in matters of fact, arising from errors in calculation, and to cases of rejected claims, in which material testimony is afterwards discovered and produced. But, if a credit has been given, or an allowance made, as these were, by the head of a department, and it is alleged to be an illegal allowance, the judicial tribunals of the country must be resorted to, to construe the law under which the allowance was made, and to settle the rights between the United States and the party to whom the credit was given. It is no longer a case between the correctness of one officer's judgment, and that of his successor.

It must be conceded upon the foregoing authorities, that the decision of Mr. Secretary Vilas, in the case at bar, is conclusive and binding upon all the officers of this Department. This being so, it follows, necessarily, that the decision rejecting said proof must remain in full force and effect. It will be seen, however, that the claimant can now make

new proof in support of his said entry, since more than three years have elapsed since said decision of your office was rendered, giving eight years of cultivation as required under said former ruling, and if he shows compliance with the requirements of the law, I see no reason why the new final proof should not be approved and the entry passed to patent.

The departmental instructions of July 16, 1889 (*supra*), did not purport to change the final decisions of the Department that had already become *res judicata*. Each final departmental decision must be obeyed until changed in accordance with law, and the well defined rules of practice.

PRACTICE—REHEARING NEWLY DISCOVERED EVIDENCE.

COLLIER *v.* WYLAND.

A motion for rehearing based upon newly discovered evidence should show that the alleged discovery was acted upon without unnecessary delay, and the proof of diligence should be clear.

An unsworn statement of the applicant's neighbors, showing his compliance with law, can not be considered on a motion for rehearing in a contested case.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 31, 1890.

March 18, 1884, J. W. Wyland made homestead entry for the NE. $\frac{1}{4}$ of Sec. 32, T. 3, R. 12, Kirwin district, Kansas, and a year and a half thereafter, September 19, 1885, made commutation proof and payment for the land, on which the local officers issued to him a final certificate. September 25, 1885, J. H. Collier made an affidavit, charging, in effect, that Wyland had never established residence on the land. A hearing was ordered and commenced, July 21, 1886. On the evidence taken thereat, the local officers, by decision of June 3, 1887, found that the charge was sustained, and that the entry should be canceled. July 27, 1887, Wyland appealed to your office, and, subsequently, April 17, 1888, filed in your office a motion for a rehearing. By decision of September 13, 1888, your office overruled the motion for a rehearing, concurred in the finding of the local officers and held the entry for cancellation. From your office decision, Wyland now appeals to this Department.

The motion for rehearing was made about ten months after the hearing before the local officers and nine months after the appeal to your office and is based upon the allegation of newly discovered evidence on the question of residence and showing, it is claimed, that contestant's witnesses swore to falsehoods on the hearing. It is stated in the affidavit accompanying the motion, that the new evidence "has come to the knowledge of affiant since the trial," and that at the trial he "did not know of this proof and was unable to procure the same." In motions for new trials, based upon newly discovered evidence, it must be

made to appear that the alleged discovery was acted upon without unnecessary delay and "the proof of diligence must be clear." (Hilliard on New Trials, 2 Ed., 495; Kelley v. Moran, 9 L. D., 581; Weldon v. McLean, 6 L. D., 9). It is necessary, therefore, that it be set forth, when or about what time the discovery was made (Kelley v. Moran, *supra*), and facts should be averred showing that by the exercise of reasonable diligence the newly discovered evidence could not have been known and produced at the trial. The motion in this case is defective in both these respects.

There is, also, attached to said motion, a statement purporting to have been signed by twenty-eight citizens of Smith county, Kansas (in which the land is located), setting forth that they live "in the vicinity of" Wyland and know him to be living on the land and improving and cultivating it, and expressing their belief that "he has complied with the homestead law to the best of his ability." Your office correctly held that this *ex parte* statement, not under oath, "while complimentary to the defendant," could not be considered in a case *inter partes*.

I have carefully examined the voluminous testimony adduced on both sides at the hearing. Wyland, it appears, cultivated and improved the land sufficiently, but was in default as to residence. He occupied the house which he first built upon the land only a few days, and the remainder of the six or seven months of his alleged residence on the land he claimed to have spent in a house known as the "line" or "partnership" house, which proved on survey to be entirely on another tract. I find no sufficient ground for disturbing the concurring findings of your office and the local officers. (Conly v. Price, 9 L. D., 490; Chichester v. Allen, *ib.*, 302). The decision of your office is affirmed.

EMPLOYÉ OF THE GENERAL LAND OFFICE—SECTION 452 R. S.

HERBERT McMICKEN ET AL.

The disqualification to enter public lands contained in section 452 R. S., extends to officers, clerks, and employés in any of the branches of the public service under the control and supervision of the Commissioner of the General Land Office in the discharge of his duties relating to the survey and sale of the public lands.

A timber land entry made by an employé in the office of the surveyor-general of the district in which the land is situated is illegal and must be canceled.

Secretary Noble to the Commissioner of the General Land Office, February 3, 1890.

Herbert McMicken, Albert J. Treadway and John P. Tweed made, February 14, 1883, timber land entries for, respectively, the SE. $\frac{1}{4}$, the NW. $\frac{1}{4}$, and the SW. $\frac{1}{4}$, of Sec. 20, T. 18 N., R. 3 W., Seattle district, Washington Territory.

These entries were held for cancellation, June 16, 1886, on the report of Special Agent James M. Carson, setting forth three grounds of cancellation: 1st, that the land was not of the character subject to timber land entry; 2d, that the entrymen sold the land covered by their respective entries to one Aden D. King, August 17, 1883, and, 3d, that at the date of the entries, the entrymen were employés in the office of the surveyor-general of Washington Territory. A hearing was had on the application of the entrymen, at which, the issues in each being the same, the cases were consolidated. The local officers found in favor of the entrymen on all three of the alleged grounds of cancellation. Your office, by decision of June 11, 1888 (from which the entrymen now appeal to this Department), held that "the entries were made in good faith, and that the sale to King was a *bona fide* transaction, no agreement to sell existing prior to entry," and that the "preponderance of the evidence" showed "that no considerable part of any of the smallest legal subdivisions of said tracts would be suitable for agricultural purposes after removal of timber, and said tracts were in fact valuable chiefly for the timber thereon;" but held the entries for cancellation, on the third ground set up in the special agent's report, namely, that the entrymen at date of their respective entries were employés in the office of the surveyor-general of Washington Territory.

I concur in the conclusions attained by your office and the local officers, as to the character of the land, and, also, as to the sale to King—the evidence clearly showing that said sale was neither agreed upon nor contemplated prior to or at the time of the entry. I further agree with your office in holding that the entrymen were disqualified from making the entries by virtue of their employment at the date thereof in the office of the surveyor-general of the district in which the lands are located. The act of April 25, 1812 (2 Stats., 716), established the General Land Office as a bureau of the Treasury Department, and by section ten, persons "appointed to offices instituted" by said act or "employed in such offices" were forbidden to directly or indirectly become concerned in the purchase of any interest in any public land. By section fourteen of the act of July 4, 1836 (5 Stats., 107), entitled "An act to reorganize the General Land Office," all officers whose salaries are provided for in said act are subjected to a like disqualification. The surveyor-general is under the control and direction of the Commissioner of the General Land Office, and by section 452 of the Revised Statutes, it is provided that

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

This is a generalization or enlargement of section fourteen of the act of 1836, which was regarded as superseding the act of 1812. (Notes on Revised Statutes U. S.—Gould and Tucker, p. 52.) By this enlarge-

ment the prohibition or disqualification is extended to *all* "officers, clerks and employees in the General Land Office," and is not limited to persons appointed or employed in an office created by the act of 1812, or to officers whose salaries are provided for by the act of 1836. Do the words, "General Land Office," as used in section 452, quoted above, relate only to the main or central office located at the seat of government, or were they intended by Congress to embrace, also, the local offices and offices of surveyors-general, which may be termed the branches or arms of the central office, through which the Commissioner of the General Land Office discharges "all executive duties devolved upon him by law appertaining to the surveying and sale of public lands?" (Rev. Stat., 453.) There are two leading subdivisions of the business of the General Land Office, namely, the surveying and the sale or disposal of the public lands; the former is conducted primarily through the offices of the surveyors-general and the latter through the local land offices. The Commissioner of the General Land Office is required, through the clerk of surveys in his office, to "direct and superintend the making of surveys, the returns thereof, and all matters relating thereto, which are done through the offices of the surveyors-general" (Rev. Stat., Sec. 449), and "under the direction of the Secretary of the Interior, to perform all executive duties appertaining to the surveying . . . of the public lands" (ib., 453). The duties of the Commissioner as to surveys are, in the language of the statute, "done through the offices of the surveyors-general," and these offices are branches and integral parts of the central office, and, I am of the opinion, that Sec. 452 of the Revised Statutes, by the substitution of the *general* words used therein for the *special* prohibitions contained in prior legislation on the subject, was intended to extend the disqualification to acquire public lands to officers, clerks and employees in any of the branches or arms of the public service under the control and supervision of the Commissioner in the discharge of his duties relating to the *survey* and *sale* of the public lands. Moreover, in construing a statute, it is proper to take into consideration the mischief it was passed to obviate. (Sedg. Stat. and Com. Law, 202). The object of Sec. 452 was evidently to remove from the persons designated the temptation and the power by virtue of the opportunities afforded them by their employment to perpetrate frauds and obtain an undue advantage in securing public lands over the general public by means of their earlier and readier access to the records relating to the disposal of, and containing valuable information as to, such lands. Officers, clerks and employees in the offices of surveyors-general fall clearly within the mischief contemplated by the statute, and the reason of the law applies to them with equally as much force as to those in the central office at Washington. Statutes and regulations of this kind are based upon grounds of sound public policy and their strict enforcement is essential to the good of the public service.

The decision of your office holding the entries for cancellation is affirmed.

HOMESTEAD—ADJOINING FARM—EQUITABLE OWNERSHIP.

CARNES *v.* SMITH.

An adjoining farm entry under section 2289, R. S., may be properly based upon the equitable ownership of an adjacent tract; and residence on such tract, for the period of five years after such entry, warrants the submission of final proof. The validity of an adjoining farm entry is not affected by the entryman's acquiring title to other adjacent lands prior to the submission of final proof.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 3, 1890.

I have considered the case of David Carnes *v.* Socrates Smith on appeal of the former from your office decision of April 18, 1888, re-affirmed by decision of July 16, 1888, on motion for review, dismissing his contest against the adjoining farm entry of said Smith for W. $\frac{1}{2}$, SE. $\frac{1}{4}$, Sec. 12, T. 84 N., R. 44 W., Des Moines, Iowa, land district.

Said entry was made by Smith April 15, 1872, as an adjoining entry to NW. $\frac{1}{4}$, NE. $\frac{1}{4}$, Sec. 13, of same township and range.

On September 13, 1884, Smith after notice duly published, made final proof before the clerk of the district court of the county in which said land is situated and received final certificate therefor.

Carnes was present when such final proof was taken and made oral protest against its being received but placed no paper on file. He expressed himself, however, as desirous of making legal protest if he could ascertain how it should be done.

On September 23, 1885, said Carnes filed an affidavit of contest against said entry alleging that the claimant had erected no building on said land or in any way lived upon it, nor had owned any land adjoining it until April 10, 1880, and in an amended and supplemental affidavit it was alleged that on April 10, 1880, said Smith acquired title to one hundred and sixty acres of land contiguous to the land in controversy, and was therefore debarred from making such entry under section 2289 of Revised Statutes.

This affidavit of contest was by the local officers submitted to your office for instructions, and by letter of May 25, 1885, a hearing was ordered thereon.

At such hearing both parties appeared in person and by counsel and submitted testimony upon which the local officers decided against the contestant and recommended the dismissal of his contest which action your office upon appeal affirmed in the decision complained of.

The evidence shows that in March, 1872, the claimant and his wife were living on NW. $\frac{1}{4}$, NE. $\frac{1}{4}$, of Sec. 13, T. 84 N., R. 44 W., which belonged at the time to claimant's father-in-law; that claimant at that time proposed to his father-in-law to purchase from him said forty acres and offered him therefor \$20, per acre, which offer was accepted

and it was agreed that a certain sum which the said father-in-law was owing claimant should be credited as part of the purchase price and that the remainder should be paid at a future time not definitely fixed by the evidence. No conveyance or written contract was made, but the claimant from that time forward continued to reside upon, occupy and cultivate said premises as owner and not as tenant, and no rent was thereafter demanded or paid by him. He subsequently made adjoining homestead entry of the land in controversy and has used the same for farming purposes in connection with the said NW. $\frac{1}{4}$, NE. $\frac{1}{4}$ of Sec. 13, ever since the date of entry.

In 1874 he purchased from his father-in-law 112.90 acres lying immediately south of said NW. NE. of 13, and on June 17, 1875, he purchased from the Iowa Railroad and Land Co., the forty acres adjoining said last described land on the west.

At the time of the said purchase of land in 1874, most or perhaps all of the payments therefor were to be made in the future and a bond for a deed was given. Claimant and his wife both say that all or nearly all of the purchase price for said NW. $\frac{1}{4}$, NE. $\frac{1}{4}$, of Sec. 13, had been paid prior to this purchase in 1874, but partly to save the expense of making and recording two deeds and partly as additional security for the purchase price, the said last described land was included in the bond for deed and the amount already paid on NW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, Sec. 13, was at that time allowed and deducted from the price of the land included in said bond. Before making conveyance under the bond, claimant's father-in-law died and the administrator of his estate foreclosed the bond against claimant, and sold the land under order of court the claimant himself being purchaser, and his deed therefor is dated April 10, 1880.

Upon this state of facts your office said in the said decision of April, 1888,

From the foregoing recital, it appears that, although under the executory contract between claimant and his father-in-law, the former had at the date of entry only an inchoate title to the tract in Sec. 13, yet since it is evident that his entry was made in good faith and he obtained record title to the land April 10, 1880, and prior to contest, he was authorized to make final proof in five years from such last named date. Final proof having, however, been made September 13, 1884, it was premature and can not now be allowed.

Your decision recommending the dismissal of the contest in this case is therefore affirmed; but the claimant Smith will be required to make new final proof, which will then be submitted to the board of equitable adjudication for final adjudication.

Contestant filed a motion for the review of your said office decision based upon the following grounds:

1st. That Smith was not the owner of any land contiguous to the land in dispute at the time of his original entry of said eighty acres.

2nd. Because the right under the law to make an additional farm entry, whether the original or final entry—is dependent on the fact that the area applied for as such additional farm entry shall not with

the contiguous land owned and occupied by the entryman exceed in the aggregate one hundred and sixty acres.

3rd. That the amended and supplemental affidavit of contest charges that the ownership of said Smith extended to one hundred and sixty acres of contiguous land and Smith was, therefore, debarred from the benefit of Sec. 2289, of the Revised Statutes and his entry was, therefore, void.

Said motion was denied in your decision of July 16, 1888.

The hearing of the contest before the local officers was had in November, 1885, and pending the decision of his appeal to the Commissioner, contestant in an affidavit dated June 14, 1887, asked for another hearing.

In said affidavit he alleged that the entry of Smith was illegal and should be canceled.

1st. Because at the date said entry was made, April 15, 1872, the said Socrates Smith was not the owner of the NW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, Sec. 13, T. 84, Range 44, to which said entry was made as an adjoining farm entry, nor was he the owner of any other land adjoining the same, and his entry is, therefore, illegal.

2nd. Because the said Socrates Smith has not made the land embraced in said homestead entry No. 594, his home nor lived thereon since said entry was made, nor erected a dwelling thereon.

3rd. Because at the date the said Smith on September 13, 1884, made final proof upon said homestead entry, he was the owner of one hundred and sixty acres of land adjoining the same, to wit, * * * and had been such owner for some years and therefore was not qualified to make an adjoining farm entry of the tract embraced in said homestead entry No. 594 nor to make final proof thereon.

4th. Because this deponent has been a settler on W. $\frac{1}{2}$, SE. $\frac{1}{4}$ Sec. 12, T. 84 N., Range 44 W., since the 23rd day of August, 1884, having filed pre-emption declaratory statement No. 3599 thereon on the first day of September, 1884, and is, therefore an adverse claimant of the land.

This application for another hearing was rejected in your said office decision of April 18, 1888, upon the ground that "the only material issue raised in said application being adversely decided by the action herein upon the hearing," and it was also held therein that the land was not subject to pre-emption entry on September 1, 1884, and contestant's filing was, therefore illegal.

The appeal now under consideration is taken upon the following specifications of error, viz: In holding the entry of Smith to be valid; in holding any of the charges in the affidavit of contest to be immaterial; in not ordering a hearing on the charges set out in the amended affidavit of contest of said appellant; in finding that Smith was on April 15, 1872, owner of any lands within the meaning of Sec. 2289, Revised Statutes; in holding that Smith was equitable owner of forty acres of contiguous land at the time of his entry, in holding that an equitable title constitutes ownership within the meaning of said Sec. 2289; in holding that the acquisition of the legal title to contiguous land, prior to the submission of final proof but subsequent to entry, can, as a matter of law, sustain the validity of such entry; and because if claimant had

equitable title to contiguous lands at date of entry, even if such title could support such entry, the fact that he owned more than one hundred and sixty acres of contiguous land prior to final proof, defeats his right to title.

From the above I deduce the following propositions as practically covering the errors complained of:—

1st. That the facts shown in the evidence are not sufficient to constitute ownership of contiguous land upon which to base and adjoining farm entry.

2nd. That the acquisition of the legal title to more than one hundred and sixty acres by the claimant April 10, 1880, does not aid his entry for the reason that he then became the owner of so much land as to inhibit an entry of the kind in controversy.

The evidence upon the question of ownership of said NW. $\frac{1}{4}$, NE. $\frac{1}{4}$, Sec. 13, at the time of the entry was principally confined to the testimony of claimant and wife. Their statements are not contradicted and clearly show such an oral bargain and sale of the said forty acre tract as has been hereinbefore set out, and that under such purchase claimant has ever since held said land as owner thereof.

In a letter of instruction from the General Land Office, to the register and receiver at Jackson, Miss. (1 L. D., 61), it was said that:

Where land in a homestead entry that has been consummated, but not patented, is sold, the purchaser may make adjoining farm homestead entry of a contiguous vacant tract (as the law allows), at his own risk as to the patenting of the land purchased.

In Sec. 2260 of the Revised Statutes there is a provision inhibiting a person from removing from land of his own to pre-empt public land in the same State or Territory, and it seems to me that the same rule of ownership which is applied by the Department to prevent a man from acquiring public land under one statute, ought to be applied in the construction of another by which the right to enter public land may be acquired.

Sec. 2289 of the Revised Statutes provides as follows:

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

In James Aiken (1 L. D., 462), it was held that the proprietorship of land contemplated in section 2260 is a legal and absolute one and not the mere equity of a land office entry, which may or may not ripen into

such ownership. But, as appears from the context, said decision was based largely upon the fact that the government cannot be sued in a court of equity and compelled to make a legal conveyance.

Later it was held that when a party holds the equitable title to land, though no deed has passed, he cannot remove therefrom to pre-empt land. *Ware v. Bishop* (2 L. D., 616); *Griffin v. Forsyth* (6 L. D., 791).

In *Davidson v. Kokojan* (7 L. D., 436) it was held that where a party had sold the land formerly owned by him before making settlement on land which he afterwards filed for under the pre-emption law, Sec. 2260 does not apply even though the legal title still remained in him.

In *Ole K. Bergan* (7 L. D., 472), it was held that the inhibition of Sec. 2260 extends to a removal from land held under a contract of purchase even though payment had not all been made at the time of removal.

It seems to me that ownership of the said NW. $\frac{1}{4}$, NE. $\frac{1}{4}$, of Sec. 13, was under the evidence sufficient to warrant the the allowance of the entry, and this being so, residence upon the said NW. $\frac{1}{4}$, NE. $\frac{1}{4}$, for five years after such entry was sufficient to admit final proof and that it was unnecessary to require him to wait five years after he had acquired the legal title before making final proof, and your office should have considered the proof upon which the local officers issued final certificate.

This ruling practically disposes of all the grounds of appeal except the proposition that a man must not at the time of final proof be the owner of so much contiguous land as will with the land entered amount to more than one hundred and sixty acres.

Counsel for contestant in an argument recently filed urge that the testimony of Smith and his wife is not to be believed in regard to the purchase of the NW. $\frac{1}{4}$, NE. $\frac{1}{4}$, Sec. 13, in 1872, because Smith permitted the said land to be included in the bond for a deed which was afterwards foreclosed and that "It was too great an imposition on human credulity to ask a reasonable person to believe that a man will deliberately permit another to sell the home which he has bought and paid for without even making protest or raising a hand to defend himself."

Counsel has evidently overlooked the fact that before putting the said NW. $\frac{1}{4}$, NE. $\frac{1}{4}$, of 13, already bought and nearly or quite paid for, into the bond for a deed the "difference in price" growing out of such payments was allowed and deducted from the price agreed upon for the land then being purchased so that the said forty acres from and after that time became liable for the payment of the purchase price of the additional land thus being purchased.

It is also claimed by counsel that there was nothing to prove that Socrates Smith was occupying the land in any other capacity than that of tenant at the time he made his additional entry.

The testimony of both plaintiff and his wife, which is not contradicted by that of any other witness precludes this theory, it being provided in

Sec. 3665 of the Code of Iowa that the provision of the statute of frauds in regard to the transfer of interest in lands shall not apply,

where the purchase money, or any portion thereof, has been received by the vendor or when the vendee, with the actual or implied consent of the vendor, has taken and held possession thereof under and by virtue of the contract.

Possession being taken or part of the purchase price being paid takes the parol contract out of the statute of frauds. *Fairbrother v. Shaw*, 4 Ia., 570; *White Butt*, 32 Ia., 335.

As I have concluded that claimant was equitable owner of NW. $\frac{1}{4}$, NE. $\frac{1}{4}$, Sec. 13, at the time of his entry and that such ownership was sufficient to base his additional farm entry upon, the question of his owning more than one hundred and sixty acres on April 10, 1880, is eliminated from the case.

No authorities have been cited by counsel and I find nothing in the statute to prevent an entryman of adjoining lands from acquiring other lands during the five years of residence before final proof, nor do I believe any such restraint was contemplated by Congress.

Your decision in so far as it dismisses Carnes' contest is affirmed, and if upon examination Smith's proof shall be found sufficient his entry may be passed to patent.

HOMESTEAD CONTEST—DEFECTIVE COMPLAINT—RELINQUISHMENT.

HAY v. YAGER ET AL.

In order to sustain a contest against a homestead entry for abandonment it must be shown that such abandonment has continued for six months, and the complaint must so allege.

If the filing of an affidavit of contest results in the relinquishment of the entry such relinquishment inures to the benefit of the contestant, though the charge as laid by him may be insufficient.

The right of a contestant to amend a defective complaint is barred by the intervention of an adverse right.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 3, 1890.

I have considered the case of *Andrew Hay v. Abraham Yager et al.*, on appeal by Hay from the decision of your office of July 13, 1888, rejecting his application to make homestead entry for the NW. $\frac{1}{4}$ of Sec. 8 T. 1 S., R. 14 W., Los Angeles, California land district.

On April 19, 1887, Abraham Yager made homestead entry for said land, and on December 20, of that year Hay filed an affidavit of contest against said entry, alleging on information and belief "that said Abraham Yager has wholly abandoned said tract; that he has changed his residence therefrom since making said entry." On the back of this affidavit appears without date the following endorsement: "Rejected on the ground that affidavit of contest does not state facts sufficient to

constitute a cause of contest against claimant." On January 31, 1888, the local officers gave Hay's attorney notice of the rejection of the contest affidavit. In the mean time on December 22, one Frank R. Adams filed in the local office a relinquishment of Yager's entry and was allowed to make a homestead entry for said land. The relinquishment thus filed was executed December 12, 1887.

On February 7, 1888, Hay applied for a reconsideration by the local officers of their action rejecting his contest affidavit, and March 15th, was set for hearing arguments upon this motion. On March 5, Hay applied to make homestead entry for said land, which application was rejected because of the homestead entry of Adams. On March 15, the question as to the rejection of Hay's contest affidavit was considered by the local officers, arguments being submitted by attorneys for Hay and for Adams, and on April 12, the local officers held that the contest affidavit was insufficient and was rightly rejected. From each of the decisions adverse to him Hay appealed. After taking his appeal he filed an amended contest affidavit alleging that Yager had wholly abandoned said tract before the filing of the original affidavit by removing to the State of Indiana with the intention of permanently remaining there; that he had been residing in the State of Indiana since four months prior to the filing of the original affidavit and setting up the execution by Yager of his relinquishment and alleging the sale of it to Adams. Your office concurred in the ruling that Hay's contest affidavit was insufficient and decided that therefore the relinquishment of Yager could not be considered as inuring to Hay's benefit, and affirmed the action rejecting his application to enter.

I concur in the conclusion that said affidavit was not sufficient. In order to sustain a contest against a homestead entry for abandonment it must be shown that such abandonment had continued for a period of six months and as a consequence it must be so alleged in the complaint. While this affidavit was insufficient, yet it should not have been dismissed without giving notice to the contestant. The filing of the relinquishment, however, effected the cancellation of the entry and the only question remaining to be determined is, Was that relinquishment the result of Hay's affidavit? I am of the opinion that a hearing should be had to determine this question. While this affidavit as it then stood may not have been sufficient to proceed to a hearing upon, yet the filing of that affidavit, defective as it was, may have caused the filing of the relinquishment and if that were the case it should inure to the benefit of the contestant. If this affidavit had alleged a sufficient ground of contest, the entryman could not by the filing of this relinquishment have defeated the right of the contestant to proceed with his contest and establish the truth of his allegations. The contestant's rights in that case would be determined by the status of the land at the date of the institution of his contest.

Kurtz v. Summers (7 L. D., 46); McClellan v. Biggerstaff (7 L. D., 442); Sorenson v. Becker (8 L. D., 357); Webb v. Loughrey (9 L. D., 440); Brakken v. Dunn (9 L. D., 461).

In this case, however, the rights of the contestant must be determined upon the case as presented by him at the date of the filing of the relinquishment. He should not be allowed, in the presence of an adverse claimant, to amend his affidavit and thus extend his right at the expense of an innocent party. Farmer v. Moreland (8 L. D., 446).

The only question then to be determined is as hereinbefore said. Was the execution or filing of Yager's relinquishment caused by the filing of Hay's affidavit of contest? For a proper determination of this question it is necessary that all the facts in connection with the execution and filing of said relinquishment should be known, and you will therefore cause a hearing to be had as soon as practicable, of which all parties in interest should have due notice and be afforded an opportunity of submitting testimony in support of their respective claims. Upon receipt of the testimony submitted at such hearing, you will please consider the same and pass upon the rights of the respective parties in the light of the facts shown thereby, and in accordance with the views herein expressed.

The decision appealed from is hereby set aside, and the papers in the case are herewith returned to your office for the action indicated.

TIMBER CULTURE CONTEST—FORFEITURE.

THOMPSON v. THE HEIRS OF PARTRIDGE.

The government will not insist upon cancellation where the failure to comply with law is not in consequence of bad faith, and the rights of third parties are not involved.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 3, 1890.

I have considered the case of Russell W. Thompson v. The Heirs of Stephen Partridge, upon appeal of the former from your office decision of July 30, 1886, dismissing his contest against the timber culture entry of said Stephen Partridge for SW. $\frac{1}{4}$, Sec. 29, T. 112 N., R. 55 W., Watertown, Dakota, land district.

The entry was made August 30, 1881 and contest was initiated October 25, 1885, the charge being that said heirs had failed, during the fourth year after entry and up to date of the affidavit, to plant to trees, tree seeds or cuttings the second five acres of the said land.

The record discloses that the entryman had soon after entry paid his nephew A. P. Partridge, who lived near the land the sum of \$250 for which he agreed to do the plowing, planting and cultivating necessary to be done upon the land until final proof was made; that upon the

death of the entryman, his heirs, most of whom resided in St. Louis, Mo., corresponded with said A. P. Partridge, in regard to the necessary work upon the land and were by him informed that he was having the same properly done to comply with the law and would in good faith carry out his contract; that said A. P. Partridge, deliberately and purposely neglected to plant the second five acres and then procured this contestant who was his hired hand, to bring this contest, himself paying the expenses. He says it was for the purpose of holding the claim without putting further labor upon it until he could have an opportunity of selling the relinquishment for the benefit of the heirs, and that contestant had agreed to dismiss the contest at any time and that it was agreed that it should never come to a hearing.

It appears also that all this was without the knowledge of the heirs of the entryman who were relying upon the representations of said A. P. Partridge that the work required by law was being properly done.

Since taking appeal from your decision, contestant has filed a motion to the effect that his appeal be dismissed, thus submitting to your office decision. Although it does not appear that any planting has been done upon the second five acres, yet as no bad faith is shown upon the part of the representatives of the entryman and the rights of a third party are not now involved, a forfeiture of the entry will not, in view of the above facts, be insisted upon. *Andrews v. Cory* (7 L. D., 89).

Your said office decision will accordingly stand as made.

TIMBER CULTURE ENTRY—PREMATURE CONTEST.

SVENNEBY *v.* BROSTE.

A stranger to the record can not be heard to complain that a contest is premature.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 3, 1890.

I have considered the case of Arne B. Svenneby *v.* John P. Broste on appeal of the former from your office decision of August 6, 1888, rejecting his application to contest the timber culture claim of Rosamond A. Steere, for NE. $\frac{1}{4}$ Sec. 20, T. 150 N., R. 60 W., Grand Forks, Dakota, land district.

It appears from the record that on March 10, 1885, Rosamond A. Steere made timber culture entry for said land, and on January 27, 1888, Broste filed in the local office an affidavit of contest alleging that "said Rosamond A. Steere did not during the year 1887 cultivate or cause to be cultivated any part of said tract, or plant or cause to be planted any part thereof to trees, tree-seeds or cuttings."

Notice was served by publication fixing March 13, 1888, for hearing before the local office.

On said day of hearing the claimant made default and Broste filed his affidavit to the effect that about ten acres of land had been broken upon the tract in controversy by some former claimant before entry was made by said Rosamond A. Steere and that after her entry she had not done or caused to be done anything further upon the land and that this state of facts continued to date of hearing. Said contestant also introduced in evidence a letter from entryman as follows:

"PASCOAG, Jan., 14, 1888.

Mr. M. N. JOHNSON,

Dakota, D. T

DEAR SIR: Your communication of the 23d ult. came to hand this day but too late to reply by return mail.

I filed on the tree claim in question but soon after transferred my right to one Geo. H. Glass then of Larimore. Robert Bruen at that time in the office with Wm. Fellows, also of L., drew up the papers which I signed and here my interest ended with the tree claim.

Very respectfully,

R. A. STEERE.

Upon this the local officers found that the land embraced in said entry "has not been cultivated as required by law" and also that claimant had executed a relinquishment soon after making entry, and rendered judgment in favor of contestant.

From this decision of the local officers no appeal was taken.

On the day of hearing before the local office the appellant herein presented an affidavit of contest against said entry, but the local officers refused to file the same because of the pendency of Broste's contest.

From this decision Svenneby appeals, alleging as error that,—

The year for which the alleged default was claimed to exist had not expired when first contest was initiated, and had not expired even when hearing was had, and that therefore the first contest was of no effect.

Examination of the record shows that the appellant is mistaken in the matter alleged as error. The contest affidavit was dated January 27, 1888, and alleged failure to cultivate in 1887. This would be sufficient grounds on which to dismiss the appeal, but even in the view of the case contended for by appellant, that the allegation is in effect that default existed in not cultivating or planting during the third year, which would not expire until March 10, 1885, it can avail him nothing.

In *Hemsworth v. Holland* (on review) (8 L. D., 400), it was held that,—

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.

Applying the rule above to the case at bar it follows, that Svenneby being a stranger to the record in the case of *Broste v. Steere*, can not be heard to complain that said contest was prematurely brought.

Your said decision is accordingly, affirmed.

PRACTICE—APPEAL—FINAL PROOF PROCEDURE.

A. LINDBERG.

An appeal will not lie from an order of the General Land Office, requiring the entryman to submit a supplemental affidavit in support of his entry.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 4, 1890.

On the 8th day of May, 1883, August Lindberg filed pre-emption declaratory statement, No. 13524, for the SE. $\frac{1}{4}$, Sec. 2, T. 132 N., R. 59 W., Fargo district, Dakota, alleging settlement on the 1st day of May, 1883.

On the 14th day of August, 1884, said Lindberg offered final proof before the district court clerk of Ransom county, Dakota, and on the 15th of August, 1884, the local officers issued final cash entry papers.

On January 4, 1887, your office instructed the local office as follows:

The testimony submitted—on said final proof—does not show continuous residence on the land for six months immediately preceding date of proof, August 15, 1884. In view of the fact, however, that the claimant appears to have commenced residence more than one year prior to that date, and also to have \$250 worth of improvements on his claim, he will be allowed to show by affidavit the duration and cause of each absence therefrom since actual residence was established May 1, 1883. He should also state how long he continued to occupy and cultivate his claim subsequent to entry.

On December 13, 1888, the local officers reported to your office the mailing of notice of said instructions of January 4, 1887 to C. D. Austin, attorney for pre-emptor, and also to said pre-emptor, (Lindberg) himself, and the return of the latter notice by the post office as "unclaimed." In the same letter (December 13, 1888) the local officers transmitted "power of attorney, F. T. Day, present owner, to C. D. Austin, affidavit of F. T. Day, and appeal (by said F. T. Day) to the Hon. Secretary of the Interior, filed in this (the local) office December 12, 1888."

In his said affidavit dated November 28, 1888, said F. T. Day makes the following allegations:—

That he is the present owner of the (tract in question). That the whereabouts of said August Lindberg are unknown to this deponent, and after diligent inquiry he is unable to learn where the said Lindberg now is, and he is of the opinion that the said Lindberg is not within the Territory of Dakota. That the said August Lindberg neglects to furnish the affidavits required by the Hon. Commissioner's decision of June 4, 1887" (meaning January 4, 1887) "or to take any action whatever in the matter.

Upon these allegations "deponent asks that he as owner aforesaid be allowed to cause an appeal to be taken from the said decision of the Hon. Commissioner to the Hon. Secretary of the Interior."

The "appeal" accompanying said affidavit is a simple statement of the fact that "F. T. Day appeals from the decision" in question—

that of January 4, 1887—calling for certain supplemental affidavits, showing duration and cause of each absence." The paper neither contains nor refers to, any specification of errors.

This omission to specify errors, and the insufficiency of the showing as to the nature of the interest by virtue of which Day claims the right to appeal, technically impeach his status as an appellant; and it would seem that, "as transferee, he was also required to file his appeal within the time prescribed by the rules." (Peter O. Satrum, 8 L. D., 485). Another—and a fatal—difficulty with the appeal, is this, that the order appealed from (that of January 3, 1887) is not a final order, but only one requiring the entryman to make a supplemental affidavit in support of his entry: From this no appeal will lie (Jennie M. Tarr, 7 L. D., 67; Mary L. Tiffany, 7 L. D., 480; Jay Pierce, 8 L. D., 73).

While for these reasons the appeal must be, and is, hereby dismissed, yet, the complete record, including the final proof, being before me, I deem it proper, in order to avoid unnecessary delay in the final disposition of this case to point out for the guidance of your office, that the circumstance in view of which your order called for further evidence, the circumstance, namely, that the pre-emptor did not show "continuous actual personal presence on his claim for six months immediately preceding the offering of his proof is one which the Department holds to have no particular significance, in and of itself (Mary A. Shanessy, 7 L. D., 62).

HOMESTEAD CONTEST—ACT OF JUNE 15, 1880.

RATHBUN *v.* WARREN.

The initiation of a contest suspends the right of purchase under section 2, act of June 15, 1880.

A decision that amounts to the determination of a substantial right is not interlocutory.

A homestead contest may be entertained, though not begun until after the expiration of five years from date of entry.

First Assistant Secretary Chandler to the Commissioner of the General Land Office February 4, 1890.

On May 8, 1879, Winslow L. Warren made homestead entry for the SW. $\frac{1}{4}$ of Sec. 8, Tp. 103 N., R. 60 W., 5th P. M., Springfield land district, Dakota.

On February 12, 1886, Edward E. Rathbun filed an affidavit of contest against Warren's entry, charging abandonment and that the tract was held for speculative purposes.

A hearing on such contest was set for March 24, 1886, and claimant, February 15, 1886, personally notified.

Pending the contest, and on March 11, 1886, Warren was allowed to purchase the land in controversy under the second section of the act of June 15, 1880.

On the day set for hearing, the contestant made default, but claimant appeared and moved for the dismissal of the contest upon two grounds:

First, that more than five years from entry had elapsed before the contest was instituted;

Second, that Warren purchased the tract on March 11, 1886, under the provisions of the act of June 15, 1880. It was claimed by Warren that upon such purchase prior to the rendition of a final judgment in favor of contestant, the contest should be dismissed. But as Rathbun was not present at the hearing, he was not heard on this motion. Judgment was rendered thereon by the local officers, as follows:

March 24, 1886. This contest is dismissed, the claimant having been allowed to purchase under act of June 15, 1880.

GEO. B. EVERETT, *Regr.*

No notice of this determination was served upon the contestant. On May 26, 1886, Rathbun appealed to your office from the action of the local officers, and on June 1, 1886, claimant moved that such appeal be dismissed, substantially for the reasons, first, because defendant made default at the time of hearing, and, second, there is no such judgment made by register and receiver as can be appealed from.

Your office took cognizance of the appeal and by your decision of August 2, 1887, the action of the local officers dismissing the contest was reversed and the same remanded for new trial. In your said decision it is stated as a principle of law and your determination upon the appeal is based upon it, that "the application to purchase should have been suspended until the final determination of the contest (*Freise v. Hobson*, 4 L. D., 580).

In accordance with this ruling the local officers ordered a hearing upon the said contest and appointed October 11, 1887, as the time for the same. Notice thereof was personally served upon the claimant on August 16, 1887.

On October 10, 1887, Warren appealed to this Department from your office decision of August 2, 1887. At the day of hearing October 11, 1887, contestant appeared and was represented by his attorney. The claimant appeared specially by his attorney and moved the dismissal of "said action" upon the the ground, among others, that "said action is now pending on appeal before the Hon. Secretary of the Interior. This motion was overruled by the register on the ground that your office decision of August 2, 1887, was purely an interlocutory order and not appealable. The receiver was of the opinion "that the appeal filed by Warren suspended action on the contest so far as this office is concerned, until the Commissioner may have an opportunity to examine into and ascertain the validity of the grounds of appeal as set forth by the claimant."

The hearing did not proceed. The matter having been referred to your office, you by a decision bearing date February 11, 1889, deter-

mined that the said decision of August 2, 1887, was appealable and that Warren's appeal suspended further proceedings before the local officers. Your office accordingly forwarded the papers in the case to this Department for consideration.

The substantial question involved in Warren's appeal is the legality of the entryman's purchase of the land under the second section of the act of June 15, 1880 (21 Stat., 237), pending the contest. The question, whether a hearing on the contest could or should be ordered after such purchase is merely incidental. If the purchase was legal then Warren is the equitable owner of the land, and any further investigation on the charges of the contest is useless. If, on the other hand, it is the law that the initiation of a contest suspends the right of purchase under the act of June 15, 1880, until the final disposition thereof, then Warren could take nothing by his purchase as against the contestant and the contest should proceed, as you directed by your said office decision of August 2, 1887.

I am of the opinion that said decision is not an interlocutory order from which no appeal will lie. It was the determination of a substantial right, one involving the validity of Warren's cash purchase of the tract, pending the contest.

In the case of *Freise v. Hobson* (4 L. D., 580), decided June 21, 1886, it was held that an application to purchase under the second section of the act of June 15, 1880, made after the initiation of a contest against the original entry, should be suspended until the final disposition of said contest, and this principle has since been adhered to. *Lyons v. O'Shaughnessy* (5 L. D., 606); *Clement v. Heney*, (6 L. D., 641); *Arnold v. Hildreth* (7 L. D., 500); *United States v. Scott Rhea* (8 L. D., 578); *Hawkins v. Lamm*, (9 L. D., 18).

In *Roberts v. Mahl* (6 L. D., 446) and *Smith v. Mayland* (7 L. D., 381), it was determined that the rule laid down in *Freise v. Hobson*, *supra*, must govern in similar cases not finally adjudicated at the time of the rendition of judgment in the latter case. Your disposition of the case is therefore, in full conformity with the authorities on this question and I think a trial should be had to ascertain the relative rights of the parties. The non-appearance of contestant on the day of hearing, after the local officers had allowed the purchase, should not determine the contest. What further proceedings after allowing the purchase could the local officers entertain?

The records show that the contest was dismissed because of such purchase. Nothing remained for contestant but to appeal. This he did.

It is likewise insisted by the claimant that the contest should not be allowed to proceed, because not commenced within five years from date of entry. That section 2297 of the Revised Statutes bars the initiation of a contest beyond such period. This position is untenable. It is the holding of the Department that while a homestead entry remains of

record, even after the expiration of seven years from date of entry, the government will allow a contest and an inquiry to be instituted to determine whether the entryman has complied with the requirements of the homestead law. *Kincaid v. Jefferson* (3 L. D., 136; *Green v. Brown* (5 L. D., 229). See also upon this question *Davis v. Fairbanks* (9 L. D., 530).

Your said office decision of August 2, 1887, is affirmed.

SPECULATIVE CONTEST—HEARING.

DAVISSON *v.* GABUS ET AL.

If the good faith of a contest is attacked, a hearing on such issue may be ordered on the final determination of the contest.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 4, 1890.

On September 15, 1885, Wm. F. Locke made homestead entry for the SE. $\frac{1}{4}$, of Sec. 12, T. 9 S., R. 31 W., Oberlin land district, Kansas.

On April 15, 1886, M. E. Davisson initiated a contest against the entry charging abandonment, change of residence and failure of settlement on the part of the entryman. An attempt was made to serve notice thereof on Locke by publication.

The case was heard *ex parte* June 17, 1886, in the absence of the contestant Davisson. No decision on the merits was entered by the local officers on account of the imperfect service and the attorney of Davisson was notified September 18, 1886, that the service in the case was defective in that proof of publication of the notice and posting the same in the local office was wanting.

Contestant was therefore allowed twenty days to "complete the service."

On November 29, 1886, Davisson's contest was dismissed by the local officers "by reason of defective service." No appeal was taken.

On January 20, 1887, Peter Gabus made and filed affidavits of contest against Locke's entry charging abandonment thereof by entryman, change of residence and failure of settlement on the land. The hearing was set for March 11, 1887, and service of notice thereof by publication on Locke attempted. A hearing was had *ex parte*, the entryman making default, and judgment was rendered by the local officers on the same day for contestant; as they were of the opinion that the entry should be canceled.

On the same day March 11, 1887, Davisson moved the local officers for the re-instatement of her contest against Locke, because the same was erroneously dismissed. The motion was denied and no appeal taken.

On October 6, 1887, the defendant Davisson filed her affidavit duly corroborated, charging that the said contest of Peter Gabus against the

entry of Locke was fraudulent and instituted for speculative purposes and asked that the said Peter Gabus be cited before the local officers to answer the said allegations and that she, the affiant, upon proof of the truth of the same be allowed the preference right to enter the said land.

On this application a hearing was fixed for November 25, 1887, and Gabus duly notified. Thereat Gabus appeared and moved to dismiss Davisson's contest, because the affidavit and notice of contest failed to state a cause of action and because the contest was prematurely initiated.

The motion was sustained by the local officers and the contest dismissed, from which decision Davisson appealed.

Pending this appeal your office considered the contest case of Gabus *v. Locke*. It appearing from the proof of service in the case that notice of contest was mailed by registered letter to the last known address of defendant February 12, 1887, and posted in the local office February 11, 1887, only twenty-seven and twenty-eight days, respectively, instead of thirty days as required by rules of practice, prior to date of hearing, your office by letter of August 4, 1888, set aside the decision of the local officers and remanded the case for a re-hearing after service of due and proper notice under the rules of practice.

On the same day August 4, 1888, your office rendered a decision upon the appeal of Davisson. In it you hold that "this case would seem to come under the rulings of the department in the cases of *Melcher v. Clark* (4 L. D., 505); and *Neilson v. Shaw* (5 L. D., 358). In the former it was held that where a pending contest is attacked on the ground of fraud, by one who also makes an application to contest, notice will not issue on such application but the case will be held for the final disposition of the prior contest. In the latter, that a preference right of entry cannot be secured through a contest initiated for the purpose of selling the right of contest rather than securing the cancellation of the entry." Your office therefore modified the decision of the local officers "to the extent of suspending further proceedings on Davisson's application for the reinstatement of his contest and a hearing to establish his allegations of fraud etc., against Gabus, until the case of *Gabus v. Locke* is settled." From this decision Davisson appealed to this Department. Gabus did not appeal.

Davisson's objection in making her application of October 6, 1887, and taking her appeal, is to obtain a hearing on her charges against Gabus. Your office decision did not deny her the hearing but delayed it till the case of *Gabus v. Locke* should be finally disposed of. The case of *Gabus v. Locke* was fully and finally determined November 15, 1888, in favor of Gabus, the contestant. There is therefore under the terms of your said office decision, no further objection to proceed with the hearing upon Davisson's said application attacking the *bona fides* of Gabus' contest. You will, therefore, order such hearing, directing the local officers to give the parties in interest the usual notice of time of hearing.

Your said office decision is modified accordingly.

PRE-EMPTION ENTRY—"QUARTER SECTION."

JOHN W. DOUGLAS.

A pre-emptor is entitled to enter a quarter section, platted as such, regardless of the actual area thereof.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 5, 1890.

I have considered the appeal of John W. Douglas, jr., from your office decision of January 21, 1888, involving lots 21, 22, 23, 24, 25 and 26 of section 6, T. 24 N., R. 42 E., Spokane Falls, Washington.

The claimant filed his pre-emption declaratory statement for the said lands September 9, 1886, alleging settlement the day previous. He submitted his final proof September 10, 1887, claimant's application to purchase the said lands under the pre-emption act was rejected by the local officers because the said lots contained in the aggregate more than one hundred and sixty acres, to wit, two hundred and one and five one hundredths acres. Claimant appealed. By your decision of January 21, 1888, you upheld the action of the local officers and restricted Douglas to lots 21, 22, 25 and 26 of said section, containing one hundred and sixty acres, in satisfaction of his pre-emption right.

You also required the testimony of claimant as to whether he removed from land of his own, to make settlement upon the public land in the same state, as a pre-emptor.

The said testimony was supplied by the said claimant, it appearing from his affidavit on file bearing date October 6, 1888, that he did not remove from land of his own in Washington Territory to make settlement upon his said pre-emption claim.

From the other rulings in your said office decision the claimant appealed to this Department.

The said lots twenty-one to twenty-six inclusive form the south-west quarter of the said section, and it is claimed on the part of appellant, that he is authorized by the pre-emption act, to enter as a pre-emptor a quarter section, platted as such, regardless of what the actual area thereof may be. On this point the claimant is fully supported by the authorities, William C. Elson (6 L. D., 797) J. B. Burns (7 L. D., 20) Henry C. Tingley (8 L. D., 205); Peder Olsen-Aanrud (7 C. L. O. 103).

The final proof of claimant appearing to be satisfactory and there being no other objections to the entry apparent, I am of the opinion that the proof as submitted by the claimant covering the whole of the land involved herein, should be accepted, and that upon his further compliance with the requirements of the pre-emption act, patent issue.

Your said office decision is accordingly reversed.

PRE-EMPTION ENTRY—SECTION 2260, R. S.

OTT *v.* CRAWFORD.

A temporary removal of the pre-emptor from land of his own, prior to the establishment of residence on his pre-emption claim, will not take such claim out of the inhibition contained in the second clause of section 2260, Revised Statutes.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 5, 1890.

I have considered the appeal of Abraham Crawford from the decision of your office dated October 10, 1888, in the case of Joseph Ott *v.* said Crawford, rejecting the latter's final proof and holding for cancellation his pre-emption declaratory statement for the W. $\frac{1}{2}$, NW. $\frac{1}{4}$, Sec. 30, T. 2 N., R. 40 E. W. M., and the N. $\frac{1}{2}$, NE. $\frac{1}{4}$, Sec. 25, T. 2 N., R. 39 E. W. M., La Grande land district, Oregon.

On August 27, 1885, Ott made homestead entry for said tract, and on September 7, 1885, Crawford filed his pre-emption declaratory statement for the same land, alleging settlement thereon July 23, 1885.

On December 31, 1887, the register advertised Crawford's intention to make final proof for said tract February 14, 1888.

On January 12, 1888, Ott filed a protest against the making or acceptance of such proof for the reason that Crawford was not at the time of his alleged settlement a qualified pre-emptor, and that he removed from lands of his own in the same State, to make said settlement.

On February 14, 1888, Crawford offered final proof for said land which was rejected by the register February 28, on the ground that Crawford was not a qualified pre-emptor at date of settlement.

On March 14, 1888, Crawford appealed; and on October 10, 1888, your office affirmed the findings of the local office, and held the pre-emption declaratory statement for cancellation.

On December 7, 1888, Crawford appealed to this Department.

In his final proof Crawford stated that he was a native born citizen, and a married man; his family, consisting of his wife and five children. That he lived on land near by and was occupied in farming prior to settling upon his pre-emption claim. That he laid the foundation for a house on the tract in dispute July 23, 1885, and about the middle of August, 1885, he had his house completed and commenced to reside thereon with his family. That his residence has been continuous. That he was not the owner of three hundred and twenty acres in any other State or Territory, but that he had taken a homestead in the vicinity of the pre-emption claim and had proved up on it, and was still the owner thereof. He had a residence on his homestead but "It is unoccupied." His improvements on the pre-emption claim consisted of a log house 18 by 28 feet; a smoke house, a chicken house, and barn,

eighty fruit trees, some fencing and about four acres plowed. Total value \$390.

On his cross-examination he testified as follows, viz:

How long before settlement on this claim did you make your final proof on your homestead?

Two or three days before. I think I made final proof on my homestead on the 21st day of July, 1885.

Where did you reside from July 21, 1885, to the time you made settlement on this tract?

On a place I had rented adjoining this tract.

Are you the identical Abraham Crawford who made final homestead entry No. 1180 on the SW. $\frac{1}{4}$, Sec. 19, T. 2 N., R. 40 E. W. M., on July 21, 1885?

Yes, sir.

Was you a resident of said tract . . . at the time you made your final proof thereon?

Yes, sir.

How long did you continue to reside on said tract after making final proof thereon?

For one day after making final proof.

Do you still own said tract upon which you made final homestead proof?

Yes, sir.

How long did you reside upon the place you had rented, that you refer to before you settled upon this claim?

The next day, that is, I commenced my house on the tract the 23rd day of July, 1885. I actually moved on this tract about the middle of August, 1885.

Was there any house on the rented place . . . ?

Yes, sir; there was house on it, and I removed into it.

Upon review of the record and proofs herein I am of the opinion that the same sufficiently shows that Crawford was not a qualified pre-emptor under the provisions of section 2260, of the Revised Statutes; that his alleged removal from the homestead to the rented house on the adjoining land was but temporary and not made in good faith with a fixed purpose of establishing his residence there, but that such removal was only for the purpose of trying to evade the inhibition contained in the second subdivision of said section, which 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 under the provisions of the preceding sections.

For the reasons herein stated and in view of numerous decisions of this Department in similar cases, the decision appealed from is affirmed.

PRE-EMPTION ENTRY—FINAL PROOF.

HENRY D. WOOLSEY.

Submission of final proof within the shortest period possible under the law is not in itself sufficient to impeach the good faith of the pre-emptor.

The preparation of a part of the testimony, on the day previous to that fixed for the submission of final proof, does not affect the regularity of the proceedings where such proof is completed and sworn to at the time and place designated, and before the officer named in the notice.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 6, 1890.

This case involves the validity of Henry D. Woolsey's pre-emption proof for the E. $\frac{1}{2}$, NW. $\frac{1}{4}$, and W. $\frac{1}{2}$, NE. $\frac{1}{4}$, Sec. 19, T. 28 S., R. 36 W., Garden City, Kansas.

It appears from the record that one Sarah Johnson had filed declaratory statement June 3, alleging settlement May 28, 1887, upon the tracts named, that Woolsey's declaratory statement was filed August 22, 1887, alleging settlement on the land the 17th of the same month, that in January, 1888, he advertised his intention to make proof before the clerk of the district court at Hugoton on March 7, 1888, that a part of the testimony in such proof was transcribed by the deputy clerk on the preceding day, to wit, March 6, 1887, between five and six o'clock p. m., that shortly afterward on the same day, an affidavit of protest against said proof was prepared for Johnson by one Charles Moore who seems to have been connected with the office of said clerk and with whom the said affidavit was left or "filed," that Johnson being advised by said Moore that she "had done all that I (she) could do," made no appearance at the clerk's office on the following day, the one named in Woolsey's published notice and that between eight and nine on the morning of that day Woolsey and witnesses appeared at the office of said clerk completed their testimony in Woolsey's proof and swore to the same.

It does not affirmatively appear that any action was taken at this time by the local office although counsel for Woolsey state that Johnson's protest was dismissed with notice on March 31, 1888.

Subsequently, however, upon an affidavit filed by Johnson to the effect that "she was unable to have said Woolsey or his witnesses cross-examined" for the reason that the latter's proof "was taken on the 6th day of March, 1888, one day before the date advertised" the local officers ordered a hearing for June 20, 1888, at the local office to determine the matter thus alleged.

At the hearing so ordered counsel for Woolsey appeared specially and moved to dismiss the same.

This motion being overruled, the local office upon the evidence adduced at said hearing, found (June 26, 1888), that Woolsey's proof had

not been taken as contemplated by law and that Johnson should be allowed full opportunity to show her interest in the tract.

Woolsey appealed from this ruling and on August 13, 1888, your office after a full consideration of the case, found that Johnson by failing as stated, to appear before the said clerk on March 7, 1888, the day fixed for the taking of Woolsey's proof, "forfeited her right as protestant." At the same time the proof of Woolsey was returned by your office that its sufficiency might be passed upon by the local officers.

Thereupon the local office as shown by the receiver's endorsement on August 18, 1888, formally rejected said proof for the reason "that it appears from the evidence submitted on June 20, 1888, that a large portion of the proof was taken on a day other than that advertised" etc.

From this action Woolsey appealed and on October 23, your office affirmed the action of the local office in rejecting his proof.

From this decision Woolsey appeals here.

Service of notice of your said decision of August 13, 1888, holding that Johnson had forfeited her right was on August 18 following accepted by her authorized attorneys. No appeal has been taken by or for Johnson from your said decision of August 13, 1888.

The claim of Johnson, who by her said affidavit of protest alleged residence upon and improvement of the land and a failure by Woolsey to reside thereon, is, therefore eliminated from the case and the matter of Woolsey's present appeal, has been considered as *ex parte*.

The proof submitted by Woolsey shows that he made his settlement on the land on August 7, 1887, by "starting" his house, that he commenced actual residence September 6, 1887, since which time he has lived thereon continuously and without absence, that his improvements valued at \$227, comprise a frame house eight by ten feet, one window and one door, seven acres broken, the planting of sixty forest trees, twenty-seven fruit trees and some walnuts and hickory nuts and that he has neither transferred, mortgaged, or offered to sell the same. It is true that his proof was made promptly at the expiration of six months from the date when he established actual residence on the land. But this in itself is not sufficient to impeach his good faith in the face of such compliance with the law as his proof indicates.

The only objection that is made to this proof is that the testimony therein was partly transcribed by the deputy clerk on the day before the one named in Woolsey's published notice of intention. This, in my opinion, is wholly immaterial for the reason that the record shows that Woolsey appeared with his witnesses at a proper hour of the day named in his notice and that his proof, was then sworn to before the duly designated officer.

The proof of Woolsey, showing a reasonable compliance with the law the same should be accepted.

The decision appealed from is reversed.

SWAMP LANDS—INDEMNITY—SCRIP LOCATIONS.

STATE OF ILLINOIS (CHAMPAIGN COUNTY).

The claim of the State should not be rejected on the report of a special agent, but if the facts set forth therein are sufficient to justify a doubt as to the correctness of the proof submitted, a further investigation should be ordered.

When the State has submitted proof, in accordance with the regulations then in force, the General Land Office should render judgment thereon, if the proof is sufficient to clearly show the character of the land; but if such proof is insufficient, or other facts in the case suggest doubts as to the correctness thereof, then a further investigation may be directed.

In adjusting the claim of the State to indemnity, the character of all tracts upon which proof is submitted should be determined, but separate lists should be made of tracts sold for cash, and those located with land warrants or scrip.

The swamp grant is made to the respective States, and the Department in adjudicating rights thereunder recognizes the State alone as the beneficiary, and not counties to whom the State may have conveyed its interest.

If a tract of land at the date of the grant was unfit for cultivation by reason of its wet or swampy condition it is of the character contemplated by the grant.

When the State files a list of indemnity selections it signifies thereby its readiness to have its claim adjusted in accordance with existing regulations, and should not thereafter be heard to allege that final proof had not been furnished, when its claim was considered.

Secretary Noble to the Commissioner of the General Land Office, February 8, 1890.

I have considered the appeal of the State of Illinois from your office decision of August 20, 1886, in the matter of the claim of said State for indemnity for certain alleged swamp and overflowed lands in Champaign county.

The authorized agent for the State of Illinois filed in your office a list of selections for which indemnity was asked under the provisions of the acts of March 2, 1855 (10 Stat., 634), and March 3, 1857 (11 Stat., 251).

In January, 1885, the State made proof in support of its claim, said proof being taken in the presence of and the witnesses being examined by J. C. Walker, special agent of your office as certified by him. Afterwards said special agent submitted his report bearing date of April 21, 1885, in which report it is said:

I have made a careful examination by going over each of the tracts (forty acres) and examining the ditches, tiling and the early history of each tract, by calling on all of the early residents of each locality of these lands, and from the facts thus obtained and the evidence of the witnesses in making out proof to character of these lands, I have come to the following conclusion—said conclusion being that five hundred and forty tracts contained in said list were originally swamp, and that six hundred and sixty tracts were originally arable lands.

By letter of June 19, 1886, your office directed special agent Elliott to proceed to Champaign county, and make a careful examination of the tracts embraced in a list inclosed in said letter. Upon examination it

is found that this list embraced a part of those tracts which were reported upon favorably by special agent Walker.

By your office letter of August 20, 1886, to the Governor of Illinois, the claim of the State for indemnity on a large number of tracts embraced in its list of selections was rejected "for the reason that evidence on file in this office shows that said lands are not of the character contemplated by the act of September 28, 1850."

From this decision the State, through its duly authorized agent appealed, urging as reasons for its reversal the following:—

First: The State of Illinois has not furnished final testimony on this subject, and until she does, it is not competent for the Commissioner of the General Land Office to hold said tracts for rejection.

Second: The report of the U. S. special agent is not binding on the State, and this report constitutes the only evidence on which the Commissioner bases his authority to hold said tracts for rejection.

Third: The former rule of the office, to hold such cases for adjustment in suspension, until such times as the State would be able to offer testimony as to the character of the lands, was acceptable to the State, and a change in the rule should not be made without the consent of the State.

Fourth: The selections referred to, were either entered with cash, or located with land warrants, and the State has no means of distinguishing one from the other, only as the information may be furnished her by the General Land Office, and the holding for rejection embraces these tracts indiscriminately, and without reference to the entry for cash, or the location with land warrants.

Fifth: The General Land Office has no jurisdiction to hold for rejection any swamp land selections located with land warrants, or sold for cash, until the State is finally heard touching the character of said selections, especially is this true as to land warrant locations where no adjustment is pretended to be made by the General Land Office, and where the State asks for no adjustment, unless she is authorized by the Department to locate her swamp land indemnity certificates on government lands subject to entry outside of the limits of the State.

Sixth: The Rules of Practice, approved August 13, 1885, to take effect September 1, 1885, were never furnished the State until the 7th of August, 1886.

Seventh: Rule 86, to which the attention of the State was called August 7, 1886, fixing sixty days as the limit in which an appeal should be taken, should not, in justice, or equity, apply to this case, nor to any case of this character, when the State is a party, from the fact that the counties and not the State, are the beneficiaries of the swamp land grant, and the counties are governed and controlled in all swamp land matters, either by a board of county supervisors, or by a county commissioner's court, and the bodies, as a rule, meet but *twice in a year*, and at these meetings the letters of the Commissioner of the General Land Office holding swamp land selections for rejection, are presented and acted upon.

Eighth: The Commissioner of the General Land Office erred in that he did not call upon the Hon. Secretary of Interior, and ask him under the exercise of the directory and supervisory powers conferred upon him by law, to establish a rule with reference to appeal in this, and similar cases, which might be just to the State, and in harmony with the views of the State and the judicial decisions of the courts.

Ninth: Error lies in the Commissioner of the General Land Office not adjusting the account on such swamp selections as had been proven up before J. C. Walker, a former special agent of the Department, and reported by him as swamp and overflowed land, and in which cases the State had every reason to suppose the case was closed.

Tenth: Error lies in the Commissioner of the Gen'l. Land Office opening the case, and sending a second special agent to examine the lands and report on the same, as

an *ex parte* proceeding not warranted by the law, or the published rules of the Department of the Interior.

Eleventh: The instructions given to the last special agent who examined and reported upon the tracts where final proof had been filed, were not such as to draw out all the facts necessary to a decision as to the character of the lands on September 28, 1850, or if sufficient, said special agent failed to report the necessary facts in the case.

The first objection is without force, for the State had been afforded an opportunity to present proof in support of her claim and had presented such proof, and in the argument filed in the case it is said that she was willing to abide by the conclusion arrived at by the special agent upon the proof thus submitted. It is evident then that what was understood by the representative of the State to be final proof had been submitted.

The second objection if supported by the facts in the case is a valid one and must be sustained. Upon this point this case is similar to that of Poweshiek county (9 L. D., 124). Here as there the State submitted proof in support of her claim, at a time and place fixed by the agent of the government, which proof was forwarded to your office together with the report of the special agent. Another special agent was, in this case as in that, sent to inspect a part of the tracts, for which indemnity was claimed. Afterwards your office, in this case as in that, rejected a portion of the claim of the State "for the reason that evidence on file in this office shows that said lands are not of the character contemplated by the act of September 28, 1850" without giving any indication of the nature of the evidence referred to. As said in that case, the presumption is that the evidence referred to is that of the field notes and the agent's report. Said report is not properly evidence in the case, but if the facts set forth therein are such as to justify a doubt as to the correctness of the proof submitted, such report may properly be made the basis for a further investigation by your office in the course of which the State should be afforded an opportunity to contradict by evidence the allegation that any tract of land for which she has asked indemnity is not of the character contemplated by the act of September 28, 1850. Upon this point the case will be returned to your office for disposition in accordance with the rule laid down in the case of Poweshiek County, *supra*.

The third objection is without force because the State had submitted testimony in support of her claim, and all had been done that her representative conceived to be necessary to establish the claim presented. It is not shown or alleged that the State was injured by the course alleged to have been pursued by your office, and objected to in the fourth objection, nor do I apprehend that any wrong was perpetrated by the action complained of, and it is therefore unnecessary to consider such objection further. The first part of the fifth objection has been answered in the discussion of the previous objections. When the State has submitted proof in accordance with the regulations then in force, your office should consider the same, and, if such testimony is sufficient to determine satisfactorily as to the character of the land, judgment should be

accordingly rendered. If the proof submitted is not sufficient to clearly show the character of such lands or of any tract embraced in said list, or if from a knowledge in your office of facts in this case, doubts as to the correctness or reliability of the proof submitted should arise, another hearing may properly be had, or a further examination in the field if that is deemed necessary.

Hardin County (5 L. D., 236); Poweshiek County (9 id., 124).

In the latter part of this objection it is claimed in effect that no adjustment of the State's claim for indemnity for those tracts which had been entered with scrip or located with land warrants should be now made, inasmuch as she wishes no adjustment as to such tracts "unless she is authorized by the Department to locate her swamp land indemnity certificates on government lands subject to entry outside the limits of the State." That selections for indemnity for swamp lands, which were located with land warrants or scrip, must be made within the limits of the State where such losses occurred, has been the uniform construction of the act of March 2, 1855. State of Illinois (1 L. D., 504), and authorities there cited.

It is said by the appellant that your office does not pretend to adjust the State's claim for indemnity for land located with warrants or scrip. If it be true that it is the practice of your office not to pass upon the claim of the State for indemnity for lands thus located, it should be distinctly stated in the decision passing upon any list of selections, that the claim of the State had not so far as such tracts were concerned been considered or passed upon, and a list of the tracts thus located should accompany such decision.

It is stated that the list of selections now under consideration, included indiscriminately tracts sold for cash and those located with land warrants and scrip, and that the list of those tracts—indemnity for which was refused by your office—included also both classes of tracts; but from the record before me the truth of this allegation cannot be determined. The practice, if such obtains in your office, of refusing in such cases to consider the claim of the State for indemnity for lands located with land warrants or scrip, has not so far as I can discover, received the express sanction of this Department. It seems formerly to have been the practice for your office to determine what tracts of those for which indemnity was claimed were swamp and overflowed within the meaning of said grant, and as to those tracts which had been located with land warrants or scrip to issue an indemnity certificate covering the total amount. This is shown by the history of the case of Illinois (1 L. D., 504). This case is referred to as authorizing the practice of holding in abeyance the adjustment of the claims of the States for indemnity for this class of land. The history of that case does not, however, justify this claim. It seems that in 1863 the proofs in support of the claim of Illinois for indemnity for certain lands in Champaign county were examined and the character of the lands

determined. Thereupon under date of August 21, 1863, a general certificate as to the amount of lands for which the State was entitled to indemnity in other public lands within her limits was issued and this action was approved by this Department. In 1880 the State asked that certificates might be issued for forty, eighty and one hundred and sixty acres each, and that a clause should be inserted therein to the effect that they might be located "upon any of the public lands of the United States either in or out of the State of Illinois." In the decision of your office of September 6, 1880 (Letter Book K-17 p. 179), in speaking of the refusal to issue certificates to be located outside the State it was said—

The action of this office above cited was in accordance with the uniform practice which has been to restrict the location of swamp land indemnity certificates to the limits of the State to which the same are issued and a clause to that effect appears in every certificate issued. The form of the certificates was approved by the Secretary of the Interior September 6, 1855, with full knowledge of this restriction and the action of this office in declining to issue certificates without such restrictive clause has been uniformly sustained by the Department.

The petition was denied by your office and that decision was affirmed by this Department (1 L. D., 504). It is thus seen that the practice of issuing certificates was not questioned, but the form of such certificates was alone considered.

On January 28, 1868, your office in passing upon the claim of the State of Illinois for indemnity for lands in Livingston county, said—

There are now no public lands in Illinois which are liable to be taken by swamp indemnity certificates and as existing laws make no provision for certifying such claims out of a land fund elsewhere, this office has ruled that it has now no legal authority for the issue of such certificates.

In passing upon this case on appeal, Secretary Browning in his letter of February 8, 1868 (10 L. and R., 536), said—

In Illinois there are no public lands subject to entry at \$1.25 per acre and Judge McDowell in an elaborate brief claims that the State has the right by way of such indemnity to locate public lands situated in other States and Territories.

The question has been decided by Secretaries McClelland, Thompson, Smith and Usher and must therefore be considered as finally settled so far as your office or this Department is concerned. Your decision adverse to the claim is in conformity with their rulings. It is therefore affirmed.

Thus it is seen that the question considered and determined was, as to the right of the State to have indemnity outside her limits rather than as to whether the character of the land for which that indemnity is asked would be considered and determined. I have found no decision of this Department in which the question as to the proper practice in such cases has been discussed or determined. Nor do I now perceive any good reason for the adoption or continuance of the practice of refusing to pass upon the State's claim for indemnity for land located with warrants or scrip.

The interests of the grantees under these various acts can not, I apprehend, be injured by a speedy adjustment of their claims and a determination as to what tracts included in their lists of selection were at the date of the grant in fact of the character contemplated by said act, while a due and proper administration of the affairs of this Department seems to demand that all questions as to the quantity of land, or indemnity therefor, to which the respective States are entitled under this grant, should be determined with as little delay as is possible. You will therefore in adjusting the claims of this character consider and determine the character of all tracts upon which proof has been submitted. Whatever action may be had you will please indicate whether the tracts affected were sold for cash or located with land warrants or scrip, and in transmitting the lists to this office, whether for approval of the action of your office allowing the claim of the State or upon appeal from the decision of your office rejecting such claim, you will please cause separate lists to be made out including in the one such tracts as were sold for cash and in the other those located with warrants or scrip.

It is not alleged that the State was in any way injured or her rights impaired by not receiving at an earlier date a copy of the rules of practice approved August 13, 1885, and hence the sixth objection may be dismissed without further comment.

Objections seven and eight may be considered and disposed of together. No objection has been made to the appeal herein which so far as the records show was filed within the time prescribed by said rule 86. The argument that because the respective counties in the State are the real beneficiaries, and that it is impossible to submit the question to and obtain from the proper authorities of the county, directions to prosecute an appeal in any case within the time limited by said rule, the general rule should not be applied to this class of cases, but that a special rule should be made to govern such cases, is not convincing. This grant was made to the respective States and this Department does not in adjudicating claims thereunder recognize the transferees of those States. As was said in the case of the State of Illinois (1 L. D., 504), questions arising under this grant being under consideration—

As far as the consideration and determination of the questions in the premises are concerned the Department does not know the respective counties as such but only the State of Illinois as contemplated by the statute in question.

In view of the foregoing no occasion has as yet arisen for establishing a rule in this and similar cases differing from the general rule applicable to all cases. As was said in the case of the State of Oregon (4 L. D., 225),

There may be instances where this Department would feel called upon to exercise its supervisory power to prevent a great wrong, and would direct that an appeal be allowed, or the record certified where the offer to file the appeal was not made in time.

See also the decision in the case of the State of Oregon (on review)—9 L. D., 360, where it was said

The rules of practice adopted by the Department like those of a court should be followed. Exceptions should be allowed only to prevent grievous wrong or correct palpable mistake.

The ninth and tenth objections go to the same thing that is, the authority of your office to make further investigation as to the character of the lands for which indemnity is asked after the State has submitted proof in support of her claim. These objections are disposed of adversely to the appellant in the discussion herein of the previous objections. In discussing the duty of the Department in such cases it was said in a recent case:

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 obtained under the swamp land act.

State of Wisconsin *v.* Wolf (8 L. D., 555). See also authorities therein cited.

The eleventh objection in so far as it relates to the action of the special agent, presents a question of fact rather than law, and the force of it will be determined upon further investigation by your office. The instructions given the agent are not erroneous or necessarily misleading though perhaps not so definite as it would be advisable to make them in order to attain the best results from the examination by and report of such special agent. He was advised by your office letter of June 19, 1886—"that land that is level or wet does not necessarily pass under the swamp grant; the greater part of each legal subdivision must be so swampy that a crop cannot be raised thereon without reclamation." His attention was also called to instructions sent him March 2, 1886, which upon examination of the records of your office it is found, directed his attention to the circular of your office dated August 12, 1878, and approved August 20.

The question as to what character of lands were granted by the act of 1850, was considered in the case of Poweshiek County (9 L. D., 124), and reference is hereby made to that decision and the authorities therein cited. In order to arrive at the true intention of the legislature as expressed in a statute, it is necessary to study the whole and every part of that statute. All the provisions of the act must be considered and compared in construing it and effect must be given to every provision

found if that be possible. In the statute now under consideration it seems clear that Congress in the third section thereof defined more clearly than had theretofore been done the character of lands granted by the act. It is directed that the Secretary of the Interior in making out a list of the lands granted should include therein "All legal subdivisions, the greater part of which is 'wet and unfit for cultivation.'" Congress by this section defined the meaning of the expression "swamp and overflowed lands made unfit thereby for cultivation" used in the first section of the act. This gives to the word swamp the meaning attached to it in common use. Webster defines the word swamp as follows: "Spongy land; low ground filled with water; soft wet ground; marshy ground away from the sea-shore; land wet and spongy; but not usually covered with water." If then a tract of land was at the date of this grant unfit for cultivation by reason of its wet, spongy or swampy condition, it was evidently of the character contemplated by said act. This is the conclusion arrived at in the decision passing upon the claim of the State of Iowa for lands in Poweshiek County (9 L. D., 124), and the views therein expressed are still adhered to. In the further consideration of the claim here in question, and similar claims, your office will be guided by the rule laid down in that case and followed here.

In one of the arguments filed it is stated that on a part of the lands embraced in the list rejected by your office the State has not offered final proof and it is contended that inasmuch as under the law the adjustment of indemnity must be made on the proof furnished by the State, and since there is no law compelling the submission of such proof within any given time, no adjustment should be made until the State has signified that final proof has been submitted. To allow this contention would be to leave these claims unadjusted and the records of your office encumbered with them for an indefinite period. The State by filing her list of selections signified her readiness to have her claim for indemnity for the tracts therein contained, finally adjusted in accordance with the rules and regulations governing such case. These rules and regulations are just, fair and equitable, affording the State full opportunity to submit proof in support of her claim, and I therefore perceive no occasion for a change in those rules or for delay by your office beyond the time fixed by said rules for the adjudication of these cases. In order that the claim of the State here under consideration may be considered and adjudicated in accordance with the views herein expressed, the case must be returned to your office. The decision appealed from is therefore vacated and set aside, and the papers in the case are herewith returned in order that it may be reconsidered and disposed of in accordance with the rules herein laid down.

It is not necessary to urge upon you the desirability of an early consideration of this and all other claims under this grant, and the adjudication thereof with all speed compatible with a just and right determination of the questions involved.

HOMESTEAD ENTRY—ACT OF JUNE 15, 1880.

CHAPMAN *v.* PATTERSON.

An entry under section 2, act of June 15, 1880, accorded by final decision prior to the ruling in *Freise v. Hobson* is not affected by said ruling; nor can the validity of such entry be questioned collaterally by another applicant for the land.

An entry under section 2 of said act is not invalid though the entryman may have contracted to sell the land before making the entry.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 8, 1890.

I have considered the case of Sarah A. Chapman *v.* James M. Patterson upon the appeal of the former from your office decision of December 17, 1887, rejecting her homestead application for the NE. $\frac{1}{4}$ of section 34, T. 17 S., R. 19 W., Wa Keeney land district, Kansas.

Chapman filed pre-emption declaratory statement for the said land December 17, 1877, alleging settlement thereon December 10, 1877.

On the same day, December 17, 1877, James M. Patterson made homestead entry for the said land.

On December 16, 1885, Sarah A. Chapman initiated a contest against the homestead entry of Patterson, charging that Patterson had abandoned the land for more than seven years since making his said homestead entry and had never had a house thereon, nor cultivated any part of it. Hearing was appointed for February 9, 1887, and notice issued.

On that day claimant did not appear and upon affidavit of the contestant the hearing was continued to April 5, 1886, for service of notice and alias notice issued.

The records fail to show that Patterson was served with notice of the contest or that any attempt to serve him was made; and nothing in the case shows that Patterson was cognizant of the pendency of a contest against his entry, when he on February 24, 1886, purchased the tract under the second section of the act of June 15, 1880, cash entry No. 1559.

It appears that after such purchase the local officers dismissed the contest, notifying the contestant of such action by letter, not registered, and that no appeal was ever filed. Chapman did not appear on the day of hearing April 5, 1886.

On November 18, 1886, Sarah A. Chapman applied to make homestead entry of the said tract; her application was rejected by the local officers because the land was covered by cash entry No. 1559, made February 24, 1886, by James M. Patterson.

From this action of the local officers Chapman appealed. In support of her appeal to your office she urged that at the time Patterson's purchase was made she had a valid contest pending against his homestead entry and was not notified of her right of appeal from the action of the local officers dismissing the contest; that said cash entry was not made by Patterson for his own use and benefit as he sold the land as soon as

he could after the final certificate issued to him, that the tract was not open to purchase under said act of June 15, 1880, while the contest was pending (citing the case of *Freise v. Hobson*, 4 L. D., 580, and *Gilbert v. Spearling*, 4 L. D., 466); and that she had an equitable right to the tract by virtue of her improvement thereof and long residence thereon, having from June 1, 1877 to the present time that is, December 6, 1886, resided upon and cultivated the land.

By your office decision of December 17, 1887, the action of the local officers was affirmed and the appeal dismissed. Chapman appealed to this Department.

Before the decision in the case of *Freise v. Hobson* (4 L. D., 580) it had been ruled uniformly by this Department in various cases that an entryman might purchase under the act of June 15, 1880, during the pendency of a contest against the entry for abandonment. See *Gohrman v. Ford* (8 C. L. O., 6); *Whitney v. Maxwell* (10 C. L. O., 104); *Bykerk v. Oldemeyer* (2 L. D., 51); *Pomeroy v. Wright* (2 L. D., 164). By the case of *Freise v. Hobson*, *supra*, decided June 21, 1886, the rule was changed; there it was held that the right of purchase under the said act was suspended during the pendency of a contest. The case of *Gohrman v. Ford* and cases following it, so far as they conflicted with this opinion were overruled by the case of *Freise v. Hobson*. It was, however, further determined in the latter case that such decision should not in any manner affect cases that had been theretofore finally adjudicated. See also *Watson v. Morgan* (9 L. D., 75). At the time of the rendition of judgment in *Freise v. Hobson*, Chapman's contest and Patterson's purchase of the land had been fully adjudicated upon by the local officers, and from their action no appeal was ever taken. Their decision in such matters can not now be questioned collaterally by an applicant to make a homestead entry, while the cash entry of Patterson is of record. See *Pierpoint v. Stalder* (9 L. D., 390). Further, if Patterson contracted to sell the land before the making of the purchase, as is claimed by Chapman, such fact is immaterial. See *George B. Sandford* (5 L. D., 535), and *Andas v. Williams* (9 L. D., 311).

Your said office decision is affirmed.

HOMESTEAD ENTRY—RESIDENCE.

THOMAS D. HARTEN.

Residence upon a tract, held by a possessory right of the claimant, adjacent to the homestead claim, and included within the enclosure of said claim, will not support an entry under the homestead law.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 8, 1890.

I have considered the appeal of Thomas D. Harten from your office decision of November 19, 1888, holding for cancellation his homestead entry for SW. $\frac{1}{4}$, of SW. $\frac{1}{4}$, and lot 4, section 13, and NW. $\frac{1}{4}$ of NW. $\frac{1}{4}$,

and lots 1 and 2 in section 24, T. 1 S., R. 15 E., Stockton land district, California.

Harten made homestead entry for the said land November 17, 1880; he submitted his final proof May 10, 1886; the same was rejected by the local officers because the evidence showed that claimant and his family had not resided upon the lands covered by his homestead but upon adjoining lands the property of claimant. Upon appeal your office, July 16, 1886, affirmed the action of the local officers and rejected the proof, for the reason that the claimant failed to show a compliance with the requirements of the statute in the matter of residence upon the land embraced in his entry, his residence having been upon adjoining land. On a further appeal by claimant, this Department in a decision bearing date August 18, 1888, stated the facts in the case as they then appeared, as follows:

It appears from the evidence, that in November, 1866, Harten purchased a possessory right to a tract of land embracing the homestead in controversy, and since has resided in a house which was upon the tract purchased, claiming and holding possession of the entire tract. In 1878 the tract was surveyed and the house occupied by Harten was found to be two hundred feet from the line of said homestead, but the garden and spring of water, which was used by him and his family for domestic purposes and also the threshing floor, were upon the tract claimed as a homestead and in the same inclosure with the dwelling, and he had cultivated one hundred and twenty-five acres of the homestead since his purchase in 1866, raising thereon each season crops of wheat, barley, hay, and vegetables for the support of his family and, since his homestead entry, which was made November 17, 1880, he had built a house, ten by twelve feet and two hundred rods of cedar fence, and cleared and broken fifteen acres of land thereon, the total value of the improvements on the homestead being estimated at \$500. Since his entry November 17, 1880, he occupied the house on the homestead one night in each month, thinking this a substantial compliance with the law, and being without the means of moving his dwelling on the homestead or of building one thereon.

It was further held in the said decision that "while the evidence shows that Harten claims and holds the entire tract purchased, embracing the land upon which the dwelling is situated, as well as that covered by the homestead entry, it does not sufficiently appear, what is the nature and extent of his claim or title to the former tract and his relation thereto."

This Department thereupon instructed your office to direct the local officers to order a hearing, to be had within thirty days from service of notice of the said decision upon Harten, at which he was to furnish supplemental proof showing—

(1st) The description and extent of the land upon which the dwelling is situated, and the location thereof with reference to the tract claimed as a homestead. (2d) The nature of his claim, or title to the land upon which the dwelling is situated, from whence derived and for what consideration. (3d) The extent to which and for what purposes he is using said land and (4th), His intentions in reference thereto, in the event he secures a patent to the tract embraced in his homestead entry.

It was further ordered in said decision that "upon receipt by your office of the proof offered at said hearing, and the opinion of the local

officers thereon in connection with the proof heretofore made you will re-adjudicate the case subject to the claimant's right of appeal."

In accordance with said decision the claimant supplied supplemental proof September 29, 1888, from which it appears that Harten purchased from one Jonas Ayres, November 2, 1866, the possessory right to the lands covered by his entry and forty acres adjoining for the sum of seven hundred dollars. The forty acre tract is a part of lots 1, 2, 3, and 4, section 19, T. 1 S., R. 16 E.; it is a narrow strip and adjoins three different forties of the homestead claim on the east. One Patrick Murphy obtained a patent for the land of which the said forty acre tract is a part and sold and conveyed the latter tract to the claimant in May, 1887, for the sum of forty dollars. On this tract are situated the dwelling house and out-houses that constituted the residence of the claimant. The dwelling house is valued at three hundred dollars, the barn, three hundred dollars, wagon-shed one hundred and fifty dollars, granary, one hundred and fifty dollars, a shed for hay and straw two hundred dollars. These buildings are distant from the boundary line of the homestead claim from one hundred and thirty to two hundred feet. The dwelling house is distant two hundred feet. A well forty feet deep, which supplies the water for all domestic purposes, valued at one hundred and seventy-five dollars is situated from the homestead line one hundred and eighty feet. Both tracts were enclosed by the same fence and cultivated together by claimant for twenty years. He raised from the lands during these years grain, vegetables and fruits of an average value of one thousand dollars each year. Harten states it to be his intention, should he secure title to his homestead, to continue to live on the land and cultivate the same as he has done in the past and to make it his home.

The local officers passing upon the evidence gave it as their opinion "that Harten never as a fact, resided upon the homestead."

Your office having considered the testimony submitted is still of the opinion that the claimant has failed to meet the requirements of the statute in the matter of residence upon his homestead. You, therefore, in your said office decision of November 19, 1888, rejected the proof and held the entry for cancellation.

Since I concur in this opinion, your said office decision is affirmed.

HOMESTEAD CONTEST—WITHDRAWAL OF CONTESTANT.

WALDROFF *v.* BOTTOMLY.

On the withdrawal of a contestant the case is left as between the government and the entryman.

If the status of an entry at the initiation of contest calls for cancellation, acts performed thereafter by the entryman will not relieve him from the consequences of his previous non-compliance with law.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 8, 1890.

The land involved in this case is the SW. $\frac{1}{4}$ of section 12, T. 135 N., R. 76 W., Bismarck district, North Dakota, and was entered under the homestead law by Thomas Bottomly, November 9, 1885.

August 6, 1886, Marion E. Waldroff initiated a contest against said entry, on the grounds that said tract was not "settled upon and cultivated by said party" (Bottomly) "as required by law," and that he had "never established and maintained a residence upon said tract." Notice was personally served on the entryman, August 9, 1886, and after hearing had pursuant thereto, the local officers found in his favor, and recommended the dismissal of the contest. The contestant thereupon, October 30, 1886, appealed, and your office, by decision of September 5, 1888, refused to concur in the finding of the local officers and held the entry for cancellation, on the ground that it appeared from the testimony taken at the hearing, that the entryman's "actual place of residence was Williamsport and he sought to keep up a pretence of residence on the homestead land by occasional visits thereto." November 9, 1888, the entryman appealed from your office decision to this Department.

While Bottomly's cultivation of the land and his improvements thereon (consisting of dwelling, well, breaking, barn, etc., valued at over \$600 by himself and witnesses) were sufficient to satisfy the law, I am of the opinion that the conclusion reached by your office, to the effect that he had a permanent residence elsewhere and had not established or maintained residence on the land in contest, was fully sustained by his own testimony, as well as that of the other witnesses at the hearing.

In the first place, he testified that, some time in May, 1883, he filed a pre-emption declaratory statement for the land in the name of George Walker, assumed because of a difficulty with his wife from whom he had separated, and that he was not then a qualified pre-emptor, because not a citizen of the United States. On being asked how he managed to make said filing under a false name and when not a citizen, he shrewdly replied that he did it just as a man votes without being challenged. By such means as this, he claims to have held the land from other settlers until November 9, 1885—over two years—when, having declared his intention to become a citizen, he made his homestead entry now under consideration. While this circumstance would have had a

direct bearing upon his former (pre-emption) claim to the land, it would not, it may be conceded, in itself, invalidate his present (homestead) claim thereto; but it is proper, nevertheless, that it be considered as bearing upon the question of his good faith toward the government in his present claim. Having first attempted to secure the land by means inconsistent with that degree of good faith which the government properly exacts of all claimants under its laws of a share of the public domain, his second attempt and claim of good faith therein must naturally be more closely scrutinized than it otherwise would have been. This would be the course which any ordinarily prudent citizen would pursue in a private transaction of his own, and the interests of the government (which are identical with those of the body of the people) are to be guarded with equally as much care by those charged with the administration of the law.

As to his residence under his homestead entry, he states that he went upon the land in May, 1886 (the sixth month after entry), but, while he claimed to have slept and eaten on the land some during that month, he did not give any estimate of how often. In the following month (June, 1886), he testifies, that he was on the claim a good many times, but was not "certain that he slept or ate there," and that in July, 1886, he was on the land "superintending it," and the latter part of that month was there frequently, eating, sleeping and cooking on the place. About the time the contest was initiated, he claims to have gone on and occupied the land a few days as a home with his wife, whom he had a short time before met accidentally in Bismarck, when and where they had become reconciled to each other.

This meagre showing of residence is to be considered in connection with the fact that from July 4, 1883, and up to date of the hearing, he had a place of abode two miles distant from his claim in Williamsport and a permanent business there as proprietor of the Emmons Hotel and the saloon connected therewith. In his direct examination, he claimed that one George Reed was the real proprietor of this hotel, that he was only an employee of Reed, and that the license therefor was taken out in the name of said Reed. On cross-examination, he stated that the license was taken out in 1884 in the name of Reed, and thereafter (hotel and saloon license) in his own name, Thomas Bottomly, and that the business had been advertised and conducted in his (Bottomly's) name. He, however, stated that Reed had a half interest with him in said business, but his name did not appear therein, because he did not want to be known as a hotel-keeper. He admitted that all the property was assessed to him, saying that Reed did not wish to be troubled with it. It is to be noted also that the contestant testified positively that Bottomly told him that he (Bottomly) "would not live upon a claim for all the land in Emmons county," and Bottomly, when asked if he had made this statement, replied: "I don't remember any such fact, but I won't swear that I didn't."

Without going further into details or outside the testimony of Bottomly, I concur, as before stated, in the conclusion attained by your office on the evidence before it. Since your office decision, however, the contestant, it appears, has made the following affidavit, which accompanies Bottomly's appeal to this Department and is the sole ground upon which he now asks that the action of your office holding the entry for cancellation be set aside, viz:

TERRITORY OF DAKOTA, *County of Emmons, ss*:

Marion E. Waldroff, being duly sworn, deposes and says that he is the identical person who filed and initiated contest against the homestead entry of the said Thomas Bottomly, above described that since the decision of said contest by said local land officers, the said Thomas Bottomly has resided upon and improved said tract that at the present time or date, there is upon said tract good and valuable improvements; that said improvements are reasonably worth one thousand dollars; that said Thomas Bottomly is growing old, and a decision adverse to him would place him in a helpless and dependent condition, if said adverse decision is affirmed. For the reasons above set forth, and believing that the ends of justice will be attained in the premises, he, the said Marion E. Waldroff, contestant above named, hereby asks that said contest be withdrawn and dismissed, and award said tract of land to the said Thomas Bottomly. He, the said Marion E. Waldroff, freely and voluntarily withdraws and withholds any and all opposition to the dismissal of said contest and the awarding of said tract to the said Thomas Bottomly.

By this affidavit, Waldroff withdraws as contestant, and the case is left to be considered and determined as one between the entryman and the government. (*Overton v. Hoskins*, 7 L. D., 394.) So considering it, I am still of the opinion, that the facts as to residence and the conduct of Bottomly developed at the hearing justify the cancellation of the entry, and the only question remaining is, whether said affidavit of contestant is sufficient to warrant a different course. It is to be observed that the contestant's appeal from the ruling of the local officers to your office had been pending nearly two years (from October 30, 1886, to September 5, 1888), when your office decided said appeal in contestant's favor, and, November 9, 1888, about a month after said decision in his favor, he files said affidavit withdrawing his contest and asking that the land be awarded to Bottomly. It is not claimed that in this period of about a month, from the date of your office decision to that of the affidavit, Waldroff had made discovery of any fact showing that Bottomly's entry should be sustained and which justified Waldroff's withdrawal. This unexplained act, occurring so soon after your office decision in his favor and after he had persisted in his contest before the local officers and before your office for about two years on the appeal, it is natural to presume was the result of some undisclosed consideration passing from Bottomly to him. The statement in said affidavit, "that since the decision of said contest by the local officers, said Thomas Bottomly had resided upon and improved said tract," is a mere averment of a conclusion of the affiant. It is not set forth in what the residence consisted or for how long it lasted. The statement

would be literally true, if a day's residence had been maintained "since the decision of the contest." Moreover, presence on the land "since the decision of the contest," if the result thereof and with a view solely of finally defeating it and acquiring the land, would not constitute residence in good faith under the law. The affidavit of a contestant made under the circumstances under which this was, and setting forth no specific facts from which the conclusion of residence might be drawn, is not sufficient to rebut the presumption raised by the facts disclosed at the hearing.

So far as this affidavit filed by the contestant, withdrawing his contest is concerned, it neither adds to nor detracts from the facts as they existed at the time of the instituting of the contest, or at the time when the case was considered by the register and receiver and your office. No new light is thrown on the good faith of the entryman as to residence, no new principle of law involved, and all that does appear therefrom is that since the decision of the contest by the local officers the claimant has resided upon and improved the tract, which, if true, does not give the entryman any additional right, as his entry must be weighed in the balance of the law, as it stood at the time of the initiation of the contest.

Gauging the entry by this rule in the light of the circumstances and the evidence submitted upon the trial, there can be no doubt as to the correctness of your conclusions.

The decision of your office is affirmed.

ROHRBOUGH *v.* DIGGINS.

Motion for the review of the departmental decision rendered in the above entitled case August 24, 1889 (9 L. D., 308), denied by Secretary Noble February 8, 1890.

RAILROAD GRANT—UNSURVEYED LAND—ACT OF APRIL 21, 1876.

OLNEY *v.* HASTINGS & DAKOTA RY. Co.

The confirmatory provisions of section 1, act of April 21, 1876, can not be invoked except on behalf of one who was an actual settler, prior to the time notice of withdrawal was received at the local office, and has shown due compliance with law.

The rule protecting vested rights on a change of ruling, does not apply to one who asserts no such right in himself, or through another, acquired under the former construction of the law.

Definite location of the line of road excludes the subsequent acquisition of settlement rights on unsurveyed lands subject to the grant.

Secretary Noble to the Commissioner of the General Land Office, February 10, 1890.

The land involved in this case is the NW. $\frac{1}{4}$ of Sec. 15, T. 120 N., R. 43 W., Benson district, Minnesota, and lies within the ten mile primary limits of the grant of July 4, 1866 (14 Stat., 87), to the State of Minne-

sota to aid in the construction of a railroad from Houston to the western boundary of said State, the present owner of which is the Hastings and Dakota Railroad Company.

The map of definite location of said road opposite said land was filed June 26, 1867, and April 22, 1868, a withdrawal of all lands within the limits of the grant was ordered and notice thereof received at the local office, May 11, 1868. Thereafter, April 12, 1870, the plat of survey of the township in which the land is situated was filed, and, September 9, 1870, Augustus E. Field filed a pre-emption declaratory statement for said land, alleging settlement thereon June 10, 1869.

November 14, 1887, Frank P. Olney applied to enter the land under the homestead law, which application the local officers rejected, because of the grant to the company, and your office, by decision of July 2, 1888, reversed the ruling of the local officers, holding that:

Prior to the decision of the Attorney-General of February 14, 1871 (13 Op., 378), it was the uniform holding that the withdrawals were not effective upon unsurveyed land until the plat thereof was filed, and that settlements made prior to survey were allowed to be perfected . . ." And that "This being unsurveyed land in 1868" (date of withdrawal), "it was not withdrawn until April 12, 1870, the date of the filing of the plat, and as Field was a settler at that date his claim was such as was confirmed by the first section of the act of April 21, 1876 (19 Stat., 35), and served to except the land from the grant.

The railroad company now appeals from said decision.

In the first place, section one of the act of April 21, 1876, has no bearing on this case. Said section provides for the confirmation and patenting of entries made in good faith by actual settlers on granted lands "prior to the time notice of the withdrawal of such land was received at the local office, in cases "where the pre-emption and homestead laws have been complied with and proper proofs thereof have been made by the parties holding such tracts or parcels." Notice of the withdrawal in this case was received at the local office, May 11, 1868, over a year before the date of Field's alleged settlement, and there is no application here by Field (the pre-emptor) or any one claiming through him for the confirmation of his claim.

It being conceded that, as stated by your office, under the ruling of this Department at the date of Field's settlement and filing and prior to the opinion of the Attorney General of February 14, 1871, the company's rights did not attach until after the sections granted were designated by survey, and that Field might as against the company have invoked the rule, that rights which have vested under one construction of the law shall not be divested by a subsequent change of construction, yet the question is presented in this case, whether the land would be absolutely excepted from the grant by Field's settlement, and whether Olney (the appellee) can claim the benefit of said rule as to change of construction. On a change in the construction of a law, the theory is, "not that the law has changed, but that it was always the same as expounded in the later decision, and that the former decision was not and

never had been the law," but in practice where rights have vested under the law as construed at the time, a change of construction is not allowed to operate retroactively so as to divest those rights. (Mary R. Leonard, 9 L. D., 190.) Olney does not claim under or through Field, or assert rights acquired under the former construction of the law, but nearly seventeen years after the change in construction makes application to make a new and original entry. He does not fall within the reason of the rule protecting vested rights on a change of ruling.

The grant, under which the company claims, is expressly of certain sections, which, at the date of definite location of the road, the United States had not sold or reserved for any purpose, and to which the "right of pre-emption or homestead settlement had not attached." (14 Stat., 87.) It is not limited to surveyed lands. In the language of Attorney General Akerman, in the opinion cited by your office, involving the construction of a similar grant to the State of Kansas:—

I find nothing in the act which in any way limits the donation to lands already surveyed. . . . Claimants by right of pre-emption and homestead settlements must take care, if they enter upon unsurveyed lands, to select such as shall not belong to the railroad company under this reservation, when the lands to which the company's right has attached come to be defined by survey. In the language of Attorney General Cushing (8 Op. 246), such withdrawal is "the only means of preventing anticipating private appropriations in the railroad grants." (13 Op., 378.)

If settlement rights could be acquired to lands subject to the grant, after the line of road has been definitely located and notice thereof given by filing the map, and prior to the survey thereof, it is manifest that such lands, being enhanced in value by their proximity to the line of the road, would be rapidly appropriated by settlers, and thus the grant be virtually defeated.

Field's alleged settlement was not only long after the filing and approval of the map of definite location, but after the withdrawal thereon and notice of said withdrawal at the local office. The company's right attached at the date of the filing of the map of definite location, and as the supreme court holds, could not be defeated by any subsequent settlement or claim. (Van Wyck v. Knevals, 106 U. S., 360.) Field's was not a "pre-emption settlement" existing at the date of definite location, by which the land was excepted from the grant, and, conceding that he might maintain a claim to the land as against the company, it would be, as before stated, on the ground that he had acted upon the faith of and acquired rights under an erroneous construction of the law, and not on the ground that the land was under the law absolutely excepted from the grant.

The land not having been excepted from the grant, the application of Olney to enter it must be denied. The decision of your office is reversed.

PRACTICE—RELINQUISHMENT—APPLICATION TO ENTER.

DUNN *v.* SHEPHERD ET AL.

Papers presented for filing, but refused by the local office on account of press of business, should be held as filed of the date when presented.

An application to enter, accompanied by a relinquishment, is immediately effective on the filing of the relinquishment.

Secretary Noble to the Commissioner of the General Land Office, February 10, 1890.

I have before me the appeal of Gladdys Dunn from your office decision of June 5, 1888, affirming the action of the local officers rejecting said Dunn's affidavit of contest against Parker Shepherd's timber-culture entry, No. 1605, covering the N. $\frac{1}{2}$ SE. $\frac{1}{4}$, and S. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 24, T. 33 S., R. 27 W., Garden City district, Kansas.

Shepherd's said timber-culture entry was made March 30, 1885.

The local officers report that in the afternoon of December 28, 1886, a relinquishment of the entry, together with the application of Oscar B. Hamilton to make timber-culture entry of the tract, were presented at the local office, with tender of fees and commission; but that, by reason of the pressure of business and a long established practice of the office, "to not receive and act upon papers presented for filing after 12 o'clock noon," no action then was taken thereon, but the attorney who presented the same was assured that his "priority of presentation would be sustained and respected." According to the affidavit of Harry C. St. John, the attorney in question, there was a still earlier presentation of the papers than the one thus reported: "At 11 o'clock A. M., December 28, 1886," he says, he presented the papers and tendered the fees. He having been told "that the papers could not be received on account of pressure of business," "an employe of his office presented the same papers again, in the afternoon of December 28, 1886."

December 29, 1886, Shepherd's entry was canceled, on his relinquishment, and Hamilton made timber-culture entry, No. 8595, of the tract. On the lower margin of Hamilton's application it was noted by the receiver: "filed December 28, 1886, recorded December 29, 1886."

"It appears however," as your office letter shows, "that in the morning of December 29, before said entry (Shepherd's) was actually canceled, and the entry by Hamilton made of record, Dunn presented her contest with application to enter the tract, alleging that Shepherd's entry was fraudulent at its inception, and made for speculation and gain and that the relinquishment was sold for a valuable consideration."

Dunn's said contest affidavit and application to enter were rejected, on the ground that Shepherd's relinquishment and Hamilton's application had been duly presented December 28, though owing to the local officers' inability to act on them at once, they were not actually received and recorded until December 29, later in the day than Dunn's inter-

vening papers. Your office, on appeal affirmed this action, citing *Browne v. Ryan*, (3 L. D., 468); *Sim v. McGrew*, (2 L. D., 324); *Lee v. Goodmanson*, (4 L. D., 363).

In my opinion this decision is correct. The only reason for not actually receiving the papers presented by Hamilton on the 28th, having been the local officers' inability to attend to them at that time, his (Hamilton's) rights can not be prejudiced, and his papers must in law be held to have been filed on the 28th. One of these papers having been Shepherd's relinquishment of his entry, Hamilton's application became at once available, and Dunn's contest affidavit found Shepherd's entry canceled and her application to enter found the land already covered by Hamilton's application.

Your said decision is accordingly affirmed.

PREFERENCE RIGHT—ALABAMA LANDS—ACT OF MARCH 3, 1883.

WADE McFERRIN.

The right of a successful contestant can not be exercised upon lands reported valuable for coal prior to the act of March 3, 1883, and not thereafter offered at public sale.

In such a case the application to enter may be suspended, pending public offering, and if the land is not sold, said application may be considered as of the date when first presented.

Secretary Noble to the Commissioner of the General Land Office, February 10, 1890.

The land involved in this case is the W. $\frac{1}{2}$ of NW. $\frac{1}{4}$ and NE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ Sec. 20, T. 18 S., R. 6 W., Montgomery land district, Alabama.

November 9, 1882, Andrew J. Batson, made homestead entry on said land, and, April 23, 1887, your office, on the report of a special agent, held the entry for cancellation. About three months thereafter, July 26, 1887, Wade McFerrin applied to contest the entry on the ground, substantially, that Batson had failed to reside upon and cultivate the land as required by law. The local officers having entertained said contest, ordered a hearing thereon, which was held, September 5, 1887. The entryman (Batson) did not appear at the hearing, and, the testimony of the witnesses for the contestant showing that Batson had wholly abandoned the land more than six months before the contest, the local officers decided in favor of the contestant. Batson not having appealed, your office, June 28, 1888, canceled the entry, and directed the local officers to advise McFerrin that he would be "allowed thirty days within which to make an entry for the land." Thereupon McFerrin, July 14, 1888, made application to enter the land. In the meantime, however, it having been discovered from an examination of the records, that the land had in 1879 been reported as "valuable for coal,"

the local officers transmitted McFerrin's application to your office, and your office by decision of December 11, 1888, revoked the order allowing McFerrin the preference right of entry, on the ground that the land, having been reported as valuable for coal in 1879, and not having since been "offered at public sale" as required by the first proviso of the act of March 3, 1883, (22 Stat., 487), was not subject to disposal as agricultural lands under said act.

McFerrin now appeals to this Department from said decision.

By said act of March 3, 1883, lands in Alabama were made subject to disposal "as agricultural lands," which theretofore, because of their mineral character had not been subject to such disposal. By the first proviso of the act, however, a condition is imposed as to lands which had, before the passage of the act, been reported as containing coal and iron, namely, that lands so reported should, before becoming subject to disposal as agricultural lands be first "offered at public sale." The only limitation on the first proviso is that contained in the second, which provides for the patenting of any bona fide entry under the provisions of the homestead law made before the passage of the act, and as to which the persons applying for patent have "in all other respects" (except as to the mineral character of the land) "complied with the homestead law."

No right of entry is given by this proviso, but entries already made in good faith before the passage of the act are validated and authorized to be patented, if the applicant for patent has complied with the law as to residence, cultivation and improvements. It is clear, that Mr. McFerrin's application to enter long after the act became a law, does not in any sense fall within the class of cases described in said second proviso.

In his appeal, however, he lays no claim to the benefit of the second proviso of the act of 1883, but asserts a right of entry as successful contestant of the entry of Batson under section 2 of the act of May 14, 1880 (21 Stat., 140). In this he overlooks the fact, that the act of May 14, 1880, does not authorize a homestead entry on mineral lands or the disposal of such lands in any way as agricultural lands. This right as to mineral lands (in Alabama) is derived solely from the act of 1883, and can only be claimed and exercised under the terms or conditions prescribed in that act. Conceding for argument's sake, that Batson might have acquired a preference right of entry under the act of May 14, 1880, by a contest initiated three months after the contested entry had been held for cancellation by your office, yet the land being mineral, no right of homestead entry thereon could have been claimed under said act.

There was no error, therefore in the revocation by your office of the order allowing McFerrin a preference right of entry. As, however, the local officers entertained his contest and your office subsequently directed that he be all owed such right of entry, on the faith of which he

claims to have gone to great expense and to have settled and made improvements upon the land, I am of the opinion that his application may be held suspended pending the offering of the land at public sale, and if the land be not sold, the application may be considered and passed upon as of the date when originally presented. Nathaniel Banks (8 L. D., 532).

It is directed that this course be taken. The decision of your office is modified accordingly.

PRACTICE—HOMESTEAD ENTRY—ALIENATION.

EBERHARD QUERBACH.

To prevent delay, and the piecemeal decision of a case, it may be disposed of on the entire record before the Department though such action involves the consideration of evidence not passed upon by the General Land Office.

The sale of the land after due compliance with law by the homesteader, payment of fees, and submission of final proof, but prior to the issuance of final certificate, does not defeat the right to patent.

Secretary Noble to the Commissioner of the General Land Office, February 10, 1890.

I have considered the case arising upon the appeal of Eberhard Querbach from your office decision of April 22, 1887, holding for cancellation his homestead entry, No. 3769, for the NE. $\frac{1}{4}$ of Sec. 28, T. 22 S., R. 22 W., Larned land district, Kansas.

The charge of the special agent which led to the entry being held for cancellation by your office is set forth in the following extract from your letter of April 22, 1887, to the local officers :

On March 1, 1887, Clark S. Rowe reported that he had made a personal examination of said tract, and found a stone house $1\frac{1}{2}$ stories high, sixteen by twenty-two feet, and stone stable, both abandoned; fifty to sixty acres cultivated; value \$700. Residence continuous from December, 1877, to August, 1883, when he abandoned the claim and settled on adjoining land under the pre-emption law. . . . The homestead was abandoned nine months and sold and transferred seven months before final certificate was issued; and its sale and transfer were evidently made to cover the evasions of law. Said entry is accordingly held for cancellation.

From the above decision Querbach appealed. Said appeal was construed as an application for a hearing; and accordingly a hearing was ordered by your office letter of January 6, 1888. Querbach thereupon (January 30, 1888,) filed with the local officers what purported to be an appeal from your decision and an application for a writ of certiorari. This was by your office (February 17, 1888,) transmitted to the Department.

The Department (February 29, 1888,) on examining the paper filed by Querbach decided that it "contained all the elements of an appeal," and directed your office to forward the record to the Department.

On March 17, 1888, your office wrote to the local officers as follows:

You are hereby advised that, in accordance with departmental instructions dated February 29, 1888, the papers in said case have this day been sent to the Hon. Secretary of the Interior, on claimant's appeal from the decisions of this office of April 22, 1887, holding his entry for cancellation, and of January 6, 1888, ordering a hearing in the case. Notify all parties in interest accordingly, and suspend action on office letter of January 6, 1888, until farther instructions.

By reference to the dates above given it will be seen that there was no unusual delay in the action either of your office or of the Department, both having acted with reasonable promptness, in view of the pressure of accumulated work; nevertheless, a somewhat unusual promptness of action on the part of the local officers led to some irregularity of procedure in the case; for a hearing was held, commencing on February 20, 1888—twenty-six days prior to the date of your office letter directing a suspension of action. The record of the hearing was subsequently forwarded to your office by the local officers, accompanied by their joint decision in favor of the entryman; and your office forwarded the same to the Department without rendering any decision thereon—and very properly so since the case was removed from the jurisdiction of your office by the departmental order of February 29, 1888 (*supra*).

To prevent delay, and the decision of the case by piecemeal, the entire record before the Department will now be considered, notwithstanding the fact that your office has not passed upon the evidence taken at the hearing.

While the statement of the special agent is literally true, that "the homestead was abandoned nine months and sold and transferred seven months before final certificate was issued," there are certain other facts which have a bearing upon the case. In a corroborated affidavit made by Querbach he states:

That on the 26th day of January, 1883, Eberhard Querbach made proof on said homestead entry, after a continuous residence on said tract from December 11, 1877, with a credit of nine months military service in the army of the United States; that after said proof was made, the required fees and commissions were paid into said land office, and Mr. Querbach was informed by the register of said office that his proof was perfect and entirely satisfactory; and that affiant Querbach never knew to the contrary until May 15, 1884, when he was informed that there was a discrepancy between his name as spelled in his entry papers and his name as spelled in his naturalization papers—in that his true and correct name is Eberhard Querbach, while in his naturalization papers the name was spelled "Querbach," and he was required to come to the local office and make an affidavit correcting said error; and that affiant's entry, it seems, had not been made of record during said time from January 26, 1883, to May 16, 1884, of which fact affiant was ignorant all of said time.

Substantially the same statement, but at much greater length, was made by Querbach at the hearing; and the local officers, in view of the testimony taken at the hearing had before them, and of the record of their own office, report and recommend:

That Querbach made final proof on the tract in controversy January 26, 1883, paid his entry-fee, and was informed by the register of the office that his proof was good

and had been accepted. Instead of making the proof of record it was laid aside because the last letter of claimant's name did not correspond with his naturalization papers. There is no evidence that either claimant or his attorney was notified, and in absence thereof it is fair to presume that none was ever given him. Said proof was not resurrected and made of record until May 16, 1884, more than one year thereafter; and during all this period the defendant was resting in total and absolute ignorance of the true situation. Being a foreigner and not familiar with the workings of the affairs of the government, he is in our judgment perfectly excusable and should not suffer one iota for the laches of this office. . . . In view of all the equities herein we hold that the case against said Querbach should be dismissed.

It will be seen that the alleged abandonment of his homestead, by removing therefrom about the 28th of August, 1883, occurred more than seven months after final proof and the payment of final fees (January 26, 1883). The transfer, by warranty deed dated October 31, 1883, was more than nine months after proof and payment.

In the case of the Magalia Gold Mining Company *v.* Ferguson—the latter being a homestead entryman—it was shown that Ferguson had sold the land prior to issue of final certificate; but the Department held (6 L. D., 218):

While it is true that the final certificate was not issued, yet the final proof showed that the entryman had complied with the requirements of the homestead law, and I see no reason why the final papers may not now issue and the entry pass to patent.

The above ruling has since been followed in the cases of *Orr v. Breach* (7 L. D., 292); *Joseph W. Mitchell* (8 L. D., 268); *Wenzel Paours* (ib., 475); *Charles Lehman* (ib., 486); *Grigsby v. Smith*, on review (9 L. D., 101).

If, therefore, it be a fact that Querbach did abandon and sell the tract in question several months after making final proof which satisfactorily showed full compliance with the requirements of the homestead laws, such fact affords no ground for the cancellation of his entry covering said tract. Your decision of April 22, 1887, holding the same for cancellation is therefore reversed.

HOMESTEAD ENTRY—ORDER OF RESERVATION.

STALTZ *v.* WHITE SPIRIT ET AL.

A homestead entry of record excepts the land covered thereby from the effect of an executive order reserving land for the benefit of Indian claimants under the homestead law; but such reservation becomes effective on the cancellation of the entry.

Land thus withdrawn, for the benefit of designated claimants, is not subject to appropriation by others while the order of reservation remains in force.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 11, 1890.

I have considered the appeal of August Staltz from the decision of your office of October 29, 1887, refusing his application to contest the homestead entries of Sam White Spirit, Uk-see-kah-ha-ta-kah, Thomas

Say and George Wallace for the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ respectively, of Sec. 2 T. 26 N., R. 9 E., Wausau, Wisconsin land district.

On February 21, 1883, one J. Hammer made homestead entry for the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of said section 2, T. 26 N., R. 9 E. Afterwards August Staltz initiated contest against said entry, which was carried to a successful termination, Staltz being notified by the local officers by letter of October 10, 1885, of his preference right of entry. He, however, made no application to enter said land. On March 1, 1886, four Indians were allowed to make homestead entries for the land as follows :

Sam White Spirit for the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$; Uk-see kah-ha-ta-kah for the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$; Thomas Say for the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and George Wallace for the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$. A few days subsequently to the allowance of those entries, Staltz applied to make homestead entry for said land, which application was refused because of the said entries then of record. Staltz, about July 1, 1887, applied to contest said entries, setting forth that he had built on this land a log house twenty by seventeen feet, in which he and his family, consisting of his wife and four children, had lived continuously since March 1884; that he had cleared, fenced and put in cultivation six acres of the land, his improvements being worth \$150; that no Indians had resided on said land since March 1884, and that no improvements, other than his own had been made on any of said tracts except that some Indians cleared a strip of land four rods long and two rods wide upon the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ in the month of May 1886; that no other improvements, no settlement of any kind, and no residence of any kind has ever been established by any of the Indians that made said homestead entries. This application was denied it being recited in the decision that under instructions of the Secretary of the Interior of September 29, 1883, directing that certain lands therein mentioned be withdrawn from sale or disposal because of the selection thereof by certain Winnebago Indians for homestead entries, your office had by letter of October 4, 1883, instructed the local officers to note on their records such withdrawal. This list included a part of the lands claimed by Staltz as follows : The S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of said Sec. 2, for the benefit of David Decona No. 2, and the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ for the benefit of Big Smoke. It was said in your office decision in conclusion :

In view of the foregoing a hearing is denied on the application as now presented, and you will advise Staltz that should he wish to amend his affidavit to attack the NE. $\frac{1}{4}$ NW. $\frac{1}{4}$ of said tract, not included in the land selected, it will receive due consideration.

Staltz makes the following allegations in support of his appeal :

1st. That at the time the said lands were withdrawn by the Hon. Secretary of the Interior in favor of certain Indians, not herein named, to wit Sept. 29, 1883 all the tracts herein described were covered by homestead entry No. 4044, by Jackson Hammer

dated Feby. 21, 1883 and that therefore said pretended withdrawal was null and void and of no effect whatever.

2nd. That having contested said Jackson Hammer's homestead entry and procured the cancellation thereof on the grounds of abandonment, a preference right of entry of all of said land became vested in appellant by Sec. 2 of the act of May 14, 1880.

3rd. That even though appellant failed to exercise his thirty-days preference right of entry of said land, owing to his ignorance of the law and the English language, he acquired a prior right of entry of said land by his continuous residence upon improvement and cultivation of said land said residence improvement and cultivation having begun at least two years prior to the date of the entries sought to be contested.

I am of the opinion that the entry of Hammer so long as it remained of record excepted the land from the reservation referred to in your letter. The rule that an entry serves to segregate the land covered thereby from the public domain, and to prevent the appropriation thereof by another is too well settled to require the citation of authorities in support thereof. In the case of *Graham v. Hastings and Dakota Ry. Co.* (1 L. D. 362), where the effect of an entry was under consideration Secretary Teller used the following language:

In the light of the judicial interpretation of the term 'entry,' as it is used in the public land laws, I am constrained to the opinion that an entry of record, which on its face is valid, is such an appropriation of the land covered thereby as to reserve the same from the operation of any subsequent law, grant or sale until a forfeiture is declared and the land is restored to the public domain in the manner prescribed by law.

This language is certainly broad enough to include the case now under consideration. In support of this position the opinion of Attorney General McVeagh of July 15, 1881, (8 C. L. O. 72) is referred to.

It would seem that under the rule laid down in the case of *Charles W. Filkins* (5 L. D. 49), said land would, upon the cancellation of the entry which served to prevent the order of reservation taking effect, immediately become subject to such reservation. If Staltz had applied within the thirty days allowed him after notice of the cancellation of Hammer's entry, to make entry for said land a different question and one which it is not necessary to consider would have been presented.

This land was ordered withdrawn to enable certain Indians to make homestead entries therefor and if such withdrawal continued in force, as held by your office, it was error on the part of the local officers to allow the homestead entries made March 1, 1886 by Indians other than those for whose benefit the land had been reserved.

It is alleged by Staltz that the Indians for whose benefit this land was reserved have never settled or made improvements thereon, that one of said Indians has since made homestead entry for other and different lands and that after diligent inquiry he has been unable to learn anything concerning the other. If those Indians have abandoned this land and no longer desire to make entry therefor I see no good reason for longer withholding it from disposition. So too if the parties who made entries March 1, 1886 had at the date of Staltz's application to

contest those entries, more than a year subsequently, made no effort to comply with the requirements of law their entries should, in the presence of Staltz' adverse claim, be canceled. Staltz seems to have acted in good faith in this matter and he should be given an opportunity to show the superiority of his claims.

You will therefore direct that a hearing be had as requested by Staltz after due notice to all parties in interest.

The decision appealed from is accordingly modified and the papers accompanying your letter of February 19, 1889 are herewith returned.

MCWEENEY *v.* GREENE.

Motion for review of the departmental decision rendered in the above entitled case July 2, 1889 (9 L. D., 38) denied by Secretary Noble, February 11, 1890.

RAILROAD GRANT—FINAL ADJUSTMENT—INDEMNITY LANDS.

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RY. CO.

The grant of May 5, 1864, of which the Wisconsin Central Railroad Company is the beneficiary, and that of July 2, 1864, to the Northern Pacific Company, did not take effect upon lands within the limits of the indemnity withdrawal under the grant of June 3, 1856.

Indemnity must be taken from the public lands nearest to the tier of granted sections. Order for restoration of lands heretofore withdrawn for indemnity purposes and not required on final adjustment of the grant.

Secretary Noble to the Commissioner of the General Land Office, February 11, 1890.

In the matter of the adjustment of the grants made by the act of June 3, 1856, (11 Stat. 20), and of May 5, 1864, (13 Stat., 66), to the State of Wisconsin and of which the Chicago, St. Paul, Minneapolis and Omaha Railway Company is the beneficiary, on October 30, 1889, you forwarded for approval lists 13, 14 and 15, being of lands which in your opinion should be patented for said company. Accompanying the lists is an explanatory letter, which contains a summary of the adjustment of said grants, stated to have been made "in accordance with the several decisions of the Department."

From your letter it appears that there are within the primary limits of the main line of said road 4,839.66 acres of land to which the company is entitled. Of this amount 501.80 acres are described as "vacant and subject to grant." This item it is not proposed to issue patents for at this time, though charged to the company in your statement. The reason for this is understood, on inquiring at your office, to be because the company has not applied for said lands and paid the costs and fees

required prior to approval. So that, the quantity now stated to be ready for approval within the granted limits of the main line amounts to 4,337.86 acres, and within the same limits of the branch line to 3,443.63 aggregating 7,781.49 acres; and for the purpose of conveying title to these lands you send for my approval list 13. But this list is for 7,603.37 acres only, or 178.12 acres less than the company appears to be entitled to from your statement, which makes no reference to the discrepancy. On inquiring in relation thereto at the Railroad Division of your office, it is learned that the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 29 T. 41 N., and the SE. $\frac{1}{4}$ of Sec. 33, T. 42 N., R. 13 W., aggregating 200 acres—more than enough to cover this, and another slight deficiency referred to hereafter, are included in Presidential proclamation No. 874, dated February 20, 1882, and thereby set apart for reservoir purposes under the river and harbor bills of June 17, 1878 (20 Stat., 162) June 14, 1880, (21 Stat., 193) and March 3, 1881 (21 Stat., 481).

Of the lands in said list, it is stated by you, that 5,987.60 acres thereof are within the common ten mile limits of the Omaha Company and the Wisconsin Central R. R., under the grant of 1864. They are also within the fifteen miles limit of the Omaha Company under the act of 1856, and were withdrawn for the purpose of that grant, when the act of 1864 was passed, under which alone the Central Company claims. It was decided by this Department, in a former consideration of these grants, that the withdrawal under the act of 1856 reserved the land therein from the operation of the act of 1864 in favor of the Wisconsin Central Company. See case of Chicago, St. Paul, Minneapolis and Omaha Railroad Company (6 L. D., 195). The same question has been more recently considered by this Department in the case of the said Wisconsin Central R. R., decided January 24, 1890 (10 L. D., 63), when the former ruling was adhered to.

Inasmuch as it appears that, as reported by you, "the Omaha Company lacks the amounts above stated, in order to make its approvals equal to one-half of the common area," and the land is there, vacant and unincumbered, I have approved list 13 for 7,603.87 acres, and herewith send the same to you.

The adjustment made by you, after charging the company with all the approvals made, also with the 501.80 acres on which the fees have not been paid, and the two hundred acres withheld under the President's proclamation, shows the main line requires 15,243.59 acres, and the branch line 15,683.11 acres of indemnity lands, aggregating 30,906.70 acres, to satisfy the grant. To meet this amount list 14 for 21,810.69 acres and list 15 for 9,083.91 acres are sent for my approval. These two lists aggregate 30,894.60 acres and fall short of the exact amount due by 12.10 acres. This deficiency in the indemnity being less than the smallest legal subdivision, cannot well be made up. But with it the adjustment is brought as near exactness as, perhaps, is possible.

The lands in list 15 are stated to be within the primary limits of the

grant to the Northern Pacific Railroad Company, under its grant of July 2, 1864 (13 Stat., 365). They are also stated to be within the primary limits of the unconstructed portion of the Wisconsin Central Railroad, between Ashland and Superior, being likewise within the fifteen miles limits of the Omaha grant under the act of 1856. As before stated the question of the right of the Wisconsin Railroad within these limits has heretofore been decided adversely to that company by this Department, which decision was subsequently and very recently adhered to. The same reasoning, as to the exclusion of the Central Company from those limits, might apply with equal force, perhaps, to the Northern Pacific Railroad Company. Therefore, I see no reason why said apparent conflicts should not be disregarded and the lists approved. Entertaining these views, I have, this day, approved list 14 for 21,810.69 acres and list 15 for 9,083.91 acres, which are herewith sent you.

On October 22d last, in view of the fact that the Northern Pacific Railroad Company had filed a protest in your office against the issue of patents to the Omaha Company for certain lands claimed to be of the granted lands of the first named company, you were instructed to suspend the issue of patents on lands, in approved lists, and which were within the primary limits of the Northern Pacific grant. Since the date of that letter, on November 25, 1889, the Northern Pacific Railway Company has withdrawn its said protest. It is, therefore, no longer an obstacle in the way of issuing the patents, and the order of suspension is revoked. I enclose said protest and the withdrawal thereof to you for record.

On the same day that the protest was withdrawn, Messrs. Britton and Gray, in behalf of the Omaha Company, filed an application to have the approval of list 8 canceled as to certain designated tracts; and, in lieu thereof, to have certain other designated tracts substituted. It is stated in the application that the tracts to be stricken out are within the twenty mile limits of the Omaha grant, whilst the tracts to be substituted are within the fifteen mile limits thereof, and nearer the bases of loss; and comprise lands heretofore sold by the company to innocent purchasers, whose title it is now anxious to protect; and, further, that, by this substitution, it is believed litigation with the Northern Pacific Company would be avoided. This application was referred to you, and your report thereon is now before me.

In that report it is admitted that the lands asked to be substituted are nearer the bases of loss than the tracts in the twenty mile limits, but you designate certain other tracts within the fifteen mile limits as being even nearer to the granted lands, and which, therefore, in your opinion, should, more properly, be substituted than the lands now designated by the company, if such substitution be allowed.

The act of June 3, 1856 (11 Stat., 20), and the act of May 5, 1864 (13 Stat., 66), under the provisions of which the Omaha Company obtains

its grants, both require that indemnity lands shall be selected from the public lands "nearest to the tier" of granted sections. This being so, it was error in your office to have placed upon the list sent me for approval, as indemnity, lands beyond the fifteen miles limit, when there were vacant and unappropriated lands within that limit, subject to the claim of the company. Therefore, I think, it eminently proper, on the facts shown, that the substitution should be made as proposed in your report.

On receipt hereof, you will, therefore, cancel the approval of list 8, as to the specified lands, aggregating 3,854.73 acres, and substitute in place thereof, in a new list to be submitted for my approval, the tracts designated in your said report, or any other lands, aggregating said amount, which may be nearest the tier of granted sections and bases of loss.

Herewith is sent for record the application of the company above referred to.

This will close the adjustment of the grant for the Chicago, St. Paul, Minneapolis and Omaha Company, and there is no longer any reason why the lands withdrawn for indemnity purposes under its grants should remain in reservation. On August 17, 1887, an order was issued directing the restoration of said lands, on certain conditions (6 L. D., 92). On September 9, 1887, before the order became effectual, it was suspended and no further action has since been taken, looking to said restoration.

I now direct that all lands under withdrawals, heretofore made, and held for indemnity purposes under the grants for the benefit of the Chicago, St. Paul, Minneapolis and Omaha Railway Company, be restored to the public domain and opened to settlement under the general land laws; provided the restoration shall not affect rights acquired within the primary or granted limits of any other congressional grant. This order, however, will not take effect, or be so construed, as to authorize the acquisition or recognition of any rights to said lands, or any portion thereof, until thirty days' notice thereof, through advertisement, shall have been previously given by the officers of the district land offices.

PRE-EMPTION—OSAGE LAND—SECOND FILING.

CHARLES E. SMITH.*

A second Osage filing is permissible where the first was in good faith abandoned on account of the intervening adverse claim of another.

Secretary Noble to the Commissioner of the General Land Office, April 1, 1889.

I have considered the appeal of Charles E. Smith, from your decision dated June 10, 1887, holding for cancellation his second Osage pre-emp-

*Omitted from Vol. 8.

tion filing No. 14,052, for the NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 21, T. 31 S., R. 12 E., Independence land district, Kansas.

The record shows that on June 19, 1886, claimant filed Osage declaratory statement No. 14,038 for the S. $\frac{1}{2}$ of NE. $\frac{1}{4}$, NW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, Sec. 23, T. 32 S., R. 11 E., alleging settlement the same day.

Newton Lewellen filed declaratory statement 13,071 for the NE. $\frac{1}{4}$, Sec. 23, May 13, alleging settlement May 10, 1884.

On July 16, 1886, claimant filed Osage declaratory statement 14,052 for the NW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ Sec. 21, T. 31 S., R. 12 E., alleging settlement July 13, 1886.

On April 9, 1887, claimant offered final proof and payment before the clerk of the district court at Howard, Kansas, for the last described tract.

On April 12, the local officers rejected the proof on account of the former filing of the claimant.

On April 15, 1887, claimant appealed and accompanying said appeal he filed his own uncorroborated affidavit in which he alleges "that he did on the 19th day of June, 1886, file on S. $\frac{1}{2}$, NE. $\frac{1}{4}$ and NW. $\frac{1}{4}$, NE. $\frac{1}{4}$ that before he could bring his family from the east and commence settlement and improvement thereon, he learned that other parties had filed thereon and had settled and commenced improvements, after which he relinquished his filing entirely, and filed in good faith on NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 21 . . . and has remained there continuously for the full time required by law and has improved said place until his improvements are now worth some fifteen hundred dollars."

On June 10, 1887, your office affirmed the action of the local officers and held claimant's filing for cancellation, for the reason that "It is not the practice of this office to re-instate the pre-emptor in his right to file upon the plea of a prior claim, it being held to be his duty to learn the actual status of a tract before placing a filing of record."

On November 8, 1887, claimant appealed from your said decision and in his appeal he alleges without oath that it was not account of the filing of Lewellen, that

I withdrew my claim or considered my declaratory statement 14,038 illegal. After making the above statement June 17, 1886, and before my family came in the forepart of July, following, another party had jumped my claim, built a house and occupied the same, I had made no act of settlement merely seen and filed on the land. I at once referred the case to the land office at Independence and was told I should have done some act of settlement, planted a tree, broken ground, or laid foundation for a house etc., that the first actual improvement and settler would hold the claim. On this ground I was led to consider the above filing illegal and withdrew in favor of the party who jumped my claim to avoid litigation, when as I believed the other claimant would hold in having made first act of settlement on said claim and the record will not show another filing and proving up since my declaratory statement No. 14038.

In his final proof claimant testified that his age was fifty years; that he was by profession a physician; he was married, his family consisted of his wife and two children; he began to build a house on the tract

July 12, 1886, and established actual residence therein with his family August 1, same year, which was continuous.

His improvements consisted of a frame shingle roofed house main part fourteen by twenty feet, wing or "L," twenty by thirty-four feet, pine floor, seven doors and ten windows, a pine board barn twenty by twenty feet, a well thirty feet deep and connected with a cistern; two hundred feet of stone wall, five feet high. The balance of the tract is enclosed with a wire fence, there were three acres broken and cultivated. Total value of improvements \$1245.

In his final proof claimant also testified that he made a prior filing "but relinquished the same as another party was on the land first and I did not work on the land."

The allegation made by claimant in his appeal to this Department (as to his June filing) not being under oath, should not be acted upon in its present state.

An examination of the tract book in your office shows that Lewellen failed to prove up on his filing and abandoned said tract; that on April 21, 1887, one George W. Clark, filed Osage declaratory statement No. 1412 for the same land, alleging settlement March 8, 1887. On October 17, 1887, Clark made final proof and payment and final cash certificate was issued to him for said NE. $\frac{1}{4}$ Sec. 23, T. 32 S., R. 11 E.

Upon review of the record herein I find that the entryman has made valuable improvements upon this property. There seems to be nothing indicating bad faith on his part. He did not pursue his right to perfect his title to the first tract, for the reason that he believed that his endeavor to do so would result in failure. There is no contest as to the land he is now seeking to enter and the controversy is entirely between him and the government. The law seems to contemplate that the filing which will debar a second declaration is a legal filing and when there is no impediment in the way of the successful assertion of the right.

For the reasons herein stated, I must reverse your decision and direct that claimant's entry pass to patent.

TIMBER CULTURE CONTEST—DECEASED ENTRYMAN.

WHARTON *v.* HINDS.

A contest against the entry of a deceased timber culture entryman, wherein the said decedent is made the sole party defendant is a nullity, and must be dismissed.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 20, 1890.

I have considered the case of Joseph C. Wharton *v.* Harvey Hinds on appeal of the former from your office decision involving the timber culture entry of the latter for SW. $\frac{1}{4}$ Sec. 9, T. 17 S., R. 19 W., Hays City, Kansas, land district.

Entry was made September 5, 1878, and contest affidavit was filed March 19, 1885.

After hearing the local officers decided in favor of the contestant, but your office on appeal modified their decision as follows :

The contest is against Harvey Hinds. The evidence shows that Harvey Hinds departed this life in 1880, leaving several minor children, who, it appears had no notice of the proceedings against said entry. Nor were their legal representatives made parties to the contest. But all proceedings were had against Harvey Hinds, who had long since been dead.

All proceedings, including your decision, are therefore set aside, with leave for thirty days, to the contestant to commence *de novo*, his contest against said entry, by making legal service on the proper parties.

It is claimed by the appellant that as notices were sent by registered letters to each of the heirs of Hind, and as the attorneys employed by the adult heirs and by their mother for the minors, expressly waived any irregularity or defect of notice, your decision is erroneous.

In the case of *Rohrbough v. Diggins* (9 L. D., 308) it appeared that Diggins, had died in August and the following October Rohrbough had filed his affidavit of contest and it was held by this Department that,—

Charles H. Diggins having died in August, 1884, it was wholly irregular to initiate and carry on, thereafter, contest proceedings against him by name, and to which those succeeding to his interest were not made parties. The whole proceeding is a nullity, as it could not be carried on in the name of a dead man, and all acts in his name after death were without jurisdiction.

The said contest should, therefore, under the ruling in *Rohrbough v. Diggins*, *supra*, be dismissed.

Your said decision is, therefore, modified accordingly.

TIMBER CULTURE CONTEST—BREAKING.

LINGLE *v.* HEADEN.

Failure to break the requisite acreage within the statutory period may be excused, where it is not the result of the claimant's negligence, and the default is, in good faith, cured as soon as possible, though not till after the initiation of contest.

Secretary Noble to the Commissioner of the General Land Office, February 8, 1890.

I have considered the case arising upon the appeal of Henry F. Lingle from your office decision of June 7, 1888, dismissing the contest of said Lingle against John Headen, involving timber culture entry, No. 1060, made by the latter April 7, 1884, for the SW. $\frac{1}{4}$, of Sec. 3, T. 32 N., R. 42 W., Valentine land district, Nebraska.

Contest affidavit was filed April 8, 1886—two years and one day after the entry—alleging failure to break the second five acres during the second year, and also to cultivate to crop, during the second year, the five acres broken the first year.

Depositions were taken before R. J. Graham, U. S. Commissioner, at Gordon, Nebraska, July 5, 1886. The register and receiver, on examination of the evidence, decided:

After a careful examination of the testimony in the case, we are of the opinion that the allegations made by the contestant are sustained, and therefore recommend the cancellation of timber-culture entry No. 1060.

Your office decision of June 7, 1888, held that the entryman had shown a "substantial compliance with the law," and therefore reversed the decision of the local officers.

The facts appearing of record are the following: The entryman, Headen, through his attorneys, Glover and Whittemore, employed one Charles H. Gay, to do the first year's breaking. Precisely at what time it was done does not appear, the several affidavits referring thereto uniformly using the same expression, that it was "done prior to April 7, 1885." The facts relative to the second year's breaking and the cultivation of the land broken the first year are set forth in the following extract from the testimony of witness George W. Seeley:

During the year ending April 17, 1886, and prior to that date, I was instructed by Glover and Whittemore, of Long Pine, Nebraska—the agents of the claimant Headen—to have five acres of ground broken on the land in controversy, and to have the old ground—five acres—backset, and the entire field planted to crop; said crop to be wheat. I engaged one James S. Barron to do said breaking, backsetting, and planting, with the distinct understanding that the work should be finished before April 7, 1886. That owing to the frozen condition of the ground, and late storms, said Barron was unable to complete the breaking at said date.

(There is an ambiguity in this expression; the language would seem to intimate that Barron had begun to break the second five acres before the 7th of April. In fact, he did not begin the breaking until the 13th of April, finishing it on the 17th. Seeley's affidavit goes on:)

I instructed Barron to do the work as soon as possible, or as soon as the ground would admit. . . . To the best of my knowledge and belief, the claimant intended to do in good faith all the work upon the land required by the timber-culture act.

Q. When were you first engaged by Glover & Whittemore to see to the work on this timber-culture claim? A. About the latter part of February or the first of March.

Q. Do you know why this work was not done in the year 1885, when it could have been easily done? A. Because in ordinary seasons there is plenty of time to do breaking between the first of March and the first of April.

It is in evidence that some plowing was done in the neighborhood that spring before the 7th of April; but one of the witnesses (for the contestant) who so stated, testified also that he broke his plow on account of the frost in the ground.

There can be no doubt that the claimant must be charged with the acts of omission (if such there were) of his agent. Yet it is admitted that Headen knew it to be the intention of the agent to break the requisite amount of ground as soon as spring opened, and before the expiration of the second year. The only reason why the breaking was not completed before the close of the second year was the unusual inclemency of the weather. The evidence shows that as early as the

weather would permit the agent promptly broke the requisite number of acres—although as a matter of fact it was after the initiation of contest. It was not the initiation of contest that led to his doing the breaking; it had been his intention to do it before contest was commenced. In this respect the case at bar is similar to that of *Purmort v. Zerfing* (9 L. D., 180), wherein it is said:

There is nothing in the testimony indicating that the entryman acted in bad faith in this matter. He honestly supposed that the law had been complied with, and . . . the deficiency in the breaking was supplied, as soon after its discovery as the weather would permit.

The slight default of the agent was of a character that tended in no way to retard or otherwise interfere with the ultimate result, so far as the growth of trees is concerned; and the party who was eagerly watching to see whether, by "act of God" cold weather would not be prolonged so late in the spring that the entryman would be unable to do the breaking which he was intending to do, on the precise day the year expired, that thereby he might avail himself of the first year's labor of the entryman, in my opinion acquired no such right as would require the United States to deny the entryman the privilege which would otherwise be afforded in equitable consideration and fair dealing (*Var-gason v. McClellan*, 6 L. D., 829).

Your office decision is affirmed.

PATENT—JURISDICTION OF THE DEPARTMENT.

LOUISA GOLDSTEIN.

The issuance of patent deprives the Department of jurisdiction over the land included therein, even though such patent by its terms amounts only to a quit-claim deed.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 12, 1890.

I have before me the appeal of Louisa Goldstein from your office decision of September 13, 1888, affirming the action of the local officers rejecting her application of March 15, 1887, to file pre-emption declaratory statement for the SW. $\frac{1}{4}$, of the SE. $\frac{1}{4}$, Sec. 33, T. 2 N., R. 13 E., the Dalles district, Oregon.

The ground upon which said application was rejected, was this, that the land applied for is covered by a patent issued in 1875 to the Methodist Missionary Society.

Upon appeal the applicant urges that the Missionary Society patent in question was adjudged "null and void by the supreme court of the United States in the case of *Missionary Society v. Dalles* (107 U. S., 336).

The language used by the opinion in the case cited, is this:

The patent from the United States for the land was issued by virtue of Sec. 2447 of the Revised Statutes, and, as directed by that section, declares as follows: "That

this patent shall only operate as a relinquishment of title on the part of the United States, and shall in no manner interfere with any valid adverse right to the same land, nor be construed to preclude a legal investigation and decision by the proper judicial tribunal between adverse claimants to the same land.' It is, therefore, clear that the patent does not conclude this controversy, and that if the United States had at the date of the patent, no title to the lands described therein, the patent conveyed none.

This clearly cannot affect the conclusion set forth in your decision, inasmuch as the hypothesis on which alone it is said that the patent conveyed no title, is that of the United States having had, "at the date of the patent, no title" to convey and that is a hypothesis which would imply that this Department had lost jurisdiction over the land even before the date of the patent. The supreme court does not hold that the patent was "null and void", but only that it was by its very terms a quit-claim deed and only conveyed such title as the grantor had (without guaranty of any). It is not shown that title has in any way vested in the United States since the date of the patent; if at that date it had title, the patent passed such title; if it had not, it has no title now: in either case the absence of title involves the lack of jurisdiction by the Department to entertain the appellant's application.

Your said office decision is accordingly affirmed.

MINING CLAIM PLACER—KNOWN LODE.

LARGEY ET AL. v. BLACK.

To exclude a lode or vein from a placer claim it must appear that a valuable mineral deposit exists, in vein or lode formation, and that it was so known to exist prior to, or at the date of the placer application.

Secretary Noble to the Commissioner of the General Land Office, February 13, 1890.

I have before me the appeal of Patrick A. Largey *et al.* from your office decision of October 31, 1888, overruling their protest against the issuance of patent to Leander M. Black under mineral entry No. 576, made June 22, 1880, and covering placer lot 110, containing 4.67 acres.

On June 20, 1879, application for patent for said placer lot 110 was filed by Leander Black.

October 18, 1879, Patrick A. Largey located the Montana Central lode claim which conflicts with the Black placer as to 4.17 acres.

June 22, 1880, mineral entry, No. 576, was made of the Black placer lot 110, after publication and other proceedings duly had under said above-mentioned application of June 20, 1879.

In March, 1886, Patrick A. Largey filed a protest against the issuance of patent under said entry, upon the ground that the tract covered by said entry embraced within its boundaries a "known" lode.

June 3, 1886, your office ordered a hearing "to determine whether a vein or lode actually existed within the placer claim as alleged, and if so, whether it was known at or prior to the application for patent for the placer claim." Said hearing was duly held, evidence being submitted by both parties.

May 1st, 1888, the local officers rendered a joint decision in favor of the protestant upon the theory that the discovery location of the Montana Central lode was made prior to Black's application for patent. (This as to the location, was on the mistaken supposition that the date of Black's application was "June 22, 1880," whereas it was really June 20, 1879, the former date being that of the entry under said application).

October 31, 1888, by the decision now under review, your office reversed the local officers' decision, upon the following grounds:

To sustain the claim of the lode claimants it must be shown that the vein or lode claimed is a *valuable* lode deposit and that it was so known to exist prior to or at the date of the application for the placer patent, June 20, 1879. Those witnesses for the contestants who were acquainted with the ground prior to the making of the placer application and were therefore competent to testify, swear that such vein was known to exist, but when questioned as to whether it was a mineral-bearing vein or not, they say that it is not, or that they do not know. Witnesses for the defendant swear positively that no such vein ever existed within the placer ground or claim. No lode mining was ever done on the premises. The ground appears to be principally valuable for residences and business purposes, being adjacent to Butte City. The testimony fails to show that any *valuable mineral* deposit in vein or lode formation was known to exist within the said placer claim prior to or at the date of the placer application, June 20, 1879.

That the rule applied by your said decision is the true one, is definitely settled by the decisions of the supreme court (*Colorado Coal and Iron Co., v. United States* 123 U. S. 307; *Mullan v. United States*, 118 U. S., 271; *Western Pacific R. R. Co., v. United States*, 108 U. S., 510), and after a very careful consideration of the testimony at the hearing I concur in your finding that the protestants have wholly failed to sustain their contention upon the issue of fact.

Your said office decision is accordingly affirmed.

MINING CLAIM—ENTRY—RELOCATION.

SWEENEY *v.* WILSON ET AL.

The Land Department has authority to order a hearing to determine whether there has been due compliance with the mining law, though the charge is not made until after entry.

An original locator will not be heard to question the validity of a relocation in a proceeding instituted to determine whether said locator has complied with the law in the matter of the annual statutory expenditure.

Secretary Noble to the Commissioner of the General Land Office, February 13, 1890.

On May 20, 1884, Wm. Wilson and others made mineral entry No. 1101, for the Plover lode mining claim, Helena, Montana.

By letter of October 27, 1888, your office held said entry for cancellation. The attorney for the owners of said claim has filed appeal.

The facts are as follows: Application for the patent of said claim was filed October 17, 1882, and entry was made May 20, 1884.

On November 13, 1884, a protest was filed in your office by John Sweeney, alleging that no work was done on said claim during the years 1882 and 1883. Sweeney also filed "a duly certified copy of record of location of the Big Bonanza lode claim." This location was made by Sweeney on August 31, 1883, and recorded September 3, following. Sweeney alleged that said Big Bonanza location was a relocation under the statutes of said Plover claim, and that on the date of said re-location, August 31, 1883, said Plover claim had been forfeited under Sec. 2324 U. S. Revised Statutes.

On said protest a hearing was ordered by your office letter of June 14, 1886, to determine the truth of the allegations therein made. After notice to the parties interested said hearing was had. Sweeney testified that no expenditure had been made on said Plover claim from October, 1881, to August 31, 1883. William Wilson, one of said applicants for patent of the Plover lode, testified: "I have often visited said claim and of my own knowledge know that no work has been done thereon by the Plover claimants or their grantors since the year 1881." No one appeared on the part of claimants to controvert these allegations. The local officers held "that the allegations in said protest have been sustained and that the entry should be canceled." On appeal your office affirmed that decision as above stated. On motion for review your office by letter of November 19, 1888, adhered to its former decision.

On appeal it is urged that it was,—

- I. Error to rule that annual expenditures are required to be made after all proof of compliance with the law has been submitted under Sec. 2325 R. S.
- II. Error in not rejecting the claim of John Sweeney *et al.* on the Big Bonanza lode.
- III. Error to find that the Plover lode claim was subject to relocation August 31, 1883.

The first specification of error is not well founded. In the case of Smith, *et al. v. Van Clief, et al.* (6 C. L. O., 2), after a discussion of the question whether the statute requires work to be performed *after* entry, Secretary Schurz, said,

The mining laws require certain acts, in the nature of conditions precedent, to be performed before an entry is made, and the validity of the entry is made to depend upon the facts existing at the time it is made, and not upon anything which the claimant may do or omit to do, afterwards * * * * * The true rule of law governing entries of the public lands to which mineral lands form no exception, is that when the contract of purchase is completed by the payment of the purchase money and the issuance of the patent certificate by the authorized agents of the government, the purchaser at once acquires a vested interest in the land of which he can not be subsequently deprived, if he has complied with the requirements of the law prior to entry.

In the case of the Bodie Tunnel (1 L. D., 584), Secretary Kirkwood held as follows :

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 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 latter clause of section 2325 therein referred to is :

If no adverse claim shall have been filed with the register and the receiver of the proper land-office at the expiration of 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.

In the case at bar the allegation is that claimants did fail to comply with the terms of said chapter, in that they had failed to perform the work required by the statute, *prior to entry*. This allegation has been sustained by the testimony and it will therefore not be necessary to consider the question whether claimants were obliged to continue such work after entry. See also Alice Placer Mine (4 L. D., 314).

In the light of these authorities and of the statute I am satisfied that your office was fully justified in ordering a hearing to determine the truth of said allegations, although the charge was not made until after entry.

The other points raised by appellant may be disposed of on the authority of the *Little Pauline v. Leadville Lode* (7 L. D., 506), wherein it was held that, (syllabus), "the original locator will not be heard to question the validity of a relocation in a proceeding instituted to determine whether said locator had complied with the law in the matter of the annual statutory expenditure."

For the reasons herein stated the decision appealed from, is affirmed.

PRACTICE—APPEAL—REVIEW—CERTIORARI.

LYMAN C. DAYTON.

A copy of the Commissioner's decision should accompany an application for certiorari.

An applicant for certiorari should make it affirmatively appear, by the allegation of specific facts, that substantial justice has not been done.

An appeal does not lie from the denial of a motion for review.

Secretary Noble to the Commissioner of the General Land Office, February 13, 1890.

This is an application by Lyman C. Dayton for a *certiorari* under Rule of Practice 83 *et seq.*, in the matter of the timber-culture entry No.

5259, of said Dayton, for the SE. $\frac{1}{4}$ of Sec. 2, T. 122 N., R. 54 W., Aberdeen district, South Dakota.

It appears that said entry of Dayton was canceled or held for cancellation by your office, and he filed a petition for review of your office decision in which said action was taken; that your office denied said petition for review, and he, thereupon, made application to appeal from said denial, and your office having refused to entertain said appeal, he makes the application for certiorari to this Department, now under consideration.

In the first place, while he embodies in his application the notice issued by the register and served upon him of the decision of your office refusing to entertain his appeal, he does not furnish a copy of said decision, as required by this Department. (*Smith v. Howe*, 9 L. D., 648.)

In the next place, it is alleged in the application that one of the grounds upon which your office, in the decision complained of, denied his appeal was, that "an appeal does not lie from the denial of a petition for review." If such was the ruling of your office, it was in accordance with the decisions of this Department. (See *Gray v. Ward et al.*, 5 L. D., 412, and cases therein cited; also, *John R. Nickel*, 9 L. D., 388.)

Lastly, "Certiorari is not a writ of right; but whether it shall issue lies in the judicial discretion of the tribunal to which the petition is addressed, and the writ will not be granted if substantial justice has been done, though the record may show the proceedings to have been defective and informal." (*Reed v. Casner*, 9 L. D., 170; *Dobbs Placer Mine*, 1 L. D., 565; *Hilliard on New Trials*, 689.) There is no allegation by Dayton of any facts relating to the questions, whether his entry was properly canceled, or his petition for review properly denied, and, hence, it can not be determined from his application that substantial justice has not been done him. In applications for certiorari this should be made to affirmatively appear by allegation of specific facts.

The application is denied.

COAL ENTRY—DECLARATORY STATEMENT—FINAL PROOF.

BRENNAN *v.* HUME.*

Failure to file coal declaratory statement within sixty days after date of actual possession, and make payment for the land within one year from the expiration of the time allowed for such filing renders the land subject to the entry of another who has complied with the law.

A coal entry must be made in good faith and not for the benefit of another.

Secretary Noble to the Commissioner of the General Land Office, April 10, 1889.

I have considered the appeal of Henry T. Brennan from the decision of your office dated February 9, 1888, affirming the action of the local

* Omitted from Vol. 8.

officers at Evanston, Wyoming, rejecting his application to file a coal declaratory statement upon the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 31, and the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 32 T. 21 N., R. 116 W., of the 6th principal meridian. The records show that Myron Hume filed in the office of the register of deeds for the county of Uinta in said Territory his coal declaratory statement No. 307 for said land on August 11, 1886, alleging possession on July 1, 1886—on September 8, same year he filed said statement in the local office—and on September 5, 1887, he made final proof and payment, and received final certificate for the land. The final proof shows that claimant was duly qualified to make coal entry; that the land is coal land; that claimant expended in developing coal mines on the land the sum of \$420; that said improvements consist of “an open cut about fifty feet long and five feet wide to the mouth of arch of a tunnel about ninety feet long averaging six feet high and about five feet wide, a part of said cut being on said coal mine and said tunnel being its full length on said coal mine;” that said claimant was in the actual possession of said mines and made said entry for his own use and benefit, and not directly or indirectly for the use and benefit of any other party. The final proof was accepted and upon the receipt of the purchase money amounting to \$3,200, final certificate No. 47 was issued on September 5, 1887. It further appears that Henry T. Brennan offered his coal declaratory statement for said land on October 18, 1887, alleging actual possession on September 1, 1887, and an expenditure of \$42.50 in improvements thereon. The local officers rejected said application for the reason that the land applied for was covered by Hume’s said entry No. 47. Brennan appealed from said decision upon the ground that Hume did not file for said land until after the expiration of more than sixty days from the date of his alleged possession, and did not make entry until eight days after the expiration of the year allowed under the rules and regulations for making proof and payment for the land. It was further alleged by the claimant in his appeal that Hume did not make said entry for his own use and benefit, but for the use of the Salt Lake and Eastern Railway Company. In support of the last allegation, Brennan filed his affidavit in which he swears that through his agent he entered upon said land in good faith on September 1, 1887, and has discovered a vein of coal thereon, and expended in work and development the sum of \$35.77; that he has been informed that said Hume

did not make said entry in good faith nor purchase the same for himself, but for the Salt Lake Railway Company and that the said Hume has not, and never had any personal interest in said land except as agent for the said Company, and deponent offers to prove that said Hume has himself so stated.

Your office affirmed the decision of the local officers. Subsequently a special agent of your office was directed to investigate the allegation of fraud made against said entry, and he reported on May 31, 1888, that

the charge was not sustained; that the only evidence tending to show fraud was the affidavit of one E. S. Clarke who swears that he is

informed and verily believes that said Hume since said tender of final proof made a statement to J. H. Hardeman of Salt Lake City and County, Utah Territory, to the effect that the said Hume had not then nor never had any personal interest in said land.

The supplemental report of said agent states that he was on said land on July 20, 1887, with said Hume who showed him the work that he was having done at that time; that then there was no adverse claim to said land and the work done in developing the claim was ample to show the good faith of Hume; that said agent interviewed A. S. Clarke, the agent of said Brennan, who claims that Brennan has the superior right to the land because Hume did not file until more than sixty days from the date of alleged possession and did not make entry until the lapse of more than fourteen months from date of possession, and, therefore, Brennan had a right to enter upon said land although he had made no application for the same. A further reason given by Clark is that Hume made a statement to one J. H. Hardeman that he (Hume) had no personal interest in the land, which allegation Hume denies. The agent concludes therefore, "that Hume is entitled to a patent for the land."

On July 5, 1888, counsel for Brennan filed in this Department the affidavit of John H. Hardeman alleging that said Hume admitted to him that he did not own said land and that the same was paid for by some New York parties."

Hume has filed his affidavit, specifically denying the allegation of Hardeman. He swears that no such conversation took place, and that the statement that he (Hume) made any admission to Hardeman that he was not the sole owner of the land covered by his said entry, is absolutely untrue. He also filed the affidavit of Millard R. Jones, dated February 12, 1889, who swears that he has been the president of the Salt Lake Valley and Eastern Railroad Company since its organization on June 28, 1887, and is well acquainted with all the property belonging to said corporation, and knows that said company has not now, and never has had, any interest in the land in question, or in any other coal land.

Sec. 2349 United States Revised Statutes provides that—

All claims under the preceding section (2348) must be presented to the register of the proper land district within sixty days after the date of actual possession and the commencement of improvement on the land, by the filing of a declaratory statement therefor.

And section 2350 United States Revised Statutes reads—

All persons claiming under section 2348 shall be required to prove their respective rights, and pay for the lands filed upon within one year from the time prescribed for filing their respective claims; and upon failure to file the proper notice, or to pay for the land within the required period, the same shall be subject to entry by any other qualified applicant.

Under paragraph 27 of the rules and regulations issued July 31, 1882 (1 L. D. 687) for the sale of coal lands, sixty days exclusive of the first day of possession is allowed for filing the declaratory statement,—and paragraph 30 provides that—

One year from and after the expiration of the period allowed for filing the declaratory statement is given within which to make proof and payment.

By paragraph 31 (*idem*)—

A party who otherwise complies with the law may enter after the expiration of said year, provided no valid adverse right shall have intervened. He postpones his entry beyond said year at his own risk, and the government can not thereafter protect him against another who complies with the law, and the value of the improvements can have no weight in his favor.

It thus appears that Hume did not file his declaratory statement within the time required by law and the regulations of this Department, and did not make his entry within the year after the expiration of the time allowed for filing his declaratory statement. Brennan alleges possession after the expiration of the time allowed Hume for making his said entry, and that Hume's entry was not made in good faith. Hume also alleges that Brennan is not acting in good faith. It will be necessary, therefore, to order a hearing to determine the rights of the respective parties. The burden of proof will be upon Brennan to show satisfactorily that he took possession of said land in good faith on the day alleged for the purpose of making coal entry thereof. The good faith of both parties should be shown by the testimony taken at said hearing. The decision of your office is modified accordingly and the papers in the case are herewith returned.

NOTE.—Motion for review was denied in this case, September 24, 1889.

SWAMP LAND—ACT OF MARCH 3, 1857.

STATE OF ARKANSAS *v.* FORBES ET AL.

Swamp selections made and reported to the General Land Office prior to the act of March 3, 1857, were confirmed by said act, irrespective of the character of the land, if it was at that date vacant and unappropriated.

Secretary Noble to the Commissioner of the General Land Office, February 17, 1890.

John B. Forbes, on November 22, 1860, made cash entry of the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 4, T.19 S., R. 27 W., Arkansas.

The SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said Sec. 14, it was afterward discovered, had been previously selected by the State of Arkansas as swamp land, inuring to said State under the provisions of the act of September 28, 1850 (9 Stat., 519). Such selection was reported to your office July 11,

1854, and was confirmed by act of March 3, 1857 (11 Stat., 251). For this reason your office, by decision of March 6, 1888, held for cancellation that part of Forbes' entry covered by the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said Sec. 14.

From said decision, R. H. Pool, holding through mesne conveyances from John B. Forbes, appeals upon two grounds:

(1) That said tract (with others) was sold by the United States to said John B. Forbes in 1860;

(2) That said tract is not now, and never was, swamp-land within the meaning of the law, but "that the entire tract is high, dry upland," and no part thereof subject to overflow.

Appellant furnishes affidavits in corroboration of his own setting forth the above facts, and prays that he be permitted to contest the right of the State of Arkansas to said land, and if he establishes the facts as above set forth, that the confirmation to the State of Arkansas be canceled," the entry of Forbes confirmed, and patent issued thereon.

The act of March 3, 1857, provides—

That the selections of swamp and overflowed lands granted to the several States by the act of Congress approved September 28, 1850 and the act of March 2, 1849 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.

The selection of the tract here in controversy having been made by the State of Arkansas and reported to your office prior to March 3, 1857, and being at that date "vacant and unappropriated under any" then "existing law of the United States," was confirmed to the State of Arkansas by the acts above cited. Said confirmatory act was passed avowedly to put an end to all litigation or question as to the character of lands selected as swamp prior to the date of the act. A hearing, as prayed for, would therefore be of no avail, since even if it should be shown that the tract in question was and always had been dry, this Department would have no authority to nullify said act. "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, is not material, and the act confirmed the selections whether swamp or not." *State of Florida* (8 L. D., 69); *St. Louis, Iron Mountain and Southern Ry. Co. v. Arkansas* (10 L. D., 46).

Your office decision is therefore affirmed.

RAILROAD GRANT—SWAMP LAND—CERTIFICATION.

STATE OF ARKANSAS *v.* ST. LOUIS, IRON MT. AND SOUTHERN RY.
Co.

Where title to a tract of land has passed to the State under a railroad grant, no action should be taken by the Department looking toward the issuance of patent to the State for the same land under the swamp grant.

On a reconveyance by the State of lands erroneously certified thereto, the Land Department has authority to make new title under the proper law.

Secretary Noble to the Commissioner of the General Land Office, February 14, 1890.

The land involved in this case is the N. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of Sec. 2, T. 10 S., R. 22 W., Camden district, Arkansas.

Said land, it appears, was, March 22, 1854, selected by the State of Arkansas and reported to the Commissioner of the General Land Office as swamp and overflowed land under the grant of September 28, 1850 (9 Stat., 519; Revised Statutes, Sec. 2479), but no patent has issued to the State under said grant.

It is also within the six mile granted limits of the St. Louis, Iron Mountain and Southern Railway Company, successor to the Cairo and Fulton Railroad Company, under the grant to the State of Arkansas for railroad purposes made February 9, 1853 (10 Stat., 155), prior to State's selection under the swamp land grant. The State, by an act of its legislature of January 16, 1855, conferred upon said railroad company the lands along the line of its location covered by said grant of 1853, and the land involved in this case was, as appears from the records of your office, duly selected and certified to the State under said grant, July 13, 1857.

By decision of your office of May 22, 1888, it is held that the claim of the State under the swamp land grant (act of September 28, 1850), was pending before your office at the date (August 11, 1855,) when the railroad company's route was definitely located, and that this excepted the land from the railroad grant, and, accordingly, the company's claim was "held for rejection." The company now appeals from said decision.

It is to be observed, that the claim of the State under the swamp land grant has not been "fully executed," but the State accepted the land under the railroad grant, conferred it by act of its legislature on the company, and said grant, as to the land involved, has been "fully executed" by selection and certification. In the case of State of Louisiana (1 L. D. 1, 510), it is said in reference to a similar state of facts:

It has been repeatedly decided by the Department that where one grant has been fully executed, no action should be had looking to the certifying or patenting of the same lands to the same grantee under another grant; therefore this office cannot consider the claim of the State to the tracts under the swamp grant, as they have already been certified to it under the railroad grant. (See State of Iowa *v.* Cedar Rapids R. R. Company, 3 C. L. O., 84; Minnesota *v.* St. Paul R. R. Co., *ib.*, 99; and State of Arkansas, 4 *ib.*, 63).

Under said decision and the departmental decisions cited therein, *supra*, and the facts upon which the case is *now* presented by the record before me, the action of your office holding the claim of the railroad company "for rejection" was unauthorized. The decision of your office is, therefore, reversed.

If it should be made to appear that the certification of the land under the railroad grant was "clearly erroneous," and the title under the certification still remaining in the State, it should reconvey it to the government, it has been held by the Department that on such reconveyance "the Land Department has authority to make new titles under the proper laws." (State of Minnesota, 2 L. D., 642.) In cases of erroneous certification, the Attorney-General is, also, authorized by the act of March 3, 1887, upon the completion of the adjustment of a grant under said act and in the event the railroad company refuses to reconvey or relinquish on demand of the Secretary of the Interior as provided therein, "to commence and prosecute in the proper courts the necessary proceedings to cancel" such certification. (24 Stat., 556.)

PRE-EMPTION—MARRIED WOMAN—EQUITABLE ADJUDICATION.

SUSAN HERRE.

The board of equitable adjudication may confirm a pre-emption entry, in the absence of an adverse claim, where a single woman after settlement, filing, due inhabitancy and improvement, marries prior to final proof, but after published notice of intention to submit the same.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 13, 1890.

By letter of July 21, 1888, your office held for cancellation the pre-emption cash entry of Susan Herre *nee* Crone for the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 34, T. 31 N., R. 12 W., Niobrara, Nebraska, on the ground that claimant was a married woman at date of entry.

Claimant and M. P. Kincaid appealed.

It appears that on November 28, 1883, Susan Crone filed declaratory statement for said tract, alleging settlement the 24th of the same month. Her residence and improvement were in compliance with the law, and on April 30, 1885, she first published notice that she would on June 18, 1885, submit her final proof before the clerk of the district court of Holt county, Nebraska. On May 28, 1885, she was married to Fred J. Herre. At the time and place specified in the notice she submitted her proof which was satisfactory to the local office and duplicate receipt was issued her thereon June 29, 1885, and on March 6, 1886, she conveyed the premises to the said Kincaid. Now at the time of her marriage she had resided upon the tract more than six months and had fully complied with the law both as to residence and cultivation of the

land, and nothing remained but for her to await the arrival of the day appointed for the submission of her final proof in support of her entry. That she acted in perfect good faith is unquestioned as it is made to appear by affidavit that she consulted those in whom she trusted and believed competent to advise her as to the effect her marriage would have upon her entry and when informed by them that under the circumstances it would not prejudice her claim she married as aforesaid.

It strikes me that it would be a harsh rule, one which does not commend itself to the equitable side of our nature and judgment to hold that when this woman had fully satisfied the law and the rules of the Department except remaining sole until after she had submitted her final proof, that she has forfeited her right to enter this tract. Such a rule is in restraint of marriage which neither law nor equity favors. I think the facts in this case are clearly within the ruling made in the case of Mary E. Funk (9 L. D., 215), wherein it was held that the board of equitable adjudication may confirm a pre-emption entry in the absence of an adverse claim, where a single woman after settlement, filing, due inhabitancy, and improvement, marries prior to final proof, but after published notice of intention to submit the same.

Said entry will, therefore, be submitted to said board. The decision appealed from is accordingly modified.

RAILROAD GRANT—MAIL STATION.

SHOWELL *v.* CENTRAL PACIFIC R. R. CO.

The status of land at date of definite location determines whether it is subject to the grant.

Under the act of June 21, 1860, the occupancy of public land for a mail station does not form the basis of a pre-emption privilege.

Secretary Noble to the Commissioner of the General Land Office, February 17, 1890.

This case involves the W. $\frac{1}{2}$ of SW. $\frac{1}{4}$, NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ and SW. $\frac{1}{4}$ of NW. $\frac{1}{4}$, Sec. 11, T. 14 N., R. 9 W., Salt Lake City district, Utah Territory, which land is within the limits of the grant to the Central Pacific Railroad Company, the line of whose road opposite said tract was "definitely fixed" October 20, 1868.

June 9, 1887, Edward J. Showell applied to make homestead entry on said land, and, due notice having been given said Showell and the company, a hearing was ordered and held by the local officers, July 8, 1887, to determine whether the land, being within the limits of the grant, was for any reason excepted therefrom and subject to Showell's application. The testimony taken at the hearing shows, that the land was first occupied in 1866 as a stage station by Wells, Fargo and Co., mail contractors and carriers, whose improvements thereon for the pur-

poses of such station consisted of a "dwelling, barn capable of stabling eight horses, stock-yard and corral;" that, February 24, 1869, said Wells, Fargo and Co., for a consideration of \$100.00, sold and conveyed to one James Shirley, said "stage station together with the house, barn, corrals and other improvements pertaining thereto, and also all their right, title and interest in and to any land claim appurtenant to said station;" that Shirley in 1875 sold to the claimant's mother, and the land has been in the possession of said parties continuously until 1877, since when the claimant has held it.

At the date when the railroad company's rights attached by the definite location of its line of road, October 21, 1868, the land was held by said Wells, Fargo and Co., mail carriers and contractors, as a stage station, and their only claim to it was based upon their occupancy and use of it as such station. The original grant to the company was made July 1, 1862 (12 Stat., 489), and enlarged July 2, 1864 (13 Stat., 356), and embraced every alternate section designated by odd numbers within certain 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 road is definitely fixed." No provision is made for indemnity in case any of the designated lands fall within any of said exceptions.

At the hearing the local officers found in favor of the claimant and your office by decision of August 27, 1888, (from which this appeal is taken,) concurred in said finding, on the ground that the claim of Wells, Fargo and Co. was such a "pre-emption claim" as excepted the land from the grant, by virtue of the act of March 3, 1855 (10 Stat., 684), in the third proviso to the first section of which it is enacted:

That each contractor engaged, or to be engaged, in carrying the mails through any of the Territories west of the Mississippi shall have the privilege of occupying stations and shall have a pre-emption right therein, when the same shall be brought into market, to the extent of six hundred and forty acres, to be taken contiguously and to include his improvements.

This provision of said act, however, had been repealed long before Wells, Fargo and Co. established said stage station, by the second section of the act of June 21, 1860 (12 Stat., 70), which provides:

That no rights from and after the passage of this act, shall accrue under the provisions of the aforesaid act of third March, 1855, which provisions are hereby repealed, saving all rights heretofore acquired.

Said section two then authorizes the Secretary of the Interior upon the application of the Post Master General, to reserve as mail stations, for the use and occupancy of mail contractors during the existence of their contracts, a quantity of public lands, not exceeding the area of one section at any and all such localities as in his judgment are deemed necessary and advisable, which lands thus reserved as stations shall be held as permanent mail service reservations, not subject to the operation of any existing pre-emption or other general land laws.

The third section then provides for the sale at public auction, under the direction of the Secretary of the Interior, of any of said lands, the

reservation of which as such stations has been abandoned by the Post Master General, and that "all laws, or parts of laws, heretofore passed, granting the pre-emption privilege to mail contractors, be and the same are hereby repealed."

When Wells, Fargo and Co. established said station in 1866, the "pre-emptive privilege" granted to mail contractors as such by the act of 1855 no longer existed, and it does not appear that the land in controversy had been reserved as a mail station by the Secretary of the Interior on the application of the Post Master General, as provided for in the second section of the act of June 21, 1860.

The rights of the railroad company are determined by the status of the land at the point of time when the grant attaches. When the grant to the Central Pacific Railroad Company attached in the present case (October 21, 1868), the claim of Wells, Fargo and Co. as mail contractors was not such as to except the land therefrom, and it does not appear that it fell within any of the exceptions named in the granting act.

It follows, that the land, having passed to the company under its grant, the application of Showell, June 9, 1887, to enter it as a homestead should have been denied. The decision of your office is reversed.

PRACTICE—EVIDENCE—DESERT LAND ENTRY.

ROOTS *v.* EMERSON.

Irregularity in the submission of testimony can not be urged on appeal by one who after such objection proceeds with the trial and submits testimony on his own behalf.

Land that without irrigation will produce grass in paying quantities is not subject to desert entry.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 17, 1890.

This case involves the SE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$, Sec. 28, T. 32 N., R. 75 W., Cheyenne district, Wyoming Territory, which are, with other lands, covered by the desert land entry, No. 1259, of Horace W. Emerson, made January 21, 1884.

On January 26, 1885, about a year subsequent to said desert land entry, George H. Roots filed an affidavit, setting forth "that he was an applicant under the homestead laws for entry of" a certain tract of land embracing said forty acre tracts above described; "that the greater portion of said land lay along Big Box Elder creek and was susceptible of cultivation without irrigation; that hay and grass could be produced on said land, and along said stream there was a growth of large cottonwood and box elder timber; and that he had settled upon said" tract embraced in his homestead application "on or about February 25, 1884, had built a dwelling and made other valuable improve-

ments thereon, and had resided thereon ever since." Thereupon notice of contest was issued and served upon Emerson, "setting the hearing before the local officers at Cheyenne on December 30, 1885, and directing the parties to appear before a duly authorized commissioner at Fort Fetterman, and furnish testimony, November 30, 1885." It having been learned that the commissioner named in said notice would be absent on November 30, 1885, and the commission as notary public of the party substituted having expired before that day, one Samuel Slaymaker, a justice of the peace, was, by written stipulation of the parties, authorized to take the testimony at his office, in Fort Fetterman, on December 5, 1885. Pursuant to said stipulation, the parties appeared in person and by attorney at the time and place named and testimony was taken. On December 30, 1885, the day designated in the notice for the hearing before the local officers, Roots (contestant) applied to examine as witnesses in his behalf said Slaymaker (who had taken the testimony under the stipulation of the parties) and two others. To this Emerson (contestee) objected, on the ground "that the testimony had been closed on the part of the contestee before said Slaymaker, and especially because the witnesses offered were present at the taking of the testimony." This objection was overruled by the local officers, and Emerson thereupon duly excepted to said ruling, and, also, to the taking of the testimony of each witness as called. Said witnesses were, however, cross-examined by Emerson. After said testimony had been taken by the local officers, Emerson filed a motion to "strike it out," "for the reason that the notice of hearing required the testimony in the case to be taken before an officer away from the land office," and this motion was also overruled. The case was then "continued by consent until such time as counsel should agree upon for further hearing," and July 24, 1886, having been agreed upon by them, the hearing was on that day resumed before the local officers, by Emerson (contestee) introducing and examining witnesses in rebuttal of the testimony taken December 30, 1885, before the local officers. The taking of testimony was thereupon closed, and the local officers on the evidence adduced before them, in connection with that taken before Slaymaker, found that said forty acre tracts, as to which the entries conflicted, "embraced a considerable quantity of land not subject to entry under the desert land act," and recommended that the desert land entry of Emerson "be canceled" as to "said subdivisions."

From this decision Emerson appealed, and your office, by decision of September 5, 1888, held that the local officers erred in overruling his objection to the introduction of evidence by Roots before them, December 30, 1885, and refusing to consider any testimony except that taken before Slaymaker, found thereon that the allegations of the affidavit of contest were not sustained. The case is now before this Department on appeal by Roots from your office decision.

The testimony of Slaymaker for the contestant could not be taken by

himself, but, conceding that the local officers erred in taking the testimony of the other witnesses introduced before them December 30, 1885, this was such an error or irregularity as the party against whom it was committed might waive. "Illegality in a proceeding by which jurisdiction is to be obtained is in no case waived," where the objection of the defendant having been overruled, he "is thereby compelled to answer" (*Harkness v. Hyde*, 98 U. S., 479; *Milne v. Dowling*, 4 L. D., 378); but the error under consideration is not of that character. By cross-examining the witnesses, consenting to a continuance to a day to be agreed upon, and by subsequently agreeing upon a day and himself on that day taking testimony in rebuttal of that to which he had objected, the injury (if any) resulting to him from the error was cured, and he must be held to have waived, or to be estopped from further insisting upon, his objection.

Considering the testimony taken before the local officers in connection with that originally taken, I concur in the finding of the local officers. I am of the opinion said testimony shows that Box Elder creek runs through said forty acre tracts (see circular, June 27, 1887, Sec. 1, 5 L. D., 708), and the overflow thereupon and rains at certain seasons in this particular locality are sufficient to cause said tracts to produce in usual seasons, without artificial irrigation, hay in paying quantities. The witnesses for contestant testify positively that about thirty-nine acres of said two forties will produce from a half to a ton per acre of hay of the value of about fifteen dollars per ton, and in 1884 there was cut on about twenty-four acres of said forties sixteen tons of hay. (*Freeman v. Lind*, 8 L. D., 163.)

As stated by the local officers, the testimony of contestee's witnesses in rebuttal is for the most part negative—as, for example, that they did not know that hay was cut on the land in 1884.

The decision of your office is reversed, and it is directed that the desert land entry of Emerson be canceled as to said two forty acre tracts.

WATER RIGHTS—RESERVATION.

HUERFANO VALLEY DITCH AND RESERVOIR CO.

Sections 2339 and 2340 of the Revised Statutes do not authorize the Department to reserve land for the construction of a reservoir.

Secretary Noble to the Commissioner of the General Land Office, February 12, 1890.

I have before me the appeal of the Huerfano Valley Ditch and Reservoir Company from your office decision of January 15, 1889, denying its petition that the E. $\frac{1}{2}$ SE. $\frac{1}{4}$, NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 11, W. $\frac{1}{2}$ NE. $\frac{1}{4}$, W. $\frac{1}{2}$ SE. $\frac{1}{4}$, and the W. $\frac{1}{2}$ Sec. 12, T. 22 S., R. 63 W., Pueblo district, Colorado, be reserved from entry and filing in order that they may construct thereon a reservoir.

By its said petition the said company claims to be "a corporation duly organized and existing under the laws of the State of Colorado, having the right and authority to build and maintain a ditch and reservoir for the purpose of irrigation in the county of Pueblo and State of Colorado; that a part of the irrigation works which it is thus authorized to construct is to consist of a reservoir located upon the above described tracts of public land; that "said land so included in said reservoir is not capable of cultivation, except by means of water conveyed through your petitioner's ditch, and is of very little value unless said ditch shall be constructed;" that "the construction of said ditch and reservoir will render a large tract of the public domain valuable for agricultural purposes, which otherwise could not be cultivated, owing to its distance from water and the difficulty of conducting water to it." Upon these grounds the petitioner "prays that the portion of the public domain included within the boundaries of said reservoir may be reserved from entry by settlers and may be marked upon the plats of your office, as reserved, under the provisions of sections 2339 and 2340, of the Revised Statutes."

Your office, by the decision complained of, rejected this petition on the following ground:—

Neither of these sections contemplates the reservation of land for the purpose of constructing ditches or reservoirs, and, while a company organized under the laws of the State has the right of way over the public land to construct such ditches and reservoirs, they must do so without injury to actual prior settlers on the land, or be liable to the party injured for such injury or damage. There being no authority of law for a reservation for the purpose named, I must decline to grant the petition.

In this conclusion I concur.

The sections relied upon by the petitioner, read as follows.—

SEC. 2339. Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

SEC. 2340. All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water-rights, as may have been acquired under or recognized by the preceding section.

The language of these enactments does not expressly authorize the "reservation" of public lands in anticipation of the building of a reservoir, and no construction giving it that effect seems ever to have been made.

Your said office decision is accordingly affirmed.

MINING CLAIM—LOCAL REGULATIONS—AMENDED SURVEY.

WALTER C. CHILDS.

The defect in a mining claim caused by non-compliance with district regulations, in the matter of the width of the location, and record notice of such location, is cured by a formal annulment of said regulations prior to the allowance of the entry.

An amended survey may be allowed, where, through an error of the deputy surveyor, the connecting line is incorrectly located, but the claim is sufficiently identified by the description given, and good faith is apparent.

When such amended survey is filed, showing the connecting line actually run upon the ground, the entry may be referred to the board of equitable adjudication.

Secretary Noble to the Commissioner of the General Land Office, February 12, 1890.

The claim of Walter C. Childs upon the Stoetzer Quartz Mine, Glencoe mining district Calaveras County, California, is located in section 19, T. 6 N., R. 13 E., M. D. M., Sacramento land district. Said claim is based upon a "relocation" for one thousand five hundred by six hundred feet made by one A. Lasey, in January 1881. Childs purchased this relocation in October, 1881, and November 9, 1882, filed in the local office an application for patent for the same.

On December 7, 1883, a judgment sustaining the adverse claim of Henry Krebs, jr., transferee of James Kane for one hundred and thirty feet along the western end of the said Stoetzer vein or lode by one hundred and fifty feet on each side thereof, was rendered by the superior court of Calaveras county.

On December 28, 1883, a protest (not sworn to) signed "Henry Krebs, jr., by William Crosby his attorney" against the issuance of said patent to Childs, was filed in the local office. This protest set out that Krebs was the owner of one thousand one hundred linear feet along the said "Stoetzer" vein with a width of one hundred and fifty feet on each side thereof and that his right to such one thousand one hundred feet "accrued after said Childs' sixty days of publication herein expired."

It was further alleged in said protest that the "location under which Childs' "sole title is derived" is void. In support of this allegation reference is had to certain findings of fact and conclusions of law by the said court as shown by the judgment roll filed in support of the said adverse claim of Krebs for one hundred and thirty feet along the west end of the vein by one hundred and fifty feet on each side thereof.

Said findings and conclusions were to the effect *inter alia* that the laws and regulations of the Glencoe mining district were in force at the date of said judgment; that under such laws, a mining location in said district was limited to one hundred and fifty feet on each side of the middle of the vein or lode; that the "notice of location" posted by Lasey, under whom as aforesaid Childs' claims, has never been recorded

with the mining recorder provided for said district, and that "said Lasey's location made as aforesaid was void."

No action upon said protest was taken by the local office.

The survey of Childs having been April 28, 1884, amended (as stated by your office) so as "to exclude therefrom a portion, one hundred and thirty feet in length, at the west end of the claim embracing the ground awarded to the adverse claimant," the local officers on May 22, 1884, allowed mineral entry No. 969 in favor of Childs for his claim as amended.

The said Krebs alleging that Childs has failed to comply with the law, appealed to your office from the action of the local office in allowing the latter's entry.

After an examination of the papers filed with said entry your office on June 11, 1888, held the protest mentioned to be irregular in that it was not sworn to by Krebs, but found the entry of Childs to be void as to the excess of the width allowed by the said regulations of the Glencoe district and required the same to be so amended "as to exclude the ground in excess of one hundred and fifty feet on each side of the vein or lode."

It further appearing that an error had been made in the line connecting the claim of Childs with a corner of the public survey "whereby the position of the claim as published and as applied for differ materially from that as it actually exists on the ground," your office by the same decision required "the claimant after the survey has been properly amended as to the width of the claim and as to the connection with a corner of the public survey, to publish under the direction of the register a supplemental notice of his application for patent for the statutory period."

Thereupon Childs by his attorneys filed a motion asking a review of your said office decision. With the said motion was filed a certificate by the county recorder of Calaveras county, showing that at a meeting of the miners of Glencoe mining district, held March 10, 1884, the office of local recorder of said district was abolished and that all district mining laws not in conformity with the general mining laws of the United States were abolished, and that the local records were ordered sent to the county recorder, and that the records of said mining district were in the possession of the county recorder in whose office was recorded a copy of the proceedings of the above meeting. An affidavit by one Gillespy was also filed in support of said motion. This affidavit set out that in 1881 and prior to the Stoetzer location, he (Gillespy) had, with others "who has for years resided in the district" made several quartz locations of the full legal dimensions of fifteen hundred by six hundred feet; that no reference was had to any local laws which were then and up to the date of their formal abolishment practically obsolete and that it was the custom "to send all location notices to San Andreas (the county seat) for recording instead of recording locally."

The said motion for review was denied by your office decision of September 27, 1887. The appeal of Childs from both of the said decisions of your office brings the case here.

No appeal has been taken by the said Krebs from the stated finding of your office that his protest was irregular.

The claim set up by Krebs in said protest has therefore not been considered.

Together with their argument for the appellant counsel file, the affidavit of seven persons to the effect that they are and have been for years residents of the Glencoe mining district; that they are practical miners and acquainted with the laws and regulations of said district; that since the "mining law of May 10, 1872, came into force no attention has been paid to any local law and all mining claims located since were for fifteen hundred feet in length along the lode with surface ground adjoining six hundred feet in width."

Thus it appears that the affidavits filed as stated to show that the mining laws and regulations of the Glencoe district had fallen into disuse, are in conflict with the said finding of the court that such laws and regulations were in force at the date of the judgment (December 7, 1883) referred to. This, however, is not material. Any defect in the claim caused by non-compliance with the district regulations, either through excessive width of location or failure to locally record the notice thereof, was cured by the formal annulment of the said local laws, prior to the entry of Childs. The claim of Krebs for eleven hundred linear feet etc., being as stated eliminated from the case and no other adverse claim having intervened I can see no reason for disturbing the entry as allowed by the local office.

It is true that the court held the location upon which said entry is based to be void. But that part of the said location which was involved in the controversy wherein such conclusion was reached has been excluded from appellant's claim by the amended survey theretofore mentioned. The claim as it now stands was not before the court at the time of its conclusion that said "location" was void and was not affected by the judgment rendered. Moreover the "conclusion" that said location was void was based upon the non-observance of the said local laws. These laws having been repealed prior to the entry of Childs, it is unnecessary for me to discuss the effect of such conclusion.

In view of the foregoing I can see no occasion for reforming the boundaries of the claim as now presented.

The action of your office in requiring the amendment of Childs' claim so as to exclude the ground in excess of one hundred and fifty feet on each side of the vein or lode, is accordingly reversed.

The error in the line connecting the appellant's claim with the public survey is apparently shown by a report dated January 25, 1884, and sworn to by A. Lasey, U. S. D. M. surveyor. This report is annexed to the appellant's letter of the same date to your office asking an offi-

cial correction of the lines connecting this and other adjacent claims owned by him (Childs) with the public survey.

The field notes and diagram comprised in said report, show the course and distance of the line connecting the "initial" point *i. e.*, the centre of the western end line of the claimant's first survey with said quarter section corner, were in Childs' application for patent erroneously stated as south 47° E., 14.75 chains, and that the same should have been south 37° $\frac{1}{4}$ E., 17.56 chains.

It appears, however, that all the proceedings prior to entry had reference to the ground now claimed and sought to be patented; that the plats and notice were posted upon the claim as defined by the improvements and corner monuments and that (it having been adversed) the location of the claim was sufficiently accurately established and identified by the description given.

The good faith of the entryman has not been questioned and the error in running the said connecting line was made by a deputy mineral surveyor, a government officer.

The locus of the claim having thus been sufficiently shown, I can see no reason in the premises for new publication posting, and proof.

The case at bar is similar to that of the Veta Grand Lode (6 L. D., 718). In that case as in this the line connecting the claim with the public surveys was, through the error of the deputy mineral surveyor, incorrectly located but the claim involved was sufficiently identified by the description given and good faith was apparent.

From the record before me it further appears that (as in the case cited) a connection between the public surveys and the entryman's amended survey "was not established by actual measurement on the ground."

In accordance, therefore, with the ruling in the case cited, the entryman should be allowed say ninety days from notice hereof within which to furnish an amended survey showing said connecting line actually run upon the surface of the ground and an application for reference of the entry to the board of equitable adjudication.

The decision appealed from is accordingly modified and your office will be governed by the foregoing in the disposition of the case.

RAILROAD GRANT—INDEMNITY SELECTION.

IOWA RAILROAD LAND CO. *v.* ERTEL.

Under the act of June 2, 1864, the right of the company to even sections within the six mile limits of the grant of May 15, 1856, does not attach until selection, and the right of selection can not be exercised until after definite location of the modified line of road.

Secretary Noble to the Commissioner of the General Land Office, February 17, 1890.

This is an appeal filed by the Iowa Railroad Land Company, successors in interest of the Cedar Rapids and Missouri River Railroad

Company, from the decision of your office of May 2, 1888, rejecting the claim of said company to the W. $\frac{1}{2}$ SW. $\frac{1}{4}$ Sec. 6 T. 84, R. 43 W., Des Moines, Iowa.

The act of Congress of May 15, 1856 (11 Stat., 9) made a grant of lands to the State of Iowa to aid in the building of four principal roads in said State. One of the roads provided for was "from Lyons City northwesterly to a point of intersection with the main line of the Iowa Central Air Line Railroad, near Maquoketa thence on said main line running as near as practicable to the 42d parallel across said State to the Missouri River." The grant was of every alternate section of land designated by odd numbers for six sections in width on each side of each of said roads," with a provision for selecting indemnity lands within fifteen miles of said road in lieu of such odd sections within the six mile limit, as the United States may have sold, or to which pre-emption rights may have attached at date of definite location. The grant for this road was conferred by the State upon the Iowa Central Air Line Railroad Company, which located its road so as to touch the Missouri river at a point near the town of Onawa, in Monona county. The map of definite location was filed in the General Land Office October 13, 1856, and embraced within its limits the land in controversy. This company failed to construct the road, and the State thereupon resumed control of the grant and subsequently conferred it upon the Cedar Rapids and Missouri River Railroad Company.

This company having constructed the road west of Cedar Rapids on the designated line as far as the town of Nevada, a distance of one hundred miles, and it having become apparent that a better line to the Missouri River could be had from the point to which the road had been constructed, the act of June 2, 1864 (13 Stat., 95) authorized the Cedar Rapids and Missouri Railroad Company "to modify or change the location of the uncompleted portion of its line as shown by the map thereof now on file in the General Land Office of the United States, so as to secure a better and more expeditious line to the Missouri River, and to a connection with the Iowa branch of the Union Pacific Railroad," and provides that said company "shall be entitled, for such modified line, to the same lands, and to the same amount of lands per mile as originally granted to aid in the construction of its main line, subject to the conditions and forfeiture mentioned in the original grant, and, for the said purpose, right of way through the public lands of the United States, is hereby granted to said company."

The act further provided that whenever the modified line shall have been established, or the connecting line located, and the map of definite location of the modified line and connecting branch filed in the General Land Office—

The Secretary of the Interior shall reserve and cause to be certified and conveyed to said company from time to time, as the work progresses on the main line, out of any public lands now belonging to the United States, not sold, reserved, or otherwise

disposed of, or to which a pre-emption right or right of homestead settlement has not attached, and on which a *bona fide* settlement and improvement has not been made under color of title derived from the United States or from the State of Iowa, within fifteen miles of the original main line an amount of land equal to that originally authorized to be granted to aid in the construction of the said road by the act to which this is an amendment. And if the amount of land per mile granted, or intended to be granted by the original act, to aid in the construction of said railroad, shall not be found within the limits of the fifteen miles therein prescribed, then such selection may be made along said modified line and connecting branch within twenty miles thereof.

In the case of Cedar Rapids Railroad Company *v.* Herring (110 U. S., 27) the court in construing this act said that the purpose of the enactment was—

To authorize the company to change the location of its road yet to be constructed west of Cedar Rapids for its convenience. . . . To adjust the amount of lands, to which the company would be entitled under this new order of things, and to enlarge the source from which selections might be made for the loss of that not found in place.

The quantity of the grant was to be determined by the length of the modified line as constructed, but to satisfy this quantity the company is entitled to all the odd sections within the six mile limit of the line as originally located, which had not been sold or to which the right of pre-emption had not attached when the line of road was definitely fixed, so far as may be necessary to supply the quantity to which the company is entitled for the constructed line, and in lieu of the odd sections within said limits previously disposed of or to which the right of pre-emption had attached at the date of definite location, and to satisfy the deficiency in quantity, the company is entitled to select first from *all* the lands within the fifteen mile limits of the original line,

and if the amount of land per mile granted or intended to be granted by the original act to aid in the construction of said railroad shall not be found within the limits of the fifteen miles therein prescribed, then such selections may be made along said modified line and connecting branch within twenty miles thereof.

This grant has been so clearly construed by the supreme court in the case of the Cedar Rapids and Missouri River R. R. Co., *v.* Herring, *supra*, and in the case of the Iowa R. R. Land Company (9 L. D., 370), that there can be no doubt as to the source from which selections can be made or as to the time when the company's right attached to any particular or specified tract of land. The ruling of the supreme court in the case above cited is that the *odd sections* within the six mile limit of the old line became vested in the State for the benefit of the road when that line was definitely located and they became part of the new grant to the Cedar Rapids and Missouri River R. R. Co.; but as to lands to be selected in lieu of those which had been sold, reserved or otherwise disposed of etc., the court say—"These latter, unlike the odd numbers within the six mile limit, are not ascertained and made specific by the protraction of the established line through the maps of the public lands. They are not, and can not be specific until the grantees'

right of selection has been exercised." Again—"It is only when the line and route of the roads are definitely fixed that any right of selection exists." With reference to the source from which these selections are to be made, the court say that the act of June 2, 1864, enlarged the grant "by declaring that *all* the sections within the fifteen mile limit shall be subject to such selection on the same terms on which only alternate sections could previously be selected; and if this limit, which had exclusive reference to the line first located, did not satisfy the grant, then selection could be made within twenty miles of the new line."

The tract in controversy is an *even* section within the six-mile limit of the original line as shown by map of definite location filed October 13, 1856, and hence under the ruling of the supreme court above referred to, the right of the company did not attach until after selection had been made, and no right of selection could be exercised until the modified line was definitely located.

Samuel C. King made homestead entry of the tract August 17, 1866, which was canceled February 25, 1868. Wentel Ertel the appellee, made homestead entry on the same tract March 3, 1868, upon which final certificate issued February 18, 1875. The railroad company selected the land March 16, 1876. Your office by decision of August 13, 1880, rejected the claim of Ertel upon the ground that the right of the company attached June 2, 1864, the date of the grant, but the entry was allowed to stand to await the adjustment of the railroad grant, and was intact upon the records when your office by decision of May 2, 1888, took up the case, revoked the decision of August 13, 1880, rejected the claim of the company, and directed that if the decision should become final further action will be taken upon the entry of Ertel looking to its final disposal. From this action the company appealed alleging the following grounds of error:

1. In reviewing, reconsidering, and revoking his predecessors decision of October 13, 1880.

2. In not finding and holding that said land was vacant at the date the right of said railroad company attached, and also at the date of the withdrawal for its benefit.

3. In not finding and holding that the entries of King and Ertel in said decision referred to were illegal and void.

4. In finding and holding that the case is ruled or governed adversely to the rights of this appellant by anything contained in the decision in *Railroad Company v. Her-ring et al.*, 110 U. S., 27.

5. In rejecting the claim of the railroad company to said land.

Whether Commissioner Stockslager had or had not jurisdiction and authority to revoke the decision of Commissioner Williamson, of August 13, 1880, is immaterial, as the case is now before the Department on appeal, and the act of March 3, 1887 directs the Secretary to re-adjudicate all cases where an entry has been erroneously canceled on account of any railroad grant or withdrawal of lands from market, and to re-instate such settler in all his rights.

The remaining grounds present the question whether the rights of the railroad company attached to this particular tract prior to the entry of Ertel.

The act of June 2, 1864, provided that whenever the modified line "shall have been established, or such connecting line located," the company "shall file in the General Land Office of the United States a map definitely showing such modified line, and such connecting branch," and thereupon the Secretary shall reserve the public lands on the main line within the fifteen mile limit of the original main line not sold etc., "or to which a pre-emption right or right of homestead settlement had not attached." While part of the line was located in 1865, the map of definite location of the entire line was not filed until December 1, 1867. Until this entire line was established and the map showing such definite location was filed in the General Land Office, there was no authority in the Secretary to withdraw these lands because the direction in the act—that when the line is established and definitely located the Secretary shall reserve the lands—is an implied prohibition against the power to withdraw or reserve them before that time, and the withdrawal of the Secretary when properly made could not operate upon land to which a homestead right had attached, but such lands were expressly excluded therefrom by the terms of the act.

This case is directly ruled and governed by the decision of the supreme court in the case of Cedar Rapids and Missouri River R. R. Co., *v. Herring*, *supra*, in which the court say—

It was during this delay of three years and a half that the entries were made under which defendants hold the land and acquired the legal title, except in a single instance, made January 4th, 1868, before any action of the Secretary could be had to withdraw the lands, and it was not until March 16th, 1876, that any of the lands in controversy were selected by the company; an average of ten years after the rights of defendants had vested. We are of opinion that the defendants had the right to do this in regard to any but the odd sections within the six mile limit; that there was no contract between the United States and plaintiff which forbade it. No right existed in plaintiff to all these lands, or to any specific sections of them, during this period. No obligation of the government to withdraw them from sale arose until plaintiff filed a map, definitely showing the entire line of its road, in the General Land Office.

The entry of King, made August 17, 1866, excepted this tract from any withdrawal that may have been made, and the entry of Ertel having been made prior to the selection by the company, his right was superior to that of the company, and your decision is therefore affirmed.

PRACTICE—AFFIDAVIT OF CONTEST—AMENDMENT.

HARTLEY *v.* YOUNG.

An affidavit of contest must show the continuance of the default alleged; but leave to amend may be given where the complaint is defective in this particular.

An objection to an affidavit of contest is not waived by going to trial after such objection is overruled.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 17, 1890.

I have considered the appeal of Charles P. Hartley from the decision of your office dated August 31, 1888, in the case of said Hartley *v.* William C. H. Young, involving the latter's timber culture entry No. 453, Boise City land district, Idaho.

On January 10, 1883, Young made said timber culture entry for the E. $\frac{1}{2}$ NE. $\frac{1}{4}$ and SW. $\frac{1}{4}$ NE. $\frac{1}{4}$ NW. $\frac{1}{4}$ SE. $\frac{1}{4}$ of section 22, T. 4 N., R. 3 W., in said district; and on August 23rd same year, he personally appeared at the local office and filed a relinquishment to the NW. $\frac{1}{4}$ SE. $\frac{1}{4}$ of said tract.

On April 30, 1886, Hartley initiated a contest against said entry alleging as follows, viz:

That the said William C. H. Young did not plow, nor break, nor cause to be plowed or broken three and three-fourths acres of the said tract during the first year as required by law; that during the second year he did not cultivate to crop or otherwise three and three-fourths acres of that said tract as required by law nor any part thereof; that during the third year he did not cultivate to crop or otherwise three and three-fourths acres of the said tract as required by law, nor plant to trees, seeds, or cuttings three and three-fourths acres of said tract as required by law; that he did not properly care for and protect trees, seeds and cuttings planted upon the said tract of land as required by law, and that there were no trees, seeds or cuttings growing upon said tract of land as required by law on the 10th day of January 1886, as required by law.

A hearing was ordered and set for June 7, 1886, at which time both appeared in person and by their respective counsel. Claimant moved to dismiss the contest upon the ground

of insufficiency of affidavit and notice of contest. The notice does not claim to contest for failure to comply with the timber culture act at time of initiating contest, but claims there was a forfeiture on the 10th day of January 1886. This contest was initiated by filing affidavit for contest and issuing notice thereof April 30, 1886.

The register and receiver overruled the motion on the ground "that non-compliance during the third year can not be cured," whereupon witnesses were sworn and testified on behalf of the respective parties and the local officers found in favor of contestant and recommended the cancellation of said entry.

On September 13, 1886, claimant appealed, alleging the following grounds of error, viz:

- 1st. In overruling contestee's motion to dismiss the contest.
- 2nd. In finding that the evidence was conflicting and contradictory as to the plowing and planting.
- 3rd. In finding that there was a non-compliance with the timber culture law by the contestee in the cultivation and protection of the timber.

On August 31, 1888, your office decided that "the affidavit of contest as also the notice to the entryman, is defective, in not charging the continuance of the alleged defaults up to the date of its filing (3 L. D., 372)," and dismissed the proceedings had from the time of filing said motion to dismiss; but allowed contestant thirty days in which to amend his affidavit for contest if he desired to do so, otherwise his contest should stand dismissed.

On November 3, 1888, contestant appealed to this Department, alleging the following specifications of error, viz:

- 1st. In requiring the amendment of Hartley's contest affidavit.
- 2d. In holding that when the defendant goes to trial and submits testimony upon the charges contained in a defective affidavit, he does not thereby waive objection to such affidavit.

The first objection is without merit. The contest affidavit was clearly defective in that it failed to allege the continuance of the default charged up to the date of the making and filing thereof. *Worthington v. Watson* (2 L. D., 301); *Parker v. Castle* (4 L. D., 84); *Eddy v. England* (6 L. D., 530).

The affidavit being thus defective, the most that could be accorded the contestant was leave to amend.

The position taken by appellant in his second specification of error can not be sustained. The entryman presented his objections to the affidavit of contest at the first opportunity offered him and has ever since insisted upon the sufficiency of such objections. Those objections were properly considered in your office, and the conclusion reached by you is concurred in. I think, however, if the contestant elects to amend his affidavit for contest within thirty days from notice of this decision, that the case should be tried *de novo*, rather than from the condition of the case at the time the motion to dismiss the contest was filed. For the reasons herein given, the decision appealed from is affirmed with this modification.

FINAL PROOF PROCEEDINGS—EQUITABLE ADJUDICATION.

FRANK L. MEASE.

An entry allowed on final proof taken before an officer not authorized by statute to act in such proceedings, may be sent to the board of equitable adjudication, if said proof is otherwise regular.

In the absence of protest, or adverse claim, supplemental evidence may be submitted where final proof is found insufficient, and bad faith is not apparent.

Secretary Noble to the Commissioner of the General Land Office, February 17, 1890.

I have considered the appeal of Frank L. Mease from the decision of your office, dated July 15, 1887, requiring him to make new proof, after new publication, upon his pre-emption cash entry No. 13,074, of the SW. $\frac{1}{4}$ of Sec. 26, T. 105 N., R. 161 W., Mitchell, Dakota, land district.

On April 11, 1887, your office rejected the final proof made by said Mease on October 11, 1884, because it was made before the probate judge of Sanborn county, in which the land is situated, and required the pre-emptor to furnish a new affidavit showing continuous residence on his claim from the date of making proof to date of entry, and that he did not alienate his land prior to date of entry.

The final proof was made as advertised, and shows that the pre-emptor, a single man, was duly qualified to make said entry; that he settled upon said land on December 1, 1883, and continued to reside thereon up to the date of his final proof; that his improvements consist of a house, well, and five acres of breaking, valued at \$50. The local officers approved the final proof, and on October 27, issued final certificates for the land.

On June 20, 1887, the local officers forwarded to your office the affidavit of said Mease, duly corroborated, in which he swears "that he continued his residence upon said tract, and did not alienate any part thereof until after said entry became of record, October 27, 1884." On July 15, 1887, your office acknowledged the receipt of said affidavit, and again required new proof and new publication, for the reason that "the improvements are not deemed sufficient to show good faith."

No question was raised by your office as to the good faith of the claimant in its decision of April 11, 1887, and the objection, namely, that the final proof was made before the probate judge, if that were all, could be obviated by sending the entry to the board of equitable adjudication, under the appropriate rule. Sylvester Gardner (8 L. D. 483).

But your office decision of July 15, 1887, holds that the improvements as shown by the final proof, "are not deemed sufficient to show good faith on the part of claimant, and require new proof and new publication. No objection was made by your office, in its first decision as to the sufficiency of the proof. There was no adverse claim and no protest. It is true the improvements are meagre and no explanation is

given therefor by the claimant. But it does not appear affirmatively that he has acted in bad faith, and, while the proof does not warrant the passing of said entry to patent, the claimant, in my judgment, should not be put to the expense of giving new publication, and since it does not appear that he has acted in bad faith, claimant should be allowed sixty days within which to file supplemental proof, showing full compliance with the requirements of the law. Albert Taylor (10 L. D., 1). When he has done this, if the supplemental proof together with the proof already submitted, shall be satisfactory to your office, the entry will be referred to the board of equitable adjudication for its consideration. But if the pre-emptor fails to make such supplemental proof as required, said entry will be again held for cancellation by your office.

The decision of your office is modified accordingly.

MINING CLAIM—EFFECT OF JUDICIAL PROCEEDINGS.

GEORGE H. SMITH ET AL. (ON REVIEW).*

A judgment favorable to the applicant, in judicial proceedings instituted by an adverse claimant, is no bar to a subsequent investigation on behalf of the government to determine whether said applicant has in fact complied with the law.

Secretary Noble to the Commissioner of the General Land Office, August 2, 1889.

The attorneys for George H. Smith *et al.*, have filed a motion for review of departmental decision of November 9, 1888 (7 L. D., 415), ordering a hearing in the matter of their application No. 37, for the Bull of the Woods lode and mill-site claim, lots 52 A, and 52 B, Bozeman, Montana.

It seems the ground included in the mill-site was embraced in the land applied for by occupants of Cooke City under the town-site laws. These claimants together with other mill-site claimants filed protest against the allowance of the town-site application.

This question was considered by this Department and said protests dismissed, October 31, 1885 (4 L. D., 212) under the rule then in force "that townsites may be located on mineral land and the townsite claimants will hold their claims subject to the rights of the mineral claimants." While that matter was pending before this Department, Smith, *et al.*, on May 15, 1885, made application for patent for their claim including the mill-site. During the period of publication adverse claims were filed by the townsite claimants, and suits duly commenced thereunder. The local officers rejected the mineral application, and your office sustained their action because the statute provides that when an

* This decision was recalled for further consideration, and released from such suspension February 25, 1890.

adverse claim is filed, "all proceedings except the publication of notice and making and filing of the affidavit thereof shall be stayed," and for the further reason that the evidence submitted by the applicants failed to show that the application for the mill-site was made for the purposes contemplated by the statute, and held for cancellation said application in so far as it related to the mill site.

Before a decision of the case in this Department the supreme court of Montana had decided the contest between the townsite claimants and the mineral claimants as to the right of possession in favor of the latter. It was then urged that this decision of the supreme court conclusively showed compliance on their part with the law; that said decision was binding upon this Department, and that there was nothing then left but for it to issue a patent.

It was, however, held in the decision now sought to be reviewed, that—

Those judgments were a finding as between these applicants and the adverse claimants only, and are not binding upon the government in matters pending between it and the applicants. These must be determined on evidence deemed satisfactory to the land department,

and a hearing was ordered—

to fully test the questions of good faith and compliance with the law by these applicants in the matters of use and occupancy of the mill-site.

The motion for review sets up that the applicants have complied with all the requirements of law and have shown use and occupation of the land for mining purposes. The proof of these things was, however, found unsatisfactory and insufficient by your office and also by this Department and I have no reason for arriving at a different conclusion. It would require the presentation of most cogent and conclusive reasons to justify this Department in granting a motion for review of a decision that did not finally pass upon the rights of the parties, but simply ordered a hearing in order that the facts might be more fully and clearly presented. It is indeed doubtful if a motion for review of such a decision should ever be allowed. There is, however, in this case a question not presented by the motion itself but contained in and made the very basis of the argument filed, that seems to demand consideration.

It is contended that the judgment of the supreme court in favor of these applicants is made by the statute conclusive as to their rights to a patent. Section 2326, upon which this contention is based, provides that after judgment in such cases the successful party may file with the register a certified copy of the judgment roll together with the certificate of the proper expenditure, and pay the receiver the purchase price of said land—

whereupon the whole proceedings and the judgment roll shall be certified by the register to the Commissioner of the General Land Office and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear from the decision of the court, to rightly possess. If it appears from the decision of the court

that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim with the proper fees, and file the certificate and description by the surveyor general, whereupon the register shall certify the proceedings and judgment-roll to the Commissioner of the General Land Office as in the preceding case, and patents shall issue to the several parties according to their respective rights.

In support of their position the claimants here cite the case of Richmond Mining Co. v. Rose *et al.*, decided May 4, 1885 (114 U. S., 576). In that case an adverse claim had been presented and suit begun in 1873. In September 1876 the applicants for patent presented to the local land officers a certificate of the clerk of the court where said suit was instituted to the effect that said case had not been placed on the trial calendar and that no proceedings had therein since March 1874 to date of said certificate. The local officers holding this to be sufficient evidence that the adverse claim had been waived, prepared the necessary papers and your office issued patent thereon. In considering the question as to whether the land department had a right, in the absence of a formal determination of the case by the court, to decide that the adverse claim had been waived and resume action in the case, it was said :

Looking at the scheme which this statute presents, and which relates solely to securing patents for mining claims, it is apparent that the law intended, in every instance where there was a possibility that one of these claims conflicted with another, to give opportunity to have the conflict decided by a judicial tribunal before the rights of the parties were foreclosed or embarrassed by the issue of a patent to either claimant. The wisdom of this is apparent when we consider its effect upon the value of the patent which is thereby rendered conclusive as to all rights which could have been asserted in this proceeding, and that it enabled this to be done in the form of an action in a court of the vicinage, where the witnesses could be produced, and a jury, largely of miners, could pass upon the rights of the parties under instruction as to the law from the court.

It is in full accord with this purpose that the law should declare, as it does, that when this contest is inaugurated the land officers should proceed no further until the court has decided and that they shall then be governed by that decision ; to which end a copy of the record is to be filed in their office. They have no further act of judgment to exercise. If the court decides for one party or the other the land department is bound by the decision. If it decides that neither party has established a right to the mine or any part of it, this is equally binding as the case then stands. With all this these officers have no right to interfere. After the decision they are governed by it. Before the decision, once the proceeding is initiated, their function is suspended.

It will be noticed here that the only question to be decided was as to the right of the land officers to assume jurisdiction while the case was still pending in the court. Any remarks made by the court upon questions outside the one under consideration, and not necessary to a decision in the case then before it may properly be considered *obiter dicta* and consequently not binding upon other courts or this Department. The correctness of the proposition that the judgment of the court as to the right of possession as between two claim-

ants in such cases is final and binding upon this Department, has never been questioned. As to the conclusiveness of such a judgment as to the right of the successful party to a patent, it is otherwise. I do not find any case where it has been held by this Department that the decision of the court prevents an investigation by the Department to determine whether the successful party has, in good faith complied with all the requirements of law. In the case of the Alice Placer Mine, decided by this Department January 9, 1886 (4 L. D., 314), this question was considered and quite fully discussed. It was there said :

The judgment of the court is in the language of the law " to determine the question of the right of possession." It does not go beyond that. When it has determined which of the parties litigant is entitled to possession, its office is ended, but title to patent is not yet established.

In that case the action of your office ordering a further hearing was approved. To hold that the judgment of the court is conclusive as to the right of the successful party to a patent, would be to pass upon and decide upon the rights of the government when it was not represented. The viciousness of the rule here contended for and the ease with which dishonest claimants would, under such a rule be able to perfect their claims without in good faith attempting to comply with the law, is apparent. The judgment of the court here is based upon a statement of facts agreed upon by the two claimants. The government was not a party to such agreement, and yet it is to be bound by that statement and is not to be allowed to investigate the matter to ascertain if such facts really existed or whether the agreement was the result of a collusion between these parties. While there may be no circumstances here indicating bad faith, yet it illustrates and makes apparent the fact that such ruling would open wide the door for fraud and corruption in these claims. I do not believe the legislature intended such a thing, or that this law properly construed so directs.

For the reasons herein set forth the motion for review is denied.

The attorney for Samuel B. Wyman, the claimant for this land under the town-site claimants filed a motion to dismiss the motion for review and also an argument against the allowance of said motion for review. Wyman was not, however, considered as a party to this case at the time the decision sought to be reviewed was rendered, his claims being then treated as concluded by the judgment of the court against him. He has made no objection to this treatment of his claim nor has he taken any steps to become a party to the case. For these reasons his motion and argument have not been considered in arriving at a conclusion herein.

PRE-EMPTION—SECOND FILING.

C. S. CURTIS.

The transmutation of a pre-emption filing to a homestead entry exhausts the pre-emptive right.

A second filing is not permissible under the pre-emption law, although the first was made for unoffered land, and prior to the adoption of the Revised Statutes.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 17, 1890.

I have considered the case of C. S. Curtis on his appeal from your office decision of October 20, 1888, holding for cancellation his pre-emption cash entry for SE. $\frac{1}{4}$, NE. $\frac{1}{4}$, Sec. 3 and S. $\frac{1}{2}$, NW. $\frac{1}{4}$, Sec. 2, T. 3 N., R. 22 W., Bloomington, Nebraska, land district.

It appears from the record that claimant filed his declaratory statement for said land October 20, 1884, alleging settlement on the 17th of the same month, and his cash entry was made May 12, 1885.

In his final proof in answer to the interrogatory in regard to his having made any former filing he said, "No, except as stated in affidavit herewith filed and made part of this proof. In said affidavit he states that,

In October, 1871, he filed on the E. $\frac{1}{2}$, SW. $\frac{1}{4}$, and W. $\frac{1}{2}$, SE. $\frac{1}{4}$, Sec. 30, T. 4 N., R. 21 W., in Furniss county, Nebraska, and he lived on said land under said filing for about three or four months and then he made homestead entry for the same tract of land, and made proof on said land under said homestead entry under a five years' residence.

And affiant further says in making proof on said homestead entry, "he did not use the time he had lived on the land as a pre-emptor," and asks that said former filing be held for naught and that his proof be allowed on the pre-emption filing he now presents.

He offered no excuse for transmuting his first pre-emption filing to a homestead entry and when the final proof was reached in your office the decision complained of was rendered.

Claimant appeals from your said office decision upon the ground that "a pre-emption declaratory statement taken prior to 1874 where the party has shown by conclusive proof that he has had no benefit therefor does not exhaust his pre-emption right, and his proof in the second filing shows such fact."

With his appeal to this Department claimant presented his affidavit that about October 1, 1884, he was advised by the local officers that when a pre-emption filing was made prior to 1874, and not proved up on by the party making the filing, he had not by such filing exhausted his pre-emption right, and that all of this was made known to the local officers when he made his second filing and when he made final proof.

Claimant in his appeal alleges as a second ground of error that his proof "shows conclusively that his former entry was canceled, and he never received any benefit therefor, and further that on account of drought and other things he was compelled to abandon it as a pre-emption," and in his affidavit attached to the appeal he says "on account of drought and this affiant being too poor to raise the money to pay out on said land he had to turn said pre-emption declaratory statement into a homestead."

Claimant's bare allegation on appeal that drought was one of the reasons for changing his first pre-emption to a homestead claim, is not sufficient to bring his case within the rule of Paris Meadows (9 L. D., 41). That case contemplates such drought as would render the land entirely worthless for agricultural purposes, so that claimant actually abandoned the same. The facts shown rather bring the case at bar under the rule in Alfred W. Sanford (6, L. D., 103), wherein it was held that the right to make pre-emption filing can be exercised but once, and such right is exhausted though the filing is subsequently transmuted to a homestead entry.

The only error of law alleged is, that pre-emption filings made prior to 1874, when the party has not had the benefit of such filing, do not exhaust the pre-emption right.

In the case of *Bridges v. Curran* (7. L. D., 395), that question was presented. Curran had made a pre-emption filing in 1870, and by reason of his poverty was unable to prove up thereon without mortgaging the land and upon the advice of the register of the local office he also transmuted to homestead and subsequently, like the claimant in the case at bar, he made a second pre-emption filing.

In deciding said case this Department said,

The case of the State of California *v. Pierce* (9 C. L. O. 118) (1 L. D., 442), upon which the appellant relies to sustain his proposition that the law under which he made his first filing did not prohibit a second and that no such inhibition existed when first filing had been on unoffered land, until the adoption of the Revised Statutes, has been repeatedly overruled. See *J. B. Raymond* (2 L. D., 854) *Jonathan House* (4 L. D., 189), *Jose Maria Solaiza* (6 L. D., 20).

The appellant having exhausted his pre-emption right by said first filing, his declaratory statement, filed for the land in controversy, was illegal in its inception and must be canceled.

I concur in your conclusion and your said decision is accordingly affirmed.

TIMBER CULTURE CONTEST—"DEVOID OF TIMBER."

PETERSON *v.* VAN HOLLEN.

A timber culture entry, made in good faith, for land subject to such appropriation under the rulings of the Department then in force, is entitled to protection; but the present construction of the timber culture act should not be enlarged to protect entries that were not thus allowed.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 18, 1890.

I have considered the case of Ambed Peterson *v.* Anna Van Hollen, upon the appeal of the former from your office decision of September 11, 1888, dismissing his contest against the timber culture entry of Van Hollen for the S. $\frac{1}{2}$ NE. $\frac{1}{4}$, section 12, T. 7 S., R. 5 E., Concordia land district, Kansas.

Van Hollen made timber culture entry for the said land September 25, 1878. Contest was initiated against the entry by Peterson August 16, 1886; upon the charge that the said Van Hollen

Has failed to do the planting required between the 25th September, 1880, and the 25th of September, 1881; that she failed to do the planting and replanting required in the fourth year, also failed to do the planting required the fifth and sixth years nor has she ever properly cultivated said land or trees, and that there was not less than two acres of natural timber on said land when she made said entry of land.

A hearing was accordingly ordered and set for September 21, 1886. On that day parties appeared in person and by their respective attorneys and the hearing proceeded.

The local officers considering the testimony in the case found

That Anna Van Hollen now Mrs. Anna Seyser has failed to do the planting, replanting and cultivation of timber as required by law, and that the section of land, which embraces this timber culture entry was not, and is not, prairie land devoid of timber and the same contained five or six acres of natural growing timber when this entry was made.

They recommended cancellation of the entry.

The entryman appealed. Your office by your said decision reversed the action of the local officers and dismissed the contest.

Thereupon contestant appealed to this Department.

By a clear preponderance of the evidence the following facts are shown. The entryman broke on the land the first year of her entry about nine acres, the second year five acres. She planted during the second year three acres and a half with cottonwood trees and walnuts; during the third year one acre and a half with box elder and cottonwood trees. These trees she cultivated, and replanting was done wherever trees had died. These facts are sworn to by four different witnesses who claim to have personal knowledge of them.

It is shown on the part of the entryman that there are about seven hundred living trees varying much in size on each of the five acres

planted to timber. Two of entryman's witnesses claim to have made an actual count of them, and five of the witnesses testify that the condition of the trees is fair.

The testimony introduced on the part of the claimant is positive and clear and nothing is shown on the part of the contestant that will overcome its force. Most of the contestant's witnesses visited the land the Friday before trial for the first time and a large part of their testimony rests upon their opinion only. I am, therefore, of the opinion that the facts in the case support the finding of your office, regarding the planting of trees on the land and their cultivation.

Regarding the further question, whether the land at the time of entry was legally subject thereto, the evidence is very conflicting.

It appears that in section one of the said town and range, not very far from its southern boundary a creek has its existence; along the border of this creek and its branches strips of forest trees naturally grow. On the part of the contestant it is shown by his witnesses that a little branch of the said creek extended into the north half of the northeast quarter of Sec. 12, and that along its banks, at the time of trial, a grove of trees covering an area of about six acres, existed. The trees numbered one witness says one hundred and fifty, another states two hundred and seventy-five. Most of the trees are small, a few about twenty-five fit to make saw logs and some adapted to fence rails and posts. None of the contestant's witnesses knew the state of these trees from observation at time of claimant's entry, eight years previous.

On the part of the entryman it is claimed that the grove of trees referred to is situate north of the boundary of section twelve and that only a few shrubs are growing on the latter section. No actual survey by a competent person was made. One of claimant's witnesses states that he is the nephew of the man that owns the land covered by these trees, that the land is fenced, that he knows the section line, dividing sections one and twelve full well and that the land covered by such growth of trees is on the land of his uncle in section one.

I think the weight of the evidence is that the grove of trees is not situated on section twelve but on section one. Besides many of the small trees must have grown up since the entry has been made and can not, therefore, now furnish a reason for the cancellation of the entry. In the case of James Hair (8 L. D., 467) it was held that the phrase "devoid of timber" as used in the timber culture act 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.

Again it is held,

The departmental construction of the timber-culture act, prevailing at the time when the entry was allowed thereunder, must govern in determining whether such entry is for land of the character contemplated by said act. *Morrow v. Lawler*, 9 L. D., 95.

The same principle is recognized in the following authorities: *Allen v. Cooley*, 5 L. D., 261; *Kelley v. Halvorson*, 6 L. D., 225; *Candido v. Fargo*, 7 L. D., 75; *William Drew*, 8 L. D., 399.

At the time this entry was made, the doctrine in the case of *Osmundson v. Norby*, 2 C. L. L., 645, prevailed. There it was held where there were from ten to fifteen acres of timber growing upon the tract in the bend of the Chippewa River that the land was subject to timber culture entry, and this case is followed in the case of *Blenkner v. Sloggy*, 2 L. D., 267, where it is decided that where five hundred trees of natural growth varying in diameter from six inches to two feet, or more, and confined to a tract from five to eight acres in extent, the tract is not excepted from the timber culture act. Applying this rule to the case at bar, I have come to the conclusion that even if the grove of natural trees referred to should actually be growing on section twelve, that it is the duty of the Department to respect the entry. This is only upon the theory that the claimant at the time he made his entry had a right to rely upon the recognized rules of the Department in determining the character of the land subject to entry, and no attempt to enlarge upon the construction now given the act by the Department as applicable to entries under different circumstances should be indulged in.

Your said office decision is, therefore, affirmed.

HOMESTEAD ENTRY—APPLICATION—ACT OF MARCH 2, 1889.

ARTHUR P. TOOMBS.

An application to make homestead entry reserves the land covered thereby from other disposition until final action thereon.

A motion for the review of a decision denying the right to make a second entry under the homestead law, pending at the passage of the act of March 2, 1889, secures to the applicant the benefit of said act, to the exclusion of any intervening adverse claim.

Secretary Noble to the Commissioner of the General Land Office, February 18, 1890.

On August 24, 1889, upon the motion of Arthur P. Toombs, asking for review of departmental decision of August 16, 1888 (7 L. D., 215), affirming your office decisions of November 19, 1886, and January 31, 1887, which held for cancellation the homestead and commuted cash entries of said Toombs, embracing the SE. $\frac{1}{4}$ of Sec. 18, T. 31 S. R. 28 W., Garden City, Kansas, and rejected his application to make new entry for said contract, you were instructed, in view of the provisions of the act of March 2, 1889 (25 Stat., 854), and inasmuch as the sole claim of Toombs, upon the merits of his case, was that he should be allowed to make new homestead entry for the land in question, to cause him to be notified that a reasonable time would be given him within which to

make application to enter the land under the provisions of said act of March 2, 1889, whereupon such entry would be allowed, unless objection not shown by the record was found to exist; and the motion for review was thereupon returned with the other papers in the case, without consideration on its merits. (See 9 L. D., 312).

I am now in receipt of your office letter of December 10, 1889, with accompanying papers, in which you state that since receiving the departmental instructions aforesaid you have found of record the homestead entry of one Charles W. Morse, covering the land in question, "allowed out of form, September 4, 1888, or four days after the cancellation of Toombs' said entries;" that such homestead entry has been contested, and Morse having made default, a decision has been rendered in favor of the contestant; that by reason of these matters your office is in doubt how to proceed, and desires further instructions in the premises.

It appears that Toombs' motion for review was filed September 28, 1888, within the time prescribed by the Rules of Practice (Rule 77) for filing such motions. It further appears that the contest against the entry of Morse was initiated March 6, 1889, by one James H. Redner, and was not brought to trial until August 22, 1889. The charges were abandonment and failure, generally, to comply with the requirements of the homestead law.

Toombs filed his application to make new entry for the land August 4, 1885. This application operated to reserve the land from other disposition, until final action thereon. *Pfaff v. Williams* (4 L. D., 455); *Sarah Renner* (2 L. D., 43). By his motion for review (filed within time), Toombs was still legitimately insisting upon favorable action on said application when the act of March 2, 1889, was passed. It can not be considered therefore, that such application was finally acted upon by the Department until the date of the decision upon the motion for review. That decision, in view of the provisions of said act of March 2, 1889, allowed Toombs to make new entry for the land, as desired, which was in effect, the allowance of his application to make such entry, upon which he was then insisting.

The entry of Morse having been made before final action, by the Department, upon the application of Toombs, must be held subject to the rights adjudged to the latter upon such final action. Redner, by his contest against said entry, acquired no rights superior to those of Toombs, (1) because the contest was not initiated until after the passage of the act of March 2, 1889, under which the rights of Toombs attached by virtue of his motion for review and pending application, and (2) because he could acquire no greater right than Morse, himself, had, which, as we have seen, was subject to that of Toombs.

I see no good reason, therefore, why Toombs may not be allowed to make entry for the land under his pending application if within a reasonable time after notice he should seek to do so.

MINERAL ENTRY—ADVERSE CLAIM—MILL SITE.

BAY STATE GOLD MINING CO. *v.* TREVILLION.

The date of a location set up by an adverse claimant, and the competency of a corporation under State laws to make such location are questions of title, and properly matters for judicial determination.

A duly qualified corporation may obtain title to a mill site under section 2337, Revised Statutes.

A discrepancy between the adverse claim as filed and accepted in the local office, and that upon which suit is instituted will not warrant the Land Department in the resumption of proceedings during the pendency of the suit in court.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 19, 1890.

I have considered the case of The Bay State Gold Mining Company *v.* James Trevillion on appeal of the latter from your office decision of January 12, 1889, accepting as an adverse claim the protest and adverse claim filed by the former in the matter of Trevillion's application for patent for the Little Rock Placer in Central City, Colorado, land district.

Placer application was filed October 19, 1885, original location May 30, 1881. First publication of notice as certified by the local officers, was made October 22, 1885. Adverse claim filed December 21, 1885, and suit commenced January 19, 1886, in the district court, Clear Creek county, Colorado.

The local officers accepted the protest of said Bay State Gold Mining Company as being adverse to that of Trevillion and on appeal your office affirmed their decision.

The errors specified in the decision of the local officers were substantially: I. That said mill-site was not located until December 21, 1885. II. A corporation cannot by itself, locate a mill-site under the local and State laws. III. Said company has not complied with the State laws as to foreign corporations.

In your said decision you say,

The first and third points of objection are questions of title, and, in view of the adverse claim and suit commenced, are matters for judicial adjudication of which this Department cannot take cognizance. As to the second ground, I know of no reason why a duly qualified corporation cannot make a mill-site location and entry, any local or State law contrary thereto would be in conflict with the laws of the United States and hence inoperative.

On appeal to this Department substantially the same errors are alleged and in addition it is claimed that your office erred in determining that "suit had been commenced by the party filing said adverse claim January 19th, 1886."

Section 2326, of the Revised Statutes, provides, that,—Where an adverse claim, is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries and extent of such adverse

claim, and all proceedings, except the publication of notice and the making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession and prosecute the same with reasonable diligence to final judgment; and a failure to do so shall be a waiver of his adverse claim, etc.

I concur in your conclusion that the time when said mill-site was located, and whether or not the said company has complied with the State laws, are both questions of title and are matters to be determined by the court.

I also agree with you that a duly qualified corporation may obtain title to a mill-site under section 2337 Revised Statutes.

In regard to the other specifications of error, viz., that suit has not been commenced by the party who filed the adverse claim; this seems to be based upon the fact that in the adverse claim filed in the local office upon which the suit is based it is alleged that the Bay State Gold Mining Company is a corporation under the laws of the State of New York, while in the copy of the complaint filed in said district court it is stated that said corporation is organized under the laws of Massachusetts. This discrepancy did not appear in the original adverse claim filed and has arisen since, and it may be a mere clerical error arising from the fact that Massachusetts is usually called the "Bay State." If simply an error the right to amend may exist. At any rate I am of the opinion that under section 2326, Revised Statutes, the adverse claim having been in due form was properly received as an adverse claim by the local officers and all proceedings in this Department are stayed until the final judgment of the court in which the question of the right of possession is pending.

Your said decision is accordingly affirmed.

PRE-EMPTION—UNSURVEYED LANDS.

HELEN M. CAMERON.

A declaratory statement can not be filed for land until it has been surveyed and the plat thereof duly filed in the local office.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 19, 1890.

I have considered the case of Helen M. Cameron on her appeal from your office decision of January 14, 1889, rejecting her application to file declaratory statement for a tract of land which lies between certain mining claims in Deadwood, Dakota, land district.

The public surveys have never been extended over this tract which comprises about twenty acres supposed to be non-mineral. No section, township, or range is mentioned, and while it appears that claimant has

been using so much of said land as is suitable for agricultural purposes, for gardening, it also appears that her house is not upon the tract sought but upon adjoining land which has been patented to a mineral claimant.

Appellant filed with her so-called application an alleged plat of the land showing its lines with reference to the adjoining mineral land entries.

I concur in your conclusion. The law provides no method for the disposal of land under the pre-emption laws, until the same shall have been surveyed and the plat thereof duly filed in the local office.

In case of Lake Warner (5 L. D., 369) this Department in discussing the proposition to survey the dry bed of said lake said,

The settlers cannot for the want of survey get their claims of record, and it is stated that the swamp land claimants threaten them with suits in ejectment as trespassers. . . . Would it not, therefore, be advisable to extend the surveys not only as recommended by you, but throughout the length and breadth of what is termed, Warner Lake, or so much thereof as practicable, and thus throw open for disposal under the public land laws lands for which no claim of record can now be made.

Your said decision is accordingly affirmed.

MINING CLAIM—MILL SITE.

PERU LODGE AND MILL SITE.

A mill site cannot be included within an application for a lode or vein, unless such site is used or occupied for mining or milling purposes in connection with said lode or vein.

Secretary Noble to the Commissioner of the General Land Office, February 19, 1890.

On September 17, 1885, the Consolidated Republican Mountain Mining Company made mineral entry, No. 2906, for the Peru lode and mill site claim, survey No. 859, A and B, Griffith mining district, Central City, Colorado.

On June 23, 1888, your office made the following ruling :

The mill site is claimed in connection with the Peru lode, but there is nothing in the record showing that the same is used or occupied in connection therewith or for any purpose whatever. Satisfactory evidence must be furnished, showing in what manner said mill site is used or occupied and when such use or occupancy commenced.

In response to this, the applicant filed an affidavit of its president, J. Warren Brown, dated November 12, 1888; but your office having under date of November 23, 1888, held this testimony insufficient, another affidavit, dated January 28, 1889, and jointly sworn to by Benjamin C. Catren and Porter P. Wheaton, was subsequently submitted.

On February 25, 1889, your office made the following ruling :

“The evidence submitted utterly fails to show that the land embraced in said mill site was used or occupied for mining or milling purposes

in connection with said Peru lode, and I therefore decline to recall said office decision of November 23, last," by which said entry was held for cancellation "to the extent of the area embraced in the mill site survey No. 859 B."

From the action so taken the applicant company appealed to this Department.

The following are the facts set up in support of the claim to the mill-site :

That said company or its grantees are the owners of a number of other mines lying contiguous to said Peru Lode and mill-site, for which patents have been issued, including a certain tunnel about eight hundred feet in length, called the Everett tunnel, and that in the development of said lode mining claims the said company and its grantors up to the year 1878 had expended more than \$50,000, and that since said year its grantees have been actively engaged in mining upon said properties at an expense of at least \$50,000 more; . . . that this applicant and its grantees have at least 20,000 tons of concentrating ore at the mouth of said Everett tunnel, which tunnel is situated on the creek just below the Peru mill site; that it is the object of the applicant or parties associated with it to build a mill and to use the water power from said Peru mill-site for the purpose of obtaining power to operate the same, said mill to be used in concentrating said ore and also to use the water power from said Peru mill-site for the purpose of obtaining power to operate machinery in said mines; that said mill would have been built long since but for the litigation in which said company had been involved, and that steps have been taken to build said mill and to secure the water power from said mill-site for the purposes above stated; that without said water power the expense of operating said mill and the machinery in said mines would be greatly increased since it would necessitate the use of steam power for such purpose (affidavit of President, November 12, 1888).

Under date of January 28, 1889, Benjamin C. Catren and Porter P. Wheaton jointly swore to the following allegations :—

That said mining company is the owner and occupier of the West Peru tunnel; that said company is now using said mill site in immediate connection with said tunnel for the purpose of dumpage for ore, mineral and rock from said tunnel and other sources; that no other ground is available for such purpose: Affiant further states that said mining company has constructed a dam on said mill-site for the purpose of utilizing the same as a water power in connection with said West Peru tunnel, the Peru lode, and other lodes.

The provision of the statute under which the claim is made, is as follows :—

Where non-mineral land non-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 (section 2337, R. S.).

I concur in the opinion of your office that the facts above set up do not bring the claim within the terms of this enactment, as they do not show that the mill-site was used or occupied by the applicant company for mining or milling purposes in connection with the Peru lode mine. See Iron King Mine and Mill Site, 9 L. D., 201; Two Sisters Lode and Mill Site, 7 L. D., 557.

Your said office decision is accordingly affirmed.

MINING CLAIM—NOTICE—EXPENDITURE.

NIL DESPERANDUM PLACER.

A notice of application that fails to connect the claim with the public surveys is insufficient; and the defect cannot be cured by a reference to the board of equitable adjudication in the presence of adverse claimants who have not had legal notice. If expenditures and improvements are made for the benefit of several claims the surveyor general's certificate should show what part of such expenditures is exclusively credited to the claim for which patent is asked.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 20, 1890.

I have considered the appeal of the Mayflower Gravel Mining Company from the decision of your office of November 20, 1888, requiring new notice of application for entry, a supplemental certificate of expenditures and additional evidence of expenditures for the year in which the application for patent was filed in the matter of the Nil Desperandum placer claim, mineral entry No. 1106, Sacramento, California land district. On July 8, 1886, said company made its entry for said claim in Sec. 24 T. 14 N., R. 10 E. M. D. M., designated as lots 84 and 85 embracing 119.10 acres in the Bushy mining district in Placer county.

In March 1887, Lucinda Stevens, widow of D. P. Stevens, deceased, filed a protest against the issuance of patent alleging that the application included ground claimed and worked by her husband now deceased; that the applicant has failed to make the showing required by law as to annual work and expenditures; that no copies of plat and notice were posted in a conspicuous place on the land; that the notice of application was published in an obscure newspaper, which had just started, and which had practically no circulation; that the published notice was insufficient in that it did not connect said claim with any corner of the public survey and that five hundred dollars have not been expended upon said claim either in labor or improvements.

On August 15, 1888, one William Muir, filed a protest against said entry alleging that the applicant for patent had never discovered, disclosed or opened up any mineral deposit of any kind upon either of said lots.

Your office, after considering the case, decided that the published notice was insufficient in that it failed to give any line connecting said claim with the public surveys; that the surveyor general's certificate is insufficient in that while it was evident that some of the improvements were outside the limits of this claim and made for the common benefit of several locations the proper proportional interest to be exclusively credited to this claim had not been shown and required new notice and additional or supplemental certificate. It was also held that in view of this requirement of republication, which would give all parties claiming adversely an opportunity to assert their claims before a competent

tribunal, it was unnecessary to order a hearing and said petitions were dismissed.

The survey of said claim and the notice claimed to have been posted on the land both connected this claim, from a corner marked "M. F. P. M." "N. Y. P. M." and P. P. M. or northeast corner of this claim, with the quarter section corner common to sections 13 and 14 of the public surveys by a line running N. 58° 31' W. 16.87 chains, but in the published notice and the copy posted in the local office no mention of this line or of any other connection with the public surveys is made.

I concur with the conclusion reached in your office that this notice was insufficient. Under the ruling in the case of the Mimbres Mining Company (8 L. D., 457) this defect might in the absence of an adverse claim be cured by submission to the board of equitable adjudication. In the presence of these adverse claimants who have not had legal notice of the application herein, such reference cannot be made.

The objection to the surveyor's certificate, heretofore filed, seems also to be well taken. It appears from various affidavits filed in behalf of this company that it controlled several claims in the immediate neighborhood of this one under consideration, and that it had expended, in developing and working such claims large sums of money, but it is not shown what part of this labor or improvements were properly to be credited to the respective locations included in the present application.

Upon the questions of the posting of notice in a conspicuous place on this claim and the work done by the respective parties thereon, a large number of affidavits have been filed tending on the one hand to sustain the allegations made by Mrs. Stevens, and on the other to flatly contradict such allegations. Inasmuch, however, as the applicant for patent will be required to give anew its notice of application, all parties claiming adversely, will, as said in your decision be afforded an opportunity to present and prosecute in due form their claims, it is unnecessary to order a hearing at this time as requested.

The decision appealed from is affirmed.

WEST *v.* OWEN.

Motion for review of departmental decision rendered June 7, 1889 (8 L. D., 576), in the above entitled case denied by Secretary Noble, February 20, 1890.

ADJUSTMENT OF DEPUTY SURVEYOR'S ACCOUNTS.

INSTRUCTIONS.

Secretary Noble to the Commissioner of the General Land Office, February 20, 1890.

Referring to your letter of January 28, 1890, with respect to the present system of examining surveys, I have to say that your report has

been duly examined and that your conclusions meet with the approval of the Department.

The instructions, therefore, of the General Land Office to surveyors-general, as shown in the Commissioner's Report for 1886 (pages 175-177), requiring all surveys to be examined in the field prior to the adjustment and payment of deputy surveyor's accounts, are hereby revoked. The revocation, however, of these instructions does not call in question the authority of the Commissioner to suspend the adjustment of a surveying account in any particular case, pending an examination in the field, if he deems such course necessary to determine the justness of the account, or the accuracy of the work.

MINING CLAIM—RES JUDICATA KNOWN LODE—PATENT.

PIKE'S PEAK LODE.

The Commissioner of the General Land Office has no authority to reverse a decision of his predecessor that has become final.

A decision of the Secretary of the Interior is binding upon all subordinate officers of the Land Department so long as it remains unchanged.

The limitation of the width of a lode, within a placer claim, by the provisions of section 2333, R. S., is only applicable where the claimant seeks a patent for a vein or lode included within the boundaries of his placer claim, and has no application for the lode claim, properly perfected by another, prior to the date of the application for placer patent.

If it appears from the record that there is a lode claim within the boundaries of a placer claim, not owned by the placer applicant, such lode claim should be in its full extent excepted from the placer patent.

If the record shows that there is no known lode or vein within the boundary of a placer claim, and patent regularly issues thereon, no subsequent application for a lode claim, within said placer, should be received by the local office, so long as said placer patent remains outstanding and uncanceled in whole or in part.

The validity of a placer patent, and its extent, as in conflict with an alleged known lode or vein, are questions that can only be determined by judicial authority.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 21, 1890.

I am in receipt of your communication dated the 30th ultimo, submitting a copy of your office decision dated January 8, 1890, in the case of mineral entry No. 688, made July 14, 1881, at the Helena Montana land office, by Patrick A. Largey, upon the Pike's Peak lode claim.

It is stated that your office, upon motion for counsel for claimant, adhered to its former decision requiring an amended survey reducing its width to twenty-five feet on either side of the center lode, upon the authority of the decision of the Department upon the Shonbar lode claim (1 L. D., 551 and 3 L. D., 388); that in a subsequent motion dated January 21, same year, counsel after stating the errors alleged in said de-

cision of January 8th, requested a reconsideration thereof, and that the entry of said claim be approved for patent to the "full extent of surface ground claimed," or in case you were of the opinion that you did not have the power to apply the ruling in the case of *Noyes v. Mantle*, (127 U. S., 328) to said lode claim, that you would "ask instructions of the Hon. Secretary of the Interior in the premises." In accordance with said request you ask to be instructed whether patent should be allowed on said claim as prayed for. You also request to be advised, in view of the holding and principle of the decision in the case of *Thomas J. Laney* (9 L. D., 83) whether it would be necessary, before the issuance of such patent, that the Upton placer patent, should first, by regularly instituted judicial proceedings be set aside or made inoperative as to the portion of land therein embraced and claimed as the Pike's Peak lode claim, or whether such lode patent should be issued without regard to the outstanding placer patent. It will hardly be necessary to consider whether the supreme court decision in the case of *Noyes v. Mantle* (*supra*) overturns the ruling in the *Shonbar* lode case above cited, for it is clear that in this particular case your office would not have jurisdiction to reverse the decision of your predecessor, rendered on April 9, 1883, which has become final, there being no appeal. *United States v. Stone* (2 Wall., 535); *Heirs of Joseph Mainville*, (3 L. D., 177); *Eben Owen et al.* (9 C. L. O., 111).

Moreover, the decisions of the Department are binding upon all the subordinate officers so long as they remain unchanged. The *Shonbar Lode* case (1 L. D., 551), cited by you, was decided by Mr. Secretary Teller on March 26, 1883. In that case your office held the mineral entry for said lode for cancellation, for the reason that the ground covered thereby was patented as placer claims, on April 15, and May 16, 1881, upon mineral entries Nos. 575 and 553. Upon appeal the Department found that the lode applicants located their claim May 5, 1879, filed application for patent on November 2, 1880, and after due notice by publication, made mineral entry No. 611 on January 14, 1881, at the Helena Montana land office. On May 29, 1882, the lode claimants filed certain affidavits alleging that said lode was a well defined vein, rich in minerals, and that its existence was known at, and long prior to the date of said placer application. The Department cited the case of the *Mammoth Quartz mine* wherein it was decided that the lode claimant should be allowed to make application for a patent, subject to the filing of an adverse claim and the institution of suit in a court of competent jurisdiction, and held that the proofs on said lode claim having been of record in your office for several months prior to the issuance of said patents, in the absence of any adverse claim, the applicants were entitled to take their lode and twenty-five feet on each side thereof and no more; that the lode claimants in order to protect their right to the full extent should have duly filed an adverse claim, and having failed to do so, they were expressly restricted by the statute to their lode "and

twenty-five feet of surface on each side thereof." Your office was accordingly directed, if, upon examination, the proofs were found to be sufficient to "require a corrected plat properly defining the restricted surface ground, upon which patent would issue."

Subsequently (on February 10 1885,—3 L. D., 388) the Department adhered to said ruling, holding that section 2333 of the Revised Statutes of the United States, expressly restricted such claims "to twenty-five feet of surface on each side thereof."

It appears to have been the ruling of the Department that a claimant for an alleged known lode should apply for patent in the usual way although it was covered by a prior placer patent, so that the controversy might be properly settled in the courts. *Robinson v. Royder* (1 L. D., 564); *Becker et al v. Sears* on review (*idem* 577); *Olathe Placer Mine* (4 L. D., 494).

So, in the case of the application for patent for mineral land covered by a townsite patent, it has been held by the Department that an adverse claim or protest should be filed by the townsite, or in its behalf, and in the absence of such action, suit to set aside the mineral patent will not be advised. *Smoke House Lode* (4 L. D., 555); *Iron Silver Mining Co. v. Mike and Starr Mining Co.* (6 L. D., 533).

The case of *Noyes v. Mantle* (*supra*) involved the rights of two mineral claimants for a lode claim, one by virtue of a patent issued on April 23, 1880, upon his application dated December 14, 1878, for a placer claim, the other by virtue of a lode location made on April 23, 1878. The supreme court held that under the provisions of section 2332 R. S., a valid location of a mineral lode or vein properly made, and perfected under the law, gives to the locator the exclusive right to such lode or vein. In deciding the case the court said—

They (the lode claimants) had thus done all that was necessary, under the law, for the acquisition of an exclusive right to the possession and enjoyment of the ground. The claim was thenceforth their property. They needed only a patent of the United States to render their title perfect, and that they could obtain at any time upon proof of what they had done in locating the claim, and of subsequent expenditures to a specified amount in developing it. Until the patent issued the government held the title in trust for the locators or their vendors. The ground itself was not afterwards open to sale. The location having become completed in April 1878, ante-dates, by some months, the application of the defendant for his placer claim. That patent was subject to the conditions of section 2333 of the Revised Statutes,

which the court quoted at length. The court held reaffirming the ruling in *Reynolds v. Iron Silver Mining Co.* (116 U. S., 687 and 124 U. S., 374), that said section 2333 provides—

(1) Than an applicant for a placer patent who is in possession of a vein or lode within his placer claim, must state the fact, and upon payment of the sum required, patent may issue covering the placer claim, and the lode claim "and twenty-five feet of surface on each side thereof."

(2) That where a vein or lode is *known to exist within the placer claim*, an application for the latter omitting to apply for the vein or lode will

be held "as a conclusive declaration that the claimant of the placer claim has no right of possession to the vein or lode," and—

(3) That if the existence of a vein or lode in a placer claim is not known a patent for the placer claim shall convey all valuable mineral and other deposits within its boundaries. The court also held that said section does not apply to lodes or veins within the boundaries of a placer claim which have been located previously under the laws of the United States, and which are in possession of the locators or their assigns; that it can apply only to lodes or veins not taken up and located so as to become the property of others, and that,

where a location of a vein or lode has been made under the law, and its boundaries have been specifically marked on the surface, so as to be readily traced, and notice of the location is recorded in the usual books of record within the district, . . . it may safely be said that the vein or lode is known to exist, although personal knowledge of the fact may not be possessed by the applicant for a patent for a placer claim.

It thus appears that the limitation of the width of the claim in said section 2333 is only applicable where the same claimant seeks a patent for a vein or lode included within the boundaries of his placer claim, and has no application to a lode claim properly perfected by another prior to the date of the application for patent for placer claim whose boundaries include the lode claim. If therefore it shall appear from the record that there is a lode claim within the boundaries of a placer claim, not owned by the applicant for patent for said placer claim, then that lode claim in its full extent should be excepted from the placer patent.

The applicant for a patent for a placer claim is required to make affidavit, corroborated by one or more witnesses, that there is no "known lode or vein" within the boundaries of the placer claim, (Paragraph 59, p. 25 Mining Regulations of the General Land Office, Edition 1889), if it be a fact.

If such affidavit is falsely made, then the patent issued upon the placer claim could be vacated or annulled by appropriate action in the proper court. But where the record shows that there was no known lode or vein within the boundary of a placer claim and a patent has regularly issued thereon, no subsequent application for a patent for a lode claim should be received by the local officers so long as said placer patent remains outstanding and uncanceled in whole or in part.

The general rule is well settled by this Department that the issuance of patent terminates the jurisdiction of the Department over the land covered thereby, and such patent can be invalidated only by proceedings in the proper court.

Roockwell v. Indian Widows (1 L. D., 90); *Heir of John Love* (2 L. D., 386); *Wisconsin Central R. R. Co. v. Stinka* (4 L. D. 344); *Pueblo of San Francisco* (5 L. D., 483); *Garrigues v. Atchison, Topeka and Santa Fe R. R. Co.* (6 L. D., 543); *The Middle Grounds* (7 L. D., 255); *Schweitzer v. Ross et al.* (8 L. R., 70); *John P. S. Voght* (9 L. D., 114).

Such being the general rule, the question arises, does a placer patent form an exception? I think not. In the case of Thomas J. Laney (9 L. D., 83) the Department held that your office correctly refused to allow the lode claimant to prove that the lode claimed by him was known to exist prior to the issuance of patent to the townsite of Georgetown, because (1) there was no allegation that the lands covered by said townsite were known to be mineral prior to entry and issuance of patent therefor, and there was no offer to make proof relative thereto prior to the decision of your office. (2) That with the issuance of patent all jurisdiction over the land embraced therein terminated so long as the patent remained outstanding. Citing *United States v. Stone* (2 Wall., 525); *Moore v. Robbins* (96 U. S., 530); *United States v. Schurz* (102 U. S., 378); and numerous departmental decisions. If it be said that known veins or lodes are expressly excepted by section 2333, from patents for placer claims whose boundaries include the same, it is also true that under the pre-emption, homestead or the townsite laws, no title from the United States to land known at the time of sale to be valuable for its minerals of gold, silver, cinnabar or copper, can be obtained. Secs. 2258, 2318 and 2392, R. S. U. S.

In the case of *Deffeback v. Hawke* (115 U. S., Op. 406), the supreme court say—

The land officers, who are the mere agents of the law, had no authority to insert in the patent any other terms than those of conveyance, with recitals showing a compliance with the law and the conditions which it prescribed. The patent of a placer mining claim carries with it the title to the surface included within the lines of the mining location, as well as to the land beneath the surface.

The court gives as a reason for using the words "land known at the time of sale to be valuable for its minerals of gold" etc., that—

There are vast tracts of public land in which minerals of different kinds are found, but not in such quantity as to justify expenditures in the effort to extract them. It is not to such lands that the term 'mineral' in the sense of the statute is applicable,—

that said words were used advisedly—

to prevent any doubt being cast upon titles to lands afterwards found to be different in their mineral character from what was supposed when the entry was made and the patent issued.

If the land covered by the placer patent was *not known* at the time of the sale to be valuable for its minerals of gold etc., the title passed by the placer patent. Moreover, the last clause of section 2333 expressly declares that "where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof." The validity of the patent for the placer claim, and its extent, will therefore depend upon a question of fact; namely, the existence, *vel non*, of a known lode or vein within the placer claim, prior to entry and issuance of patent thereon. It is eminently proper that this question should be

passed upon by the courts. The legislation relative to the sale of mineral lands, specially guards the possessory rights of conflicting claimants.

Sections 2325 and 2326 of the Revised Statutes prescribe the manner of procedure for obtaining a mineral patent, and, among other things, provide that the claimant, prior to filing his application for patent shall post a copy of a plat duly made with the notice of this application for patent in a conspicuous place on the land embraced in said plat previous to filing his application for patent, and after making due proof of such posting, the register, upon the filing of said application plat etc., is required to make due publication thereof, within which time, if no adverse claim has been filed, upon making the required proof as to expenditures and payment for the land, it will be assumed that the applicant is entitled to a patent upon his claim. If, however, an adverse claim be duly filed, then "all proceedings except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of *competent jurisdiction*, or the adverse claim is waived."

In the case of *United States v. Iron Silver Mining Co.* (128 U. S., 673) the supreme court said—

The amount of land which may be taken up as a placer claim, and the amount as a lode claim, and the price per acre to be paid to the government in the two cases, when patents are obtained, are different. And the rights conferred by the respective patents, and the conditions upon which they are held, are also different.

While this may be conceded, yet it still remains that a placer patent by the express provision of law conveys "all valuable mineral and other deposits within the boundaries thereof," where the existence of the vein or lode was not known. If it be shown that the applicant has knowingly made misrepresentations as to discovery of mineral, or as to the form in which the mineral appears, the government may institute proceedings to set aside the patent. But so long as the placer patent remains outstanding and unlimited, in my judgment, the government through its officers should not receive lode applications for any part thereof. Upon a sufficient showing being made, the patent may be set aside by proper proceedings in the courts.

HOMESTEAD ENTRY—"TRADE AND BUSINESS."

BICKEL ET AL V. IRVINE.

If at the date of the original entry the land is not settled upon and occupied for purposes of trade and business, the subsequent occupancy of the land by others for such purposes will not defeat the right of the homesteader.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 20, 1890.

On May 22, 1883, Wm. Irvine made homestead entry for the W. $\frac{1}{2}$, NW. $\frac{1}{4}$, section 13 and E. $\frac{1}{2}$, NE. $\frac{1}{4}$, section 14, T. 2 N., R. 13 E., M. D. M., Stockton land district, California.

He made final proof December 28, 1885, against the allowance of the final entry Wm. Bickel, J. C. Tarbot, G. W. Cordes and Joseph Canepa protested upon the grounds that certain portions of the land embraced in said homestead entry, viz., the SE. $\frac{1}{4}$, of NE. $\frac{1}{4}$ or lot 12 of said section 14, and the SW. $\frac{1}{4}$, of NW. $\frac{1}{4}$, of said section 13, are more valuable for mineral than agricultural purposes and further that the townsite of Carson is situated on portions of the lands last aforesaid. The local officers rejected the proof. From this action Irvine appealed.

Upon the request of both parties, your office on November 10, 1886, ordered that a hearing be had before the local officers "to determine whether the SE. $\frac{1}{4}$, of NE. $\frac{1}{4}$, or lot 12 of Sec. 14 and the SW. $\frac{1}{4}$, of NW. $\frac{1}{4}$, of Section 13, T. 2 N., R. 13 E., M. D. M., are most valuable for agricultural or for mineral or townsite purposes."

Hearing was accordingly ordered for March 28, 1887, and continued by stipulation to June 21, 1887. On this day the parties appeared and were represented by their respective attorneys. After a full hearing, the local officers found as a fact "that the tract in dispute is more valuable for agricultural than mining purposes," but concluding that the so called village of Carson, situated on those lands is properly and legally a townsite, they rejected the claim of Irvine to the tract in question.

From this action of the local officers Irvine appealed; the contestant took no exception to the finding that the lands are non-mineral in character.

Your office by decision bearing date November 6, 1888, upheld the local officers in the finding of fact regarding the non-mineral character of the land but reversed their ruling on the further question, whether any part of the land is covered by a valid and legal townsite. Your office held that the claim of a townsite upon the said lands is not supported by the facts in the case. You thereupon modified the decision of the local officers and concluded "that Irvine should be permitted to complete his proof and make entry of the lands in controversy with the other lands embraced in his entry to which he is entitled under the homestead laws."

The contestant appealed to this Department from your said office decision and assigned the following errors therein:

I. Error in holding that public land is subject to homestead entry and final proof while occupied for the purposes of trade and business and in the adverse possession of twenty *bona fide* permanent residents.

II. Error in holding that the townsite residents or contestants had acquired no rights against the United States at the time the homestead entry of Irvine was made, sufficient to withdraw the land from such entry.

III. Error in deciding that the tracts in question were "unappropriated public lands" at the date of the homestead entry of Irvine.

IV. Error in holding that the homestead entry of Irvine was valid when made.

V. Error in concluding that Irvine should be permitted to complete his proofs and make final entry of the land under the homestead law.

No exception is taken by the contestant to the finding regarding the non-mineral character of the land, either in the assignment of error or in the argument filed in connection therewith.

In reference to the townsite question involved in the case, the facts shown by the evidence are as follows:

The pretended townsite of Carson covers about twelve acres of the lands in contest. There were settlements on it as early as 1851; it was called "Carson Camp." The occupants were miners and store and saloon keepers, all dependent upon the mines in the immediate vicinity for support. Since 1862 the mines have been gradually abandoned and the number of occupants in the village or camp correspondingly reduced. The population in 1852 was about one hundred, in 1862 twenty-five, in 1882 twenty or twenty-five; at the time of hearing, June, 1887, twenty, consisting of two families respectively of nine and seven persons, seven and five of whom were children and four single persons. The only place of business was a store kept by one of the latter. From 1878 to 1883 no business whatever was carried on in the camp; it was during these years September, 1879, that Irvine settled upon the lands embraced in his entry; in December following he brought his family to the land, and the same has ever since been his residence, and been improved and cultivated by him.

At the time of hearing Irvine had the land covered by the entry exclusive of the pretended townsite fenced, and thirty acres under cultivation. He had on the land two dwelling houses and many out-houses. He used a large part of the land for grazing and kept there five horses, four colts and forty-five head of cattle. His improvements are valued at five thousand dollars.

On the other hand the inhabitants of the pretended townsite had dwelling houses and other improvements on their respective lots. The improvements in the so called village mostly owned by the contestants are valued in the aggregate also at about five thousand dollars.

Considering this question you set out in your said office letter:

The lands were surveyed in 1871. At no time since have there been sufficient inhabitant in the village or camp to make a townsite entry, Sec. 2389 Revised Statutes. The occupants or residents of the tracts in controversy never in any manner indicated that they desired to obtain title to the tracts from the government under the townsite or other laws. They do not now desire to enter the tracts. There was no store or business house in the village from 1878 to 1883. During this interval Irvine made settlement and entry. At date of Irvine's entry the townsite contestants had acquired no rights against the United States and there was no appropriation of the public lands by the settlements which they had made. In the case of *Keith v. Townsite of Grand Junction* (on review, 3 L. D., 431) the Hon. Secretary says, following the ruling in the case of *Townsite of Superior City* (1 Lester, 432), 'that it was manifestly not the object of the law to withhold from pre-emption such lands as individuals might designate or select without authority as a site for a probable or prospective city or town.'

In the case of *Matthiessen and Ward v. Williams* (on review, 5 L. D., 180), the Hon. Secretary says,—‘I think the best evidence that the alleged townsite had been abandoned as such when Williams made his entry is the fact that not one of the people then staying there ever laid claim to any part of this land under the townsite laws.’

The occupants of “Carson Camp” never even made a selection as did the contestants Matthiessen and Ward.

I must take exception to the statement that since 1871, there never have been sufficient inhabitants in the village or camp to make a townsite entry. The law does not prescribe that any number of inhabitants is necessary to make a townsite entry. See Revised Statutes, section 2389; paragraph 9, of subdivision 3, of circular of November 5, 1886, 5 L. D., 265, and case of *Coyne v. Townsite of Crook et al.* (6 L. D., 675). However, the contestants took no legal steps to enter the lands covered by their settlement under the townsite law, nor do they now ask it; and since it is not shown that any part of the land was settled upon and occupied for purposes of trade and business at the time of Irvine’s entry, I concur in the conclusions expressed in your said office decision.

While in point of law, the question of the character of the land, whether agricultural or mineral is not involved in the appeal, I have nevertheless fully considered the evidence regarding this fact, and have come to the conclusion that the weight of the testimony sustains the finding of the local officers affirmed by your office.

Accordingly your said office decision is affirmed.

Subsequent to the appeal the contestants filed various *ex parte* affidavits in which the mineral character of the land is asserted.

These affidavits, which present no new facts but are cumulative in their nature cannot be considered in the determination of the case.

PRE-EMPTION ENTRY—SECTION 2260 R. S.

NANCY M. MAZE.

A removal from land held under equitable title, to reside upon public land in the same State, is within the inhibitory provision of the second clause of section 2260, Revised Statutes.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 24, 1890.

This is an appeal by Nancy M. Maze from your office decision of December 27, 1888, affirming the local office and rejecting her pre-emption proof for lots 6, 7, 9 and 16, Sec. 6, T. 11 S., R. 21 E., Stockton, California.

From the statements of your office it appears that said proof was submitted in support of declaratory statement No. 14253, filed February 10, 1888, by Mary M. Maze, alleging settlement January 30, 1888, upon lots 6, 7, N. $\frac{1}{2}$ of lot 9 and lot 16, in said section 6, and that the S. $\frac{1}{2}$ of said

lot 9, is embraced in a certain pre-emption cash entry dated December 27, 1886.

The proof in question was submitted before the county clerk of Fresno county, October 6, 1888.

In her formal testimony in support of such proof (showing residence from the first part of February, 1888, and improvements valued at \$300) the claimant averred that in order to settle on the land involved she had left other land that had been embraced in the homestead entry of her deceased husband and which entry she had "proved up as his surviving widow and for his family."

The said homestead entry is shown by the statements of your office to have been made by Sargent H. Maze on October 1, 1885, for land in the Stockton, California land district, and commuted to cash entry October 1, 1887, by his widow the claimant in question.

Both the local and your office found in effect that having acquired the equitable title to the land (in the same State) covered by the said homestead entry of her deceased husband and having removed therefrom to the land in question, the claimant was disqualified as a pre-emptor under section 2260 Revised Statutes.

In this conclusion I fully concur. Section 2291, Revised Statutes provides that,—

No certificate, however, shall be given, or patent issued therefor, until the expiration of five years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry, or if he be dead, his widow; or in case of her death, his heirs or devisee; or in case of a widow making such entry, her heirs or devisee, in case of her death, proves by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years immediately preceding the time of filing the affidavit, and makes affidavit that no part of such land had been alienated, except as provided in section twenty-two hundred and eighty-eight, and that he, she or they, will bear true allegiance to the government of the United States; then in such case, he, she, or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law.

When, therefore, the claimant in the exercise of her statutory right (section 2301 R. S.) commuted the homestead entry of her deceased husband she acquired by virtue of the section quoted, the equitable title to the land embraced in such entry. See also Adolphine Hedenskay (2 C. L. O., 83), *Perry v. Ashby* (Supreme Court Neb., 4 C. L. O., 63).

The claimant at the date of her pre-emption settlement was the equitable owner and entitled by law to patent for land (in the same State) from whence she removed to settle on the tract in question.

The inhibition of the second clause of section 2260 Revised Statutes, extends as well to one who holds under an equitable title as to one who holds under a legal title. *Kimbrel v. Henry* (9 L. D., 619) and cases cited.

It consequently follows that the claimant is not qualified to make pre-emption entry for the tract involved and that her proof has been properly rejected.

The decision appealed from is affirmed.

It is accordingly unnecessary for me to consider the discrepancies between the filing and proof that are shown by this record.

CONTEST—PRIORITY OF RIGHT.

BAIRD *v.* CHAPMAN'S HEIRS ET AL.

Failure of the local office to properly enter of record a contest, and issue notice thereon, will not render such contest subject to the intervening right of a second contestant.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 24, 1890.

I have considered the case of E. Z. Baird *v.* the Heirs of Ralph H. Chapman on appeal of Chas. H. Chambers, from your office decision of June 2, 1888, rejecting his testimony offered in support of his contest against the timber culture entry of Ralph Chapman for W. $\frac{1}{2}$, NW. $\frac{1}{4}$, and W. $\frac{1}{2}$, SW. $\frac{1}{4}$ Sec. 12, T. 121 N., R. 56 W., Watertown, Dakota, land district.

Chapman made entry July 6, 1880, and on September 9, 1884, Baird initiated contest for failure to plant. Hearing was had November 3, 1884, which resulted in the dismissal of the contest by the local officers which decision was finally affirmed by your letter of April 8, 1886.

From this decision of the local officers no appeal was taken, but instead on March 22, 1886, Baird filed a second contest subject to the final disposition of the first by your office. In regard to this second contest the local officers say in their letter of November 17, 1887—

This affidavit was misplaced in the files of this office and upon the reception of the Commissioner's letter "C" April 8, 1886, was overlooked. Attention was called to the matter and notice was issued for personal service April 29, 1887 On April 13, 1887, this office inadvertently allowed Charles H. Chambers to contest the heirs of Ralph H. Chapman for same tract.

On April 29, 1887, the local officers notified the attorney for Chambers that the contest of Baird had been overlooked by them and would take precedence, and that the said contest of Chambers had been docketed "subject to Baird *v.* Chapman," and on the day set for the hearing of the contest of Chambers they endorsed upon the papers in said Chambers' contest as follows—

Rejected for the reason that there was on file in this office at the time this contest was filed, a contest of Eli Z. Baird, against said entry, filed March 22, 1886, which had been overlooked until this contest was filed and notice issued April 19, 1887. On the 29th of April, 1887, notice was issued in the case of Baird *v.* Chapman, and Chambers' counsel was duly notified that his case was an error. Case was docketed subject to Baird *v.* Chapman.

Chambers, however, appeared with his witnesses on the day of hearing and offered to produce their testimony but the local officers refused

to receive it, and on Chambers' appeal your office sustained their decision, upon the ground that "It does not appear that Baird is directly responsible for the delay in the prosecution of his contest, nor in any way chargeable with laches."

Chambers in his appeal from your decision alleges error in sustaining the decision of the local officers that Baird's contest should precede that of appellant, and error in recognizing Baird's contest, and appellant argues that Baird lost all his rights by his laches in neglecting to have said contest called up and notice issued thereon, whereby appellant was led to innocently file his affidavit of contest against said entry, and to incur liability and expense in obtaining counsel and service of notice and bringing the said contest to a hearing, and that by his neglect and failure to have notice issued and to bring on a hearing upon his said contest he waived all right as against a subsequent contestant in good faith.

Chambers claims negligence on part of Baird in failing to call up and have notice issued on his second contest, and that by such negligence he lost all his previous rights under his contest.

This claim cannot be sustained for the reason that Baird's negligence, if he was guilty of laches was not the proximate cause of the alleged injury to appellant, and it is a maxim of the law that the proximate and not the remote cause is to be looked to. The proximate cause of the alleged injury complained of by Chambers was the result of the local officers in failing to note in the proper place upon their books, the filing of the second contest affidavit by Baird and giving notice of the hearing, and but for this negligence on the part of the local office, the alleged injury to appellant could not possibly have occurred.

Where there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it. *Milwaukee and St. Paul Ry. Co., v. Kellogg* (94 U. S., 469).

Your said decision is accordingly affirmed.

HOMESTEAD CONTEST—ABANDONMENT—RESIDENCE.

LUNSFORD *v.* EVANS.

Proof of permanent and absolute abandonment, shown after the expiration of the six months allowed for the establishment of residence, warrants the cancellation of a homestead entry, though the contest is initiated prior to the expiration of said period.

An entry is invalid at inception if the claimant has no intention of making a home on the land at the date of entry.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 24, 1890.

April 12, 1886, Laura J. Evans made homestead entry, No. 10,305, for the E. $\frac{1}{2}$ of NE. $\frac{1}{4}$ and E. $\frac{1}{2}$ of SE. $\frac{1}{4}$, Sec. 11, T. 24 N., R. 9 W., Neligh district, Nebraska. July 29, 1886, the entry was contested by Arthur

M. Lunsford, on the grounds, substantially, that it was not made for the exclusive benefit of said Evans, but in the interest of one J. Y. C. Johnson, and that said Evans had abandoned said entry by relinquishment. After hearing had, September 28, 1886, the local officers found in favor of the contestant and recommended the cancellation of the entry. Your office, by decision of September 24, 1886, reversed that of the local officers, and dismissed the contest. The contestant now appeals to this Department.

It was testified on the hearing, that Miss Evans left Nebraska, July 12, 1886, three months after making entry, and at the time of initiating the contest, July 29, 1886, the contestant having made affidavit that she was not a resident of Nebraska and that personal service of notice of contest could not be had upon her, notice was duly given by publication, and also by mailing such notice by registered letter to her at Ft. Atkinson, Iowa. She did not appear in person at the hearing, but C. C. Jones, Esq., appeared, representing himself to be her attorney, and the contestant, with a view of taking her deposition, made affidavit, as required by Rule of Practice 24, that she resided at Ft. Atkinson, Winnesheik county, Iowa, and was not a resident of Nebraska, and at the same time filed interrogatories, service of which was duly accepted and cross-examination waived by said Jones. Commission having issued, deposition was duly taken thereunder, October 30, 1886, more than six months after entry, and in it she stated, that she was then teaching school and residing in said county of Winnesheik, Iowa, and that on July 5, 1886 (less than three months after her entry and twenty-four days before the contest) she had relinquished her "right and interest to said claim to J. Y. C. Johnson, at the residence of John C. Johnson, in the presence of Clifford Johnson," that said relinquishment was delivered to John C. Johnson," and that she had "no claim or interest in said claim whatever." The deposition of said John C. Johnson was also taken in accordance with the rules of practice, and he corroborates Miss Evans to this extent, that he, as a justice of the peace, "took her acknowledgment to a relinquishment on the back of what he supposed to be a receiver's receipt." There is no testimony in rebuttal. Your office does not allude to or seem to have taken into consideration said depositions, and holds on the testimony taken at the hearing that the fact of Miss Evan's relinquishment was not proven. While the best evidence would have been the paper (relinquishment) itself, yet, as it was not in the possession of the contestant or subject to his control, and there is no process by which he might have compelled its production before the local officers by those holding it, I am of the opinion, the admission of Miss Evans—presumably, if she still claims the land, against her interest—corroborated to the extent that it is by the justice of the peace who took her acknowledgment, is sufficient to establish the fact of relinquishment. Was this relinquishment intended by Miss Evans as a permanent and absolute abandonment of the entry, and, if so, was it ground for cancellation of the entry at the

date of contest, which was initiated prior to the expiration of the six months in which she might have established residence? That it was a permanent abandonment of the entry is conclusively shown by the subsequent conduct of Miss Evans. On July 12, 1886, seven days after executing the relinquishment, she left Nebraska for Iowa, and on October 30, 1886, over six months after entry, she testifies that she was residing and teaching school in Winnesheik county, Iowa, and that she had no right or interest in the claim. There is no pretence that she, ever, before or after the contest, settled or established residence on the land. Lunsford, the contestant, testified at the hearing that, on the evening of the day the entry was made she stated to him that she would not give up the school she was then teaching, but that

He (J. Y. C. Johnson) is going to take me over there (to the claim) every two or three weeks and I will stay there one or two nights, and then I can teach my school and go there on Friday and Saturday—so that I can make that my residence for the first three months. After my school is out, I will go there and live three months and prove up, and then I will go home.

If she made this statement (and it is not denied by her or any one), it goes to show that at the time she made the entry she had no intention to give up her old home for one upon the claim, and, this being true, the entry was for that reason invalid at its inception.

The testimony, also, tends strongly to show that Miss Evans had no use for the land and did not want it for herself, but made the entry at the instance of J. Y. C. Johnson, with the understanding that it was to be conveyed to him for a consideration after patent was obtained.

I am of the opinion that the charges contained in the affidavit of contest were sustained, and, as they show that the entry was not only invalid from its inception, but absolutely abandoned before the contest, that they authorized its cancellation at the date of contest. The decision of your office dismissing the contest is therefore reversed, and it is directed that the entry be canceled.

COMMUTATION PROOF—SUPPLEMENTAL EVIDENCE.

C. R. McDONALD.

Supplemental evidence showing due compliance with law prior to the submission of final proof, may be accepted in lieu of new proof, where the entry is allowed by the local office, payment made, and said proof not called for until four years after entry.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 25, 1890.

April 17, 1883, C. R. McDonald made homestead entry for the NE $\frac{1}{4}$ of Sec. 23, T. 114 N., R. 80 W., Huron district, Dakota Territory. One year thereafter, April 17, 1884, he made commutation proof, which was accepted by the local officers and receipt for the purchase money and final certificate were issued to him, May 5, 1884.

In his proof McDonald and his witnesses testify, that his improve-

ments consisted of house ten by twelve feet, stable twelve by fourteen feet, and six acres of breaking, all of the value of \$100; that he had for one season cultivated one and a half acres in corn and for a garden; that he established residence on the land at the time he built said house in August, 1883, and had been continuously on the claim, except "for a week or two at a time, teaming and breaking out."

Your office, by decision of July 16, 1888, held that the "residence and cultivation shown are not satisfactory," and rejected the proof, but allowed the "claimant an opportunity to submit new proof," during the lifetime of the entry. Thereupon, McDonald's attorney files, September 22, 1888, affidavits of five parties, who claim to have lived near the land during the period of McDonald's alleged residence thereon. These affiants state that he resided on the land over six months before making proof. It is also stated by them that part of the six acres broken was cultivated by McDonald in 1883, the year of the entry, and that all of it "was cultivated in 1884." In submitting these affidavits, the attorney asks that they be "favorably considered, in view of the fact that McDonald was then" (September 22, 1888,) "in the State of Missouri, and could not return to Dakota, except at great expense." Your office, by decision of October 30, 1888, refused to accept said affidavits, and directed the local officers to "inform the claimant that your former ruling of July 16, 1888, was adhered to and he would be required to submit new proof during the lifetime of the entry." From this action appeal has been taken to this Department.

While the proof was not as specific as to residence as it might and should have been, there was nothing therein from which bad faith could be inferred. As said in the case of James H. Marshall (3 L. D., 411), the proof was "at most merely defective, not fraudulent." Inasmuch as it was approved by the local officers (whose duty it was in the first instance to reject if for any cause defective), and payment was accepted for the land and final certificate issued, and the action of your office calling for new proof was not taken until four years thereafter, I am of the opinion, the five affidavits showing over six months' residence before proof should have been accepted in lieu of the further proof which had been required.

The decision of your office is accordingly reversed.

RAILROAD GRANT—INDEMNIFY SELECTION.

ATLANTIC AND PACIFIC R. R. CO. (ON REVIEW.)

Indemnity selections of unsurveyed lands cannot be allowed, as it cannot be determined whether such selections are for lands subject thereto until after survey.

Secretary Noble to the Commissioner of the General Land Office, February 27, 1890.

This is a motion by the Atlantic and Pacific Railroad Company for the review of the departmental decision of February 25, 1889 (8 L. D.,

307), affirming your office decision of October 3, 1887, which sustained the rejection by the local office of the selection by said company of 10,240 acres in the Las Cruces New Mexico district as indemnity for an alleged loss within the granted limits of said company by reason of a grant to the town of Caboletta in township 12 N., R. 7 W., Territory of New Mexico.

The said selections were rejected for the reason that the land embraced therein being unsurveyed it "cannot 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 companies, nor can the boundaries of private land grants be sufficiently determined to enable them to correctly certify such selections," and for the further reason that as "patents cannot be granted to unsurveyed lands and as the certificate of the register and receiver is the basis of patent in such cases, such action on the part of the local officers would be *ultra vires*."

In behalf of the motion counsel contend that the company by the terms of its grant (act of July 27, 1866, 14 Stat., 292), upon filing the map showing the definite location of its line of road, acquired the right to select within prescribed limits indemnity for losses sustained within the granted limits; that such selection is not conveyance and cannot operate to bring within the grant lands excepted therefrom, and that consequently the fact that the land is unsurveyed is of no valid force against such selection.

I am not favorably impressed with this contention.

It is true that upon a sufficient showing of loss within its granted limits the company is entitled to select, within the prescribed limits indemnity for such loss.

But such selections must be made with reference to the terms of the company's grant (act of June 27, 1866, 14 Stat., 292), *i. e.*, the land so selected must be "not mineral" and to which "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 of filing the said map of definite location.

These selections when approved by the Department, form the basis upon which the government patent is issued.

It follows that said selections should not be allowed until it can be ascertained whether or not the land so selected is properly subject to the company's grant.

This cannot, for manifest reasons, be determined in the absence of survey.

The motion is denied.

PRE-EMPTION CONTEST—INTERVENING ENTRY.

CRANE *v.* STONE.

Failure of the pre-emptor to submit proof and make payment within thirty months after filing declaratory statement subjects his claim to the intervening adverse right of another.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 27, 1890.

I have considered the case, entitled *Pierce Crane v. Chester A. Stone*, in which Stone, as contestee, appeals from your office decision of October 9, 1883, holding that he forfeited his right to enter the NW. $\frac{1}{4}$ of Sec. 17, T. 5 S., R. 81 W., in Eagle county, Colorado, Central City district.

From the record it appears that the approved plat of the township, embracing said land was received at the district land office August 9, 1882.

The claimant Stone made pre-emption declaratory statement, No. 2437, for said tract, on May 23, 1883, alleging settlement August, 1881, while the contestant, Crane, made homestead entry No. 535 for said tract, on December 2, 1885.

On June 5, 1886, Stone filed with the register notice of his intention to make final proof of having complied with the provisions of the pre-emption law, in respect to said land, on July 19, 1886. The said notice was duly published.

On June 30, 1886, Crane filed protest against allowing Stone to make such final proof; and, on July 13, 1886, he filed his affidavit to contest Stone's right to make such entry, alleging, among other things, that he (Crane) had made homestead entry No. 535, on said land, December 2, 1885; that said Stone had not made his final proof on said declaratory statement within thirty-three months from the date of his settlement; that since December 2, 1885, he had continuously resided on said land, and improved and cultivated the same, and that his improvements were worth at least \$600; that on the second day of December, 1885, the said land was a part of the unappropriated public domain of the United States, as affiant then and now believes.

On the filing of such affidavit of contest, notice was served upon Crane and the issue raised between said parties was tried and the local office found against the entryman who appealed to your office, where, on October 9, 1883, you affirmed its decision, whereupon the entryman still further prosecuted his appeal and the case is now before this office for determination. The question involved is, has Stone forfeited his right to the tract by his laches? To determine this question it is necessary to examine Section 2267 of the Revised Statutes, which reads as follows:

All claimants of pre-emption rights, under the preceding sections, shall, when no shorter time is prescribed by law make the proper proof and payment for the land within thirty months after date prescribed therein respectively for filing their declaratory notices.

In this case it was thirty-seven months and twenty-six days after filing his declaratory statement before he offered to make proof and payment for the land. In the mean time, but subsequent to the expiration of the thirty months after Stone filed, Crane made homestead entry of the same tract, thereby acquiring a vested right in the land in controversy, and while it may be inequitable to thus adverse Mr. Stone, if he failed to so "prove up and pay" within the time provided by law, yet it is quite clear that any other qualified claimant had a legal right to appropriate the land. Crane exercised that right and made his entry, hence he must be protected therein. *Molyneaux v. Young* (2 C. L. L., 560); *Atherton v. Fowler* (6 Otto, 513).

Stone gives two reasons for his neglect to make his final proof and payment within the limited period, viz :

1. I did not have nor could I get the money to pay for the land.
2. I believed I had thirty-three months from the time I filed on the land in which to make payment.

These are reasons which, while they call for sympathy, are beyond the reach of the Department to relieve, for the law makes no provisions that such excuses may be beneficially interposed in the face of an adverse claim. They would have some weight, however, if it were a question between the entryman and the government, but in this case the Department can not sacrifice Mr. Crane to protect Mr. Stone. His misfortune is due entirely to his own laches and the hardship which he is now enduring is beyond the power of this office to alleviate.

Your decision is accordingly affirmed.

STATE SELECTIONS—ACT OF SEPTEMBER 4, 1841.

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

Prima facie valid selections of record, made by the State under section 8, act of September 4, 1841, prior to survey by the government, and renewed when the plat of survey is filed, operate as a bar to any other disposition of the land, and may be certified to the State if found to be valid.

Secretary Noble to the Commissioner of the General Land Office, February 27, 1890.

I have considered the cases of Robert Campbell and James H. Harvey *v.* The State of California on appeal of said Harvey and Campbell, from your office decision of December 1, 1886, rejecting their respective applications to make homestead entries for SW. $\frac{1}{4}$, NE. $\frac{1}{4}$, and lots 2, 3 and 4, Sec. 1, T. 4 N., R. 2 E., H. M., and SE. $\frac{1}{4}$, NE. $\frac{1}{4}$, and lot 1, Sec. 1, T. 4 N., R. 2 E., and lot 4, Sec. 6, T. 4 N., R. 3 E., and SW. $\frac{1}{4}$, SW. $\frac{1}{4}$, Sec. 31, T. 5 N., R. 3 E., Humboldt, California, land district.

Applications to make said entries were presented at the local office by the persons above named, on March 25, 1886, and were rejected for

the reason that all of said lands except SW. $\frac{1}{4}$, NE. $\frac{1}{4}$, Sec. 1, are embraced in a selection made by the State of California under the internal improvement grant of September 4, 1841, (5 Stats., 453).

Prior to the survey of said land by the government a selection was made by the State (March 5, 1861), under the act of 1841, upon a survey made by the county surveyor, and a second selection was filed in the local office October 19, 1874. On the latter list is a note as follows: "This is a re-application under the act of July 23, 1866, the land having been sold as unsurveyed, long prior to that time."

Plat of government survey of the land in T. 5 N., R. 3 E., was filed in the local office May 24, 1877, but for the remainder such plats were not filed until July, 1882.

Again by letter of May 8, 1884, John L. Hauke, as attorney for the grantee of the State requested that said selections be listed and approved to the State in order that the purchaser might receive his patent from the State.

It appears from the record that prior to December 8, 1860, one Alexander Preston, had located said land with school fund warrants and that it was at his request that said survey and selection of March 5, 1861, were made; that he subsequently paid the State in full for said land and a certificate of purchase was issued to him therefor, May 4, 1872.

On July 23, 1866 (14 Stat., 218) an act was passed by Congress to quiet the title to certain lands in California and in section one thereof it is provided:

That in all cases where the State of California has heretofore made selections of any portion of the public domain in part satisfaction of any grant made to said State by any act of Congress, and has disposed of the same to purchasers in good faith under the law, the lands so selected shall be, and hereby are confirmed to said State, etc.

with proviso in regard to lands to which adverse rights may have attached prior to the passage of said act.

Section 3 of said act provides that—

Where the selections named in section one of this act, have been made from lands which have not been surveyed by the authority of the United States, but which selections have been surveyed by authority of and under the laws of said State and the land sold to purchasers in good faith under the laws of the State, such selections shall, from the date of the passage of this act, when marked off and designated in the field, have the same force and effect as the pre-emption rights of a settler upon unsurveyed public land; and, if upon survey of such lands by the United States, the lines of the two surveys shall be found not to agree, the selection shall be so changed as to include those legal subdivisions which nearest conform to the identical land included in the State survey and selection. Upon the filing with the register of the proper land office of the township plat, in which any such selection of unsurveyed land is located, the holder of the State title shall be allowed the same time to present and prove up his purchase and claim under this act as is allowed pre-emptors under existing laws; and if found in accordance with section one of this act, the land embraced therein shall be certified over to the State by the Commissioner of the General Land Office.

In their arguments in appeal filed respectively June 14, and 20, 1887, counsel for appellants concede that, the lands in question were surveyed

by authority of the State of California prior to their survey by the United States and that on the 16th day of March, 1861, the same were selected by the State in part satisfaction of her 500,000 acre grant; that on October 19, 1874, the State filed a notice that she had made such selection, and had sold the land, and they say without doubt, the vendee of the State could have perfected his title by proving up his purchase and claim within thirty-three months after the plats of survey were filed, viz: July 31, 1882, but they urge that as Preston neglected to prove up his purchase under section 3, of the said act of July 23, 1866, the lands in controversy became public lands by action of law at the expiration of thirty-three months, viz: on May 1st, 1885.

In another argument filed on part of appellants it is stated that the claim of the State or its vendee rests upon section 3, of the act of July 23, 1866. and that this section becomes operative when prior to its enactment the State had made a selection of lands not surveyed by authority of the United States and had sold the land to a purchaser in good faith under her laws, and that the purchaser from the State then occupies the same position as a settler upon unsurveyed lands. They contend that the limitation of time allowed such pre-emptor after filing of survey, viz: thirty-three months, must be strictly construed.

The act of September 4, 1841, (5 Stats., 453), provided in section 8,

That there shall be granted to each State specified in the first section of this act, five hundred thousand acres of land for purposes of internal improvement: and located in parcels conformably to sectional divisions and subdivisions, of not less than three hundred and twenty acres in any one location, on any public land except such as is or may be reserved from sale , which said locations may be made at any time after the lands in said States respectively, shall have been surveyed according to existing laws. And there shall be and hereby is granted to each new State that shall be hereafter admitted into the Union, upon such admission, so much land as, including such quantity as may have been granted to such State before its admission, and while under a territorial government, for purposes of internal improvement as aforesaid, as shall make five hundred thousand acres of land, to be selected and located as aforesaid.

On March 5, 1861, the surveyor general of California upon certificate from the county surveyor of Humboldt county, under a law of said State, filed in behalf of the State a selection of said lands as a part of the five hundred thousand acres granted said State, and in such selection the surveyor general said:

Said lands have not yet been sectionized by the United States. You will please note the selection upon your plats as soon as the same may be returned to your office.

After the passage of the act of July 23, 1866, the surveyor general of California again presented a selection of the same lands on behalf of the State as a part of the five hundred thousand acres. Upon the said list is the following note:

This is a re-application under the act of 23rd July, 1866, the land having been sold by the State long prior to that time.

The certificate of the register upon said list is as follows :

Land Office at Humboldt, Cal., October 31, 1874. I hereby certify that the foregoing list was filed on the 19th October, 1874, and that the selections are correct, and that no valid conflicting right is known to exist.

Upon the back of said list is endorsed :

R. & R. No. 51.—500,000 acre grant. Humboldt Land Dist. Recd. and filed October 19, 1874. Approved October 31, 1874. C. F. Roberts, Register.

In the view I take of the law applicable to the case at bar it will not be necessary to discuss either the propositions upon which your said decision is based or the propositions of counsel for the appellants.

It seems to me that this case must be decided upon the act of September 4, 1841, and not upon that of July 23, 1866.

The act of July 23, 1866, was a remedial one and cannot be construed as abridging or restricting any rights already existing under the law.

The State of California was at the time entitled to select five hundred thousand acres for the purpose of internal improvement, and had, under a survey made by the State, already filed a list or selection of said lands as a part of said grant with a request that the same take effect as soon as the plats should be filed in the local office.

If it be said this selection was prematurely made, it may be answered that it was renewed in 1874, and again in 1884; the selection of 1874 being approved by the register of the land office, and the list of 1884 being presented after filing of plats of survey and nearly two years before the application of appellants to make homestead entries.

Your office has never reversed the approval of the local office made October 31, 1874, and such selection is still alive and "*prima facie* valid."

In *Southern Pacific (Branch Line) v. State of California* (3 L. D., 88), the State had been permitted to make selection of the land before survey, but in deciding said case it was said,—

Although said selection antedated even the survey of rancho, the substantial fact has been shown, nevertheless, that the selection was *prima facie* valid and remained extant upon the record nearly fourteen years, during which period it operated as a bar to attachment of the company's right, or to any other disposition whatsoever. See also *Southern Pacific Ry. (Branch Line v. Bryant*, 3 L. D., 501).

A school indemnity selection, based upon a loss alleged prior to the survey of the township in which the basis is situated, is not void, but voidable and becomes valid, in the absence of an intervening adverse claim, from the date when said township is surveyed and said loss definitely ascertained. *Early v. State of California* (7 L. D., 347); *Niven v. State of California* (6 L. D., 439).

Section three of the act of July 23, 1866, was, so far as purchasers from the State are affected thereby, in the nature of an additional privilege in the matter of acquiring title to their lands. They were not required to prove up their purchases at all, but merely allowed that privilege. They were not looking to the United States for title but to the State of California. All the valid selections of the State under section

8, of the act of 1841 would have ripened into title had the act of 1866 never been passed. Section 3, of said act, in effect, said to persons who had purchased from the State lands which had not been surveyed by authority of the United States: "If you desire to come in and make proof of your purchases as provided in this section, then such land shall be certified over to the State regardless of any question in regard to the legality of the selection thereof by the State and you may thereby make your titles certain," but neither expressly nor by implication does it say to such purchasers, "If you do not accept this privilege but prefer to stand upon your contracts with the State you shall forfeit all rights under such contract and your lands will be restored to the public domain without notice to you and will be subject to entry by the first applicant."

Neither does the act of 1866 say to the State that "any selections of unsurveyed lands it may have made or have pending under section 8, of the act of 1841, and sold to innocent purchasers, shall be forfeited and held void without notice unless such purchaser shall, within thirty-three months after filing of plats, go to the local office and make proof of such purchase," and yet this is the construction contended for by appellants.

I see no reason why the two acts should in any manner conflict, and if upon proper investigation by your office, the pending selections of the State approved by the local office be found to be valid, I see no reason why the same should not be certified to the State of California as a selection under section 8, of the act of September 4, 1841, and leave the question of Preston's title to be settled between him and his grantor the said State.

It follows then that for the reasons herein set forth, your conclusion that appellants' applications to make a homestead entries of said tracts were properly rejected by the local officers is correct and said decision is hereby affirmed.

APPLICATION TO ENTER—CANCELLATION.

HENRY GAUGER.

An application to enter may be received during the time allowed for appeal from a judgment of cancellation, subject to such appeal, but should not be made of record until the rights of the former entryman are finally determined.

During the period accorded for the exercise of the preference right of a successful contestant, an application to enter may be allowed subject to such right.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 19, 1890.

This case involves the NE. $\frac{1}{4}$ of Sec. 18, T. 105 N., R. 56 W., Mitchell district, Dakota Territory.

One Gilbert Sheppard made timber-culture entry, No. 6020, for this land, and said entry was, June 30, 1888, held for cancellation by your

office on the contest of George N. Bruce. On July 23, 1888, before the time in which the entryman might have appealed and that allowed the contestant to assert his preference right of entry had expired, Henry Gauger made application to the local officers, accompanying the same with the necessary fees, to enter said land under the timber-culture law. The local officers denied said application, and your office, by decision of October 3, 1888, sustained their action, holding that it was "clearly regular, pending the final determination" of the contest of Bruce. Gauger appeals from your office decision.

A judgment rendered by your office holding an entry for cancellation is final as to your office, and an application to enter during the time allowed for appeal from such judgment "should be received subject to the right of appeal, but not made of record until the rights of the former entryman are finally determined, either by the expiration of the time allowed for appeal or by the judgment of the appellate tribunal" (John H. Reed, 6 L. D., 563); and an application to enter, made before the time allowed the successful contestant to assert his preference right has expired, should be allowed subject to such preference right, and, on its subsequent assertion within the prescribed time, "due notice thereof should be given the intervening entryman, with opportunity to show cause why his entry should not be canceled and the contestant allowed to perfect his entry." Geo. Premo (9 L. D., 70); Welch v. Duncan (7 L. D., 186).

The action of the local officers in rejecting said application was therefore erroneous, and the decision of your office sustaining said action is reversed.

SALT SPRINGS—ACTS OF MARCH 3, 1875, AND JANUARY 12, 1877.

STATE OF COLORADO.

The provision in the act of March 3, 1875, requiring the State of Colorado to make its selection of salt springs within two years after the admission of the State is directory only, and failure to select within the period specified, does not work a forfeiture of the grant.

The act of 1875 is not repealed by that of January 12, 1877, nor does the proviso in the later act amount to a legislative declaration that the right of selection conferred by the act of 1875, expires at the end of two years after the admission of the State.

Secretary Noble to the Commissioner of the General Land Office, February 27, 1890.

On October 31, 1887, the State of Colorado caused to be filed in the local office of Glenwood Springs in said State, a list containing its selection of certain "salt lands" under the eleventh section of the act of Congress approved March 3, 1875, (18 Stat., 474). The list embraces 3840 acres

in T. 5 N., R. 84 W., for the use of a salt spring located on the SW. $\frac{1}{4}$ of section 17, of said township.

The local officers forwarded the list with the request for instructions.

Your office by letter of April 2, 1888, rejected said list on the ground that the selections were not made within two years after the admission of said State to the Union.

The State appealed.

Said act of March 3, 1875, provides :

Section 11. That all salt springs within said State, not exceeding twelve in number, with six sections of land adjoining, and as contiguous as may be to each, shall be granted to said State for its use, the said land to be selected by the governor of said State, within two years after the admission of the State, and when so selected to be used and disposed of on such terms, conditions and regulations as the legislature shall direct: *Provided*, That no salt-spring or lands the right whereof is now vested in any individual or individuals, or which hereafter shall be confirmed or adjudged to any individual or individuals, shall by this act be granted to said State.

The question presented by the appeal is whether the failure to select within the time indicated by the grant works a forfeiture of the grant.

A review of the legislation on this subject may throw some light on the question.

By act of Congress of May 18, 1796, "for the sale of the lands of the United States in the territory northwest of the River Ohio, and above the mouth of the Kentucky river," it was provided

that a salt spring lying upon a creek which empties into the Scioto river . . . and every other salt spring which may be discovered, together with the section of one mile square which includes it, shall be reserved for the future disposal of the United States. (1 Stat., 464).

By the act of April 30, 1802, for the admission of the State of Ohio into the Union,

the six miles reservation, including the salt springs, commonly called the Scioto salt springs, the salt springs near the Muskingum River, and in the military tract, with the sections of land which include the same

were granted to the State. (2 Stat., 173). So in the case of Indiana. By the act for the disposal of public lands in the Indiana Territory, it was provided that the salt springs "with as many contiguous sections to each as shall be deemed necessary by the President of the United States," should be reserved for the future disposal of the United States. (2 Stat., 277). By the act of April 19, 1816, for the admission of the State of Indiana into the Union "all salt springs" within the Territory together with adjacent land were granted to the State. (3 Stat., 289). Following these precedents Congress has adopted the policy of granting to the States, generally on their admission to the Union, the salt springs and adjacent lands found within their respective borders. As in the case of Illinois, Missouri, Arkansas, Michigan, Florida, Iowa, Wisconsin, Minnesota, Oregon, Kansas, and Nebraska. The policy of the government since the inauguration of our land system, to reserve

salt springs from sale is recognized by the supreme court in *Morton v. Nebraska*, where it is said:

The policy of the government since the acquisition of the Northwest Territory and the inauguration of our land system, to reserve salt springs from sale has been uniform—an intention to abandon a policy which had secured to the States admitted before 1854 donations of great value, can not be imputed to Congress unless the law on the subject admits of no other construction. (21 Wall, 660).

The policy of Congress to secure to the several States the title or use of the salt springs within their borders respectively, is equally well marked.

It seems equally conclusive that in the execution of these laws no presumption should be indulged that Congress has abandoned its long established policy, unless the terms of the law admit of no other construction. The solution of this question depends, therefore, on whether the requirement that the lauds are "to be selected" within two years after the admission of the State is mandatory or merely directory.

In *French v. Edwards* (13 Wall, 506), the court said:

There are undoubtedly many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them which do not limit their power or render its exercise in disregard of the requisitions ineffectual. Such generally are regulations designed to secure order, system, and dispatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected. Provisions of this character are not usually regarded as mandatory unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated. But when the requisitions prescribed are intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, they are not directory but mandatory. They must be followed or the acts done will be invalid. The power of the officer in all such case is limited by the manner and conditions prescribed for its exercise.

In *Pearce v. Morrice*, Justice Taunton drew the distinction as follows:

I understand the distinction between directory and imperative statutes to be that a clause is directory when the provisions contain mere matter of direction and nothing more; but not so when they are followed by such words as are used here, viz: that anything done contrary to such provisions shall be null and void to all intents. These words give a direct, positive, and absolute prohibition. (2 A. & E., 94).

In *People v. Cook*, (8 N. Y., 67) it was said that a statute directing the mode of proceeding by public officers, is to be deemed directory, and a precise compliance is not to be deemed essential to the validity of the proceedings, unless so declared by statute. In matter of *Empire City Bank*, (18 N. Y., 200), it was held that a provision in the statute limiting the time for a referee to make his report is merely directory.

When a statute directs a person to do a thing in a certain time, without any negative words restraining him from doing it afterwards, the naming of the time will be considered as directory to him, and not a limitation of his authority. *Pond v. Negus*, (3 Mass., 232); *People v.*

Peck, (11 Wend., 604); *People v. Dawson* (25 N. Y., 299); *Barnes v. Badger*, (41 Barb., 98).

Maxwell in *Interpretations of Statutes*, (p. 337) says:

On the other hand, where the prescriptions of the statute relate to the performance of a public duty, they seem to be generally understood to be merely instructions for the guidance and government of those on whom the duty is imposed, or directory only. The neglect of them may be punishable, indeed, but it does not affect the validity of the act done in disregard of them. To give them that effect would often lead to serious inconvenience and absurdity. Thus, to hold that an act which required an officer to prepare and deliver to another officer a list of voters, on or before a certain day, under a penalty, made a list not delivered till a later day invalid, would, in effect, put it in the power of the person charged with the duty of preparing it, to disfranchise the electors; a conclusion too unreasonable for acceptance.

To the same effect is the ruling in *Marsh v. Chestnut* (14 Ill., 223), where the statute required certain commissioners appointed to ascertain and assess the damage and recompense due to certain owners of land, to return the assessment to the city council within forty days of their appointment. This provision was not complied with, but return was made, afterwards, and the question was raised as to its validity when thus made. The court held the provision to be directory only, and said:

There are no negative words used declaring that the functions of the commissioners shall cease after the expiration of the forty days or that they shall not make their return after that time; nor have we been able to discover the least right, benefit, or advantage which the property owner could derive from having the return made within that time and not after.

So the court in New York in a case subsequent to that of *Cook*, *supra*, announces the rule: "Statutory requisitions are deemed directory only when they relate to some immaterial matter, where a compliance is a matter of convenience rather than of substance." *People v. Schermerhorn*, (19 Barb., 558). The supreme court of Wisconsin announces the doctrine as follows:

We understand the doctrine concerning directory statutes to be this: that where there is no substantial reason why the thing to be done might not as well be done after the time prescribed as before, no presumption that by allowing it to be so done it may work an injury or wrong, nothing in the act itself, or in other acts relating to the same subject matter, indicating that the legislature did not intend that it should rather be done after the time prescribed than not to be done at all, the courts assume that the intent was that if not done within the time prescribed it might be done afterwards. But when any of these reasons intervene, then the limit is established. *State v. Lean* (9 Wis., 292).

Judge Cooley in his *Constitutional Limitations* (4th Ed., 93) after discussing the question at some length says:

Those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly, and prompt conduct of the business, and by a failure to obey which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory; and if the act is performed, but not in the time or in the precise mode indicated, it may still be sufficient, if that

which is done accomplishes the substantial purpose of the statute. But this rule presupposes that no negative words are employed in the statute which expressly or by necessary implication forbid the doing of the act at any other time or in any other manner than as directed.

In New York a statutory provision authorizing the commanding officer of each brigade of infantry, on or before the first day of June to appoint a brigade court-martial, was held to be directory only in an action for fines imposed by a court-martial appointed in July. It was objected that the fines were illegally imposed. The court said :

There is nothing in the nature of the power showing that it might not be as effectually exercised after the first of June as before, and the act giving it contains no prohibition to exercise it after that period." *The People v. Allen* (6 Wend., 487).

In an early case Lord Mansfield said :

There is a known distinction between circumstances which are of the essence of a thing required to be done by an act of Parliament and clauses merely *directory*. The precise time in many cases is not of the essence.

From the English jurisprudence the doctrine was adopted in our own ; and of late years, owing partly to the immense multiplicity of statutes, and the haste and carelessness with which they are drawn, partly to the want of education and system on the part of subordinate officers clothed with important trusts, this practice of treating statutes has been carried to a very great extent (*Sedgwick on Construction of Stats.*, 319).

In *People v. Murray* (15 Cal., 221) the court announced the rule as general, that when time is prescribed to a public body in the exercise of a function in which the public is concerned, the period designated is not of the essence of the authority, but is a mere directory provision. See also *Tuohy v. Chase*, (30 Cal., 524).

These citations clearly point out the course of the rulings on this question. Many others might be added to the same effect.

It will be observed that "negative words" forbidding selection after the two years are not employed in this statute. A case of that character arose in the land practice in *Baca Float No. 3*, (5 L. D., 705). The statute provided "that the right hereby granted to said heirs of Baca, (to select certain lands) shall continue in force during three years from the passage of this act, *and no longer*." It was held that the provision was mandatory, and that the right to select ceased at the end of the three years. A comparison of this case with the one at bar clearly illustrates the rulings cited, *supra*.

Again, time was not of the essence of the transaction. That provision was evidently inserted to secure "dispatch" in the proceeding. The essence of the act was the securing of control and ownership of the salt springs to the State. No doubt it was desirable that this should be effected as speedily as might be, but there is no reason in the nature of the transaction why the selection might not be made as well after as before the time indicated. Moreover, in this case, the selection could not have been made in that time, for the survey was not completed until 1882, six years after the admission of the State. It would

be most unreasonable to suppose that this condition could have defeated the grant for the lack of a survey was within the knowledge of Congress, when the grant was made. No rights are infringed and no damage done by the failure to select in time. There is no private interest concerned. The question is solely between the grantor and the State.

In every aspect of the case this provision under the ruling of the courts is merely directory.

I, therefore, find that your office did not allege a sufficient ground for the rejection of said list.

However, on January 12, 1877, Congress passed an act as follows :

That whenever it shall be made appear to the register and the receiver of any land office of the United States that any lands within their districts are saline in character, it shall be the duty of said register and said receiver under the regulations of the General Land Office to take testimony in reference to such land, to ascertain their true character, and to report the same to the General Land Office; and if upon such testimony, the Commissioner of the General Land Office shall find that such lands are saline and incapable of being purchased under any of the laws of the United States relative to the public domain, then, and in such case, such lands shall be offered for sale by public auction at the local land office of the district in which the same shall be situated, under such regulations as shall be prescribed by the Commissioner of the General Land Office, and sold to the highest bidder for cash, at a price not less than one dollar and twenty-five cents per acre; and in case said lands fail to sell when so offered, then the same shall be subject to private sale, at such land office, for cash, at a price not less than one dollar and twenty-five cents per acre, in the same manner as other lands of the United States are sold; *Provided*, That the foregoing enactments shall not apply to any State or Territory which has not had a grant of salines by act of Congress, nor to any State which may have had such a grant, until either the grant has been fully satisfied, or the right of selection has expired by efflux of time. (19 Stats., 221).

There can be no doubt that this statute indicates a change, to some extent, in the policy of the government in dealing with such lands.

Does the proviso above quoted amount to a legislative declaration that the right of the State to select expired by limitation at the end of two years from its admission, or is the former statute repealed by this later one? In the light of the above discussion I am of opinion both questions should be answered in the negative. There is no express repeal, and repeals by implication are not favored, and are never admitted where the former can stand with the new act, but only where there is a positive repugnancy between the statutes, or the latter is plainly intended as a substitute for the former. *Chew Heong v. United States* (112 U. S., 536); *Harford v. United States* (8 Cranch, 109), *ex parte Crow Dog* (109 U. S., 556). Assuming, as above shown that the provision as to the time of selection is directory only, these two statutes may operate in entirely different fields. In the first place the grant to the State of Colorado, for instance, was limited to twelve salt springs. All such springs beyond that number in that State, would undoubtedly be subject to the later act. Had third parties intervened

prior to the selection, and initiated proceedings under the act of 1877, touching the lands in question, the right of the State thereto might have been lost. The case is analogous, in this respect, to that in *Shepley v. Cowen* where the court said :

The two modes of acquiring title to land from the United States were not in conflict with each other. Both were to have full operation, that one controlling in a particular case under which the first initiatory step was had. (91 U. S., 330); *Webb v. Loughrey* (9 L. D., 440); *Freise v. Hobson* (4 L. D., 580).

Furthermore, the act of 1877 does not declare that all salt lands shall become subject to its provisions, from its passage. It is only "when-ever it shall be made appear to the register and receiver of any land office of the United States that any lands within their district are saline in character," that a sale shall be had. Now it had not been made so to appear in this case prior to the selection by the State. For all that appears to the contrary on the face of the later act, its objects will be accomplished if all such lands not otherwise disposed of, are sold under its provisions.

It is obvious that where the objects of two apparently repugnant acts are different no repeal takes place. The language of each is confined to its own object. They run parallel lines without meeting." Maxwell, *Int. Stat.*, 153). "A general later law does not abrogate an earlier special one. It is presumed to have only general cases in view, and not particular cases which have been already provided for by a special or local act. (*idem.*, 157).

The proviso that the act of 1877 should not apply to any State which may have had such a grant "until either the grant has been fully satisfied or the right of selection thereunder has expired by efflux of time," is not such a legislative declaration as above suggested. Both provisions may stand. The principles above cited apply equally to this proposition. It is not provided that such lands *shall* be sold under the later act, immediately upon the expiration by efflux of time, of the right to select, but that they *shall* not be so sold sooner. The right of the State is absolutely protected until the grant shall have been satisfied, or the time fixed in the former act shall have expired; thereafter, the right is qualified only, made subject to the intervention of another claimant under the later act.

I, therefore, conclude that the State was authorized by law to make the selection herein discussed.

The decision appealed from is accordingly reversed.

PRE-EMPTION ENTRY—SECOND FILING.

CHRISTOPHER HELLEKSON.

A pre-emption entry allowed upon a second filing may stand, where the first was made through mistake and subsequently relinquished, and the second was made in good faith, and in accordance with the rulings of the Department, then in force.

Secretary Noble to the Commissioner of the General Land Office, February 27, 1890.

I have considered the case arising upon the appeal of Christopher Hellekson, from your office decision of April 22, 1887, holding for cancellation his pre-emption cash entry made June 12, 1884, for the NW. $\frac{1}{4}$ of Sec. 20, T. 103, R. 69, (unoffered lands), Mitchell district, Dakota.

Hellekson, in connection with his final proof, submits an affidavit, stating (*inter alia*) as follows :

That in or about the year 1872, at Jackson, Minnesota, before the U. S. land office, he filed by mistake a declaratory statement embracing the SE. $\frac{1}{4}$ of Sec. 28, T. 103, R. 38; that within a few weeks after filing said declaratory statement he relinquished the same at said land office at Jackson, Minnesota—at least, he supposed he relinquished his right to the filing; that at the time he did this the officers told him that his right to file a pre-emption was not lost, but that he could file a pre-emption at any time; that he relinquished said declaratory statement for the purpose of filing a timber-culture entry upon the same tract, in his own right and for the interest of no other person whatever; that he exhausted his homestead right in Minnesota, and by reason of hard times and grasshoppers was unable to hold said homestead; that he came to Dakota in June 1882, and filed the declaratory statement, and made the settlement and improvements mentioned in said application to make cash entry; that all the property he owns is now expended in the improvements on this land, and to lose this would leave him entirely destitute of means whereby he could procure a home.

The above is corroborated by the affidavit of three of claimant's neighbors, who say :

That they have read the foregoing affidavit of Christopher Hellekson, and know the contents thereof; that they have known said Christopher Hellekson for a great many years, and of their own knowledge say that the statements set forth in the above affidavit are true.

In the case of *California v. Pierce* (1 L. D., 442) this Department held that, Pierce having made a filing prior to the date of the approval of the United States Revised Statutes (June 22, 1874) upon unoffered land,

Such filing was no bar to a second filing; . . . he relinquished his filing, and was thereafter *correctly advised* by the register that he could file a second declaratory statement for another tract.

In connection with his appeal Hellekson states :

At the time this proof was offered before the local office at Mitchell, D. T., these facts were before the register and receiver; and on reading the decision of the State of *California v. Pierce*, above referred to, both the register and receiver concurred in the view that the claimant was not disqualified by reason of his former pre-emption filing to make this entry.

This last-quoted statement is not made under oath; but it was filed with and transmitted to your office by the same register (George B. Everett) before whom said entry was made, and is not by him denied.

It is not very clearly apparent how the mistake in making the original entry occurred; nevertheless, inasmuch as the assertion that it was a mistake is strongly corroborated; as the filing was afterward relinquished, not for the benefit of any one else, but in order that he himself might make timber-culture entry of the tract covered thereby; as he was told by the local officers at the time he relinquished that he could file again; and as his good faith is apparent in that he voluntarily disclosed the fact of his former filing, asking and following the advice of the local officers—who allowed the entry and received the money therefor with a full knowledge of the facts—it would seem to me that Hellekson ought not, in view of the departmental rulings at the date of his second filing, to be held to have exhausted his right under the pre-emption law. The question is one solely between him and the government; and for the reasons stated the proof should, in my opinion, be accepted, and the entry pass to patent.

Your office decision, rejecting his proof is accordingly reversed.

FINAL PROOF PROCEEDINGS—JURISDICTION.

JOHN WOODS. (ON REVIEW.)

After a decision of the Department, the General Land Office is without jurisdiction in the case except in the matter of enforcing the decision according to its terms.

Secretary Noble to the Commissioner of the General Land Office, February 27, 1890.

Application has been made for a review of departmental decision of November 9, 1888 (7 L. D., 420), in the case of John Woods, involving his pre-emption cash entry for the NW. $\frac{1}{4}$ of Sec. 13, T. N., R. 3 E., Helena land district, Montana.

The claimant advertised that he would make final proof on the 16th of October, 1884, before W. F. Parker, notary public at Great Falls.

Proof was made two days later—to wit, October 18, 1884; and then the testimony of witnesses was taken before the notary public, while that of the entryman was taken before the clerk of the court.

For this reason your office (on April 21, 1887) required the entryman to make new publication of notice and submit new proof. From which action of your office Woods appealed to the Department.

Subsequently to said decision and Woods' appeal therefrom, and while the case was pending in this Department—to wit, on July 8, 1887,—one John S. Jacobs applied to contest said entry, filing with his application an affidavit alleging failure on the part of the entryman to reside and cultivate as required by law.

This Department affirmed the decision of your office requiring new advertisement and proof, and returned Jacobs' application to contest for proper action by your office.

Your office ordered a hearing, notice of which was given to attorney for contestant. Said attorney, on February 9, 1889, returned said notice, with a communication from contestant declining to prosecute the contest. Consequently no witnesses for the contestant appeared at the hearing; but the entryman appeared, with five witnesses, who testified in support of his claim. This testimony was forwarded by the local officers to your office.

On March 26, 1889, Messrs. Curtis and Burdett, counsel for Woods, forwarded to your office an affidavit of one H. P. Rolfe, tending to show the good faith of Woods and to explain that the irregularity in making proof occurred not through his fault, but through the erroneous action of the local officers; at the same time asking that the entry of Mr Woods be allowed to take the same course as that of Judith M. Clark (7 L. D., 485). Thereupon your office on June 6, 1889, transmitted to the Department the papers in the case.

Under ordinary circumstances—your office having ordered a hearing on Jacobs' application to contest; the hearing having been ordered and had; the contestant having defaulted; the entryman having at said hearing offered proof in support of his entry; the proof so offered having been forwarded to your office—your office should thereupon have adjudicated the case upon the record thus coming before it, without transmitting the same to this office, unless an appeal were taken from your decision.

But at this point your office was confronted by this difficulty; its decision of April 21, 1887, had required the entryman "to make new advertisement, by proper publication and posting, and to make new proof in accordance with the new notice;" the Department had affirmed that decision; and after such affirmation by the Department your office was without jurisdiction to act in any other wise than to insist upon its demand for new publication of notice, and new proof in the form and manner of making original proof—no matter what new legislation might in the meantime have been had by Congress, or what changes consequent upon such legislation might have been made in the rulings of this Department.

In view of the facts herein stated, the papers in the case are herewith returned to your office; and said departmental decision of November 9, 1888, is hereby so modified as to impose no inhibition upon your taking such action in the matter as you may deem proper, in view of the evidence offered at the hearing, of section 7 of the act of March 2, 1889 (25 Stat., 854), and of the present practice of your office and the Department.

TIMBER-CULTURE CONTEST—RES JUDICATA.

SEWELL *v.* ROCKAFELLER.

Matters tried and determined by final decision cannot be made the subject of a second contest.

A contest must fail if the entryman, prior to the initiation thereof, commences in good faith to cure the default.

If on the issue joined the contest fails, the contestant will not be heard to say that it will not be possible for the entryman to show compliance with the law within the statutory period.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 27, 1890.

I have considered the case of Wm. D. Sewell *v.* James Rockafeller on appeal of the former from your office decision of August 24, 1888, dismissing his contest against the timber culture entry of the latter for SW. $\frac{1}{4}$, Sec. 12, T. 8. N., R. 12 W., Bloomington, Nebraska, land district.

Rockafeller entered said land under the old timber culture law May 21, 1873. The record shows that he had commenced the planting of trees upon the tract under the old law, and that forty acres were planted to trees three different times. But few of them grew however, and after the change in the timber culture law several efforts were made to have a good stand of trees upon ten acres of said forty, with but indifferent success up to April 5, 1883, when contest was commenced against the said entry by present contestant which after formal trial and hearing resulted in the final dismissal of his contest by your office September 11, 1884.

On July 30, 1885, Sewell filed another affidavit of contest alleging,—

That claimant failed to have ten acres of said land planted to forest trees, seeds or cuttings up to and during the fourth year of said entry and has so failed up to present time.

2. That he failed during the years 1877, 1878, 1879, 1880, 1881, 1882, 1883, 1884 and 1885, up to present time to plant, cultivate and protect ten acres of forest trees on said land.

3. That he has allowed fire to burn over and destroy trees on said land during the past six years.

4. That at present there are less than two hundred living thrifty trees to each acre of said land which has been planted to trees.

Your said decision holds that all allegations of default and failure prior to April 5, 1883, are *res judicata* by reason of your office decision of September 11, 1884, and that the only issues in the case are,—

1. That claimant has failed from April 5, 1883 (the date of filing contest decided September 11, 1884) up to July 30, 1885, (the date of filing this contest) to plant, cultivate, and protect ten acres of forest trees on said land.

2. That there was at the date of this contest (July 30, 1885) less than two hundred living thrifty trees to each acre of said land, which has been planted to trees.

In this conclusion as to issues involved I concur. Contestant having failed to appeal from your decision of September 11, 1884, dismissing his contest, that decision became final as to all matters in issue therein and can not be tried over again in the second contest.

The evidence in regard to the planting and cultivation of timber on the land in controversy is very conflicting. It is reasonably clear however that several efforts have been made by the entryman to obtain the proper stand of trees and that about the last of February or first of March, 1883, when he had about accomplished this a fire driven by a very high wind swept through the tract and destroyed most of them; that ever since he has each season caused more or less work to be done looking toward again obtaining the necessary number of trees.

The trees were mostly cottonwood and in addition to the injury caused by the fire it appears that the cottonwood bug has stripped and damaged the trees each year since 1883. It might be difficult to decide whether the injury caused by fire was the result of insufficient fire guards around the land planted to trees and thus the claimant's own fault, but I am relieved from the necessity of any finding in regard to such facts by the testimony of the witness Powell, corroborated as it is by that of several others to the effect that in the spring of 1885 and prior to the filing of the affidavit of contest herein, he as agent for claimant set out upon the tract 6,000 trees and 3,000 cuttings, and that 4,400 trees were then growing thereon; that at least two-thirds of these trees were growing July, 1885 but were attacked by the bugs in August and most of them killed but that in pursuance of a contract made with claimant in 1883 witness was still at work (at time of the last hearing, August, 1886), and it appeared that the timber was then in a good state of cultivation.

The claimant seems to have been unfortunate in his attempts to secure proper planting, cultivation and protection, of his trees, but his efforts in that direction have been so persistent that I am not warranted in finding bad faith upon his part. There was no contest pending in the spring of 1885, when Powell by his direction planted 9000 trees and cuttings upon the land, and if any default existed upon his part it was cured or commenced to be cured by this work thus bringing the case within the rule in *Boulware v. Scott* (2 L. D., 263); *Stanton v. Howell* (9 L. D., 644).

Appellant urges in his argument that it will be impossible for the claimant to have upon his land at the end of thirteen years from date of entry ten acres of growing thrifty trees all of which have been cultivated not less than eight years, as some of the trees were not planted until nearly thirteen years had elapsed.

In regard to this it is sufficient to say that the commencement by claimant in good faith to cure his laches prior to initiation of contest, is sufficient ground for the dismissal of the contest, and this conclusion having been reached upon the case as made by the allegations of the

contest affidavit and the evidence, the contestant has no longer any interest in the case, and it will not be necessary at this time to discuss this proposition which was not one of the issues presented in his affidavit of contest.

Your said decision is accordingly affirmed.

HOMESTEAD—SETTLEMENT BEFORE SURVEY—JOINT ENTRY.

FERGUSON v. SNYDER.

A settler prior to survey should give notice of the particular tract he intends to claim, by such marking or improvement as will indicate the boundaries of his claim.

Under section 2274, R. S., a joint entry may be allowed in case of conflicting homestead settlements made prior to survey.

Conflicting rights, acquired through settlement prior to survey, may be adjusted by either party making entry of the land in conflict, on condition that he tenders to the other an agreement to convey to him that portion of the land covered by his occupancy.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 27, 1890.

I have considered the case of James Ferguson v. John W. Snyder on appeal by the former from your decision of March 31, 1888, adverse to him.

June 17, 1885, John W. Snyder made homestead entry of the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of section 15, T. 4 S., R. 19 E., M. D. M., Stockton land district, California.

June 22, 1885, James Ferguson made application to enter under the homestead law the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of the section above designated which was rejected by the local officers because it embraced the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of said section 15, which was covered by the homestead entry of Snyder.

Upon the application of Ferguson your office by letter dated September 22, 1885, ordered a hearing to determine the question of right between the two claimants. Upon due notice and citation the parties with counsel and witnesses appeared at the local office November 26, 1886, and offered testimony. Arguments were filed by counsel; and the local officers united in an opinion that Snyder had the superior right to the tract in dispute. Ferguson appealed, and March 31, 1888, you affirmed the action of the local officers whereupon Ferguson appealed and the case is thus brought before me.

The official plat of the survey of the township was filed in the local office June 12, 1885. Both claimants settled in the section many years before the survey and were prompt in making known their claims at the local office.

The land which both claim is the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of the section, described otherwise as the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$.

Snyder's dwelling house and outhouses valued at \$5000, are on the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, which is not in dispute, and his entry embraces also the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, directly north, the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ directly west, the latter forty not being in dispute.

Ferguson's dwelling house and outhouses valued at from \$1200 to \$3000 are on the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ one of the tracts which is in dispute and also he seeks to enter the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ due north which is also in dispute and the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ which is not in contest.

A diagram filed by Snyder (exhibit B) shows that he has five acres of cultivated land on the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ the forty upon which is Ferguson's house, and thirty acres upon the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$; Ferguson appears to have no land cultivated upon the latter tract and to have only a garden, near his house, upon the former.

In reference to the acts of Snyder before survey his testimony shows that he has known the land since June, 1863, when he and his brother-in-law, R. C. Harris, formed a partnership to conduct the butchering business. Harris rented the place for one year from a former occupant. In October of the same year Harris & Snyder concluded to buy the improvements and the possessory right of their lessor and they did so paying \$525. Among the improvements were many fence rails which were scattered over three-forties. In the spring of 1864 they began to build a fence beginning at the slaughter house and moving north about one-half mile, thence west about one-half mile, thence south "in a zig-zag shape," one-half mile and thence east one-half mile. During the fall of 1864 Snyder girdled timber on the land in contest and in the following spring he cleared some of the underbrush and prepared ten acres for planting and plowed the same in the fall. In 1865 he purchased Mr. Harris' interest in the place and ran a fence in a southerly direction three-fourths of a mile, thence in an easterly direction one-fourth of a mile, thence in a northerly direction to the slaughter house. Snyder has with his wife, continuously since 1863, resided upon the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$.

In 1870 one Bobbio saw Snyder and stated that he has selected a site upon which he desired to build a wayside inn. Snyder told him that the site would, upon survey fall within the boundaries of his claim and forbade the erection of the house. Bobbio, nevertheless, in Snyder's absence, erected his house and thereafter seems to have held the place by permission of Snyder and with no purpose of asserting any right adverse to him. The diagrams filed in the case do not show the location of Bobbio's house and the testimony fails to show whether it was on the forty on which Snyder's house is or on the one on which Ferguson's house stands. In 1880 Ferguson came. He bought the improve-

ments of Bobbio with full knowledge of Snyder's claim to the land in which they were situated as the following notice shows:

SNYDER'S June 8, 1880.

Mr. JAS. FERGUSON,

DEAR SIR: I hear that you are about buying the place now occupied by Bobbio. While doing so you will please consider the fact the land where the buildings are located will be inside my lines when the surveys are made and will be filed upon by me for entry at the Government Land Office.

Yours truly,

J. W. SNYDER.

Ferguson swears that he paid Bobbio \$800 for what was on the ground and \$800 for what was in the house and \$50 for a cow and calf. He admits the receipt of the letter from Snyder and states that in consequence thereof and to avoid trouble he moved the house he had bought from Bobbio, eighty or one hundred yards in a northeasterly direction from Snyder's house along the road towards Hite's Cove. In his testimony Ferguson says:

Q. From that time until the pending application was made did Snyder in any way indicate his dissatisfaction with the location of your buildings or improvements?

A. Not until we talked about entering this land, no trouble to my knowledge.

Ferguson further testified that Snyder's house is about three hundred yards and his place of business about one mile from where his house stands; that Snyder was at his house twice while he was making improvements and passed the door frequently.

After Ferguson moved Bobbio's house he made valuable improvements, buying the lumber from the firm in which Snyder was a partner. He built a good house, had a large shed, a small garden and had enclosed about seventy acres, the most of which was outside the tracts in contest.

The Mariposa and Hite's Cove road passes east of Snyder's house in the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, thence north through the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$. Snyder's fence is on the west side of the road in the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and Ferguson's fence on the east side. On the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ the road forks and on each side of each fork is a fence belonging to Snyder and there is another fence running east from the road a little south of the line between the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ which is said to be the boundary between the land in the possession of Ferguson and that in the possession of Snyder.

The testimony shows that Snyder had inclosed by fence a tract of land estimated at from four hundred and forty to seven hundred acres. I will not hold that his inclosure of so large a tract constituted a claim to each subdivision of it and gave notice to all comers of his intention to enter under the public land laws any particular quarter section or smaller subdivision except the one upon which his house stood. He is presumed to have known that he could only enter one hundred and sixty acres under the homestead law, and he should have given notice

of the particular parcels he would claim after survey, by some marking or improvement that would serve to indicate the boundaries of his claim. I do not find that he did so in relation to the land in contest. The notice he sent to Ferguson is indefinite and it may not improperly be interpreted as the latter contends, as notice that Snyder would claim the land where Bobbio's house stood. As has been stated the particular forty upon which Bobbio's house stood is not identified by the testimony. Upon receipt of the notice Ferguson moved the house eighty or one hundred yards north in order, as he says, to get it off the forty upon which Snyder's house was, and he built another house and made valuable improvements. Snyder seems not to have objected to the new location at the time and so far as the testimony shows he acquiesced in Ferguson's possession of the land surrounding the house, on the east of the road, until the survey was made. Ferguson, on the other hand, seems to have asserted no claim to any portion of the forty west of the road and to have done nothing in regard to the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$.

The question remains as to the proper disposition of the tracts in controversy. The tract upon which Ferguson's house was placed is the smallest legal subdivision and it appears that to the part west of the road Snyder's claim is superior, while to the part east of the road Ferguson has the superior claim.

Section 2274, Revised Statutes, provides that when it shall be ascertained, upon survey, that prior to the survey two or more settlers with a view to asserting claims under the pre-emption law have placed improvements upon the same legal subdivision, joint entry of said subdivision may be made. Section 2289 R. S., provides that every person who is the head of a family etc., shall be entitled to enter one-quarter section or a less quantity of unappropriated public lands upon which such person may have filed a pre-emption claim, or which may, at the time the application is made, be subject to pre-emption at one dollar and twenty-five cents per acre.

It has been held that the spirit of section 2274 of the Revised Statutes had in view the settlement rather than the nature of the claim, and that its provisions would embrace a homestead settlement, although its terms had reference to a pre-emption settlement only, and that in such case a joint entry may be awarded. *Stone v. Banegas and Holloran* (2 L. D. 104); *Miller v. Stover* (2 L. D., 150); *Burton v. Stover* (ibid, 585).

Under this statute upon the facts as I have found them, I direct that Snyder's entry for both of the forty acre tracts in contest be permitted to stand, upon condition that within ninety days from notice hereof he tender to Ferguson an agreement in writing to convey to Ferguson, after he receives patent, all of the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said section 15, that is east of the Mariposa and Hite's Cove road; and if Snyder decline to enter into such agreement then Ferguson may make entry of

the two forties in contest upon condition that he tender to Snyder an agreement in writing to convey all of the tracts in dispute except the portion of the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ that is east of the Mariposa and Hite's Cove road. If both parties fail or refuse to make entry upon these terms and conditions, then they will be allowed to make joint entry, in accordance with the provisions of section 2274, Revised Statutes. Edward J. Doyle (7 L. D., 3), *Coleman v. Winfield* (6 L. D., 826); Lord v. Perrin (8 L. D., 542).

The decision appealed from is modified accordingly.

TIMBER CULTURE CONTEST—NOTICE—INSANE PERSON.

HAGEN v. GULBRANSON.

In case of a contest against the entry of an insane person the notice must be served in accordance with the statutory provisions of the State or Territory.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 28, 1890.

Anders Gulbranson, on May 26, 1880, made timber-culture entry of the NE. $\frac{1}{4}$ of Sec. 2, T. 136, R. 57 Fargo land office, Dakota.

On the 24th of October, 1885, Hans O. Hagen filed affidavit of contest, alleging—

That the said Anders Gulbranson has failed to plant or cause to be planted the first five acres of said tract, during the third year after making said entry, in timber-seeds or cuttings or trees; that the said Anders Gulbranson has failed to plant or sow, or cause to be planted or sown, the second five acres of said tract in timber-seeds, cuttings, or trees, during the fourth year after making entry; and that he has failed to cultivate said tract as provided by law.

From certified copies of the records of Ransom county, Dakota, wherein the tract in dispute lies, it appears that on the 16th day of June, 1885, Gulbranson was adjudged insane, and committed to the hospital for the insane at Jamestown, Dakota, where he still remained confined as a lunatic at the time of the trial.

From the same records it appears that one Andrew C. Koello was on the 25th day of July, 1885, appointed guardian of Gulbranson's estate, and was acting as such when the contest against his timber-culture entry was initiated.

Notice of contest was issued on October 24, 1885, fixing December 9th ensuing as the date of hearing.

The question primarily at issue here is, whether notice was properly served upon the defendant. The officer who served it endorsed upon it that it had been served—

On the within named defendant personally, on the 6th day of November, 1885, by delivering to and leaving with the wife of the within named defendant, Andres Gulbranson, at his place of residence in said Ransom county, a true and correct copy of the within notice of contest.

On December 9, 1885, defendant's attorney entered a special appearance, and moved to dismiss the contest "for want of legal notice of contest upon said defendant as provided by rules of practice or Code of Civil Procedure of Dakota, Chapter 9, sub-division 5, Sec. 102."

At the same time, the attorneys for both parties filed a stipulation to take testimony before Frank P. Allen, a notary public, at his office in Lisbon, Ransom county, Dakota, commencing on February 2, 1886.

On the 19th of December, 1885, an attempt was made to serve notice upon Gulbranson through the officers of the Insane Asylum, as appears from the following:

Received two (2) copies of the within notice—one for O. W. Archibald, Superintendent, and one for Andrew Gulbranson, a patient in this hospital.

J. T. ARMSTRONG,
Asst. Physician.

This patient is in such a condition that it is impossible for him to understand the nature of the within paper; and to me it seems an unjust act for any one to take any such undue advantage of a poor, unfortunate, insane man, who is at present unable to care for his own interest on account of unavoidable disease.

O. W. ARCHIBALD,
Superintendent.

On the 27th day of December, 1885, service was made upon A. C. Koello, guardian of said Gulbranson.

On the date set (February 2, 1886), testimony was taken, in the presence of the contestant and the guardian of the defendant. On May 17, 1886, the local officers rendered their joint opinion holding that notice of contest had not been legally served, and sent to your office the record without any finding as to facts.

The register and receiver refer to the Section of the Dakota Code cited (*supra*) by the defendant's attorney, which provides:

The summons shall be served by delivering a copy as follows: If against a person judicially declared to be of unsound mind and for whom a guardian has been appointed, to such guardian and to the defendant personally.

The substance of their joint opinion is contained in the following extract therefrom:

There is no evidence that either copy was ever delivered to the claimant, and it is to be inferred from the endorsement of the Superintendent upon the original notice, now with the case, that personal service upon the claimant was never had or attempted. As the rules of practice make no provision for service upon insane persons, it is to be presumed that if the defendant recognizes any service of process upon them as valid, it would be such service as the laws of the Territory provide for the service of summons in civil actions, upon insane persons If there ever is necessity of requiring a strict compliance with the statute as to service of process in any case, it would seem to be required where the rights of a person who, for the time, is disqualified from defending himself, are concerned We are of opinion that it is the safer course for all parties in interest that all proceedings be stayed till the recovery or death of the claimant, and until due service of notice—unless otherwise instructed by the Commissioner.

Your office, on June 4, 1888, decided that notice of contest had been properly served, and that the default charged in the affidavit of contest had been proven; and therefore held the entry for cancellation.

Among the proceedings at the hearing the following appears:

L. W. Gammon, being first duly sworn, deposes and says—

Witness withdrawn: it is admitted by both the plaintiffs and the attorney for the guardian for the defendant that Gulbranson was of unsound mind since 1880.

The entry was made May 26, 1880. The proof showed, and the contestant concedes, that shortly after entry, the entryman did the breaking required by law to be done the first year. In other words, there was no default on the part of the claimant prior to his becoming insane.

It is clear that the opinion of the local officers "that all proceedings should be stayed till the recovery or death of the claimant," is not tenable; for the entryman might remain insane for many years before either recovery or death.

The practice of this Department is intended to be in substantial accordance with that of the federal courts; and section 914 R. S., re-enacting the act of June 1, 1872 (17 Stat. 197), provides:

The practice, pleadings, and forms and modes of proceeding in civil causes in the circuit and district courts shall conform as nearly as may be to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding.

The service of process is held to be within the meaning of the above act. (See 5 Biss., 322).

While the section above quoted is not addressed to, nor necessarily binding upon this Department, it nevertheless furnishes a safe and proper guide to follow in cases where the federal statutes are silent, and the departmental Rules of Practice make no specific provision.

According to the statute of the Territory of Dakota, notice of contest was not served upon Gulbranson in the case at bar. Hence the contest must be dismissed. Your office decision of June 4, 1888, holding the entry for cancellation is therefore reversed.

HOMESTEAD ENTRY—DEVISEE—RESIDENCE.

WISE *v.* SWISHER.

If a homesteader dies before final proof, and his widow also dies, not having made proof, the right vests in the heir or devisee of the original entryman and not in the heir or devisee of the widow.

Acts indicating an intention to make the land a home to the exclusion of one elsewhere are required to establish the fact of residence in good faith.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 28, 1890.

I have examined the record in the matter of the appeal of W. R. Wise, from the decision of your office bearing date July 16, 1888, in the case of W. R. Wise, *v.* Abraham Swisher, dismissing the protest of Wise

against the issuance of patent to said Swisher for the N. $\frac{1}{2}$, NW. $\frac{1}{4}$, of Sec. 25, and E. $\frac{1}{2}$, NE. $\frac{1}{4}$, Sec. 26, T. 9 S., R. 45 W., La Grande land district, Oregon, and find that on March 25, 1881, Charles B. Swisher made homestead entry No. 1523, for said tract; that on May 14, 1883, he died intestate leaving a widow (Frances E. Swisher) but no children surviving him. Frances E. Swisher died November 20, 1883, without issue.

On September 8, 1884, Abraham Swisher, father of Charles B. Swisher, and claiming to be his only heir at law, in accordance with notice duly published, offered final proof before the local officers for said land.

One A. Augustus filed a protest against the acceptance of said proof, alleging that Frances E. Swisher had left a will in which she had devised her interest in said land to Nora and Charles Waterbury, and that the right to make final proof passed by said will to the devisees thereunder, and whom he, Augustus, claimed to represent.

This claim was sustained by the local officers, but when the matter came before your office it was there, very properly, held that when a homestead entryman dies before final proof, and his widow also dies not having made proof, the right vests in the heir or devisee of the original entryman and not in the heir or devisee of the widow. See section 2291, R. S., also letter of your office to the register and receiver, at La Grande, Oregon, dated May 6, 1885.

On November 11, 1885, W. R. Wise, filed his protest against the acceptance of said proof alleging among other things that Charles B. Swisher never in his lifetime established his residence on said land, and that he had abandoned the same for more than six months previous to his death, and that said Abraham Swisher had not, nor had any other heir of said Charles B. Swisher, cultivated said land since his death.

Upon this protest your office ordered a hearing December 3, 1885, which hearing was had and the evidence adduced tended to show that Charles B. Swisher built a house upon, and cultivated a portion of this land in 1881, and in 1882 cultivated a larger portion and in 1883 still a larger portion.

That at the time of the entry he was a single man, and that his alleged acts of residence, during the year 1881 and up to the date of his marriage in August, 1882, consisted of occasional visits for the purpose of planting and cultivating his crop, and so repairing and changing the construction of an irrigating ditch as to furnish water for his land, rather than such acts as indicate an intention to make this land his home.

Shortly after his marriage he moved upon the land with an apparent intention to live there, but this removal was not followed by continuous residence. On the contrary the evidence shows that he did not remain there to exceed three weeks and then he, with his wife, returned to his father's house, where he had previously made his home, and remained

there a short time and then returned to this land where he remained a few days, but did not stay there at all during the winter of 1882 and 1883. March 25, he with his wife, went to their land again but remained only about a month when he returned to his father's house where he sickened and died, May 14th.

The absence of himself and wife from this place for such a large portion of the time is sought to be excused upon the ground that the weather was severely cold, and the house on this land was scarcely habitable at all, and wholly unfit to be occupied by his wife who was an invalid, having consumption. This excuse I deem insufficient. The entryman is shown to be a man of some means, had cattle of the value of \$1000, besides horses and several hundred dollars in money, and it seems to me that had he intended to make this land a home in the true sense of that word, he would certainly have provided a habitable house for the shelter of a newly married wife in delicate health. It is further shown that his team was kept at his father's, that no milch cow was kept at this place, nor even a chicken.

Were I satisfied that the entryman had in his lifetime complied with the law, I should feel much disposed to hold that the cultivation of this land by those who had kept the claimant from occupying and cultivating it, should inure to his benefit, but such is not my opinion.

There are some circumstances tending to show that this protest is in the interest of Charles and Nora Waterbury, the devisees under the will of Frances E. Swisher. If this be true, it does not add anything to the right of the claimant, and whether the protestant is acting in good faith, and seeks to acquire title to this land for his own benefit, or that of another is a matter that can be passed upon when his rights become the subject of investigation, and is not material here.

The protest will be sustained; the proof rejected, and the entry canceled.

The decision of your office is reversed.

CALIFORNIA LANDS—ACT OF JULY 23, 1866.

TAYLOR *v.* YATES ET AL. (ON REVIEW).

The purchaser of an undivided interest in a Mexican grant, who, under such purchase, enters into possession of a tract marked by specific boundaries, and continues to use, improve, and remain in the undisturbed occupation thereof according to the lines of the original purchase, is entitled to the right of purchase conferred by section 7, act of July 23, 1866, notwithstanding the fact that the deed of conveyance under which he claims does not describe the land by metes and bounds.

Secretary Noble to the Commissioner of the General Land Office, March 1, 1890.

This is a motion filed by Ann Taylor, contestant, asking for review and reconsideration of the decision of the Department of March 1, 1889 (8 L. D., 279) in the above stated case, rejecting her application to pur-

chase, under the seventh section of the act of July 23, 1866 (14 Stat., 218), the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 3, the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 4, the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 9, W. $\frac{1}{2}$, and the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 10, T. 1 S., R. 3 W., M. D. M., San Francisco, California.

Said motion for review is based upon the following grounds: "First, error in law as specified in brief to be filed; Second, error in fact as specified in brief to be filed."

The specifications of error filed by the applicant in support of this motion states that the Commissioner of the General Land Office, and the Department, were led into error in respect to the facts through the changing of the title of the case in the local land office, in this: that both the Commissioner and the Secretary considered the appeal of Mrs. Taylor in the light that she had initiated proceedings before the local land office to make proof under the seventh section of the act of July 23, 1866, whereas the contestant only appeared in obedience to the summons in each of the cases of the homestead and pre-emption claimants to contest their right to pre-empt and homestead lands within the enclosure which her husband had bought of a Mexican grantee of the Sobrante grant, and in none of the cases was she called upon to make her proofs under the act of July 23, 1866, to purchase said lands.

The specification as to error of law is that the real issue in the respective cases was, whether the claimants were entitled under the law to perfect their homestead and pre-emption claims, and not whether the contestant, Ann Taylor, was entitled to enter the land under the seventh section of the act of July 23, 1866, and she asks leave to adopt and submit her brief filed in the case on the appeal from the Commissioner's decision, which she submits with this motion for review.

The right of this claimant to purchase under the act of July 23, 1866, was the direct issue in this case, and when she was notified to contest the right of these parties to make pre-emption filings and homestead entries upon these lands, she was necessarily called upon to show that she had the right to purchase said tract under the act of July 23, 1866, and so far as her rights are concerned, it is immaterial whether they were passed upon under a direct application to make proof and purchase said lands under the seventh section of the act aforesaid, or whether her right to purchase was considered upon the hearing ordered to determine the right of the homestead and pre-emption claimants to make entries of the lands applied for by them respectively.

If this was the only error of law, alleged to have been committed by the Department in its decision of March 1, 1889, I should have no hesitancy in affirming it; but the claimant, Ann Taylor, also asks to adopt and submit her brief filed on the appeal from the decision of your office which she submits with this motion, and asks that it be considered in connection therewith. By reference to this brief it will be seen that she alleges that the premises are a portion of a Mexican grant claim that

was excluded from the grant upon final survey; that she bought the same from the Mexican grantees or assigns in good faith; that she has used, improved and continued in the actual possession of the same as according to the lines of her original purchase, and that there is no valid adverse right or title existing except of the United States. She alleges that these facts were conclusively established, and conceded by the Commissioner, but she was denied the right to purchase under the seventh section of the act of July 23, 1866, solely upon the ground that her title was simply for an undivided interest in the grant. This ruling was affirmed by the Department upon the ground that "said section 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."

Neither the register and receiver, the Commissioner, nor the Secretary passed upon the question as to whether Mrs. Taylor and her grantors were in possession of said tract, or how that possession was obtained, but the Commissioner in referring to this question says:

The testimony shows that the Taylors resided on the tract claimed, from the year 1864, until about October 1882, when they leased the land to Wm. L. Yates, and moved to another county.

Mrs. Taylor and her daughter swear that when the land was purchased it was enclosed by brush fences and natural enclosures on the lines as now claimed by Mrs. Taylor. That her husband, shortly after his purchase, commenced to repair the enclosures around the whole tract except where brush, bluffs, and deep ravines rendered such repair unnecessary.

This evidence is seriously controverted, however, by the testimony of several witnesses to the effect that said fences were not finished until the year 1871, or 1872, and that the enclosure prior thereto only embraced about one hundred and sixty acres of the tract claimed.

The settlement of this point, however, is not material to a proper decision of the case, as there is another feature involved, about which there can be no dispute, and which is decisive of the claim of Taylor under the act of 1866.

The question referred to by the Commissioner as controlling the case is the construction given to the seventh section of the act of July 23, 1866, which was affirmed by the Department. This is the substantial and specific error alleged to have been committed by the Department in the decision now under review.

Mrs. Taylor claims the right to purchase under the act of July 23, 1866, as owner of an undivided interest in the grant made by the Mexican government in 1841 to Juan Jose Castro and Victor Castro, known as the Rancho El Sobrante. It appears from the certified copies of deeds and other instruments of writing filed in this case, that on August 5, 1852, the Castros entered into an agreement with one John Wilson to convey to said Wilson, whenever required, one-tenth interest in said grant in consideration of services to be rendered by said Wilson in procuring the confirmation of it. The grant was confirmed in 1855, and in 1862 the Castros executed to Wilson a deed to said one-tenth interest in accordance with their agreement. Prior to the execu-

tion of said deed, to wit on February 13, 1854, the said Wilson conveyed by deed to Jacob M. Tewksbury the undivided half of the interest of said Wilson, being one-twentieth of the entire rancho, and part of this interest through mesne conveyances was finally acquired by Thomas Valleau by deed executed April 4, 1865, who on July 1, 1865, conveyed it to James Taylor, who conveyed to Ann Taylor his wife, by deed executed September 22, 1880.

It appears from the evidence that the Taylors went into possession of this tract in 1863, and that in 1864 they held possession of it under a contract of purchase from J. W. Venable the immediate grantor of Valleau, and were engaged in carrying on the dairy business; that in 1865 they purchased the land from Valleau to whom it had in the mean time been sold. The deed to Mrs. Ann Taylor described the land as—

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 the Ranchos of San Pablo and San Antonio and on the east and north by the Rauchos known as the Moraga Valencia and Pinole Ranchos, meaning to convey three-fourths of one twentieth of said Rancho less three hundred and twenty acres, also meaning to convey the interest of W. Bogard of the city and county of San Francisco, deeded to the party of the first by B. W. Caryl to all that certain piece of land situated in the Moraga Rancho in Contra Costa county, described as follows, commencing at the south east corner of the corral of B. W. Carroll thence running due north eighty rods, thence at right angles easterly forty rods, thence at right angles westerly forty rods to the place of beginning containing twenty acres of land together with the appurtenances thereunto belonging.

The deeds from Venable and the several grantors down to Mrs. Taylor, convey the land by the same description. Mrs. Taylor testifies that they took possession of this land in November, 1863, and continued in actual possession of it from that date until October, 1882, when she leased it to W. L. Yates one of the pre-emption claimants; that it was fenced all around except in places where steep bluffs prevented the egress or ingress of cattle; that the road divided the place and that a fence was on each side of the road.

The testimony does not show positively when the fences were built. Mrs. Taylor testified several times that the fences were there when she leased the place, but on page 11-18—(Vol. 6 of testimony), she says the land was not fenced when she went there; that they built it all. It will be remembered that she first went on the place in 1863 as sub-tenant of one McHolland, but in 1864 they occupied the place under a contract of purchase. This may account for the discrepancies in her testimony. Besides she testified that they put up fences at different times, and that "we put up the biggest part of the fence we built on it about two years after we went on it." She testified from a plat shown her of a survey made by W. T. Boardman the county surveyor in 1876, and that the plat showed the land she was living on in 1863 and which she continued to reside on up to the time of the lease to Yates.

Charles T. Boardman, the deputy surveyor under his father, testified that he made a survey for Mrs. Taylor in August 1876, on what was called the Sobrante, and that the diagram shown him (marked exhibit A) is the diagram of that survey; that in running the lines it represented the ranch as she claimed it and of which she was then in possession; that the lines were run in some cases according to the fences, but where there were gaps or breaks the line was run across the gap to the continuation of the fence, and that it contained five hundred and ten acres. He testified that the fences were sufficient to designate the line because they made the survey from the indication of the fence.

W. F. Boardman, the county surveyor, testified that he had known the ranch for fifteen years; that he never knew any person to be in possession of the property during that time but Mrs. Taylor; that when he surveyed the tract in 1876, it was all fenced; the green shading on the diagram represents the lines of her possession containing five hundred and ten acres; and the dotted line represents the road running through her place which is fenced on both sides. It is therefore immaterial whether the fences were or were not finished until 1871 or 1872, as testified to by other witnesses. There is sufficient evidence to show that the lines of her possession were sufficiently indicated at the date of her purchase, whether it was entirely enclosed by a fence or not.

By decision of February 23, 1882 (1 L. D., 181) the Department determined the extent and proper location of the sobrante, and directed a survey to be made in accordance with said decision. The claim was finally located by survey approved August 11, 1883, which embraced within its limits 19,982.49 acres, and excluded therefrom the tract claimed by Mrs. Taylor. There is no evidence as to how any of the several grantors through whom the title of Mrs. Taylor is derived were placed in possession of this tract, or whether they or either of them held it with the consent of the owners of the remaining interests in the rancho. Caryle, who held the title in 1863, must have claimed the identical land under his deed, because the Taylors then went into possession of the land as sub-tenants under one McHolland, who held under Caryle.

The decision of your office rejecting the application of Mrs. Taylor was affirmed upon the ground that the uniform rulings of the Department is to the effect that 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 designating by particular description the land purchased,—citing the cases of *Hyatt v. Smith* (14 L. & R. p. 625); *Aurrecoebea v. Sinclair et al.*, (18 L. & R. p. 120); *Owen v. Stevens et al.*, (3 L. D., 401).

I have examined the decisions in these cases and I am unable to conclude that either of them is authority for the broad doctrine announced in the decision now under review; that no right of purchase is conferred by the act where the deed is for an undivided interest merely, and does not designate the land purchased by metes and bounds.

In the case of *Hyatt v. Smith* the Commissioner rejected the application of Smith to purchase under the act of July 23, 1866, upon the ground "that his original purchase was of an undivided interest of which no severalty was had prior to July 23, 1866," and that therefore he has not, in compliance with the requirements of the act "used, improved and continued in the actual possession of the same as according to the lines of his original purchase."

Upon this ruling the Secretary said :

While agreeing with you in the general conclusion that in case of an original tenancy in common in a grant of this character where no partition of any kind has been made prior to the act of 1866, neither of the tenants in common can establish a right under the 7th section, for the reason that the individual possession of each is such as necessarily to prevent use, improvement and continued actual possession as according to the lines of the original purchase, still I think the facts proven do not warrant its application to this case. There can be no doubt that Smith purchased in good faith for a valuable consideration, and the fact is established that the original tenants in common made a parol partition, and that Smith's purchase was from the grantees of one of them, the deed describing the land by metes and bounds.

The application of Smith was rejected by the Commissioner not because the deed failed to describe the land by metes and bounds, but because the land had never been partitioned, and this ruling was reversed by the Secretary and the application allowed upon the ground that a parol partition had been made between the co-tenants. So the question as to whether the interest in the land purchased should be designated in the deed by particular description, was not passed upon.

The decision of the Department in the case of *Aurrecochea v. Sinclair* is a simple affirmation of the decision of the Commissioner, "so far as it affects the claim of Aurrecochea . . . and for the reasons therein stated." By reference to the decision of the Commissioner in this case, it appears that Aurrecochea was the owner of an undivided interest in the grant, and went into possession of part of it and continued to use, cultivate and improve it. The Commissioner said :

No partition of the land claimed by him, either by parol or otherwise, appears ever to have been made, although his occupancy of the same was recognized and respected by his heirs, and his continuance in this occupancy seems to have existed by virtue of an understanding among all concerned, and was to be allowed until a partition should be made.

A part of the heirs were minors; they of course could make no binding agreement for themselves, and in fact it is not pretended that they did, neither did they act by guardian.

Section 7 of the act of July 23, 1866, relates to the purchase of a specific or segregated tract within the limits of a grant, which may be excluded from a final survey. It does not contemplate an undivided interest.

It is apparent that the question as to whether the land must be designated by particular description in the deed, to entitle the owner of an undivided interest to purchase under the act of July 23, 1866, was not decided in these cases, nor in the case of *Owen v. Stevens*, nor is the ruling of the Department in either case authority for ruling that the act does not confer the right of purchase upon one who bought a mere

undivided interest in a Mexican grant without designating by particular description in the deed the land purchased.

It is true that the decision of the Secretary in the case now under review does not state that the particular description of the land purchased must be designated *in the deed of conveyance*, but that is the effect of the decision, as no question was raised as to the correctness of the finding of the local officers, and of the Commissioner that Mrs. Taylor continued in the actual use and occupation, and improved the land claimed by her from 1864 until 1882, when she leased it to Yates.

The act of July 23, 1866 (14 Stat., 218), is remedial and should be liberally construed (*Hyatt v. Smith, supra*). The 7th section of said act provides as follows :

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 purchase 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 regulation to be provided by the Commissioner of the General Land Office.

In the investigation of the various land grants in California, made by the Mexican government, "many grants supposed to be valid were rejected, and in numerous instances land purchased from the grantees and improved was excluded by the surveys from the tracts confirmed. To meet the hardship thus arising, and to enable purchasers in good faith and for value to hold the tract *improved* by them," Congress passed the act of July 23, 1866. *Hosmer v. Wallace* (97 U. S., 575).

If the grant was rejected the pretended conveyance of the Mexican grantor conveyed no title to any land; but where the land was purchased *bona fide* and improved with the belief that the grant was valid, the act of July 23, 1866, allowed to grantees to purchase from the United States the land which was intended to be conveyed. If the grant was confirmed, but upon final survey the land purchased and improved was excluded from the grant as located, the purchaser from the Mexican grantee would be entitled to purchase from the United States that part of the land excluded by survey, which he "used, improved and continued in the actual possession of according to the lines of his original purchase."

"According to the lines of their original purchase" means, the boundaries of the land which the claimant went into possession of under his purchase, and which he has used, improved and continued in the actual possession of as the land intended by the grantor to be conveyed, whether such land was designated by particular description in the deed, or whether he was merely placed in possession of the tract without any description being given in the deed, except the amount of interest con-

veyed. I do not see how the description of the land in the deed, by specific boundaries or particular designation could confer any better right to purchase than where the deed merely conveys an undivided interest without particular description, and the purchaser is placed in possession of a particular tract equivalent in quantity to his interest in the entire grant. It has been the uniform ruling of the Department that a *bona fide* purchaser of an undivided interest designated by metes and bounds is entitled to purchase under the 7th section of said act, if he has used, improved and continued in the possession of said tract according to the lines of his original purchase. But a conveyance of an undivided interest by one joint tenant or tenant in common, although described by metes and bounds as a particular part of the common estate intended to be conveyed, invests the purchaser with no greater interest in or better title to that particular tract, as against his co-tenants, than where the property is described as an undivided interest merely, without designating any particular tract, but where the purchaser goes into possession of a particular tract which the grantor intended to appropriate as his share of the joint property "One joint tenant in common may convey his interest in a particular portion of the land described by metes and bounds, subject to the co-tenant's right of partition of the whole tract." The conveyance, however, is valid and passes the interest of the grantor subject only to the contingency of loss of the premises, if upon partition of the general tract it should not be allotted to the grantor, *Stark v. Barrett* (15 Cal., 361) and authorities there cited. But in making partition between tenants in common, Sec. 10-761, Civil Code of California, provides that—

Whenever it shall appear, in an action for partition of lands, that one or more of the tenants in common, being the owner of an undivided interest in the tract of land sought to be partitioned, has sold to another person specific tract by metes and bounds, out of the common land, and executed to the purchaser a deed of conveyance, purporting to convey the whole title to such specific tract to the purchaser in fee and in severalty, the land described in such deed shall be allotted and set apart in partition to such purchaser, his heirs or assigns, or in such other manner as shall make such deed effectual as a conveyance of the whole title to such segregated parcel, if such tract or tracts can be so allotted or set apart without material injury of the rights and interests of the other co-tenants who may not have joined in such conveyance; *provided*, that in all cases the court shall direct the referees, in making partition of land, to allot the share of each of the parties owning an interest in the whole or in any part of the premises sought to be partitioned, and to locate the share of each co-tenant, so as to embrace, as far as practicable, the improvements made by such co-tenant upon the property; and the value of the improvements made by the tenants in common must be excluded from the valuation in making allotments, and the land must be valued without regard to such improvements, in case the same can be done without material injury to the rights and interests of the other tenants in common owning such land.

Under this section, if the deed describes the land as a specific tract by metes and bounds, the owner of such undivided interest is entitled to have the tract described allotted and set apart to him as his share of the common property, if it can be done without material injury to the rights of

his co-tenants; and *in all cases* the owner of an undivided interest is entitled to have his share so allotted and located as to embrace as far as practicable the improvements made by him upon the common property, if it can be done without material injury to the rights of his co-tenants. The right of an owner of an undivided interest in a Mexican grant—which has been rejected—to purchase under the act of July 23, 1866, a particular part of said grant which he has used, improved, and continued in the actual possession of according to the lines of his original purchase, must be at least co-equal with his right, as against his co-tenant to that particular tract, if it had been confirmed and the land embraced in the limits of the grant by final survey.

Upon a full consideration of this case, I am satisfied that Mrs. Taylor went into possession of the tract which she now claims the right to purchase, in 1864 under a contract of purchase, and used, improved, and continued in the actual occupation of said tract until 1882 without objection from her co-tenants, when she leased to Yates; that the tract claimed by her was sufficiently marked to indicate the lines of her original purchase, and that the quantity embraced in said claimed limits, as shown by the survey of Boardman, to wit, five hundred and ten acres, is not in excess of the interest conveyed by the said deed, as the grant at the date of her purchase had been confirmed for eleven square leagues; that although the land purchased is not designated in the deed by particular description, yet it is the land she used, improved, and actually resided upon, without objection from her co-tenants, according to the lines of her original purchase as located, used, and improved, before the exclusion of the land from final survey.

The decision of the Department of March 1, 1889, is hereby revoked, and Mrs. Taylor will be allowed sixty days in which to make application to purchase said land under the act of July 23, 1866.

PREFERENCE RIGHT—INTERVENING ENTRY—CERTIORARI.

FLETCHER *v.* ROODE.

A preference right of entry is not acquired by a speculative contest.

On a general order to an entryman to show cause why his entry should not be canceled, and the application of another allowed, he may properly set up any charge involving the invalidity of the adverse claim.

The Department will not interfere with the discretion of the Commissioner in the matter of ordering hearings, unless a clear abuse of such discretion is shown.

Secretary Noble to the Commissioner of the General Land Office, March 1, 1890.

The land involved herein is the SW. $\frac{1}{4}$ of Sec. 4, T. 10, R. 28, Wa Keeney district, Kansas.

The homestead entry of Allen W. Roode on said land was contested by Jacob Fletcher, and September 10, 1885, a decision was

rendered by the local officers in favor of the contestant. Roode did not appeal from said decision, but, on October 24, 1885, was allowed by the local officers to make cash entry of said land under section two of the act of June 15, 1880 (21 Stat., 237), and at the same time the contest of Fletcher was dismissed. September 15, 1886 (about eleven months after the allowance of Roode's cash entry and a year after the decision in Fletcher's favor), Fletcher, as successful contestant, made application to enter the land under the homestead law, which was denied by the local officers, on the ground that the land was covered by the cash entry of Roode. Your office sustained the action of the local officers, holding that, no appeal having been taken by Fletcher from the action of the local officers of October 24, 1885, allowing Roode's cash entry and dismissing Fletcher's contest, said action thereby became final. Fletcher claimed that he received no notice of the allowance of Roode's cash entry and the dismissal of his contest, and, also, set up as an excuse for his delay in asserting his preference right of entry as a successful contestant, that he had no notice of the decision in his favor on the contest.

On appeal by Fletcher to this Department, it was held by decision of June 21, 1889 (not reported), that the cash entry of Roode, under act of June 15, 1880, having been allowed when the statutory period for the exercise by Fletcher of his preferred right of entry had not expired and when, consequently, the right of purchase under said act was suspended (*Pomeroy v. Wright*, 2 L.D., 165; *Freise v. Hobson*, 4 L.D., 580; *Roberts v. Mahl*, 6 L.D., 446), was "subject and subordinate" to Fletcher's preferred right; but that, if Fletcher had forfeited his preference right by not asserting it within the prescribed time, then he "occupied a position with reference to his right to enter in no way superior to that of any other person qualified to enter and the question as to Roode's right under his purchase became one solely between him and the government" (*Hollants v. Sullivan*, 5 L. D., 115). On the question, whether Fletcher had received notice of the decision of the contest in his favor, it is then said:—

The record not only does not show the date of notice (to Fletcher) of cancellation of the entry contested, but leads rather to the conclusion that no notice was in fact given. The same is true as to notice of the action of the local officers of October 24, 1885, allowing the cash entry of Roode, upon a failure to appeal from which your office decision is based.

The decision then concludes, as follows:—

On this state of facts, I am of the opinion that the burden is devolved upon Roode to show Fletcher's forfeiture of his right and the consequent validity of his own entry, in so far as it is dependent upon such forfeiture, and to this end it is directed that notice issue to Roode to appear before the local officers within sixty days from date of service thereof, to show cause why his entry should not be canceled and Fletcher's application allowed. On his failure to make said showing within said period, said entry will be canceled and the application of appellant, if in all respects conformable to law, will be granted.

Notice, as directed in said decision, having been issued and served upon Roode, "to show cause why his entry should not be canceled and Fletcher's homestead application allowed," he, on September 7, 1889, filed a response to said notice, in which he sets up as one ground for the disallowance of Fletcher's application, that Fletcher's "contest was prosecuted for the purpose of extorting money from an innocent purchaser and not in good faith for the purpose of making entry therefor, as shown by his letter filed herewith." The letter referred to, if authentic, tends strongly to sustain Roode's charge, and said charge is also corroborated by the affidavit of one J. D. Beal, an alleged purchaser from Roode. On this showing, your office, December 13, 1889, ordered a hearing, for the purpose of determining the truth of said charge. From this action of your office, Fletcher applied to appeal to this Department, alleging that said hearing was ordered on grounds insufficient and "wholly different from that authorized by" the departmental decision of June 21, 1889. Your office refused to allow the appeal, holding that under Rule of Practice 81 an appeal does not lie from "orders for hearing or other matters resting in the discretion of the Commissioner." Fletcher, thereupon, applied to this Department for an order of certiorari under Rule of Practice 83.

In the application for certiorari, it is contended that the decision of June 21, 1889,

Adjudicated the rights of the respective litigants to the land in dispute, in so far as the question of speculation or good faith in either one of them is concerned, and directed only that Roode be given an opportunity to affirmatively show Fletcher's forfeiture of right of entry by reason of failure to exercise it within the statutory period.

On an examination of the decision of June 21, 1889, it will be found that the question of "speculation or good faith" of the parties was not involved or referred to, and, while the primary, if not sole, object had in view by this Department in directing a hearing to be ordered was the investigation and determination of the question, whether Fletcher had forfeited his preference right by failing to assert it within the statutory period, yet the direction and order were *general*, namely, that Roode "show cause why his entry should not be canceled and Fletcher's application allowed," and if they had been necessarily *limited* as claimed, your office would not have been thereby precluded from ordering a hearing on any charge bearing on the validity of Fletcher's application, though not strictly responsive to the order to show cause, if said charge was sufficiently corroborated. The charge made by Roode, if true, deprived Fletcher of any preference right of entry (*Dayton v. Dayton*, 8 L. D., 248), and was "cause why" his application should be disallowed and the cash entry of Roode suffered to remain intact, in so far as its validity was affected by such preference right in Fletcher. The appeal by Fletcher from the order of your office for a hearing was properly denied, because in the first place the grounds of appeal set up were in themselves insufficient, and in the second place, this Department "will

not interfere with the discretion of the Commissioner in the matter of ordering hearings, unless a clear abuse of such discretion is shown." (Reeves v. Emblen, 9 L. D., 584; Rule of Practice 81). I am of the opinion there was no abuse of that "discretion" in this case.

The application is denied.

SECOND CONTEST—FINAL PROOF.

MEAD v. CUSHMAN.

An issue once tried and determined cannot be made the basis of a second contest. A pre-emption entry when finally allowed relates back to the date of final proof to the exclusion of intervening adverse claims.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 4, 1890.

I have considered the case of J. W. Mead v. Chas. M. Cushman, upon appeal of the former from your office decision of November 25, 1887, rescinding the order of your office made August 3, 1887, and denying his application to contest the pre-emption cash entry of the latter for S. $\frac{1}{2}$, SW. $\frac{1}{4}$, Sec. 26, T. 139 N., R. 81 W., Bismarck, Dakota, land district.

In 1877 Cushman and one Helmsworth, made settlement upon unsurveyed lands in said section 26, and when surveyed Cushman filed declaratory statement upon the SW. $\frac{1}{4}$ and Helmsworth upon S. $\frac{1}{2}$, NW. $\frac{1}{4}$, and N. $\frac{1}{2}$, SW. $\frac{1}{4}$, of the same section, there being a conflict as to N. $\frac{1}{2}$, SW. $\frac{1}{4}$. Upon final proof being offered by Cushman on October 21, 1879, a hearing was had to determine the priority of right, the local officers decided in favor of Helmsworth and Cushman appealed.

Pending appeal said parties entered into a written agreement of compromise under section 2274, Revised Statutes, and Cushman for that purpose filed a relinquishment of his claim as to N. $\frac{1}{2}$, SW. $\frac{1}{4}$. His final proof was held until February 9, 1882, when cash entry was allowed as to the S. $\frac{1}{2}$, SW. $\frac{1}{4}$, of said section 26, by direction of your office, upon the proof presented October 21, 1879, and upon the evidence taken on the trial of the conflicting claims of Cushman and Helmsworth.

On March 29, 1879, one Carland made homestead entry for S. $\frac{1}{2}$, SW. $\frac{1}{4}$, and W. $\frac{1}{2}$, SE. $\frac{1}{4}$, said section 26, and his said entry was subsequently successfully contested by one King S. E. Mead and the same was canceled by relinquishment September 1, 1881, and on September 12, 1881, the said Mead filed his declaratory statement for all of said Carland's entry alleging settlement April 15, 1880.

Subsequent to the allowance of Cushman's entry for said S. $\frac{1}{2}$, SW. $\frac{1}{4}$, said Mead made final proof under his pre-emption filing for said Carland tract but the local officers refused to permit him to enter said S. $\frac{1}{2}$, SW. $\frac{1}{4}$, for the reason that Cushman had been allowed by your office to

make entry thereof. To this ruling Mead submitted without appeal and accepted cash certificate for W. $\frac{1}{2}$, SE. $\frac{1}{4}$, but subsequently filed an affidavit of contest against Cushman's said entry alleging that—

Said Cushman never did reside upon said tract of land (SW. $\frac{1}{4}$ said Sec. 26) or any portion thereof more than to pay it an occasional visit; that his only improvement on the north half of said quarter section consisted of a rude board shanty; that since said May 1, 1879, said Cushman has been engaged in the mercantile business in the city of Bismarck, D. T., and has during all of said period made his home in said city; that from May 1, 1879, up to date of making final proof and entry the said Cushman did not cultivate said land nor any portion of it, nor raise any crop thereon, nor in any manner improve the same, and that said entry is a fraud upon the government.

Said King S. E. Mead died subsequent to the initiation of said contest and by permission of your office his sole heir-at-law, J. W. Mead, the appellant in the case at bar, was substituted as contestant and a hearing was had both parties being present with counsel and witnesses and a large amount of testimony in regard to Cushman's compliance with law, was taken.

Upon this testimony the local officers found against the contestant and your office on appeal sustained their decision.

The said J. W. Mead thereupon appealed to this office and on February 10, 1886, Secretary Lamar affirmed the decision of your office, and motion for review being filed was decided February 24, 1887 by this Department denying the motion.

In rendering said decision it was said—

No new evidence is presented, neither is there anything material in the motion before me or the argument in support of it, which was not presented and considered when the former decision was rendered.

Pending his said motion for review, said J. W. Mead, on March 5, 1886, filed in the local office another affidavit of contest against the entry of Cushman, alleging that,

said Cushman never complied with the requirements of the pre-emption law as to settlement, residence upon and cultivation of said land; that said Cushman never resided upon said land as required by law but he made his home in the city of Bismarck, from the date of his settlement to date of his said entry; that said Cushman's said filing and entry were speculative and made in bad faith; that said Cushman did not make final proof as required by the act of March 3, 1879.

In argument the counsel for appellant argue the latter proposition and claim that no notice of intention to offer final proof was published by Cushman as required by said act of March 3, 1879, (20 Stat., 472) and that the said entry is, therefore, void.

It appears, however, in the record before me, and from affidavits filed June 21, 1888, that notice was published prior to the making of final proof in 1879, by Cushman so that it will not be necessary to further discuss this question.

In addition it is also urged by appellant that he made settlement in November, 1879, and that as Cushman's said entry was not made until February, 1882, his rights as a settler should be considered.

In regard to this, it is sufficient to say that Cushman's entry was made and allowed after a full and complete trial as to his compliance with the law, upon the evidence presented October 21, 1879, and although not made until February, 1882, it related back to said final proof, and residence established by Mead in November, 1879, could give him no rights as against an entry made upon final proof presented prior to that time.

The remainder of appellant's affidavit of contest is substantially the same as the one filed by King S. E. Mead and which was finally decided by departmental decision of February 10, 1888, referred to above.

Your office in the decision from which this appeal is taken, said:—

It will be seen that the charges made by James W. Mead against Cushman's entry are substantially the same as those made by his father, King S. E. Mead, except that the son claims residence on the land since November, 1879, while the father only claimed to have resided there since April 15, 1880, and as Cushman's proof of residence, made in October, 1879, has been held sufficient to establish his claim, even if it were admitted that an adverse claimant established a residence on the land, at a date subsequent to said proof, it could not affect Cushman's rights.

In your said decision it is said further,

As the rights of J. W. Mead were evidently considered and determined by the Hon. Secretary in the decisions referred to, after a hearing upon practically the same questions, as those now brought forward with a view to re-opening the controversy, the application for hearing now under consideration should not have been allowed. (See *Moore v. Horner*, 2 L. D., 594.)

J. W. Mead the present applicant to contest is the same individual as the J. W. Mead who as heir of his father has once contested the entry of Cushman.

The ground upon which it was sought to have the entry canceled was the alleged failure of the entryman to comply with the law and whether J. W. Mead claims as heir of his father or as a settler can not aid the least in determining whether such failure occurred or not, so that it appears to me, all the facts by which J. W. Mead might hope to acquire a right to enter said land were fully tried in the former actions and whether his right to proceed was as heir of his father or as a settler is wholly immaterial.

In *Parker v. Gamble* (3 L.D., 390), it was held, that when the information contained in an affidavit of contest has been fully considered in a former contest against same entry the second contest may be denied.

It appears to me that all the matters of default of entryman alleged in the pending application of J. W. Mead to contest were fully gone into and tried in case of J. W. Mead, heir of King S. E. Mead, *v. Cushman* and should not be gone into again.

The decision of your office is accordingly affirmed.

CONTEST—RELINQUISHMENT—RECORDS.

JACOBSON *v.* REMENDER.

The right of a contestant is not defeated or impaired by a relinquishment, accompanied with an application to enter, filed after the initiation of contest.

Ex parte evidence will not be accepted as sufficient to impeach the records of the local office.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 4, 1890.

I have considered the appeal of Fred Remender from the decision of your office dated September 5, 1888, in the above entitled case wherein you adhere to your former decision holding for cancellation Remender's timber culture entry No. 5145, and denying his application for a hearing. The facts as I find them, are these :

On June 23, 1884, Charles Balkenhaur, made timber culture entry No. 1960, for the SE. $\frac{1}{4}$ Sec. 28, T. 27 N., R. 47 W., Chadron land district, Nebraska; and on December 2, 1885, Charles Jacobson initiated a contest against Balkenhaur's entry alleging that said entryman "has not broke or caused to be broken five acres on said tract during the first year, nor has not broken on said tract up to the initiation of this contest."

On December 11, 1885, a hearing was duly ordered to be held before the register and receiver February 10, 1886; the depositions of witnesses were taken before W. J. McCandless, a notary public, at his office at Buchanan, Nebraska, February 6, 1886.

On December 16, 1885, Fred Remender presented a relinquishment of Balkenhaur's entry at the local office, which was filed, and Remender then and there made his said timber culture entry for the same tract.

On the day appointed for the taking of depositions, contestant appeared with his witnesses and they were duly sworn and testified. Balkenhaur made default.

On February 10, 1886, the local officers found in favor of Jacobson, and recommended the cancellation of Balkenhaur's entry.

On April 26, 1886, the register and receiver reported that "due notice of our decision and of the right of appeal were given all parties in interest, by registered mail, but no appeal filed."

On May 29, 1886, your office affirmed the action of the local officers, and held Balkenhaur's entry for cancellation because of the evidence furnished by Jacobson. On June 18, 1886, Jacobson made timber culture entry No. 5903 for said land as successful contestant.

On July 2, 1886, Remender filed an unsworn protest against Jacobson's entry alleging that the same should be set aside for the reason that Balkenhaur's entry was relinquished because of a prior contest by protestant and which resulted in protestant securing from Balkenhaur said relinquishment.

On July 9, 1886, the register transmitted said protest to your office for instructions in the premises, at the same time he reported that "Upon an examination of the contest docket, I can find no record of any contest initiated by Fred Remender against this tract."

On August 6, 1886, your office held Remender's entry for cancellation because of its conflict with Jacobson's entry. On September 7, 1886, Remender appealed, and accompanying said appeal he filed his own affidavit corroborated by that of his attorney, also by the affidavit of Charles Balkenhaur. In his said affidavit Remender alleged—

"That on or about the 20th day of October 1885 he initiated a contest against Charles Balkenhaur's T. C. No. 1960 and after said contest was filed in the local office; affiant secured the relinquishment of Balkenhaur to said entry and made T. C. entry No. 5145 upon the same land ; that his contest and due diligence caused said relinquishment to be made; that Jacobson's contest in no respect caused the cancellation or relinquishment of Charles Balkenhaur's entry."

On March 15, 1888, this Department discovering that the application for a hearing had not been received by your office prior to the decision of August 6, 1886, returned the case for further consideration; and on September 5, 1888, your office, after considering the whole case, adhered to its former decision, holding the entry for cancellation, and denied the application for a hearing on the ground that if Remender ever filed a contest against Balkenhaur's entry, he admits having withdrawn it when he filed the relinquishment, and that Jacobson had a contest pending when the relinquishment was filed, prosecuted his contest regularly to a hearing and submitted testimony which entitled him to a decision in his favor independently of the relinquishment.

On December 26, 1888, Remender appealed from your judgment to this Department.

The record in the case at bar sufficiently shows that Jacobson's contest was the first and only contest initiated against Balkenhaur's entry; and that said contest had been initiated fourteen days prior to the date of filing Balkenhaur's relinquishment.

The *ex parte* affidavits filed by Remender can not be accepted as sufficient to defeat the records of the local office nor to deprive Jacobson of his preference right of entry, who appears to have complied with the requirements of the second section of the act of May 14, 1880 (21 Stat., 140).

Upon review of the whole record, I am of the opinion that the local office erred in allowing Remender to make entry for the tract in dispute, and that the action of your office canceling said entry was proper and in conformity with law and numerous decisions of this Department.

Pfaff v. Willaims et al., (4 L. D., 455); *Webb v. Loughrey* (9 L. D., 440); *Brakken v. Dunn et al.*, (9 L. D., 461).

For the reasons herein stated, the decision appealed from is accordingly affirmed.

RAILROAD GRANT—HOMESTEAD SETTLER.

NORTHERN PACIFIC R. R. CO. *v.* ANRYS. (ON REVIEW.)

Under the express terms of this grant, lands occupied by homestead settlers, at the date when it becomes effective, are excepted therefrom.

Secretary Noble to the Commissioner of the General Land Office, March 4, 1890.

By letter of April 12, 1889, your office transmitted a motion by the Northern Pacific railroad company for review of the decision of the Department dated March 19, 1889 (8 L. D., 362), in the case of said company against A. P. Anrys, involving the NE. $\frac{1}{4}$, NE. $\frac{1}{4}$, W. $\frac{1}{2}$ NE. $\frac{1}{4}$, and lot 5, Sec. 7, T. 5 N., R. 2 E., Vancouver, Washington Territory.

Said decision states that the land is 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; that on March 23, 1887, A. P. Anrys applied to make homestead entry for the tract, alleging that the land was covered by the homestead settlement of one Isaac Newland prior to and on August 13, 1870, and was thereby excepted from the operation of the withdrawal on general route; that a hearing was had on these allegations, on April 26, 1887, after notice to the company, at which Anrys appeared, and submitted testimony but the company made default; that the local officers found in favor of Anrys and recommended the allowance of his entry, and that your office affirmed their decision. On appeal the decision of your office was affirmed by the decision complained of.

From said decision it appears the following finding of facts was made: In February, 1870, Isaac Newland, qualified to make homestead entry, settled on the land (then unsurveyed) with a view to acquiring title thereto under the homestead law, and continued to reside there with his family until May, 1871. Meanwhile he made valuable improvements on the tract.

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 improve-

ments 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.

The Department held 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 from the operation of such withdrawal, and that the settlement claim of Anrys excepted the tract from the operation of the withdrawal on definite location.

The facts as found by the Department are not disputed in the motion for review.

The grant to said company was of certain odd numbered sections to which,—

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, etc.

It is urged that the land was not subject to the operation of the homestead law at the date of Newland's settlement, because unsurveyed, and that the homestead claim could have attached only by entry. But it must be remembered that the rights of the parties here must be determined by a proper construction of the *railroad grant* rather than of the general *homestead law*.

It must be admitted that the ruling in the case at bar is in line with those of the Department for many years. In the case of *Southern Pacific R. R. Co. v. Lopez* (3 L. D., 130), the question here presented was fully discussed in connection with a grant framed in words identical with those used in the grant for the Northern Pacific company, and it was held that a homestead settlement on unsurveyed land with a view to entering it when surveyed is within the term "other claims," and that "it is evident that one of the 'other claims or rights' excepting land from the operation of the grant was 'occupation by homestead settlers'." In support thereof it was urged that Congress was aware that by the act in aid of a road extending across the western half of the continent, it was making a grant far beyond the line of government surveys, in regions occupied and to be occupied largely by settlers awaiting the advent of the surveyor to prefer their claims. In this view I concur. It seems beyond question that it was to protect such settlers as described above that Congress excepted from the operation of the grant tracts "occupied by homestead settlers."

Had Congress intended to extend its protection only to those who had made entry, it would have said so, in other and appropriate words. The ordinary exception of "lands to which a homestead right has attached" would have fully protected that class of settlers. But Congress went further and made occupation the test, instead of entry. I do not deem it necessary to cite cases to show that the views of the Department on this point have not changed.

Counsel for the company cites the case of Atchison, Topeka and Santa Fe R. R. Co. v. Mecklim (23 Kansas, 167), in support of his view that a homestead settler can acquire no rights as against the company, prior to entry. Without expressing any opinion of the merits of the case cited, it is sufficient to say that the grant there under consideration differed materially from the one now before me, the exception there being of lands to which "the *right* of pre-emption or homestead settlement has attached."

No sufficient reason is presented for disturbing the decision complained of, and the motion is accordingly denied.

PRE-EMPTION FINAL PROOF—RESIDENCE.

ABRAM W. FOUNTAIN.

The submission of pre-emption final proof a few days prior to the expiration of the six months requisite residence, does not, in itself, call for cancellation, if good faith is otherwise apparent.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 4, 1890.

I have considered the case of Abram W. Fountain, on appeal of the Colonial and United States Mortgage Co., mortgagee, from your office decision of November 20, 1888; holding for cancellation the pre-emption cash entry of said Fountain for NW. $\frac{1}{4}$, Sec. 33, T. 130 N., R. 62 W., Fargo, Dakota, land district.

It appears from the record that Fountain filed declaratory statement April 7, 1883, alleging settlement March 28, 1884, and after notice duly published the evidence in final proof was taken September 24, 1884, before the probate judge of the county in which the land is situated, and the proofs being forwarded to the local office, cash certificate was issued October 2, 1884.

On April 19, 1887, your office in letter "G" to the local officers in regard to said entry said, "Proof was made in less than six months from date of settlement. Require claimant to re-advertise and make new proof according to circular of March 30, 1886."

On October 29, 1887, by letter "G" your office directed the local officers to "*notify the claimant,*" of your said decision of April 19, 1887, and that he was allowed ninety days to comply.

On November 20, 1888, no response having been made by claimant your office made the decision complained of, holding said entry for can-

cellation, because final proof affidavits had been made four days before the expiration of six months after settlement. From this decision said mortgagee now appeals and files with its appeal an abstract of title showing that on October 3, 1884, it took a mortgage upon the land in controversy to secure a loan of \$250 made to the entryman.

The final proof showed that the said Fountain, a qualified pre-emptor, purchased from a former claimant the improvements consisting of a house and four acres of breaking; that on March 28, 1884, he established actual residence upon the land; that he subsequently broke forty acres more and cultivated four acres of it to oats and five acres to corn; that he built a house ten by twelve feet with a gable roof matched and papered, a barn fourteen by sixteen feet made of lumber, and dug a well twelve feet deep; all of the value of \$300.

No fault whatever is found with the proof, except that it was made four days prior to the expiration of six months from date of settlement.

The regulation of the Department requiring a residence of six months next preceding entry as a guaranty of good faith is one proper to be made, and any attempt to make proof prior to the expiration of the time thus fixed might tend to show want of good faith, but in the case at bar, any presumption which might arise from such premature making of final proof is rebutted by the more than ordinarily good showing of improvements and continuity of residence. The final certificate was not issued until after the expiration of six months, and from the whole record I am inclined to believe that the irregularity complained of was rather an inadvertence on the part of both the entryman and the local office, than an attempt to evade the rules of the General Land Office, and that the submission of final proof under such circumstances a few days before the expiration of the requisite six months, is not of itself sufficient grounds to justify the cancellation of the entry.

In the case of Fred G. Waite (8 L. D., 638), I find some matters of fact similar to those in the case at bar, and it was there held that the entry should be passed to patent.

Your said decision is accordingly reversed.

TIMBER CULTURE CONTEST—DECEASED ENTRYMAN—AMENDMENT.

NORTON *v.* THORSON ET AL.

The death of the entryman, prior to the initiation of contest, being shown on behalf of the heirs, together with the names of said heirs, the contestant should be required to make such heirs parties defendant, by amendment of the charge, and due service of notice, and a continuance for such purpose should be granted.

The right of the contestant to thus amend on the suggestion of the entryman's death is not defeated by an intervening contest.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 4, 1890.

I have considered the case of Thomas Norton *v.* Knute Thorson, *et al.*, on the appeals of said Norton and George Fulton from the decision of

your office of October 12, 1888, in the matter of Norton's contest against Knute Thorson's timber-culture entry made May 31, 1884, for the NE. $\frac{1}{4}$ of Sec. 15 T. 143 N., R. 61 W., Grand Forks, Dakota land district.

On November 11, 1887, Norton filed affidavit of contest against said entry charging:

That the said Knute Thorson has failed to break, during the 2nd year after making said entry, five acres as required by law, and has failed during the 3rd year after making said entry to plant any part thereof to trees, and said failures exist at the present time; and affiant is informed and believes that said tree claim has been offered for sale for the past year.

In this affidavit it is alleged that he, affiant, was informed that Thorson then lived in Colorado. A hearing was ordered by the local officers for December 29, 1887, the testimony to be taken before a notary public at Latoka on December 27th and notice thereof was given by publication. On the day fixed for taking testimony the contestant appeared at the place designated and was there met by Thomas Thorson who entered a special appearance for the purpose of moving to dismiss the contest for lack of proper parties defendant, supporting this motion by the testimony of himself and one George Fulton to the effect that the entryman had died prior to the filing of the contestant's affidavit, leaving a father and four brothers, said Thomas Thorson being one of the latter, as his heirs. On the same day, November 27th, George Fulton filed in the local office an affidavit of contest against said entry, Thomas Thorson appearing as the corroborating witness. On the same day, Norton, the original contestant, executed another affidavit making the same charge as was contained in his former affidavit, but stating that "said Knute Thorson is dead and the deceased's father, the heir, resides in Glenville, Freeborn county, Minnesota State." This affidavit was received at the local office on November 28th. On January 6, 1888, the local officers sustained the motion to dismiss Norton's contest, and rejected his second affidavit "for the reason, first, that the complaint is not filed against the heirs of the entryman, who it appears is dead, and second, for the reason that the prior application of George Fulton to file a contest against the same entry is now pending and the application of Norton should be held subject to the final disposal of the application of Fulton." Upon appeal it was held in your office that—

It was error to dismiss the contest, for although proper notice thereof had not been given, contestant was entitled, when the entryman's death was suggested upon the record, to amend and proceed against the proper parties (*Fisher et al. v. Salmonson*, 4 L. D., 538), and he seems to have endeavored to do so before the day of hearing, though I do not consider the second affidavit sufficiently explicit,

and Norton was allowed thirty days within which to amend his allegations by charging failure on the part of the heirs of the entryman to comply with the law.

From that decision both Norton and Fulton appealed. Norton contends that it was error to require him to amend his contest when there

was no "judicial knowledge" that the entryman was not alive when the contest was initiated or is not yet alive, or if dead that he left any heirs. This contention cannot be sustained to its full extent. The death of the entryman and the names of his heirs has been satisfactorily shown. This being true the contest should not have been dismissed but the contestant should have been required to make these heirs parties by due service of notice of the contest, and a continuance should have been granted for that purpose.

I am of the opinion, however, that the charge in the affidavit of contest that "said failures exist at the present time" is sufficient allegation of failure on the part of all persons interested in said entry, whether as entryman or heirs, to comply with the requirements of the law.

Fulton alleges that it was error to allow Norton to amend his contest affidavit after he, Fulton, had filed his affidavit charging failure against the proper parties. This objection to the decision appealed from cannot be sustained. The authority cited in that decision, *Fisher v. Salmonson* (4 L. D., 538), in which case the facts were very similar to those in the case now under consideration, justifies the allowance to Norton of the privilege of amending and proceeding against the heirs.

Norton will therefore be allowed thirty days from notice hereof within which to take the necessary steps for making the heirs of the entryman parties defendant to this proceeding, after which the case should proceed to a hearing in conformity with the regulations governing such cases. Fulton's application to contest should be held subject to the final disposition of Norton's contest. The decision appealed from is accordingly modified.

SCHOOL SELECTION—ADVERSE SETTLEMENT—APPLICATION.

ALICE C. WHETSTONE.

A prior adverse settlement claim cannot be set up as against a school selection except in the interest of the settler himself.

An application to enter cannot be allowed for land covered by a school selection.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 4, 1890.

I have considered the appeal of Alice C. Whetstone from the decision of your office of October 25, 1888, affirming the decision of the local office rejecting her application to make homestead entry of the SW. $\frac{1}{4}$ of Sec. 25, T. 11 N., R. 39 E., Walla Walla, Washington Territory, upon the ground that "the land sought to be entered had been selected by the Territory as school land in list No. 8 of school selections."

The applicant basis her claim to enter said land upon the ground that the land was settled upon prior to survey and that at the time of the selection of the land by the Board of County Commissioners it was held, occupied and cultivated, and was not subject to such selection by reason

of such occupancy and cultivation. She does not claim, however, that she settled upon said land, earlier than September 25, 1887, whereas the land was selected by the Territory February 22, 1870.

The land in controversy is not a school section and therefore the question as to whether it was or was not occupied by a settler at and prior to survey is immaterial. If there was no prior or superior claim existing at date of selection, it was subject to selection by the Territory, and even if an adverse claim did exist it could only be asserted against the Territory by such claimant. Such settlement did not inure to the benefit of a subsequent settler, who went upon the land after abandonment by the first settler and selection by the Territory, and there was therefore no error in refusing the application.

Your decision is affirmed.

RAILROAD GRANT—SETTLEMENT CLAIM—ACT OF MARCH 3, 1887.

HARRIS *v.* NORTHERN PACIFIC R. R. CO.

Land covered by a claim, resting on settlement, improvement, and occupancy, and existing at date of withdrawal on general route, is excepted from the operation of such withdrawal.

The abandonment of land by a homesteader under a decision of the local office that the company has a better right thereto, is not the "voluntary abandonment" that precludes re-instatement of the entry under section 3, act of March 3, 1887. A relinquishment under the act of June 22, 1874, confers no right upon the company if the land relinquished was in fact excepted from the grant.

Secretary Noble to the Commissioner of the General Land Office, March 4, 1890.

The SE. $\frac{1}{4}$ Sec. 5 T. 3 N., R. 2 E., Vancouver, Washington Territory, lies opposite the Northern Pacific Railroad (main line) between Portland and Tacoma and is within the granted limits of said company as shown by its map of general route filed August 13, 1870, and by its map of definite location filed September 22, 1882.

On October 4, 1870, Emry Harris made homestead entry for the tract named. This entry appears by the records of your office to have been canceled March 19, 1878, for failure to make proof within the statutory period.

On March 17, 1887, Harris applied for a restoration of his homestead right and to make homestead entry for the land alleging settlement, residence and improvement thereon prior to the filing of the said map of general route.

After notice to the parties a hearing was duly had at the local office on April 28, 1887, when Harris appeared with counsel and the company made default.

Upon the testimony submitted the local office found the land to have been excepted from the company's grant by reason of Harris' settlement and residence thereon, and that he (Harris) should be permitted

either to make a new entry for the land or to have his former entry reinstated.

On appeal by the company your office by letter to the Department, dated February 13, 1888, recommended the re-instatement of Harris' former entry and "that he be restored to his rights and allowed to complete the same."

Notice of the foregoing was given by your office in accordance with the departmental letter dated November 22, 1887 (6 L. D., 276), containing instructions for the adjustment of railroad grants under the act providing for such adjustment approved March 3, 1887 (24 Stat., 556). Thereupon on March 10, 1888, the company by its resident attorney, filed a brief to show why the said entry of Harris should not be reinstated.

It appears from the testimony that about February 1, 1870, Harris with his wife and two children, moved into a house which he had previously built on the land; that owing to poverty he did not make his entry until October 4th following; that with his family he continued to reside on the land until December 1874, and that his improvements thereon, valued at \$200, comprised a log house fourteen by twenty-two feet with an addition twelve by sixteen feet, several out-houses, a well, and one to two acres fenced and cultivated.

It was further shown that he abandoned the land in December, 1874, in consequence of a letter from the local officers dated May 15, 1873, whereby he was notified that under a decision of this Department, his said entry having been made after August 13, 1870, for land withdrawn for the benefit of the company's grant, the same was suspended to await the definite location of the road, and that in the meantime his entry could be canceled at his discretion.

It also appeared that Harris is entitled to credit for three years' military service.

The recommendation of your office is based upon the third section of the act of March 3, 1887, *supra*.

This section provides for the re-instatement of the pre-emption or homestead entry of any *bona fide* settler that in the adjustment of said grants shall appear to have been erroneously canceled by reason thereof; on the condition that *inter alia* he did not voluntarily abandon said original entry.

When the company filed its map of general route (August 13, 1870), the land within the granted limits thereby defined became withdrawn from settlement and entry by operation of law. *Buttz v. Northern Pacific R. R. Co.* (119 U. S., 55).

But it is now well settled that land covered by a claim resting on settlement, improvement and occupancy, existing at the date of such withdrawal, is excepted from the operation of the same. *Northern Pacific R. R. Co., v. Evans* (7 L. D. 131).

The records of your office, however, show that Harris' entry was can-

celed for failure to make proof within the time limited by law, and that the land was apparently vacant when the company filed its definite location.

But Harris abandoned the land because he was notified by the local officers that the company had the better right thereto. His abandonment was not a voluntary one, and it consequently will not do to hold that by the resulting cancellation of his entry the land was relieved of the Harris claim and passed by the company's grant upon the definite location of the road.

The said letter of November 22, 1887, *supra* in regard to the third section of the act of March 1877, provides :

The object and purpose of this section is to correct all decisions made by the Department or the General Land Office where it shall appear in the examination of any land grant heretofore unadjusted that the homestead or pre-emption entry of a *bona fide* settler was erroneously canceled. In such case 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 readjudicate the case, notwithstanding the former decision whenever it appears that the pre-emption or homestead entry of any *bona fide* settler has been erroneously canceled on account of any railroad grant or of withdrawal of public lands from market.

For the reason hereinbefore stated the application of Harris comes within the purview of the act of March 3, 1887, *supra*. You will accordingly notify Harris that upon the showing required by the circular of February 13, 1889, (8 L. D., 348), containing instructions under the act just mentioned, his said homestead entry will be re-instated and that he will be permitted to complete the same.

I have deemed it unnecessary to consider the company's relinquishment under the act of June 22, 1874 (18 Stat., 194), dated May 4, 1876, which you forward by letter dated February 20, 1888, for the reason that it never acquired an interest in the land involved.

RESIDENCE—SETTLEMENT LAWS—HUSBAND AND WIFE.

THOMAS E. HENDERSON.

A husband and wife, while living together in such relation, can not maintain separate residences at the same time, in a house built across the line between two settlement claims, so that each can secure a claim by virtue of such residence.

First Assistant Secretary Chandler to the Commissioner of the General Land Office March 5, 1890.

I have considered the appeal of Thomas E. Henderson from your office decision of October 31, 1888, holding for cancellation his homestead entry, made April 23, 1883, for the SE., $\frac{1}{4}$, NE. $\frac{1}{4}$, N. $\frac{1}{2}$ SE. $\frac{1}{4}$, and SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Section 32, T. 18 N., R. 40 E., Spokane Falls land district, Washington.

It appears that one Viola O. Davis on October 1, 1880, made homestead entry for lands adjoining the tract of the claimant in the same section, to wit, the E. $\frac{1}{2}$ SW. $\frac{1}{4}$ and S. $\frac{1}{2}$ NW. $\frac{1}{4}$.

The claimant and Viola O. Davis subsequently intermarried. Viola O. Henderson formerly Davis, submitted her final proof for the lands covered by her entry November 19, 1887. It appeared from the proof that the claimant and his wife built their house in which they resided on the dividing line of their respective claims.

Your office being of the opinion that husband and wife cannot hold two different tracts and comply with the law as to residence and cultivation at the same time, although the house is built across the line and occupied by both parties, by letter of June 19, 1883, suspended the final homestead entry of the wife and allowed the parties thirty days from the receipt of notice of such determination, within which to elect which of the two entries they would retain.

By letter dated October 10, 1888, signed Viola O. Henderson and Thomas E. Henderson, they, though not waiving their rights to the entry of the husband, chose to retain at any rate the said entry of the wife already proven.

Thereupon your office by letter of October 31, 1888, held the entry of Thomas E. Henderson for cancellation.

From this determination the said entryman appealed.

The homestead law requires that the homesteader shall make the homestead his home to the unqualified exclusion of one elsewhere. It is for this reason that a person cannot legally maintain one claim under the homestead law and another under the pre-emption law, though those claims might be adjoining. Both laws require residence and it has been uniformly held that one cannot maintain two residences at one and the same time.

A husband and wife, while they live together as such, can have but one and the same residence. The residence of Henderson and his wife must therefore have been either on his or on her claim; it could not have been on both. The same question was determined in the late case of L. A. Tavener (9 L. D., 426).

Since the claimant jointly with his wife chose to retain the latter's entry, it follows, of course, that his own can not be maintained. Your said office decision is accordingly affirmed.

TIMBER CULTURE* CONTEST—NOTICE—SECOND CONTEST.

KENNEDY *v.* LOWDELL.

In contest proceedings it is the duty of the local office to issue the notice, but the service thereof rests with the contestant.

A charge of non-compliance with law made prior to the expiration of the first year after entry is premature and does not authorize proceedings against a timber culture entry.

Failure to serve notice of a contest, and the initiation of new proceedings by the contestant, is an abandonment of the first contest, and warrants the dismissal thereof.

A contest, invalid on its face, and abandoned by the contestant, is no bar to the initiation of new proceedings by said contestant.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 5, 1890.

October 4, 1886, George A. Lowdell made timber culture entry for the NE. $\frac{1}{4}$ of Sec. 12, T. 25 N., R. 51 W., Chadron district, Nebraska.

July 26, 1887, William Kennedy filed an affidavit of contest dated July 18, 1887, charging in substance that Lowdell had up to said date wholly failed to comply with the requirements of the timber culture law. Notice was issued by the local officers on this affidavit August 12, 1887, designating October 13, 1887, as the time when testimony would be taken before a notary public, and October 19th of said year as the day of hearing before the local officers. This notice does not appear to have been served, and on October 10, 1887, Kennedy filed a second affidavit of contest, dated October 6, 1887, alleging, that up to that time Lowdell had failed to break over one acre. Notice was also issued on this affidavit, naming November 28, 1887, as the day on which testimony would be taken before one M. J. Bailey, a notary public, and December 5, 1887, as the day of hearing before the local officers. This notice was served on Lowdell, October 15, 1887, but on November 23, 1887, five days before the time designated therein for taking testimony, it was recalled and proceedings directed to be discontinued by the local officers in a letter addressed to Kennedy in care of said M. J. Bailey. It is claimed by Kennedy that this letter was not received until November 30, 1887, after the testimony had been taken. Lowdell did not appear at the taking of the testimony before Bailey, November 28, 1887, but did appear before the local officers, December 5, 1887, the time appointed for the hearing, and on his motion the second contest was dismissed because initiated during the pendency of the first, and the latter was also dismissed for want of prosecution.

Kennedy appealed from the action of the local officers in dismissing his second contest, and your office decision of May 22, 1888, reversed said action and held the entry of Lowdell for cancellation on the *ex parte* testimony adduced by Kennedy at the hearing, November 28, 1887. From your said office decision Lowdell now appeals to this Department.

While the local officers issue, the contestant is required to give notice of the contest. (Rule of Practice 60; Sec. 3, act of June 14, 1878, 20

Stat., 113.) By failing to give notice under his first affidavit of contest and by subsequently filing a second affidavit and serving notice thereunder, Kennedy abandoned his first contest, and it was properly dismissed by the local officers for want of prosecution. Said first affidavit, moreover, was filed about nine and one-half months after the entry. As the statute gives the claimant an entire year after entry within which to break the first five acres, an affidavit filed two months and a half before the expiration of the year and charging a failure to comply with the law up to its date, is insufficient on its face to authorize contest proceedings. It is held by Secretary Schurz in the case of *Tripp et al., v. Stewart*, that such an affidavit confers no jurisdiction and that proceedings thereunder are "illegal and must be treated as a nullity." *Tripp et al., v. Stewart* (7 C. L. O., 39); *Stewart v. Carr*, (2 L. D., 249).

Kennedy having abandoned his first contest by failing to serve notice thereof and instituting a second, and said first contest being invalid on its face, your office was correct in reversing the action of the local officers in dismissing the second contest because initiated during the alleged pendency of the first.

Lowdell in his appeal alleges among other things, that—

4th. Prior to the day of taking testimony (Nov. 28, 1887) a motion was filed by entryman to dismiss second contest, first contest being unacted upon and still pending.

5th. The attention of the register and receiver at Chadron was called to the matter and the notice in the second contest was recalled.

6th. This prevented entryman from appearing at the time and place of taking the testimony.

11th. The Commissioner erred in holding the entry for cancellation without permitting entryman to offer his testimony, the notice being recalled by local office, entryman had no reason to believe the testimony would be taken.

In conclusion the appellant asks that the action of the local officers in dismissing the second contest be sustained or that a hearing be ordered and an opportunity given him "to defend his entry."

The allegations numbered 4 and 5 are expressly admitted by Kennedy in his answer to the appeal, and it appears that the letter of the local officers recalling the notice of hearing and directing proceedings to be stopped, was mailed November 23, 1887, in ample time to have been received by due course of mail before the day, November 28, 1887, appointed for taking testimony. Under these circumstances, Lowdell was justified in assuming that the testimony would not be taken that day and in not appearing with his witnesses, and this is evidently what he means by claiming in allegation 6, to have been "prevented" from so appearing.

I am of the opinion, that the prayer of Lowdell for a hearing should be granted, and it is directed that the local officers be instructed to order such hearing to be had after due notice of the time and place thereof to all parties in interest.

The decision of your office is modified accordingly.

MINING CLAIM—ADVERSE PROCEEDINGS.

SOLITAIRE MINING AND MILLING CO. *v.* SIGAFUS.

During the pendency of adverse proceedings, duly initiated and pending in the courts, a motion to dismiss the application for patent will not be entertained by the Land Department.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 7, 1890.

This record presents the appeal (by its attorney in fact) of the Solitaire Mining and Milling Company, from your office decision of December 22, 1888, affirming the action of the local office in denying its motion to dismiss the application of James M. Sigafus for patent to the Homestake Lode claim survey No. 621, White Oaks mining district, Las Cruces, New Mexico.

The application of Sigafus for patent is dated May 23, 1887, and the motion for its dismissal (dated August 2, 1888), appears to have been refused at the local office on or about September 15, following.

The motion sets out that the said application for patent is "not verified as required by section 2325, Revised Statutes of the United States" and that by said application "it nowhere appears that said James M. Sigafus is a citizen of the United States."

In its appeal to your office it is by the said company

admitted . . . that suit is pending in the court having jurisdiction between the adverse claimant corporation and the applicant herein involving the public mineral lands of the United States set out in the protest and adverse claim of the adverse claimant corporation herein.

As such adverse proceedings do not appear to have been settled the case at bar comes within and is governed by the rule laid down in the case of the Iron Silver Mining Company *v.* The Mike and Starr Gold and Silver Mining Company (6 L. D., 533) where the Department held that a motion to dismiss an application for patent will not be entertained prior to the disposition of adverse proceedings duly initiated and pending in the courts.

It is, therefore, in the light of the authority just cited unnecessary for me to pass upon the matters presented by this appeal.

The action of your office in denying the said motion is accordingly hereby affirmed.

TIMBER LAND ENTRY—ADVERSE CLAIM.

KNEELAND ET AL. *v.* NORTON.

An entry under the act of June 3, 1878, is not permissible, if the land contains mining improvements made and maintained by another in good faith.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 7, 1890.

I have considered the case of J. H. Kneeland *et al. v.* Sarah Norton upon appeal of the latter from your office decision of February 15, 1889, rejecting her application to purchase as timber land, under the act of June 3, 1878 (20 Stat., 89), the E. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 34, T. 15 N., R. 9 E., M. D. M. Sacramento, California, land district.

It appears from the record that appellant filed her application February 28, 1888, and published notice of final proof to be made May 22, 1888.

On said last date John H. Kneeland and Levi D. Leeds appeared and objected to entry being made by said Norton and asserted an adverse claim to the land they having filed mineral application therefor March 15, 1888. They claim that said land is not valuable for its timber.

Evidence was thereupon introduced upon both sides and the local officers decided against Norton and recommended the cancellation of her entry and your office upon appeal affirmed their decision and held her entry for cancellation.

It appears from the evidence that the land has no agricultural value whatever and in regard to the value of the timber Mrs. Norton and her husband and two other witnesses testify that there is \$1,500 to \$2,000 worth of it, while several witnesses who were examined on part of the mineral claimant testify that after payment of the expenses of taking it off there would remain a profit variously estimated ranging from nothing at all to \$250.

It appears that but few of the trees originally growing upon the land now remain and they are of an inferior character and that there is not upon the whole tract a single tree which is suitable for sawing into lumber. The so called timber upon the tract consists almost entirely of second growth pine which has sprung up since the milling timber was removed several years since, and the only purposes for which it is claimed the timber growth upon the land is valuable are for cordwood and hop poles, and it further appears that a similar growth upon lands in that locality which are suitable for agriculture is usually burned by the farmers when clearing their land.

Upon the part of the mineral claimants it appears that they with some thirty-four other persons located a mining claim upon this ground

in 1871, and that said Kneeland and Leeds have since purchased the interests of the others therein.

It appears from the testimony of E. C. Wren, United States deputy surveyor, that there are two tunnels running under the land in controversy, one of which has its face or exterior opening upon the land in controversy, made by the mineral claimants, with the intention of tapping a gravel bed in the mountain for the purpose of mining the gold which surface mining in the ravines indicated such gravel bed contained.

After digging several hundred feet in one tunnel they were compelled to abandon work on account of the hardness of the rock, and they then ran another several hundred feet in length and succeeded in reaching the gravel deposit, but further progress was then stopped by water and quicksand. They however panned out some of the black sand which ran down into the tunnel and found that it contained gold.

This caving of the tunnel occurred in 1878, and since that time only the assessment work or a little more has been done each year, but mineral claimants have kept the tunnels timbered and have done some other work each year but have not been able to prosecute the work vigorously for want of funds.

The said act of June 3, 1878, provides among other things that the person desiring to make entry under the act shall furnish satisfactory evidence that the land is unoccupied and "without improvements, other than those excepted, either mining or agricultural."

In the case at bar it clearly appears that the tunnels dug by the mineral claimants are upon the land in question and that Mrs. Norton knew it before she made her application to enter.

It is also said in the circular of June 3, 1878 (6 L. D., 114) that lands which may be entered under said act "must be unoffered, unreserved, unappropriated and uninhabited, and without improvements," except such as were made by or belong to the applicant.

In *Hughes v. Tipton* (2 L. D., 334), it is said "the existence of a valid settlement or improvement is therefore fatal to the timber claim notwithstanding the land may be non-agricultural." See also *Spithill v. Gowen* (2 L. D., 631).

I am of the opinion that the mining improvements which appear to have been made and maintained in good faith, were of such character as to prevent entry under the said act of June 3, 1878.

Your said decision is accordingly affirmed.

PRACTICE—NOTICE—PROOF OF SERVICE.

HAUSEN *v.* UELAND.

If the fact of service is admitted, or not denied, and the service is legal and duly made, the manner in which proof of such service is made is not material.

The defendant by appearing and procuring an order of continuance waives any defect in the service of notice, or proof thereof.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 8, 1890.

March 2, 1884, Martin A. Ueland made homestead entry, No. 14,384, on the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and E. $\frac{1}{2}$ of NW. $\frac{1}{4}$, Sec. 6, T. 144 N., R. 58 W., Fargo district, Dakota.

On March 16, 1886 (over two years after said entry), Jorgan Hausen filed an affidavit of contest against said entry, alleging therein that Ueland had "wholly abandoned said tract," had changed his residence therefrom, and had not settled upon and cultivated the land as required by law. Notice of contest was issued March 18, 1886, reciting that "complaint had been entered at the local office against Ueland for abandoning his said entry," and summoning him to appear at said office, May 7, 1886, "and respond and furnish testimony concerning said alleged abandonment." Ueland appeared upon the day named in said notice and filed an affidavit, setting forth the absence of material witnesses and what he expected to prove by them, and asked a continuance for sixty days of the "hearing of the said matter of contest under the said notice." The hearing was thereupon continued until June 8, 1886, when Ueland, by his attorney, appeared specially and moved the dismissal of the contest, because (1) there was no evidence of a legal, personal service by affidavit of the party serving said notice, as required by the Rule of Practice governing such cases, and (2) there was a variance between the affidavit of contest and the notice. This motion having been overruled, Ueland then moved that, because of the alleged variance between the affidavit of contest and the notice, "the testimony be confined strictly" to the charge of abandonment set forth in the notice. This motion was granted by the local officers and the hearing was then proceeded with. The contestant examined a number of witnesses, who were cross-examined by the attorney for Ueland, and at the conclusion of the examination (direct and cross) of said witnesses, Ueland declined to submit any testimony, relying upon his motion to dismiss the contest above set forth. On the testimony adduced, the local officers held, August 19, 1886, that the said entry should be canceled. Ueland having appealed, your office, by decision of September 11, 1888, concurred in the finding of the local officers, and from said office decision he now appeals to this Department.

In his appeal, Ueland does not dispute the correctness of the finding of your office and the local officers on the evidence taken at the hearing,

namely, that he had abandoned the land, and, on an examination of said evidence, I find that it fully sustains said conclusion.

His assignments of error are based entirely on the denial of his motion to dismiss. It appears from the return endorsed on the original notice, that it was duly served by the sheriff of Griggs county, Dakota, by reading the same and delivering a true copy thereof to Ueland. If this return made by the sheriff was true, the service was in strict accordance with the rules of practice, prescribing the mode of such service. (Rules 9 and 10). It is not denied by Ueland that he was in fact thus served and his motion was on the ground, not that he had not been legally served, but that there was "no evidence of service by affidavit of the party serving, as required by the Rules of Practice." Rule of Practice 15, which provides how proof of personal service shall be made, was intended to apply to, and can only be invoked in cases where the fact of service is denied. Where the fact of service is admitted or not denied, and the service was legal and duly made, the mode of proof of it is immaterial. (*Allen v. Leet*, 6 L. D., 669). Moreover, by appearing and procuring a continuance, he waived, as held by your office any defect which might have existed in the service of notice or proof thereof. While jurisdiction of the subject matter is given by law, and, hence, can not be acquired by waiver or consent of parties, jurisdiction of the person may be and frequently is so acquired. (Free-man on Judgments, 2 Ed., Secs. 119, 120.)

The alleged variance between the affidavit and notice of contest, if material, was cured by the granting of Ueland's motion to "confine the testimony strictly to the charge of abandonment, set forth in the notice."

The decision of your office is affirmed.

HOMESTEAD ENTRY—ALIENATION—CONTEST.

CRAWFORD *v.* FURGUSON.

The sale of an undivided half interest of the land covered by a homestead entry, prior to final proof, renders the homesteader incompetent to perfect his entry, and the defect cannot be cured by a reconveyance in the presence of an intervening contest charging said incompetency.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 7, 1890.

On May 11, 1880, Richard N. Furguson made homestead entry for the SE. $\frac{1}{4}$ of Sec. 8, T. 29 S. R. 27 E., Visalia, California.

In 1884 he sold and conveyed by warranty deed to Charles E. Coughran one half interest in said land, and said deed was placed of record.

On November 11, 1885, Furguson gave notice of his intention to make final proof and on December 21, 1885, appeared with his witnesses be-

fore the judge of the supreme court of Kern county, California, and made final proof including final affidavit in which he swore

that no part of said land has been alienated except as provided in section 2288 of the Revised Statutes, but that I am the owner of an undivided one-half of the land as an actual settler.

After the final proof was taken and the final affidavit made, the contestant served claimant with notice of contest, charging abandonment and that the said Ferguson

has sold and conveyed the undivided one-half of said tract to one Coughran by warranty deed, and that said conveyance was not made for church, cemetery, or school purposes, or for the right of way of a railroad, but for the purpose of absolutely conveying and transferring the undivided half of said land,

whereupon Ferguson withdrew his final proof, and Coughran reconveyed said interest to Ferguson.

A hearing was had upon said contest and from the testimony submitted thereon the local officers held that the contest should be dismissed, which ruling was affirmed by your office by letter of September 17, 1888, from which the contestant appealed.

The material question presented by this appeal is whether the sale of an undivided interest in a homestead claim prior to final proof will forfeit the right of the claimant, although the proof was withdrawn and the land was reconveyed to the claimant, but after the filing of a contest charging claimant with having alienated part of said homestead claim.

It has been held that a mere contract made prior to final proof, to convey a homestead claim in whole or in part, after making final proof, will not *per se* invalidate the claim but is only a presumption of bad faith which may be rebutted by proof. *Matthiessen and Ward v. Williams* (6 L. D., 95); *Guyton v. Prince* (2 L. D., 143); *Foster v. Breen* (*Ib.*, 232).

The homestead claimant in submitting final proof must make affidavit "that no part of said land has been alienated except as provided in Sec. 2288." See Section 2291, R. S. Your office found from the testimony that it is clearly shown "that before making said conveyance, both parties consulted a real estate agent and notary public in whom they had confidence as to his knowledge in such matters, and they were advised by him that such conveyance could be made without violating the law." But if the claimant was ignorant of the requirements of the law at the date of the conveyance, he must have known what was required by the homestead law at the time he made the final affidavit, because said affidavit required him to swear that he was the "sole *bona fide* owner," etc., and in making said affidavit he struck out the words "*sole bona fide*" and inserted in lieu thereof the words "of an undivided one half." Whatever right the claimant might have had to cure this defect by having a reconveyance made prior to final proof and final affidavit, I am satisfied that the conveyance of part of the

claim prior to final proof, and the attempt of the claimant to make final proof with such title outstanding, was such a violation of the homestead law as would defeat the entry, if contested, and that the right of the contestant could not be defeated by the reconveyance of the outstanding interest to claimant.

The same principle applies where the homestead claimant fails to commence actual residence within the time prescribed by the rules. In such cases, a subsequent compliance with the law will cure the default, but, if the rights of a contestant have attached before the default is cured, the entry will be canceled. *Redding v. Riley*, 9 L. D., 523. So where the preliminary affidavit was made before the clerk of a court, without the requisite residence on the land, the default may be cured by making settlement and residence afterwards; but the intervention of a contestant will defeat all rights under the entry, if filed before the default is cured. *O'Connell v. Rankin* (7 L. D., 245); *Brassfield v. Eshom* (8 L. D., 1).

The question is not, whether the disqualification or failure to comply with the law will defeat the entry, but whether it can be relieved against in the face of a contest. If the contestant could be deprived of the fruits of his contest, in a case like this; there could hardly arise a case in which he could be successful.

It is true that Ferguson had nothing to convey, but he had done all he could to alienate a part of his homestead, and said entry with such outstanding conveyance might have passed to patent but for the contest of Crawford. His entry should therefore be canceled, and Crawford should be allowed the preference right of entry for thirty days.

The decision of your office is reversed.

HOMESTEAD ENTRY—RESIDENCE—SETTLEMENT.

MCDONALD *v.* JARAMILLA.

Residence maintained on public land as the employé of another, who asserts a possessory claim to such land, confers no right under the homestead law.

In the absence of an actual settlement, the ownership of improvements on public land, or use of such land for ranch purposes, does not confer any rights under the settlement laws, nor withdraw the land from entry by another.

A homestead settler may receive credit for residence on land while it was covered by a prior donation entry, under which no right was ever asserted, and which was subsequently canceled.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 7, 1890.

The land involved in this case is the SW. $\frac{1}{4}$ of SE. $\frac{1}{4}$, N. $\frac{1}{2}$ of SW. $\frac{1}{4}$ and SE. $\frac{1}{4}$ of SW. $\frac{1}{4}$, Sec. 5, T. 22, N., R. 31 E., Santa Fe district, New Mexico.

February 19, 1885, Crescencio Jaramilla made homestead entry of this land, and, April 15, of that year, the homestead application of James

McDonald therefor was rejected by the local officers because of the prior appropriation thereof by the entry of Jaramilla. Thereupon, McDonald filed an affidavit setting forth, among other things, that Jaramilla's claim is fraudulent and illegal in its inception, and asking that final proof on homestead of Jaramilla be suspended, and a reasonable time be allowed him to present properly corroborated affidavits as to such charges. Jaramilla having, July 15, 1885, submitted final proof and the same having been, together with McDonald's charges, transmitted by the local officers to your office, a hearing was ordered, which was held October 15, 1885.

In September, 1879, it appears from the testimony at the hearing, one Thomas O. Boggs, a sheep-raiser, fenced a tract of public land embracing that involved herein. He also built upon the land in dispute a small dwelling and corral, and having hired Jaramilla as a herder, moved him and his effects into said house. Jaramilla, as an employe of Boggs, occupied the house until December 5, 1880, when, having been discharged as such employe, he left the place with his family, but, having been re-employed by Boggs, returned thereto February 1, 1881, and remained there in the employ of Boggs until about August, 1881. At the latter date, Boggs sold the improvements on the tract to James McDonald, who was also a sheep-raiser and retained Jaramilla in the place as herder. In December, 1883, McDonald discharged Jaramilla, but the latter continued to occupy the place as his home (and cultivated a part of it) and was so occupying it at the date of his entry and of his proof. Jaramilla built some additions to the dwelling, and built a chicken house, but most of the improvement on the place, consisting of the dwelling, well with pump, and fencing, were put there by Boggs and McDonald. A donation entry embracing the land had been made in the name of Crescencio Jaramilla, October 14, 1880, and canceled by relinquishment, October 21, 1884. Jaramilla denied under oath having either made or relinquished said entry, and claims that his name was used without his knowledge or consent by Boggs or McDonald, or both of them. They testify they had nothing to do either with said entry or its relinquishment.

On the evidence taken at the hearing, the receiver recommended the cancellation of Jaramilla's homestead entry, but the register held, as stated in your office decision—

that, inasmuch as the land in question became subject to entry on the cancellation of the donation entry, and as Jaramilla was legally qualified to make homestead entry, and was the first legal applicant for the land, his entry should be allowed to stand, and his settlement should date from February 1, 1881, as his residence had been continuous since that date.

Your office, by decision of July 12, 1888, held that as at the date of the cancellation of the donation entry, October 21, 1884, Jaramilla's occupancy of the land as an employe had ceased for nearly a year, his right as a homestead settler should begin from that time, and there-

fore rejected his proof theretofore made (July 15, 1883), but directed that he be allowed to make new proof, based upon settlement as of October 21, 1884.

From this decision of your office McDonald appeals.

There is no pretense that McDonald had ever made homestead settlement on the land, and the fact that he had bought and made improvements thereon and had used it as a ranch neither gave him rights as a settler nor withdrew the land from entry by another. (*Willis v. Parker*, 8 L. D., 623). From the time of the cancellation of the donation entry, October 21, 1884, the land was, as held by your office, restored to the public domain and was subject to the homestead entry of Jaramilla, (a qualified entryman), February 19, 1885.

The question in this case is—from what time should Jaramilla be allowed to claim homestead settlement? The doctrine referred to by counsel for appellant, that a tenant is estopped from disputing the title of his landlord so long as he holds possession under such landlord, has no application to this case; but Jaramilla cannot claim to have been a homestead settler so long as he held the land as employe of Boggs and McDonald, respectively. His proof made July 15, 1883, being based upon such holding, was properly rejected. He ceased to hold as employe, however, from the time of his discharge by McDonald in December, 1883, and from that time on held in his own right, and, as he claims, with the intent to secure the land under the homestead law. Did the existence of record of the donation entry prevent his settlement right from relating after the cancellation of such entry to the actual date when he became a homestead settler? The general rule is, 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), and

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 or under the control of another . . . ; for to allow a claim to be initiated under such circumstances would be "to invite forcible invasion of the premises of another, in order to confer the gratuitous right of preference of purchase on the invaders." (*Atherton v. Fowler*, 96 U. S., 513; *E. S. Newman*, 8 L. D., 450, and cases there cited).

The donation entry in this case being in the name of Jaramilla, and there being no other person of the same name shown to exist or claiming the land, was, it may be assumed, either the entry of Jaramilla, or, as he claims, an entry fraudulently made in his name. Even if it was an entry actually made by another person of the same name, such other person was never in possession of the land and never asserted or claimed any rights under the entry. In any of these cases, the rule forbidding the acquisition of settlement rights on lands covered by another entry of record, does not apply, and the reason not existing, the rule itself ceases. In the case of *Adam S. Harris* (8 L. D., 45), there being no in-

tervening adverse claim, a homestead entryman was allowed credit for a period of residence preceding his entry and while he held the land under a timber-culture entry; and, in the case of Owen D. Downey, (6 L. D. 123), a desert land entry on land embraced in an abandoned timber-culture entry of record, upon the cancellation of the latter, in the absence of an intervening adverse claim, was allowed to take effect from the day it was actually made. In consonance with the principles applicable to such cases, as deduced from departmental and supreme court decisions, I am of the opinion, that, as no other right intervened prior to Jaramilla's homestead entry, he should be permitted to claim settlement from the time (December 1883,) when he ceased to hold the land as an employe and commenced holding it in his own right and residing upon it as a homestead settler, and not from the date of the cancellation of the donation entry (October 21, 1884), as held by your office; and you are directed to allow him to make new proof in accordance with this view. On making such proof, he will be required to show full compliance with the law in good faith as to improvements, as well as to the other essentials to the acquisition of title under the homestead law. The title to the improvements on the land put there by Boggs and McDonald is not passed upon herein; if they own these improvements, their remedy would seem to be in the courts.

It is claimed by McDonald that the NW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Sec. 5, T. 2 N., R. 31 E., was not embraced in Jaramilla's homestead entry as originally made, and that said land was therefore subject to his (McDonald's) application. Jaramilla, however, files an affidavit that said land was embraced in his entry when made, and that a line was subsequently—by some one without his knowledge or authority—drawn through the numbers in his entry papers embracing said forty acre tract, and an inspection of said papers is corroborative of this affidavit.

The decision of your office is modified as above indicated.

HOMESTEAD—PRE-EMPTION—ESTOPPEL.

WEAVER *v.* EADS.

A homesteader who has applied for the right to relinquish his entry and take another tract, on the ground of mistake in said entry, is estopped from setting up any right thereunder, as against one who subsequently establishes a residence upon the land embraced in said entry, and files declaratory statement therefor with full knowledge of the facts.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 7, 1890.

I have considered the case of John Weaver *v.* Adelaide Eads on appeal of the former from your office decision of October 30, 1883, refusing to order a re-hearing of his protest against the final proof of said Eads offered in support of her pre-emption declaratory statement for SW. $\frac{1}{4}$, Sec. 29, T. 18 S., R. 49 W., Lamar, Colorado, land district.

It appears from the record that on October 29, 1887, Mrs. Adelaide Eads filed her declaratory statement for the land in controversy, alleging settlement August 9, 1887.

The ground of the controversy appears to be as follows:

On August 15, 1887, Weaver made homestead entry for the said land, but before Mrs. Eads filed her declaratory statement he made application for the cancellation of his entry without prejudice to his right to make entry for the SE. $\frac{1}{4}$ of the same section, upon the ground that through the mistake of the person who located him, he had filed on the land settled upon by another party and not the land which he had intended to enter. This application was pending before the local office when Mrs. Eads appeared to file her declaratory statement, and it appears that the matter of Weaver's entry, was discussed between the local officers and Mrs. Eads and they informed her that Weaver had made application to relinquish his entry and enter other land upon the ground that he had not intended to enter the land upon which she had settled and that it would be perfectly safe for her to put her filing thereon; and the local officers say in their letter of July 25, 1888, that had it not been for the fact of such application and relinquishment they would have ordered a hearing to determine the conflicting rights of said parties.

On March 14, 1888, your office denied Weaver's application to amend his entry, for the reason that his proof did not sufficiently show that a mistake of description had been made in the land entered by him; and upon the further ground that it did not appear that Eads had fully complied with the law and could in consequence by reason of her prior settlement debar Weaver from completing title.

On June 15, 1888, Mrs. Eads made final proof and Weaver appeared and protested submitting his own testimony and that of two other witnesses to the effect that although Mrs. Eads had caused the lumber for the erection of her house to be hauled on August 9th, the day of her alleged settlement she had not slept therein until about August 30, and tending to show that her residence was not continuous upon the land until about November 1, 1887.

Weaver also alleged that his right to said land was prior and superior to that of Eads by reason of his entry dated August 15, 1887.

Upon the evidence taken at final proof hearing the local officers found that Eads had fully complied with the law and dismissed the protest.

Subsequently Weaver transmitted the affidavits of four persons to the effect that Mrs. Eads had not in fact maintained a continuous residence upon the land until about the first of November, 1887, and in his appeal filed August 25, 1888, he asked also for a new hearing upon the ground of newly discovered evidence which it had been impossible to obtain upon the former trial said new evidence being the testimony of the four persons as set forth in the affidavits mentioned above.

It appears from the record that no question is made as to the suffi-

ciency of the improvements made by Mrs. Eads or to the continuity of her residence for the six months next preceding her final proof.

It is only claimed by the appellant that Mrs. Eads did not make settlement upon the land until the 27th day of September, 1887, when the house which had been erected by mistake upon adjoining land was removed to the land in controversy and that she did not establish residence thereon until about November 1, 1887, and that his rights are therefore superior under his entry of August 15, 1887.

Without going into all the propositions of appellant it will be sufficient to say that claimant, Mrs. Eads, filed her declaratory statement for said land and established actual residence thereon after appellant had filed a statement under oath that his entry for said land was made through mistake and after he had relinquished the same to the government or applied to do so, and that this fact was fully known to the claimant Eads when she filed thereon.

These facts alone are sufficient to estop the appellant from now setting up any claim to said land adverse to hers, and as the residence and cultivation seem to have been sufficient, your said decision dismissing protest, refusing a re-hearing thereon and allowing the proof made by Mrs. Eads is affirmed.

RAILROAD GRANT—SETTLEMENT CLAIM—RES JUDICATA.

CENTRAL PACIFIC R. R. CO. ET AL. v. REES.

The local office has authority to order a hearing to determine the right of a homestead applicant as against a railroad grant.

The adjudication of an applicant's claim for a tract of land under one law, is no bar to a subsequent application by the same party, claiming under another law, and upon a different state of facts.

Lands claimed, occupied, and improved by pre-emption settlers at the date of the grant, withdrawal, and definite location, are excepted from the operation of the grant.

Secretary Noble to the Commissioner of the General Land Office, March 4, 1890.

I have considered the case of the Central Pacific Railroad Company v. Thomas Rees, as presented by the appeal of the company and the Bank of Nevada, claiming as successor in interest, from the decision of your office, dated June 14, 1888, holding for cancellation the list of said company made on October 20, 1884, so far as it covered the NE. $\frac{1}{4}$ of Sec. 7, T. 2 S., R. 2 W., M. D. M., San Francisco, California.

The company claimed the land under the grant by the act of Congress, approved July 1, 1862 (12 Stat., 489), and the enlarging act of Congress, approved July 2, 1864 (13 Stat., 356), the withdrawal on map of general route having been ordered by your office on December 23, 1864, which was received at the local land office on January 31, 1865. The right of

the road to the granted lands in said section is held to have attached on January 21, 1870. Township plat was filed July 8, 1878.

Rees offered to file his pre-emption declaratory statement for said land on October 7, 1883, claiming that the land was excepted from said grant, because it was within the claimed limits of certain Mexican grants at the date of the grant. The filing of Rees was rejected by the local office, and their decision was affirmed by your office, whose decision was subsequently affirmed by the Department on the appeal of said Rees. (5 L. D., 62). Thereupon, Rees, by his attorney, filed in your office an application to be allowed to make homestead entry of said land, claiming that it had been resided upon and occupied by *bona fide* settlers since 1860, and requested that a hearing be ordered. The application was duly corroborated by affidavits and documentary evidence. On February 1, 1887, your office returned said application, and accompanying papers, to said attorney and advised him that, in order to secure consideration of his claim, Mr. Rees must file in the local land office his application to enter said land, and, if the same were rejected, he could appeal.

On February 14, 1887, the local officers issued a summons to the land agent of said company, requiring him to appear before the local land officers on April 1, 1887, and contest the right of said Rees to make homestead entry of said tract. Said agent accepted service without objection, on February 25th, same year, and by agreement of counsel the hearing was continued, and the testimony was taken on April 18, 1887. The attorney for said company filed a motion to dismiss said hearing, because the local officers had no authority to order the same. The local officers overruled the motion, and found that the land was excepted from the grant for the benefit of said company.

On appeal, your office affirmed the action of the local office, for the reason that the company had appeared and consented to a continuance without objection, and because the testimony shows that the land was "occupied at date of withdrawal (January 31, 1865), and definite location (January 21, 1870), by pre-emption settlers." Your office, therefore, held for cancellation "the selection of the tract" by said company, and directed the local officers to advise Mr. Rees that he would be permitted to make homestead entry of said land, in case said decision of your office should become final.

It is to be observed that Rees filed on April 18, 1887, his formal application to enter said land under the homestead law, and, hence, there was no error in overruling said motion to dismiss.

The appellant insists that the question of the right of Rees to enter said land is "*res judicata*" by the final decision of this Department. This contention can not be maintained. Rees is not claiming that the land was excepted from said grant, by reason of its status at the date of the grant, as he did in the case already decided. Nor is Rees claiming under the pre-emption law, but he seeks to enter the land under the

homestead law, claiming that the land was excepted from the grant by reason of the settlement claims of pre-emptors made in good faith. In such a case the doctrine of *res judicata* does not apply. *Starkweather v. Atchison, Topeka and Santa Fe R. R. Co.* (6 C. L. O., 19); *Sohn v. Texas & Pacific Ry. Co.* (3 L. D., 122); *St. Paul, Minneapolis and Manitoba Ry. Co. v. Northern Pacific R. R. Co.* (4 L. D., 428); *Southern Pacific R. R. Co. v. Burlingame* (5 L. D., 415); *Blodgett v. Central Pacific R. R. Co.* (6 L. D., 309); *Malone v. Union Pacific Ry. Co.* (7 L. D., 13).

The further objection alleged by appellant, namely, the holding "that said land was within the claim and occupancy of qualified pre-emptors at date of attachment of the railroad right," can not prevail.

The record shows that the company was duly summoned to attend at said hearing, "to show cause, if any there be, why the said Thomas Rees should not be allowed to make homestead entry for said land, he having filed due notice of his intention so to do." At the hearing Rees offered testimony in support of his right to enter said land.

The first witness, J. M. Proctor testified, among other things, that he had known said land "since 1858"; that, at that time, the land was occupied by James I. Randall, who sold his interest "to Mr. Jackson, Mr. Dias, and others," who afterwards occupied the land. To the question, "Did they claim it as pre-emptors," witness answered: "I presume so," and to the question, "Were they qualified pre-emptors, as far as you know?" witness replied, "I do not know." The witness further stated that Randall, Dias and Jackson occupied and used said land continuously for agriculture and grazing, from 1858 up to the time when said Rees settled upon it; that the improvements thereon consist of a small house and barn, fencing, fruit trees; that all of said parties claimed said land "under the public land laws," and that the value of the improvements at the time of hearing was \$2500.

The second witness, C. C. Calvert, testified that he had known said land since May 24, 1855; that it was occupied shortly after witness knew it by James I. Randall, and afterward by said Jackson and Dias, who used the same "as a stock range and for farming;" that Randall's improvements on said land consisted of "a good house," a barn and some fencing; that Randall sold his improvements and interest to Jackson and Dias, who occupied and claimed the land under the public land laws up to the time when said Rees settled thereon; that witness lived within a half a mile of said land, for ten years, "from 1855 to October 1, 1864," and has resided there ever since, except during one year, and has known the land in controversy during all that time.

The next witness, Duncan Cameron, testified that he has known the land in question for thirty-three or thirty-four years, and that for thirty-three years said land has been "used and occupied by parties claiming it as government land." In answer to the question, "So far as you

know was he (Randall) a qualified pre-emptor?" witness said: "Yes, sir. I knew him well. He lived right opposite my stable. I boarded with him a year or more. He was an American." Witness further testified, that, after Randall, the land was occupied by Manuel Dias, until settled upon by Mr. Rees, who has improvements thereon to the value of \$2000.

In addition to the foregoing, Rees offered in evidence "the affidavits, papers and original deed heretofore filed herein by said Rees on the 14th of February, 1887;" also, the summons, with due acknowledgement of service thereon by said company. The railroad company offered no testimony, and the case was closed. The affidavits above referred to tended to corroborate the statements made by witnesses in behalf of the claimant.

Rees swears that his improvements are worth \$2500; that he has been occupying and residing upon said land for the past five years. Another affiant, W. J. Field, swears that he has known said land since 1860, and at that time it was occupied by James I. Randall, who had the larger part thereof enclosed by a fence, down to the year 1866, when he sold the same to Frank Jackson and others; that from 1866 to 1880 the land was occupied and claimed by said Jackson and Manuel V. Dias as pre-emption claimants, who improved said land, and had the larger part under fence; that said Dias had a dwelling house on said land, and resided thereon with his family from the latter part of 1865 to the year 1880, claiming said land as a pre-emptor, and that during all that time said Dias "was a duly qualified pre-emptor;" that since January 1881, said land has been occupied by Thomas Rees and family as a home. The affidavit of Field is corroborated by the joint affidavit of Dias and Jackson, and also four others.

The deed shows that Randall sold his interest in February 1866 to said Jackson, Antonio Pedro and Manuel V. Dias.

The local officers found, "that the land in contest was continuously occupied, claimed and cultivated by pre-emption claimants, under the laws of the United States, from 1863 or earlier down to 1880, and that the said Thomas Rees went into possession in the month of January, 1881, and has lived on said land ever since, and that the said land contained valuable improvements, consisting of a dwelling house, barn, fencing, etc., and that the said land did not inure to the railroad company."

Your office, on appeal, found that the land had "been occupied at date of withdrawal (January 31, 1865,) and definite location (January 21, 1870,) by pre-emption settlers," and affirmed the action of the local officers.

In my judgment, the evidence sustains the findings of the local officers and your office, and shows that at the date of said withdrawal and said definite location, there was such a "lawful claim" to said land as served to except it from the grant to said company.

The fourth section of the amendatory act of Congress, approved July 2, 1864 (13 Stat., 356), provides, *inter alia*, that "any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp land, or other lawful claim," etc.

Such claim being found to exist at the date when the company's right attached, excepts the land from the grant, and it is of no concern to the company what becomes of the land, since it was excepted from its grant. *Kansas Pac. R. R. Co. v. Dunmeyer* (113 U. S., 629).

It surely was not the intention of Congress that lands occupied and claimed under the land laws, and upon which valuable improvements had been made, for a home by the pre-emption claimant, long prior to the date of the grant, and during the time when the withdrawal for the benefit of the company was made, and its map of definite location filed, as well as subsequently thereto, should be given to the company. Such lands seem to be excepted from the grant by the express terms thereof.

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

SWAMP GRANT—INDIAN LANDS.

CALLANAN ET AL. *v.* CHICAGO MILWAUKEE ST. PAUL RY. CO.

The grant of swamp lands to the State of Iowa is a grant *in presenti*, and the fee of all swamp and overflowed land within her borders at the date of the act passed to the State subject to the right of Indian occupancy, and such right being extinguished the right of possession attached to the fee *eo instanti*, and without further grant.

Secretary Noble to the Commissioner of the General Land Office, March 4, 1890.

I have considered the appeal of Callanan, Savery, *et al.* from your office decision of July 15, 1887, holding for rejection the claim of the State of Iowa and its assignees for the SE. $\frac{1}{4}$, SE. $\frac{1}{4}$, Sec. 25, T. 99 N., R. 23 W., in Winnebago county, Iowa.

On June 16, 1886, Knudt Johnson filed in the land office at Des Moines, Iowa, an affidavit, duly corroborated, alleging that the land above described is now and was on the 28th day of September, 1850, swamp in character and unfit for cultivation, without artificial drainage or embankment.

The land in controversy is also claimed by the Chicago, Milwaukee and St. Paul Railway Co., as successors of the McGregor Western Railroad Co., under act of Congress of May 12, 1864, it being within the limits of said grant.

The interest of Callanan and Savery in said land does not clearly appear, but it is stated that they are grantees or successors of the Amer-

ican Emigrant Co., and I infer are grantors of said Johnson, or that their interests are identical with his, and that in fact the whole controversy is between the said Johnson and the said Chicago, Milwaukee and St. Paul Railway Company.

Upon the filing of Johnson's affidavit as aforesaid, your office, by letter "K" of June 26, 1886, ordered that notice be given the State of Iowa, and Winnebago county, as well as the other parties named above, and that a hearing be had to determine the character of the land.

Hearing was duly had, and upon the evidence the register and receiver decided that said land was swamp in character. From this part of the decision there was no appeal taken, and it will be considered as finally determined by their said decision. But they also decided that said land did not inure to the State under the act of September 28, 1850, because the Indian title to said land was not extinguished at the date of the passage of said act.

This part of the decision of the local officers being appealed from, your office by letter "K" of July 15, 1887, affirmed the same and held the claim of the State and its grantees for rejection.

Upon appeal of Callanan, Savery and Johnson, from your said decision, to this Department, they claim, in substance,—

1st. That in September, 1850, the Indians had no title or claim whatever to the land in controversy.

2nd. That if they had any claim at all, it was only a possessory right and that the government had at the date of the passage of this act full power to transfer the fee of said land subject only to the right of occupancy by the Indians, and the Indian occupancy being extinguished in 1853, the right of possession attached *eo instanti* to the fee, and the full title and right of possession then became vested in the grantee of the United States, *i. e.*, the State of Iowa under whom appellants claim.

No appearance is made by the Chicago, Milwaukee and St. Paul Railway Co.

Whatever title or right appellants may have in said land is derived under and by virtue of the act of September 28, 1850, (9 Stat., 519) which granted the swamp and overflowed lands within their borders to the States respectively, to enable them to construct the necessary levees and drains to reclaim such lands.

It is provided in section 1, of the said act,—

That to enable the State of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands, made unfit thereby for cultivation, which shall remain unsold at the passage of this act, shall be, and the same are hereby, granted to said State.

Section 4, provides, that—

The provisions of this act be extended and their benefits conferred upon, each of the other States of the Union in which such swamp and overflowed lands, known as designated as aforesaid, may be situated.

It is said in Public Domain 1883, Chapter 12, that the reasons assigned for this donation to the several States were:

1st. The alleged worthless character of the premises in their natural condition, and the inexpediency of attempting to reclaim them by direct national interposition.

2nd. The great sanitary improvement to be derived from the reclamation of extensive districts notoriously malarial, and the probable occupancy and cultivation that would follow.

3rd. The enhancement in value, and readier sale of adjoining government property

It is true that at the date of the grant the land in controversy and perhaps nearly half of the other land in Iowa was occupied by the Sioux and other Indian tribes, and had been so occupied from time immemorial, and it is true that they had not at that date ceded to the United States the lands in Iowa occupied by them. It is also true that by the treaty of August 19, 1825 (7 Stat., 272) which was made with the Indian tribes occupying several of the western States, the boundaries of these tribes were fixed as between themselves; and in said treaty it was provided that the boundary between the lands of the Sioux on the north and the Sac and Fox tribes on the south, should be a line drawn from the mouth of the Upper Iowa River where it enters the Mississippi, thence up said Iowa to its left fork, up the fork to its source, thence in a direct line to the second or upper fork of the Des Moines river, thence in a direct line to the lower fork of the Calumet (now Big Sioux River), thence down that river to its junction with the Missouri.

If the Indian right or title was of such a character as to except the land from the terms of the act of 1850, then the position taken by your predecessor in the decision appealed from is correct and not otherwise.

The said act grants all the unsold swamp lands, the only reservation from its operation then being swamp and overflowed lands which had been sold prior to its passage.

I do not think that the land in controversy can be said to have been sold to the Sioux Indians by the treaty of August 19, 1825.

It has been uniformly held both by this Department and the supreme court of the United States that the act of September 28, 1850, was a grant *in presenti*. *Beecher v. Weatherby* (5 Otto 517); *State of California* (1 L. D., 312); *State of California* (2 L. D., 644); *W. H. Cushing, et al. v. Michigan* (4 L. D., 415).

In *Beecher v. Weatherby, supra*, it was claimed that the Indian title to the land, at the time of the admission of the State into the Union, with a grant of the sixteenth section of each township for educational purposes, prevented the State from acquiring title to the land in controversy, and much of the reasoning of the court therein is applicable to the case at bar. The learned judge in announcing the opinion of the court therein, said—

The right which the Indians held was only that of occupancy. The fee was in the United States subject to that right, and could be transferred by them whenever they chose. The grantees, it is true, would take only the naked fee, and could not dis-

turb the occupancy of the Indians; that occupancy could only be interfered with or determined by the United States The right of the United States to dispose of the fee of lands occupied by the Indians has always been recognized from the formation of the government, (*Johnson v. McIntosh*, 8 Wheat 543, decided in 1823, and *United States v. Cook*, 19 Wall., 591, decided in 1873, and many intermediate decisions). . . . The possession when abandoned by the Indians attaches itself to the fee without further grant. . . . There can hardly be a doubt that Congress intended to vest in the State the fee to section 16 in any township in the State, 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. The greater part of the State was, at the date of the contract, occupied by different tribes; and the grant of sections in other portions would have been comparatively of little value. Congress undoubtedly understood that at no distant date, the State would be settled by white people and the semi-barbarous condition of the tribes would give place to the higher civilization of our race.

Based upon the same reasoning and authorities I conclude that the swamp land act was a grant *in presenti* and the fee of all the swamp and overflowed land within her borders at the date of the act passed to the State of Iowa, subject only to the Indian right of occupancy, which being extinguished by the treaty of 1853, the right of possession attached itself to the fee *eo instanti*, and without further grant.

This conclusion fully disposes of the case upon the second ground of appeal as above set out, and renders consideration of the first unnecessary.

Your said decision is accordingly reversed.

RAILROAD GRANT—WITHDRAWAL ON GENERAL ROUTE—FILING.

NORTHERN PACIFIC R. R. CO. *v.* FUGELLI.

The withdrawal on general route does not take effect upon land covered by an unexpired pre-emption filing at the date when the map of general route is filed.

That the filing was made without the prerequisite settlement, or that the pre-emptor failed to comply with the law subsequently, are facts that can not be shown by the company to defeat the effect of the filing as against the grant.

The company having filed one map of general route, cannot legally file another amended map of general route, and a withdrawal under such amended map is without legal sanction.

Secretary Noble to the Commissioner of the General Land Office, March 4, 1890.

I have considered the appeal of the Northern Pacific R. R. Co., from the decision of your office dated February 23, 1886, rejecting its claim to the N. $\frac{1}{2}$ of NE. $\frac{1}{4}$ of Sec. 19, T. 17 N., R. 19 E., Yakima land district, Washington Territory. The record shows that said land is within the limits of the withdrawal on general and the amended general route ordered on November 1, 1873, and July 3, 1879, for the benefit of the Northern Pacific R. R. Co. It is also within the granted limits of said company's road as shown by the map of definite location filed on May

4, 1884. On December 11, 1871, one Fenton D. McDonald filed his pre-emption declaratory statement No. 70, for said land, alleging settlement December 6, same year. On May 5, 1884, Peter Fugelli, filed his pre-emption declaratory statement No. 852, upon said land alleging settlement on the 4th of said month. Upon objection being made by the company a hearing was ordered to determine the respective rights of Fugelli and the company. The hearing was had on August 22, 1885, and the local officers rendered a decision in favor of the company. On appeal, your office reversed their action, and rejected the company's claim, upon the ground that the land was continuously claimed and cultivated from December 6, 1871, up to the time of said hearing. It is urged by the company that the filing of McDonald was illegal because it appears that he had not made settlement when he filed his declaratory statement and did not comply with the requirements of the pre-emption law. But the validity of said filing can not be called in question by said company. It was a live filing at the date of the withdrawal upon the filing of the first map of general route and hence served to except the land from the operation of said withdrawal. *Malone v. Union Pac. R'y Co.* (7 L. D., 13). The company having filed one map of general route could not legally file another amended map of general route and the withdrawal thereunder was without legal sanction. *Northern Pac. R. R. Co. v. Miller* (7 L. D., 100).

The question then arises what was the condition of the land at the date of the definite location of the road May 29, 1884.

The evidence relative to the status of said land at the date of the definite location is not satisfactory. That the land was fenced is not denied, but it is urged that the occupancy was under a claim from the railroad company. On December 10, 1887, your office transmitted the application of Pierre Laurendeau to be permitted to file for said land and to intervene as a contestant. In his application, Laurendeau swears that he is a duly qualified pre-emptor; that he is the same Pierre Laurendeau who tendered at said office his filing for said land on May 22, 1885, which was rejected by the local officers on account of the claim of said company; that in the year 1883, and long prior thereto, said land was held by one Charles A. Wilcox, as railroad land, under a filing made by said Wilcox with the general agent of the Northern Pacific R. R. Co.; that said Wilcox enclosed said land and cultivated the same until about the month of February, 1883, when he transferred his right to the same as railroad land to one John L. Amlin who held said land from the month of February, 1883, until the month of February, 1884, when he sold the land to said applicant for the sum of one thousand dollars; that at the time affiant purchased said land it was enclosed by a good fence with other "deeded lands" or lands upon which final certificates had been issued; that a large portion of said land had been seeded to timothy by the grantors of said affiant; that said applicant caused other portions of said land to be seeded and

placed valuable improvements thereon; that he continued to hold said land in the quiet and peaceable possession thereof until he was disturbed by said Fugelli; that on or about May 5, 1885, said Fugelli broke through the affiant's enclosure and forcibly took possession of said land and has ever since held possession thereof; that said Fugelli has repelled said affiant from going upon said land and has threatened to shoot the affiant if he should go upon the land. Said Laurendeau therefore asks that a hearing be ordered to determine his rights in the premises. Inasmuch as the evidence does not satisfactorily show the status of said land at the date of the definite location of the company's road, and in view of the allegations set forth in the application of Laurendeau I have to direct that you cause a hearing to be had after due notice to all parties to determine the status of the land at the date of the definite location of the road and also the facts concerning the settlement and possession of said Laurendeau and said Fugelli. 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.

The decision of your office is modified accordingly.

RAILROAD GRANT—SETTLEMENT CLAIM.

NORTHERN PACIFIC R. R. CO. *v.* KERRY.

The claim of a qualified settler, based on residence, possession, and cultivation existing at date of definite location, excepts the land included therein from the operation of the grant, and the subsequent abandonment of such claim does not affect the status of the land under the grant.

Secretary Noble to the Commissioner of the General Land Office, March 4, 1890.

June 7, 1886, Nancy E. Kerry made application to enter, under the homestead law, the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 2, and the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 1, T. 27 N., R. 36 E., Spokane Falls land district, Washington.

The described tract of land is within the granted limits of the Northern Pacific Railroad Company (act of July 2, 1864, 13 Stat., 365), and the township plat of survey for said township was filed in the local land office March 11, 1885.

The right of said company to the lands granted to it attached on the definite location of its main line of road, October 4, 1880, and it claims the eighty above described in section one, by virtue of its said grant and definite location. Mrs. Kerry claims that the eighty in dispute was not granted to said company, because, at the time the company's right attached to the lands granted, said eighty was not "free from pre-emption or other claims or rights," but, on the contrary, was possessed and held under a valid settlement claim, and therefore was and is excepted from the company's grant.

A hearing was had herein before the local land officers September 6, 1886, and a further hearing April 15, 1887, at which hearings the parties in interest were represented by their respective attorneys. The local officers found, that the evidence did "not show that there was a settlement on the land at the date the grant attached," and decided in favor of the railroad company.

On appeal, your office, on January 27, 1888, found that in July, 1880, one John E. Keener procured a private survey of the described one hundred and sixty acre tract and made certain improvements thereon; that in September following he sold these improvements to J. B. Clinton; that Clinton took immediate possession, and that his claim to said tract was an existing and valid claim on October 4, 1880. And, therefore, your office held that the tract in controversy was, when applied for, June 7, 1886, subject to homestead entry, and rejected the company's claim thereto.

On appeal from this decision, the company, by its attorney, assigns the following errors, to wit:

1. Error to hold that a valid claim existed to the tract in dispute October 4, 1880, and that it was subject to entry when applied for.
2. Error not to have ruled that this land was subject to the grant October 4, 1880, when map of definite location was filed.
3. Error in rejecting the claim of the company, and in not rejecting that of Mrs. Kerry.

In argument on behalf of the company, it is insisted that your office erred in finding, as a matter of fact, that the land in dispute was occupied by a *bona fide* settler at the date of the definite location of its road; and that if the fact as found by your office be admitted, there is error in the application of the law to such fact. That "the 'claims or rights' excepted from the grant are such as had been recorded, or which should subsequently be recorded in accordance with law based upon a prior settlement;" and that, "A mere occupation never ripened into an entry, but on the contrary abandoned by the individual without ever asserting in legal manner a claim or right, does not except the land from the grant, and a third party can not upon such occupancy build a right to enter."

On a careful consideration of the evidence taken at the hearing had herein, I find the following facts to be satisfactorily proven, to wit:

In July, 1880, John D. Keener had the land in controversy surveyed—a private survey—for his son-in-law, and plowed and planted a portion of it in potatoes; the lines of this survey were changed but slightly by the government survey subsequently made; John E. Keener, a son of said John D., being fully authorized by his father to do so, sold said improvements—and such claim as was set up to said tract—to J. B. Clinton, about the last of September, 1880; Clinton thereupon took possession of said tract, and soon afterwards built a cabin on what proved to be, as shown by the subsequent government survey, the E.

$\frac{1}{2}$ of the SE. $\frac{1}{4}$ of said section 2, but so near the line dividing sections 1 and 2, that his yard fence extended over on the land in controversy; Clinton was at the time qualified to make pre-emption or homestead settlement, and he resided continuously on the unsurveyed tract on which he settled for more than two years thereafter, breaking and fencing portions of it; in November, 1882, Clinton sold his possessory right and improvements to Mrs. Nancy E. Kerry's husband, who thereupon moved on the land with his family, and resided there continuously up to the time of his death, in September, 1883; since her husband's death, Mrs. Kerry has built a new house and has lived continuously on the tract for which she applies to make homestead entry, her house being in section 2, and about one hundred and fifty yards from where Clinton built in 1880. Nearly all of said tract is fenced, fifty acres of it is in cultivation—from fifteen to twenty acres of which are on the tract in dispute—and her improvements are valued at not less than one thousand dollars.

It is clear that no settlement right attached to the land in controversy by reason of any act of settlement performed by Keener, and none of the witnesses can testify to the exact date of Clinton's settlement. The witness Frans, in his examination in chief, says that Keener sold to Clinton in September, 1880, to the best of his recollection, and that on purchasing, Clinton took immediate possession of the land. On cross-examination, he says Clinton commenced to build his house in September, 1880.

At the hearing it was stipulated by the attorneys of the respective parties that the testimony of J. D. Sutherlin and Mrs. Kerry might be taken in the form of an affidavit corroborative of the testimony of Frans, and their testimony was accordingly so taken, each of them swearing that the testimony given by Frans "is in each and every particular true."

Witness John D. Keener, aged sixty-four, testifying in relation to the sale to Clinton, says:

My son-in-law declining to make a home on this land, I asked my son John E. Keener to sell the location, as I was going to Walla Walla at the time. He did sell it to Jim Clinton. This was about the last of September, 1880. . . . I am not able to give the date when Clinton went on the land. He went on when I was gone to Walla Walla. I got back from Walla Walla in December, 1880. When I got back Clinton was on the place and had a cabin building on the land and was living in the cabin.

On cross-examination by the attorney for the company, and in answer to the question, "At what time did Mr. Clinton buy from your son the land in controversy? Do you know?" the witness answered, "No, I was in Walla Walla, and do not know the exact date."

From this testimony the local officers inferred that Keener went to Walla Walla the last of September, 1880, and as the grant attached October 4, 1880, they say, "it appears to be more than probable that the grant had attached prior to Clinton's settlement. In any event,

it is not shown that there was a settlement on the land at the date the grant attached." Where the witness says, "This was about the last of September, 1880," the pronoun "this" refers more naturally to the fact stated in the sentence immediately preceding it, to wit, "He did sell it to Jim Clinton," than to what is stated by the witness further back in the sentence preceding the one just quoted.

In addition to this, the Department agrees with your office in finding that the evidence elicited at the first hearing, in the absence of contradictory testimony, shows that Clinton's said purchase was made in September, 1880, that he immediately went into possession, and the same month commenced to build his cabin. It is satisfactorily shown that Clinton possessed the qualifications of a settler on the public lands; that he was engaged in the business of dairying where he settled, was in the actual possession of a part of the tract in controversy, had about twenty acres under cultivation on the tract which is now in section 2, and that he resided continuously for more than two years on the unsurveyed land, where he established his home.

These facts satisfactorily show, as found by your office, "that a valid claim existed to the tract (in controversy) on October 4, 1880." But this settlement claim, established by two years' occupancy, was never recorded. It "never ripened into an entry," or filing. On the contrary, Clinton, when he sold his improvements and possessory right to Kerry, abandoned all right to file for or enter said land. Therefore—it is insisted by the company—Clinton's claim, even though a valid and subsisting claim at the date of the definite location of its road, "did not except the land from the grant."

It is insisted that "a third party can not, upon such occupancy, build a right to enter." This point has been made repeatedly in cases like the one under consideration, and the question raised by it is now well settled. If appellant's right did not attach to the particular tract in controversy on October 4, 1880, no right, by virtue of its grant, can afterwards attach thereto, because its grant being a present grant took effect on the odd numbered sections within the granted limits instantly on the filing of its map of definite location, and the power of the grant was then exhausted. The company's title was not held in suspension, or abeyance, awaiting the possible default of a *bona fide* settler, and, therefore, the fact that Clinton in November, 1882, abandoned all right to perfect his claim to said tract, in no manner affected appellant's rights. *Perkins v. Central Pacific R. R. Co.*, 1 L. D., 336; *Emmerson v. Central Pacific R. R. Co.*, 3 ib., 117 and 271; *Texas Pacific R. R. Co. v. Gray*, ib., 253; *Griffin v. Central Pacific R. R. Co.*, 5 ib., 12; *Ramage v. Central Pacific R. R. Co.*, ib., 274.

The foregoing are a few only of the numerous decisions of the Department enunciating the same doctrine.

Discovering no error in the decision of your office, either in the finding of facts, or in the application of the law to the facts found, the same is affirmed.

AFFIDAVIT OF CONTEST—NOTICE—RESIDENCE.

GREEN *v.* BERDAN.

Where the affidavit of contest charges abandonment and change of residence, and the notice cites the entryman to respond to the charge of abandonment the variance is not such as to prejudice the right of the claimant.

Actual residence is an essential prerequisite to the acquisition of title under the homestead law.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 11, 1890.

I have considered the appeal of Rachel C. Berdan from your office decision of October 20, 1888, holding for cancellation appellant's homestead entry, No. 10,719, made April 15, 1884, for the SE. $\frac{1}{4}$ of Sec. 19, T. 116 N., R. 59 W., Watertown, Dakota, and thus affirming the action of the register and receiver of said district in relation to the same case.

Contestant herein filed his affidavit December 29, 1885, alleging that claimant "has wholly abandoned said tract and changed her residence therefrom for more than six months since making said entry and next prior to date herein."

On June 8, 1886, the register and receiver issued notice summoning claimant to appear at their office February 26, 1886, "to respond and furnish testimony concerning said alleged abandonment." This notice was served on claimant, January 14, 1886.

Prior to taking testimony and during the progress of the contest, attorneys for appellant objected to any evidence being given tending to show that claimant had "changed her residence," for the reason that the notice only called for testimony concerning "abandonment;" and one of the errors complained of, and lengthily and rather adroitly discussed, is that you held that the variance between the affidavit of contest and the notice issued in pursuance thereof was "technical merely"—citing *Shinnes v. Bates* (4 L. D., 425), which seems to sustain appellant's position.

The affidavit of contest was made on form 4-072, and the body of the affidavit, except as to the names of the parties and the description of the land, is printed; the compound predicate, "has wholly abandoned said tract and changed residence therefrom," being the usual allegation of abandonment. One of the ways to abandon a homestead is to change one's residence therefrom; indeed, it is the usual way, and the evidence necessary to prove that claimant had not "abandoned" her homestead was certainly sufficient to show she had not changed her "residence therefrom;" hence, she could not say she was unprepared under the notice to prove she had not changed her residence, if she was prepared under such notice to prove she had not "abandoned." I can not, therefore, agree that you committed any error in holding such

supposed variation as rather technical; and the several cases cited by appellant, in justification of the position assumed as to variance between declaration and writ, or affidavit and notice, are not analogous to the present case, but show distinct and well defined "variance" between affidavit and notice. In the present case there is no such variance—only different modes of expressing the same general idea.

I have carefully read the testimony in this case. Appellant, Green, filed his affidavit of contest a little over twenty months after the entry of Berdan. In this time twenty acres had been broken, and all witnesses say that the land was in good condition and regularly cropped. Prior to the entry, there was on the land a small sod shanty, with a flat board roof. The evidence shows that claimant stayed in this shanty at least one night in September, 1883—prior to her entry. In the spring of 1884 there was placed on the land a frame house, covered with shingles, sided with drop-siding, was floored and had a double roof; it was about fourteen by sixteen feet, and about eight feet high. A heavy wind storm, about June 20, 1885, blew this building down, and a part of the debris was used in the construction of another building of near the same size, erected in the fall of 1885; boards, placed horizontally, made the siding; the roof was made of shingles; tarred paper was used for covering the siding. This house is the present dwelling house.

The evidence shows that claimant improved the land, in the manner aforesaid, but it fails to show that claimant ever established an actual *bona fide* residence on the claim, with intent of making it her home to the exclusion of a home elsewhere. She is an unmarried woman, and lived with her father, a short distance from the claim; and the evidence shows this was her real home, and from there she only made occasional visits to her homestead. The evidence shows she assisted in building the houses and harvesting the crops. In respect to improvements, they were, perhaps, ample. But this does not fill the legal requirements. Claimant's evidence, which is the basis of this decision, shows that her home was with her father; her several visits to the land to keep alive the fiction of residence, do not constitute a compliance with the law.

All the facts and circumstances in this case, in respect to residence, are inconsistent with good faith. This case is similar in some respects to *Strawn v. Maher* (4 L. D., 235); also *Spalding v. Colfer* (8 L. D., 615). However great the improvements may be, actual residence on the land is a prerequisite to entitle one to the public lands. In this case there was no such residence established, but mere visitations to the place.

In view of the above circumstances, your said office decision is affirmed, and the said entry canceled.

FINAL PROOF PROCEEDINGS—EQUITABLE ADJUDICATION.

WILLIAM K. BECK.

An entry may be referred to the board of equitable adjudication under rule 9 of the regulations of July 17, 1889, where the testimony of the witnesses was taken on a day, and before an officer, not named in the notice, but was submitted, together with the testimony of the claimant, at the proper time and before the officer designated.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 11, 1890.

I have considered the appeal of William K. Beck from your office decision of May 15, 1888, regarding Osage entry No. 2323 for the S. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$, N. $\frac{1}{2}$ S. E. $\frac{1}{4}$ and N. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$, Sec. 20, T. 27 S., R. 16 E., Independence, Kansas, in which you require claimant

to make new publication and to furnish the testimony of two witnesses mentioned therein for the reason that the testimony of his witnesses in his proof was taken on a day and before an officer not mentioned in his published notice.

I find that on the filing of the notice of intention to make final proof, the register of said district designated said proof to be made before the probate judge at Fredonia, Kansas, on Thursday May 8, 1884, and that on May 7, the day next before that fixed in the notice, claimant's two witnesses made their affidavits before one Henry Pearman, a notary public; on May 8, the day advertised for making said proof, claimant appeared himself before the probate judge and made his own affidavit and presented the proof of his two witnesses, taken the day before. The proof appeared to be ample in extent and regular in form, and on May 7, 1885, claimant having paid in full for the lands, received the register's final certificate. It thus appearing that the claimant went in person and made his own affidavit on the day as advertised, and at the same time presented the said affidavits of his two witnesses taken the day before, adverse claimants, if any, had ample opportunity to be heard.

Rule 9 of the circular of July 17, 1889 (9 L. D., 123), is as follows:

Where final proof has been accepted by the local office prior to the promulgation of said circular of February 19, 1887, if in all other respects satisfactory, except that it was not taken as advertised, the cases may be submitted to the board of equitable adjudication for its consideration.

There is no adverse claim, and I deem this case as one coming under said rule 9, and, accordingly, direct that it be submitted to the board of equitable adjudication.

TIMBER CULTURE CONTEST—HOMESTEAD ENTRY.

EWING *v.* ROURKE.

If the successful contestant of a timber culture entry does not exercise his preference right, the land becomes subject to appropriation by any qualified person.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 11, 1890.

I have considered the appeal of contestant, Ewing, from your office decision of September 17, 1888, dismissing his protest against appellee, Rourke, on the latter's homestead entry, No. 2963, on the S. $\frac{1}{2}$ NW. $\frac{1}{4}$ and N. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 2, T. 2 N., R. 32 E., La Grande, Oregon.

Rourke's entry was made November 24, 1884. He established a residence on said land February 5, 1885, and the evidence, which is very voluminous, and which I have carefully examined, shows conclusively that Rourke continuously resided on said land from the date of establishing his residence until the contest, and that in the interim he had placed valuable improvements, estimated at \$2,000, upon the land, his improvements being not only substantial, but in good taste, and surpassing the ordinary improvements of other farmers in the vicinity. As to residence and improvements ample good faith is shown.

Contestant alleges claimant's first entry to have been accomplished by trespass; but I can not agree that the proof sustains the charge. I see nothing irregular in the entry. Ewing had attempted to obtain title to this land under the timber-culture laws, and on a contest his entry appears to have been canceled. The successful contestant in Ewing's cancellation seems not to have exercised his preference right, and the land became subject to entry by any other qualified entryman. Rourke exercised a legal right in his entry; his *bona fides* is apparent, and I find no error in your said office decision, which is affirmed. The contest will be accordingly dismissed.

CONTEST—SUSPENDED ENTRY—DEFECTIVE SURVEY.

JOHN BUCKLEY.

A contest, based on a charge of non-compliance with law in the matter of residence and improvements, should not be entertained where a homestead entry is suspended on account of a defective survey.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 11, 1890.

I have considered the case of John Buckley on his appeal from your office decision of August 8, 1888, rejecting his application to contest

the homestead entry of Claus Tidenkan for S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 6, and W. $\frac{1}{2}$, NE. $\frac{1}{4}$, Sec. 7, T. 1 N., R. 4 E., Humboldt, California.

The reason assigned by your office for refusing to allow said contest to proceed is that under the decision of this Department of February 15, 1888, the same can not be entertained as all entries, filings, and locations have been suspended in the said township 1 N., R. 4 E., on account of the survey of said township having been so imperfectly and irregularly made "as to be practically worthless for the purpose of disposing of the land."

It appears from the record that by your office letter of February 10, 1886, based upon the report of John B. Treadwell special agent of the Land Department, all entries, filings and locations were suspended in said township pending a resurvey thereof.

The record shows that on July 11, 1887, C. H. Olmstead and a number of others, who had made homestead entries and filings in a township in which entries had been suspended on account of defective and irregular surveys, and against whose entries contests had been commenced, presented to this Department a petition, alleging that on account of the great changes which were likely to be made in the location of the lines in said township, they felt reluctant to make further improvement for fear they might be lost upon survey, and that as they could not improve they had been compelled to temporarily remove from said lands in order to earn a living for their families.

In your office letter transmitting said petition you recommended that the local officers at Humboldt be directed "to take no action upon contests against homestead and preemption entries situated in those townships, where the allegations are simply failure to comply with the law as regards residence and improvements, until the surveys have been corrected or the suspension removed," and this Department in a letter of February 15, 1888, directed to your office, after quoting said recommendation said, "I concur in said recommendation and you will so direct said officers."

The affidavit of contest presented in the case at bar is based wholly upon the alleged failure of entryman to comply with the law in regard to residence, and the facts are similar in all material respects to those in the said Olmstead petition.

Your said decision is accordingly affirmed.

EQUITABLE ADJUDICATION—INSTRUCTIONS.

Entries submitted for equitable action should be placed under the rule appropriate thereto. In the event that no rule is applicable to a particular entry it should be submitted as "special," with a letter of explanation.

In submitting an entry under the authority of a departmental decision, the authority may be noted, but the appropriate rule should be stated, or the entry placed under the special provision.

Acting Secretary Chandler to the Commissioner of the General Land Office, March 13, 1890.

I enclose copy of correspondence, between the Attorney General and myself, with respect to the submission of suspended entries to the board of equitable adjudication, for your future guidance.

You will learn therefrom that hereafter entries must be submitted under the appropriate rules, or, in event that no rule applies to a particular entry, it should be submitted as "special" with a letter of explanation. This ruling does not conflict with any decision of the Department that may have been made, or that may hereafter be made, in disposing of cases on appeal, nor with the rules governing action on final proofs. In submitting a suspended entry under the authority of such decisions or rules, the authority should be noted in the proper way, but the rule must be stated, or the entry must come under the special provision.

In other words the decisions or rules alluded to, simply direct or warrant the submission of certain entries to the board under a rule specified; or, that by which it is governed, or under the special provision.

The sections of the Revised Statutes and the rules thereunder, governing action on entries properly coming before the board, are few in number, are easily understood and must be adhered to without deviation. If it is found that the rules, from any cause, are not comprehensive enough to apply to all cases of suspended entries contemplated by sections 2450-2457 Revised Statutes, you will prepare and submit to the board such modifications thereof as will meet the conditions now existing.

Attention is especially directed to section 2457 Revised Statutes, which specifies the character of entries which may be submitted to the board as those "where the law has been substantially complied with, and the error or informality arose from ignorance, accident or mistake which is satisfactorily explained." Entries not coming under this provision can not properly be submitted to the board.

Secretary Noble to the Attorney-General, March 6, 1890.

In connection with the action of the board of equitable adjudication on the suspended entries submitted to it, from time to time, by the Com-

missioner of the General Land Office, I have the honor to call your attention to a practice initiated under the last administration, by a former Commissioner, which it appears should be discontinued. I refer to that of submitting suspended entries without placing them under the appropriate rules, or submitting them under the provision for special cases. Such entries are submitted as coming under certain decisions of this Department, covering individual cases, on appeal from the General Land Office. It is true that these decisions have determined that the cases in which they are rendered are proper ones for confirmation by the board, and they have been ordered before it under the proper rule in most instances. The Commissioner is not, however, justified in adapting these decisions to any cases, other than those on which they are based. They were not intended as a guide for the submission of similar cases to the board, but as an equitable disposition of specific appeals. In themselves considered they are not known to the board, although they may be the means of bringing particular cases before it under a given rule. Cases are therefore submitted in error when placed under decisions rather than the rules.

The board is governed solely by rules of its own creation and those it has adopted for the guidance of the Commissioner are thirty in number, with a provision for the submission of cases that may arise and which cannot be brought thereunder, as special cases accompanied by letters of explanation.

For the orderly working of the board it is desirable that the rules which it sanctions be as few and as comprehensive as a spirit of justice and equity would warrant. It is not competent for cases to be submitted for its consideration that do not come under some one of these rules, or under the special provision. Any departure therefrom leads to complexity and confusion which it is desirable to avoid.

As the board by its joint action has heretofore approved cases submitted, as stated above, it seems proper that the instructions to the Commissioner for a discontinuance of the practice alluded to should have the force of our dual action. If then you coincide with the views I have expressed and will so apprise me at as early a date as is practicable, I will instruct the Commissioner accordingly.

DEPARTMENT OF JUSTICE,
Washington, D. C., March 12, 1890.

The SECRETARY OF THE INTERIOR.

SIR: In reply to your letter of the 6th instant, I have the honor to state that the plan proposed by you meets with my approval. I am entirely in accord with your views, and would recommend that you instruct the Commissioner as suggested in your letter.

Very respectfully,

W. H. H. MILLER,
Attorney General.

FINAL PROOF PROCEEDINGS—ACT OF MARCH 2, 1889.

FRANK H. SMITH.

Section 7, act of March 2, 1889, is retroactive in its effect, and legalizes final proof taken within ten days following the date advertised, in pending cases where unavoidable delay has prevented the entryman from making proof on the date specified.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 12, 1890.

Frank H. Smith has appealed from your office decisions of November 3, and December 18, 1888, requiring new notice and a re-offering of his testimony, in the case of his pre-emption cash entry for the SE. $\frac{1}{4}$ of Sec. 13, T. 131, R. 59, Fargo land district, North Dakota.

The above requirement is made upon the ground that the printed notice designated March 18, 1884, as the day on which the claimant's testimony would be offered, whereas such testimony was not given until March 25, 1884—one week later.

Whether or not such requirement on the part of your office was proper when made need not now be discussed, in view of the seventh section of the act of March 2, 1889 (25 Stat., 854), which renders valid

The taking of testimony for final proof within ten days following the day advertised as that upon which 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.

That the section quoted from above is retroactive in its operation is shown by its terms—which are that it shall apply, not where accident or unavoidable delays “*shall prevent*,” but where they “*have prevented*” the making of proof on the specified date. See also case of William Simrall (8 L. D., 581), and Martin Gleeson (9 L. D., 283), in which proof was made much earlier than in the case now under consideration.

In the case at bar it does not affirmatively appear from the record why the delay occurred. But, as the local officers accepted the proof, it is to be presumed that they did their duty (2 L. D., 465), and satisfied themselves that there was justifiable reason for the delay.

Your office decision requiring new proof on the ground that the proof transmitted was not taken on the date advertised is therefore reversed.

TIMBER CULTURE CONTEST—INTERVENING ENTRYMAN.

WEBB *v.* LOUGHREY ET AL. (ON REVIEW.)

While a contest is not initiated until the issuance of notice, yet the contestant by filing the affidavit of contest secures for himself a right to proceed against the entry that can not be defeated by a subsequent relinquishment.

In contest proceedings an intervening entryman is entitled to notice of any action that necessitates the cancellation of his entry.

In case of a contest, based on a charge of non-compliance with law, an intervening entryman, claiming under a relinquishment, is entitled to defend as against said charge.

An entry is subject to contest during the period of extension provided for in section 2, of the timber culture act.

Secretary Noble to the Commissioner of the General Land Office, March 13, 1890.

I have considered the motion, filed by the attorney for José A. Peters, for review of departmental decision of October 3, 1889, in the case of George W. Webb *v.* William Loughrey and said Peters (9 L. D., 440), involving the right to the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 6, T. 11 S., R. 3 W. S. B. M. Los Angeles, California land district.

The motion filed does not present in definite specifications of error the objections to the decision complained of as should be done in all instances.

One objection seems to be that, as claimed in the argument, the decision complained of changes the rule heretofore announced and adhered to by the Department that a contest is initiated by the issuance and service of notice and not by the filing of the contest affidavit. That the decision under consideration is not in conflict with the line of decisions referred to, is apparent and it should not be necessary to call attention to the distinction.

While a contest is not initiated until the issuance of notice yet the contestant by filing the affidavit secures for himself a right to proceed with his contest that cannot be defeated by the execution or filing by the entryman of a relinquishment of his right under such entry. The decision in this case announced no new rule, but followed a principle announced in former decisions as shown by a reading of the cases cited therein. It is admitted after the sweeping statement that this decision "over rules all former decisions of the Department upon the questions at issue" that it is possibly in accord with "a possible construction given to the decisions of the cases of Kurtz *v.* Summers (7 L. D., 46), and Sorensen *v.* Becker (8 L. D., 357), neither of which are in harmony with any other decision of the Department." A careful re-examination of the questions involved in this case, and of the authorities cited in

the decisions complained of in connection with those cited in the motion for review discloses no good reason for a conclusion upon the question of law involved in this case, different from that heretofore reached as set out in the decision complained of.

It is further urged that Peters should have been notified at the hearing upon the charges against Loughrey's entry. It is true that Peters entry having gone to record no steps necessitating the cancellation of said entry should have been taken without due notice to him. He has since, however, intervened in the case and entered a general appearance therein so that this Department had full jurisdiction at the time the decision complained of was rendered. If, however, Peters had set forth such facts as would negative the conclusion that Loughrey had failed to comply with the timber culture law, he might properly have been afforded an opportunity to defend against the cancellation of that entry. This he has not done. It is contended that Loughrey's entry was not subject to contest at the time Webb filed his affidavit because, he, Loughrey, had before that time filed an application as provided for by, and in conformity with the requirements of section 2, of the act of June 14, 1878 (20 Stat., 113) for an extension of time for one year to enable him to replace trees or seeds planted in the spring of 1886. It is strongly contended that during the period of the extension applied for any contest was premature and without authority of law. This contention cannot, however, be sustained. In the case of *Galbreath v. Maguire* (9 L. D., 350), wherein the question as to the effect of an application, under the second section of the timber culture act, for an extension of time was under consideration, it was said—

I am of the opinion that if it (the affidavit for extension) had been made in the best of good faith, and an extension had been allowed by the local officers, yet the entry would be never-the-less subject to contest at any time during the period of such extension.

For the reasons herein set forth the motion for review must be and is hereby denied.

SCHOOL LANDS INDEMNITY SELECTIONS.

L. B. RINEHART.

A school selection resting upon a basis theretofore employed as the basis of a former selection is invalid, but the defect may be cured in the absence of an adverse claim, by the cancellation or relinquishment of the first selection.

Secretary Noble to the Commissioner of the General Land Office, March 13, 1890.

This case comes before the Department upon the appeal of L. B. Rinehart, claiming as grantee of the State of Oregon from the decision of your office of December 26, 1888, holding for cancellation school indemnity selections embraced in list 15, La Grande, Oregon.

It appears from the record that the deficiency in fractional township 17 S., R. 47 E., La Grande Oregon, is 559.25 acres. This deficiency was used as the basis for the selection of certain tracts aggregating four hundred and eighty acres, as list No. 8, and filed in the local office August 1, 1883. On December 11, 1886, while list No. 8 remained uncanceled, the State used the same basis for the selection of other tracts of land in list No. 11. On September 23, 1887, the selections in list No. 8 were canceled. On December 16, 1887, while the selections embraced in list No. 11 remained uncanceled, the State used the same basis in making selection of certain land aggregating three hundred and twenty acres as list 15.

On February 2, 1888, you held for cancellation the selections embraced in list 11, upon the ground that they were made while other selections made upon the same basis (list No. 8) were then pending, and that this deficit could not be used as a basis for a second selection until the former selection had been canceled. By the same decision the selections made per list No. 15 were allowed to stand.

A motion for review of this decision was filed on November 9, 1888, by the attorney of purchasers from the State of lands embraced in list No. 11, stating that the State had disposed of three hundred and sixty acres of the four hundred and eighty acres embraced in said list. In passing upon said motion your office on December 26, 1886, held that although the selections in list No. 11 were invalid when made in 1886 because of the pending selections made in list No. 8, upon the same basis "yet upon the cancellation of the prior selections the latter selections became valid." The decision of February 2, 1888, holding for cancellation the selections in list No. 11 was revoked and the selections embraced in list No. 15 were held for cancellation upon the ground that they are far in excess of the deficiency on which they are based and are consequently invalid.

The appellant in this case is claiming under the State, and as the Department only recognizes the State as the party in interest, the appellant is therefore only entitled to such rights as the State itself may claim.

In the case of *Barclay et al., v. The State of California* (6 L. D., 699), it was held that a school indemnity selection made upon a basis defective in part, is invalid as to the entire selection. In this case part of the basis for the selection in controversy was being also used at the date of the selection as the basis for another selection. The Department held that the entire selection was invalid. It was also held that a defect of such character in a selection may be cured by amendment or relinquishment, but the right of the State in such case takes effect only from the date of the amendment or relinquishment. But in that case there were adverse claimants who had made application to purchase certain parts of the land embraced in said selection, while the defect existed and the Department held that their right to enter any part of said

selection could not be defeated by amendment or relinquishment made with a view to curing said defect.

In the present case there is no one claiming adversely to the State, and hence the State could, under the authority cited, have relinquished the first selection and thereby cured the defect to take effect from the date of the relinquishment. The cancellation of list No. 8, had the same effect as a relinquishment, and the selections embraced in list No. 11 became valid selections from that date. There was no error in the decision of your office of December 26, 1888, revoking the decision of February 2, 1888, on motion for review, and holding that the selections embraced in list No. 11 were valid selections.

But I can see no reason for holding the entire selection embraced in list 15 for cancellation. It is true that this list, like list No. 11, had at the date of selection no valid basis. The defect in list 11 being that at the date of selection the same basis was being used as the basis for selections in list No. 8, and the defect in list No. 15, being that at the date of that selection, the basis was also being used for selections in list No. 11. But if there are no adverse claims I see no reason why the State may not relinquish all of said selections in list No. 15 except eighty acres, which will approximate the balance due to compensate deficiencies in said township after deducting the four hundred and eighty acres in list No. 11.

It is alleged by counsel, in the motion for review, that the State has disposed of three hundred and sixty acres of the four hundred and eighty acres selected in list No. 11, and it is alleged by Rinehart that he is the purchaser from the State of lands embraced in selection No 15. If the State desires to protect her grantees, I see no reason why she may not relinquish both of said selections, and file a new list embracing five hundred and sixty acres from both lists, if there are no adverse claims. If the State so elects, it may file said selections within thirty days from notice of this decision, otherwise the decision of your office holding the selection in list 11 to be valid is affirmed, and that part of the decision holding list No. 15 for cancellation will be modified to the extent of allowing the State to relinquish all of said selection in list No. 15, except eighty acres.

TRAINER *v.* STITZEL.

Motion for review of departmental decision rendered October 23, 1888.
7 L. D., 387, denied by Secretary Noble, March 14, 1890.

RAILROAD GRANT—ACT OF APRIL 21, 1876.

SOUTH AND NORTH ALABAMA R. R. CO. *v.* PANNELL.

The provisions of section 3, act of April 21, 1876, do not extend to an entry made after the expiration of a railroad grant, where said grant is revived, and the road constructed in accordance with the terms of the reviving act, prior to the passage of the act of 1876.

Secretary Noble to the Commissioner of the General Land office, March 14, 1890.

I have before me the appeal of the South and North Alabama Railroad Company from your decision of January 27, 1888, "reinstating William Pannell's homestead entry No. 2,194, which was made June 20, 1868, for the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 18, and NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 19, T. 12 S., R. 1 W., Huntsville, Alabama, but "was canceled, as to the tract in Sec. 19, (on) January 11, 1873, for conflict with the grant of June 3, 1856, for the South and North Alabama Railroad Company."

The tract in section 19 is within the primary limits of the grant in question (11 Stat., 17), which grant "expired by limitation, June 3, 1866." Opposite this tract, the road was definitely located on May 30, 1866.

On June 20, 1868, Pannell made his entry aforesaid, covering, with other lands, such tract in section 19.

On March 3, 1871, the grant in question was "renewed and revived," a period of three years from the date of the act being allowed for the completion of the road. (16 Stats., 580).

On September 18, 1873, said tract in section 19 was listed by the company, and on May 19, 1875, the same was approved to the state for the benefit of the road.

On February 28, 1877, final certificate (646) issued to Pannell under his entry for the tract in section 18, and subsequently he received patent for the same.

Upon this state of facts your office, under date of January 27, 1888, made the following ruling :

Mr. Pannell's entry, having been made after the expiration, and before the revival of said grant, comes within the purview of the 3d section of the act of April 21, 1876, providing that such entries "shall be deemed valid," and therefore his petition (which alleges continuous residence on the land) is granted, and I have this day re-instated his entry for the land in question. Inasmuch, however, as the land has been approved to the State under the railroad grant, no action can be taken on said entry looking to its confirmation or the issuance of patent thereon (see case of *Stinka v. Wisconsin Central R. R. Co.*, 4 L. D., 344). If said land has not been disposed of by the company and a relinquishment of their claim thereto can be procured, further action can then be taken on the re-instated entry, looking to its confirmation.

In my opinion, however, the case is not one in which re-instatement can properly be ordered. In the first place, I cannot concur in the view that the entry here, considered as including the tract in section 19, is one

of those which, under the 3d section of the act of 1876, is to be deemed valid and confirmed accordingly. Before the date of that confirmatory act—to wit, on March 3, 1871, Congress passed an act reviving and renewing the grant, on condition that the road should be completed within three years from the date of said act. This condition the company fulfilled, by completing its road before March 3, 1874, and, consequently, before the passage of the act of April 21, 1876.

The tract in question being within the primary limits of the grant, title thereto vested in the grantee at definite location, and became irrevocable on the fulfillment of the condition, with the consent of Congress, before anything had been done by the government by way of forfeiting the grant. Under such circumstances the act of 1876 cannot be supposed to apply to the entry here in question, whatever its effect might have been, had not the grant been revived, or had the tract involved been unselected indemnity land (as in the case of Alabama and Chattanooga R. R. Co. v. Clabourne, 6 L. D., 427, and other cases there referred to).

For these reasons your said decision is hereby reversed.

RAILROAD GRANT—WITHDRAWAL—ACT OF MARCH 3, 1887.

GALE v. NORTHERN PACIFIC R. R. Co.

A homestead entry of record when the map of general route is filed excepts the land covered thereby from the effect of the statutory withdrawal; and the subsequent cancellation of the entry leaves the land open to entry or settlement until date of definite location.

Former adjudications of the Department are no bar to the re-instatement of an entry under section 3, act of March 3, 1887, if such entry was erroneously canceled on account of a railroad grant.

Where part of an entry is erroneously canceled for conflict with a railroad grant, and the entryman is required to relinquish his claim to such portion of the entry, as a pre-requisite to the perfection of the remainder of said entry, such relinquishment can not be held a "voluntary" abandonment that will preclude re-instatement under the act of 1887.

Secretary Noble to the Commissioner of the General Land Office March 14, 1890.

This case comes before the Department on the appeal of John Gale, from the decision of your office of January 28, 1888, affirming the action of the local office, in rejecting his application to purchase under the act of June 15, 1880, lots 3 and 4, Sec. 3, T. 20 N., R. 3 E., Seattle, Washington Territory.

These lots are part of an odd section within the limits of the grant to the Northern Pacific Railroad Company main line, as shown by map of definite location filed May 14, 1874, and also within the limits of the branch line as shown by map of definite location filed March 26, 1884.

The section is also within the limits of the withdrawal upon map of general route of the main line, made August 13, 1870, and within the limits of withdrawal for the branch line made August 15, 1873.

The tracts in controversy, together with lots 6 and 7 in Sec. 4, T. 20, R. 3 E., were embraced in the homestead entry of Charles W. King, made January 26, 1869, prior to the withdrawal, and said entry was of record uncanceled at the date of withdrawal of August 13, 1870. Gale contested this entry, which was canceled October 4, 1870, and on November 16, 1870, Gale made homestead entry of said tracts. By letter of April 18, 1872, your office canceled said entry "as to the tracts in Sec. 3, for the reason that the odd sections in said township were withdrawn for the Northern Pacific Railroad, under date of October 19, 1870." The local officers were advised in said letter to inform Gale that the residue of his entry would be allowed to stand, or he might, if he should so elect, have his whole entry canceled without prejudice. At that time the ruling of the land office was that the withdrawal took effect from the date of the receipt of the order at the local office, which in this case, was October 19, 1870. King's entry having been canceled October 4, prior to the receipt of the order of withdrawal at the local office, under the ruling of the Department then in force, the homestead claim of King was not existing at the date the order took effect, and the land was not therefore subject to the entry of Gale made on November 16th, subsequent to the receipt of the order of withdrawal at the local office.

But in the case of *Buttz v. Union Pacific Railroad Company* (119 U. S., 55) the court held that when the map of general route is filed with the Secretary of the Interior, the law withdraws from sale or pre-emption the odd sections to the extent of forty miles on each side. This withdrawal operates immediately upon the odd sections not sold, reserved, granted or otherwise appropriated, or to which pre-emption, and other rights and claims had not been attached; but the existence of a homestead entry of record uncanceled at the date of the filing of the map of general route, with the Secretary of the Interior (which in this case was August 13, 1870) excepts the tract covered thereby from the operation of said withdrawal, and the subsequent cancellation of the entry, subjects the land to entry by any other applicant and continues so subject until the date of definite location. Hence the entry of Gale, made November 16, 1870, was properly allowed, and the cancellation of said entry, by the land office April 18, 1872, for conflict with the railroad grant, was erroneous.

Subsequent to the cancellation of his entry as to the lots in the odd section, to wit—July 8, 1873, Gale commuted the balance of his entry to cash which was affirmed August 29, 1873, and patented November 1, 1873. He subsequently made application to be allowed to re-enter said lots, but his application was rejected by your office by letter of May 14, 1877, upon the ground "that a claim initiated prior to withdrawal must also be valid and subsisting at the date of definite location, to defeat

the operation of the grant," and, that the entry of King, although subsisting at date of withdrawal was canceled before definite location and therefore conferred no rights upon Gale. This decision was affirmed by the Department November 16, 1880. Subsequently, to wit, September 20, 1887, Gale made application to purchase said lots under the act of June 15, 1880, which was rejected by the local officers and their decision was affirmed by your office January 28, 1888, holding that—

Gale's entry having been canceled prior to the date of definite location (May 14, 1874) which was prior to the passage of the act of June 15, 1880, there was no right in Gale to purchase under said act.—

From this decision the appeal now under consideration was taken. After said appeal had been filed and transmitted to the Department Gale filed an application to be allowed to make additional homestead entries of said lots 3 and 4, which was transmitted with your letter of May 28, 1889.

From the record now before me it is unnecessary to consider the question whether your office erred in refusing his application to purchase under the act of June 15, 1880, since the application last filed raises the question whether Gale is entitled to be "re-instated in all his rights and allowed to perfect his entry" under the third section of the act of March 3, 1887. (24 Stat., 556). Said 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 settlers 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 reclaimed lands shall be disposed of under the public land laws, with priority of right given to *bona fide* purchaser of said reclaimed lands, if any, and if there be no such purchaser, then to a *bona fide* settler residing thereon.

It is contended by counsel for the road that the withdrawal of the odd sections upon general route, provided for by the sixth section of the act of July 2, 1864, making the grant to the Northern Pacific Railroad Company, is of all the odd sections, without reservation whatever, except in favor of a settler upon any of said odd sections at date of withdrawal, but if he abandons his land before definite location, a second settler cannot acquire a right to the land as against the right of the road; but upon the abandonment of the land it becomes as effectually withdrawn as if such pre-existing right never existed and that such was the ruling of the court in the case of *Buttz v. Northern Pac. R. R. Company, supra*.

It is a sufficient answer to this to say that the Department, since the decision in the *Buttz* case was rendered, has held that a claim existing at date of withdrawal on general route serves to except the land covered thereby from the operation of such withdrawal, so that a subsequent

settler before definite location may acquire a right as against the company by reason of the settlement or claim existing at date of withdrawal. *Northern Pacific R. R. Co. v. Evans* (7 L. D., 131); *Northern Pacific R. Co. v. Anrys* (8 L. D., 362). There is nothing in the decision of the court in the case of *Buttz v. Northern Pac. R. R.*, in conflict with this view.

It is further contended by counsel that the claim of Gale to make re-entry of this land has been adjudicated adversely to him by a former Secretary, whose decision cannot be disturbed, and that he is not entitled to re-instatement under the act of March 3, 1887, because he has relinquished his right to the land.

The former adjudications of the Department, if erroneous, cannot in any manner affect the rights of Gale to be re-instated, because the very object and purpose of the third section of the act of March 3, 1887, is, as stated in the circular of November 22, 1887 (6 L. D., 276)—

To correct all decisions made by the Department or the General Land Office where it shall appear in the examination of any land grant heretofore unadjusted that the homestead or pre-emption entry of a *bona fide* settler was erroneously canceled. In such case 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, whenever it appears that the pre-emption or homestead entry of any *bona fide* settler has been erroneously canceled on account of any railroad grant or of withdrawal of public lands from market.

In answer to the contention that Gale relinquished his claim to this land, it may be said that at the time of the alleged relinquishment the entry had already been canceled by the land office on account of conflict with the railroad grant. It appears that subsequently when he applied to commute the balance of the entry he was required, in order to have his entry approved, to conform to the unnecessary formality of filing a relinquishment of that part of his entry that had already been canceled. The filing of such relinquishment had no force or effect, nor could it be considered against him as a voluntary abandonment of his original entry. Besides it appears from the affidavits of Gale that he settled on lots 3 and 4 in connection with lots 6 and 7 on April 5, 1870, and has ever since said date continued to reside thereon and to cultivate and improve the same.

From the foregoing it appears that Gale's entry, which was valid and subsisting as against the right of the road, on April 18, 1872, was erroneously canceled on account of the railroad grant; that he has not voluntarily abandoned his original entry, and that he has not located another claim or made an entry in lieu of the one erroneously canceled. It is this class of cases that is provided for by the third section of the act of March 3, 1887, which directs that if the—

homestead or pre-emption entry of any *bona fide* settler has been erroneously canceled on account of any railroad grant . . . such settler, upon application shall be re-instated in all his rights, and allowed to perfect his claim by complying with the public land laws.

The question, therefore is not whether he can be allowed to purchase under the act of June 15, 1880, but whether he should not be re-instated to his right to make homestead entry of the entire tract as was ruled by the Department in the case of Michael Donovan (8 L. D., 382). In the case of Donovan the original entry, as in this case, was for part of an odd section within railroad limits and part of an even. In that case, as also in this, the land within the odd section was canceled for conflict with the grant, and the entryman perfected entry as to that part in the even section. The ruling of the Department in this case seems to be decisive of the question herein presented. Your office decision is therefore modified, and you will allow Gale's entry to be re-instated so that he may perfect it upon proof showing compliance with the homestead law, as to continuous residence and cultivation of said tract.

CONTEST—MINERAL RETURN—REVIEW.

MULLIGAN *v.* HANSEN.

The burden of proof is upon an agricultural claimant for land returned as mineral to show the *fact* of its non-mineral character, but he is not required to prove affirmatively that it is agricultural land.

In case of a contest between agricultural and mineral claimants for land returned as mineral, the burden of proof is not shifted to the mineral claimant by the non-mineral affidavit and publication of notice by the agricultural claimant.

Unless it clearly appears that manifest injustice has been done, a motion for review will not be granted.

Secretary Noble to the Commissioner of the General Land Office, March 14, 1890.

A motion has been filed for a review and reconsideration of departmental decision of October 2, 1888, in the case of Andrew Mulligan *v.* H. H. Hansen, involving said Hansen's additional homestead entry, and a portion of his original homestead entry, for certain lands in Sec. 26, T. 16 N., R. 8 E., in the Sacramento land district, California.

The motion is based upon the ground that the Department erred in holding that the return of the surveyor-general, stating the ground to be mineral, placed the burden of proof upon the agricultural claimant; and contends that, were the burden of proof held to be upon the mineral claimant, the testimony fails to show the tract in controversy to be mineral.

Said departmental decision of October, 1888, says:—

It appears that, by means of the extensive use of fertilizers and irrigation, the entryman has so enriched the portion of ten acres reduced to cultivation that it produces excellently, and is more valuable for agricultural than mineral purposes; but as to remainder, the proof utterly fails to show that it has at the present time any agricultural value whatever.

This conclusion seems to be based upon a mistaken idea as to what the agricultural claimant is called upon to prove or disprove. The return of the surveyor-general indicates the tract in controversy to be mineral. This throws upon the agricultural claimant the burden of proving the contrary; to wit, that it is *not* mineral. If it be proven that a given tract is worthless for mineral purposes, it is no more necessary to prove affirmatively that it is agricultural land than that it is timber land, or some other kind of land. The affidavit, which an applicant for land under the general land laws must file (in certain localities), is not an "agricultural" affidavit—it is simply a "non-mineral" affidavit.

Counsel for the agricultural claimant in the case at bar contends that, "where a homestead claimant has published notice of his intention to make final proof on an entry of land returned as mineral by the surveyor-general, this publication and the non-mineral affidavit supporting it shifts the burden of proof to the mineral claimant"—in support of which position he cites Nancy Ann Caste (3 L. D., 169).

This position is correct—so far as it goes. But it should be noticed that the case of Nancy Ann Caste was an *ex parte* case. Where a contestant comes, however, with counter-affidavit, alleging that the tract in question is mineral, such affidavit offsets the non-mineral affidavit of the agricultural claimant, and thereafter the burden of proof is upon the latter to sustain his allegation that the tract is not mineral.

In the case at bar, no new evidence is offered on review. The voluminous testimony taken at the hearing has been re-examined with great care and thoroughness. Much of it is irrelevant to the question at issue; that portion which bears upon the question is very contradictory. The case is in an eminent degree one in which "fair minds might reasonably differ as to the conclusion that should be drawn from the evidence" (Neilson *v.* Shaw, 5 L. D., 387; Mary Campbell, 8 L. D., 331). A review on the ground that the decision is against the weight of evidence will be allowed only where such decision is "clearly against the palpable preponderance of the evidence" (Dayton *v.* Dayton, 8 L. D., 250; Mary Campbell, *ib.*, 331). As was said in the case of Anderson *v.* Bailey (decided by the Department, on review, November 30, 1889, but not reported), "It is not enough to show that the decision *may* have been wrong; it must clearly appear that manifest injustice has been done the party applying for a new trial. . . . Since it does not clearly appear that these findings are erroneous, they will not be disturbed."

The motion for review is denied.

DESERT LAND ENTRY--HAY RESERVATION.

JAMES A. HARDIN.

A desert entry made in good faith, and in ignorance of the fact that the land was included within a hay reservation may stand, where such reservation is subsequently abandoned and the land restored to the public domain.

The fact that land was at one time included within a hay reservation raises a presumption against the non-desert character of the land, but such presumption may be overcome by direct proof.

A desert entry should be referred to the board of equitable adjudication where proof and payment are not made within the statutory period, and such failure is due to obstacles that could not be overcome by the entrymen.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 14, 1890.

I have considered the appeal of James A. Hardin from the decision of your office of December 14, 1888, holding for cancellation his desert land entry No. 122, described in his application as containing 639.95 acres of unsurveyed land in the Carson City land district, Nevada.

The claimant filed a declaration of his intention to reclaim this land, under the desert land act, on the 27th of August, 1877. He paid the cash instalment of twenty-five cents per acre, received the usual certificate, and proceeded, at considerable expense, to irrigate the land, and and prepare it for producing hay and other crops.

On the 18th of December, 1880, in pursuance of previous notice, he appeared before the district officers at Carson City, and offered to make final proof and payment, but his offer was rejected on the ground that the land embraced in his entry was covered by the Fort McDermitt hay reservation, which contained six thousand four hundred acres. This hay reservation, it appears of record, was established by executive order on the 3rd of September 1867, long before the claimant applied to make his entry, and should have appeared on the maps and plats of the local office at the time he filed his application, but did not so appear, and he was permitted to make entry without objection, and had no intimation whatever that his claim was in conflict with a government reservation, until he appeared, as above mentioned, at the local office, to make his final proof and payment.

It further appears that this hay reservation was restored to the public domain, December 1, 1886, by executive order under an act of Congress approved July 5, 1884 (23 Stat., 103).

On the 25th of October 1888, your office, by letter of that date, directed the register and receiver at Carson City to call upon this claimant to show cause, within ninety days, why his entry should not be canceled for failure to make final proof and payment within the statutory period.

On the 11th of November 1888, the register of the Carson City land district, referring to the letter of your office of October 25, 1888, re-

ported that the desert land entry No. 122 made by James A. Hardin, August 27, 1877, is in the United States hay reservation at Camp McDermit, hence the notice above ordered was never given.

After receiving this report, your office, December 14, 1888, held the entry of Hardin for cancellation on the ground of illegality, the said entry having been made subsequent to the above-mentioned hay reservation, and prior to its restoration.

The claimant entered an appeal from this decision, specifying, in effect, that it was error,—

1st. To hold his entry for cancellation on a report from the register of the Carson City land office, without giving him notice or hearing.

2nd. To hold that his entry was illegal because his declaration was made subsequent to the establishment of the military hay reservation, and prior to the restoration of the land to the public domain.

3rd. In failing to hold that the claimant had the right, upon completion of the government surveys, to adjust his said declaration of entry thereto, to complete title and receive patent for the land.

With this appeal he filed an affidavit in which, among other things, he substantially avers that having purchased the interests of a former settler on this land, who had commenced the work of irrigation, he made his entry in good faith and without being notified by the local officers that the land was covered by a hay reservation; that the said land was desert in character and incapable of producing a crop, without irrigation; that he has irrigated and owns the water and ditches for future use; that he has caused a crop of hay to be produced on said land every year since 1878, but one, when the water failed. He further avers that in 1877, when he made his entry, the maps and plats on file in the local office gave no indication that the land embraced in his entry was included in a hay reservation, and he never understood that it was so embraced until December 3, 1880, when, in response to an order from the United States Land Office, he appeared before the local officers at Carson City, with his witnesses, and offered to make final proof and payment, at which time his offer was rejected on the ground that the land embraced in his entry, and which he had reclaimed at an expense of over four thousand dollars, was within the limits of the Fort McDermit hay reservation. He further avers that this land has been in his use and occupation from the time he made his entry, and was never occupied or claimed by the government officials, nor did they cut or remove any hay therefrom.

His affidavit presents a case of considerable equity and merit, and as the lands of the reservation have since been restored to the public domain, in the absence of an adverse claim, the pending controversy is between the government and the claimant, and his entry should not be canceled without giving him an opportunity to show that it was made, in good faith, without knowledge of the reservation, and that he has complied with the provisions of the desert land law in all essential

particulars. The entry in this case having been made on lands within the limits of a government reservation, was clearly illegal at its inception, and could not, in strict law, be allowed so long as the government reservation continued in existence; but as the reservation has been abandoned and the lands restored to public use, the rights and equities of the entrymen, as far as may be proper should be considered and protected.

It may be further said that as this reservation was made for the purpose of supplying Fort McDermit with hay, the presumption is that the lands reserved were hay-producing in character; but as the said reservation extended over a broad area, it may have contained desert lands within its boundaries, and the presumption of the law may be rebutted by direct and positive testimony.

You will, therefore, direct the local officers to notify the claimant that he will be allowed ninety days from the time he receives notice of this decision within which to make final proof and payment. In addition to this proof, he must also show that the land was desert in character at the time when the entry was made, and that he had no knowledge at that time that said lands were within the limits of the Fort McDermit hay reservation. When this proof is submitted to your office, if satisfactory, the entry will be referred to the board of equitable adjudication for its consideration and action.

You will modify the decision of your office in accordance with the views herein expressed.

SWAMP GRANT—CHARACTER OF LAND.

BOYD *v.* STATE OF OREGON.

The grant of swamp lands to the State included such lands as were from their wet and swampy condition not susceptible to cultivation without artificial drainage.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 14, 1890.

I have considered the case of S. S. Boyd *v.* The State of Oregon, upon appeal of the former from your office decision of November 24, 1888, rejecting his application to make timber culture entry for NW. $\frac{1}{4}$, SE. $\frac{1}{4}$, NE. $\frac{1}{4}$, SW. $\frac{1}{4}$, and W. $\frac{1}{2}$ NE. $\frac{1}{4}$ Sec. 17, T. 41 S., R. 25 E., W. M., Lakeview, Oregon, land district.

It appears from the record that a plat of the official survey of said land was filed February 5, 1880, and selection of the same by the State of Oregon under the swamp land grant was filed in the local office January 6, 1883.

On January 23, 1885, the said S. S. Boyd presented his application to make timber culture entry for said land which was suspended by the local office, and the same day he filed an affidavit of contest against the State of Oregon, alleging that none of the subdivisions of said land

were swamp and overflowed within the meaning of the swamp land act "but on the contrary are good arable land and can be successfully cultivated in the staple crop of the country without drainage or reclamation of any kind whatever."

Upon this contest a hearing was ordered which was concluded July 14, 1886.

August 31, 1886, the local officers rendered their joint decision upon the evidence taken at said hearing. In said decision they say,—*inter alia*, that this land,—

is situated in Coleman Valley. This is a small mountain valley almost level and is subject to an annual overflow from the melting of snow and the rainfall from the surrounding mountains. This overflow usually commences sometime from about the last of February to the first of April, owing to the season; and from the evidence of the witnesses who testify as to the condition of the valley at the earliest dates of which we have any testimony, it then continued until the latter part of the summer or perhaps during the entire season.

It appears from the evidence of all the witnesses who testify on the subject that for some years past this land has produced a fair growth of native grass which has been harvested for hay, and while this grass seems to grow well partially inundated yet it could not be successfully harvested without turning off the water sometime before the period for cutting it.

Besides, this valley and the tract in contest is proven now to be much dryer than it was when first seen by some of the witnesses who have testified in regard to its condition. This change has been brought about by two causes. First, several ditches have been cut by settlers for the purpose of taking water from the natural channel through which a large part of the water flows down from the upper portion of the valley over the land in controversy and adjacent land. These ditches are used for irrigating the farms above this land and the overflow of the same is thereby much decreased, and we are of the opinion that at the date of March 12, 1860, it was too wet and marshy to be successfully cultivated in its natural condition.

But the second cause of the change in the condition of the land in this valley including the tract in contest, is, that the grantees of the State of Oregon have by artificial drainage succeeded in reclaiming this land to such an extent that the water is allowed to flow over the meadow while the native grasses require it for their growth, but it is turned off in time to permit the harvesting of the same.

The evidence shows that Irwin Ayers the present claimant, under the State of Oregon has invested a large amount of money in these lands, and in reclaiming them from their swampy condition.

After a careful consideration of this case we have concluded that the tract in contest was on March 12, 1860, swamp and overflowed land within the meaning of the act of Congress of said date.

Upon appeal your office affirmed the decision of the local officers, and in your said office decision after a finding of facts to the same effect as found by the local officers as above given your decision says,—

In addition to the facts shown by the testimony touching the character of these tracts, the records of this office show that they were examined in the field in accordance with the method agreed upon between the government and the State, by U. S. Agent Shackelford and State Agent Abernethy, who reported under oath that these tracts were swamp and overflowed within the meaning of the swamp grant.

This examination it is claimed by the appellant, was made subsequent to the hearing and he alleges that the consideration of the report of such examination by your office was error.

This examination seems to have been made in accordance with the method of adjustment agreed upon as set out in State of Oregon (3 L. D., 334), but without giving any weight to such report I am of the opinion that under the evidence the land was swamp or overflowed within the meaning of the act at the date it took effect.

Appellant contends in his appeal that no competent evidence of any purchase from the State was introduced on the hearing and therefore the State was really in default and no testimony introduced by the parties defending as alleged purchasers from the State should have been received or considered.

Even if this position of appellant was conceded still the evidence introduced on his behalf does not prove the land to have been good arable land which could have been successfully cultivated in the staple crop of the country without artificial drainage, as alleged in his affidavit of contest on March 12, 1860, when the swamp land grant took effect.

The evidence fully warrants the findings of fact by the local officers as given above and the conclusion reached by your office.

Your said decision is accordingly affirmed.

RAILROAD GRANT—FORFEITURE—SELECTION.

PLAETKE v. CENTRAL PACIFIC R. R. CO.

Lands granted to aid in the construction of railroads do not revert after condition broken, until a forfeiture has been declared by the government, either through judicial proceedings or legislative enactment.

Lands included within pending selections by the company are not restored to the public domain by the revocation of the indemnity withdrawal.

Secretary Noble to the Commissioner of the General Land Office, March 14, 1890.

On April 27, 1886, Herman Plaetke filed his pre-emption declaratory statement for the S. $\frac{1}{2}$ SE. $\frac{1}{4}$, NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Section 34 and NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, section 35, T. 36 N., R. 1 W., M. D. M., Shasta land district, California. He offered proof therefor after proper notice April 13, 1888, which shows among other matters, that he made settlement on the land April 20, 1886. The proof was on protest of the said company, rejected so far as it covers land in section 35.

Upon Plaetke's appeal your office by decision dated October 12, 1888, affirmed the action of the local officers.

In your said decision it is said:

Said tract in section 35, is within the thirty mile indemnity limits of the grant of July 25, 1866 to the California and Oregon Railroad Co., now Oregon Branch of the Central Pacific Railroad Company and was ordered withdrawn for the benefit of said company September 6, 1871. On January 7, 1886, the Central Pacific Railroad company applied at your office to select all of said section 35, and upon the rejection of

such application by you appeal was taken to this office, where the case is now pending. The records show no entry, filing or claim of any character to have attached to the said tract which would have excepted it from the operation of the railroad withdrawals nor is any such claim alleged to have existed by the appellant. By the Hon. Secretary of the Interior, said withdrawal was ordered revoked August 15, 1887, but as the company had applied to select said tract prior to such date and to the date of claimant's settlement such revocation does not defeat said company's claim to the tract in question.

Plaetke appealed to this Department. His attorney argues that since the said company utterly failed to comply with the provisions of the granting act respecting the rate of progress to be made in building the road and also failed to complete the same until many years after the time prescribed in said act, the grant was forfeited and the land embraced therein had reverted to the United States, and that therefore the application of the railroad company to select all of section 35, was void and of no effect and could not defeat the right of the claimant. This argument can not be sustained for 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 enactments. *Schulenberg v. Harri-man* (21 Wall, 44); *St. Louis Iron Mountain and Southern Railway Company v. McGee* (115 U. S. 469). See also *Brown v. Central Pacific Railroad Co.* (8 L. D., 589). I also refer to *Dinwiddie v. Florida Railway and Navigation Co.* (9 L. D., 74) where it is held that lands included within pending selections by the company are not restored to the public domain by the revocation of the indemnity withdrawal.

The application of the company to select said section 35, for indemnity is still pending in your office. Your said decision is, therefore, affirmed.

TIMBER CULTURE CONTEST—RES JUDICATA.

HORNBACK *v.* DAILEY.

A second contest, so far as it involves matters finally decided in the first, will not be entertained.

A contest charging non-compliance with the timber culture law must fail if it appears that such non-compliance is due to the wrongful possession of the land by the contestant.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 15, 1890.

I have considered the case of *David J. Hornback v. Joseph Dailey* upon the appeal of the former from your office decision of June 21, 1888, dismissing his contest against the timber culture entry of Dailey for the SW. $\frac{1}{4}$, section 6, T. 8 N., R. 11 W., Bloomington land district, Nebraska.

The record shows that the timber culture entry of one James W. Stinchcomb for the said land was canceled on April 26, 1879, upon the

relinquishment of the entryman filed by Joseph Dailey who had previously initiated a contest against Stinchcomb and that said Dailey, on April 30, 1879, made the entry now under contest, in pursuance of his preference right as a successful contestant.

On April 29, 1879, David J. Hornback filed his pre-emption declaratory statement for the tract, alleging settlement on the 26th of the same month. Subsequently Hornback offered final proof under his pre-emption filing; Dailey having entered his protest a hearing was had, which resulted in the cancellation of Hornback's filing by the direction of this Department, September 30, 1882, and is based upon the preference right of Dailey as a successful contestant.

On January 16, 1883, Hornback commenced a contest against Dailey's entry charging non-compliance on the part of Dailey with the requirement of the timber culture act. The contest was heard and finally dismissed by the direction of this Department by decision of February 24, 1885. Therein it is found that "Notwithstanding the continuous harassment which the entryman was obliged to encounter, it appears that he has in good faith ever since the entry endeavored by all reasonable means to sustain and complete the improvements required of him under the timber culture act."

On June 1, 1885, Hornback again filed an affidavit for the purpose of contesting the entry of Dailey for the same reasons as set out in his first contest. This affidavit was rejected by the local officers "because sufficient time had not elapsed since the last decision to allow Dailey to comply with the law." From this decision no appeal was taken.

On February 17, 1886, Hornback commenced the contest against Dailey's entry now under consideration. The affidavit charges—

that the said Joseph Dailey failed to break or plow five acres of said land during the first year of said entry; claimant failed to break or plow five acres of said land during second year of said entry and has failed to break or plow five acres of said land to present time; claimant has failed to cultivate any portion of said land to crop or otherwise since making said entry; claimant failed to plant five acres of said land to trees, tree seeds or cuttings during the third year of said entry and failed to plant five acres of said land to trees, tree seeds or cuttings during the fourth year of said entry or caused the same to be done and has so failed in each particular to the present time.

So far as this charge has reference to the first three years of Dailey's entry it is identical with the charge in the contest of January 16, 1883, and so far as these three years are concerned the matter is therefore *res adjudicata*.

At the hearing of the contest both parties were present and represented by their respective attorneys.

The testimony of the defendant and of the witness John Eggiman was taken before the local officers; the testimony of the other witnesses was taken partially before John W. Brewster, notary public, and partially before N. B. Vineyard a justice of the peace.

The evidence presented at the trial covered the whole period of

Dailey's entry; the part of it which refers to facts that had occurred before the initiation of the former contest, should be considered only in so far as it may help the court to understand the acts of the parties in relation to the land and to each other, their motives and intentions. This Department can not indirectly review its former decision.

The evidence shows the following facts: Dailey bought of Stinchcomb in the fall of 1878, the latter's improvements on the land, paying therefor, the sum of two hundred and seventy-five dollars. These improvements consisted of a breaking of thirty-nine acres, with some scattering trees growing on it. During the same fall and spring of 1879 before Hornback settled on the land, Dailey replowed of the breaking from twenty-five to thirty acres. He also during the fall of 1878 took up the trees growing on the tract; kept them during the winter on his homestead and planted them again on the land in the spring together with other trees, all covering an area of five acres. The trees were set out twelve feet each way, Dailey intended to plant more trees thereafter between them. The rest of the land replowed by him he sowed to oats; between the trees he planted corn.

The plowing, planting of trees and sowing of oats had been done before Dailey filed Stinchcomb's relinquishment and his own entry, and before Hornback made settlement on the land in April, 1879.

In the spring of 1880 Hornback took possession of the said thirty-nine acres of plowed land with the exception of the small portion planted to trees by Dailey, and ever since that time the contestant has assumed and kept full and exclusive control of the same, raising crops thereupon each and every year. That his filing was canceled by this department September, 1882, that his former contest was finally dismissed in February, 1885, did not disturb him or affect his action in the least. He kept on holding possession of the improvements not belonging to him, with the strong hand. The corn planted by Dailey in 1879 was reaped by the Hornbacks, father and sons; they drove at will with wagon and teams over the ground planted to trees by Dailey; they plowed up a large number of his trees and for the last two years during the winter, spring and fall seasons the trees were injured by the sheep and cattle of others, to whom Hornback had rented parts of the land adjoining the tract planted to trees for pasturage.

The history of the case shows the continued animosity of the parties. Hornback admits that he held out to Dailey the prospect of losing all the labor he, Dailey, might do on the land, and the contestant's actions verify his intentions, that he would use all means in his power to effect such a result. He repeatedly told others that Dailey should never possess the land. The origin of the strife and enmity of the parties was a misunderstanding regarding the purchase of Stinchcomb's improvements and relinquishment. Hornback claims that Dailey had agreed to purchase the same for him, Hornback; this Dailey denies. This explains the actions of Hornback; he meant what he said, Dailey should

not have the land. It is well expressed in your office letter when you state that Hornback endeavored "to take by conquest what he failed to obtain by negotiation."

In spite of all harassment and obstacles, Dailey fairly tried to comply with the requirements of the timber culture act. In 1883 at the time of his arrest, noted above, he set out twelve hundred trees, which were all plowed up by the Hornbacks; in 1884 he planted out eight thousand cuttings three or four feet apart, and in the spring of 1886, he had intended to plant more trees but Hornback having sowed the plowed land to crops he, from fear of another arrest, or trouble, desisted.

The evidence fairly considered shows about five or six acres planted to trees; trees numbering twenty-seven hundred as counted and admitted by one of contestant's witnesses.

I concur in your office opinion, that the entry of Dailey should not be disturbed. To hold otherwise would allow the contestant to take advantage of his own wrong. He held by force the improvements purchased by Dailey and his actual possession of the land and his personal presence there after his filing had been canceled, was against law and a hindrance and continued threat to Dailey. It is not for him under the circumstances as shown in this case, to charge failure on the part of the entryman, to comply fully with the conditions under which the entry was allowed.

Your office decision is affirmed.

SWAMP LAND—PERIODICAL OVERFLOW.

MOYLAN *v.* STATE OF OREGON.

A periodical overflow that subsides in time for cultivation does not render the land subject to the swamp grant.

Secretary Noble to the Commissioner of the Land Office, March 15, 1890.

I have considered the case of Michael Moylan *v.* The State of Oregon, on appeal of the State from your office decision of July 7, 1887, holding for rejection the claim of the said State to the NW. $\frac{1}{4}$, Sec. 32, T. 23 S., R. 31 E., W. M., Lakeview, Oregon, land district.

Said tract was selected by the State and reported to the General Land Office as swamp land in 1883.

In October, 1884, Moylan applied to enter it under the timber culture act, and his application was refused on account of the claim of the State. He then filed affidavit of contest alleging that he is "well acquainted with the land in question and knows that it is not swamp nor overflowed within the meaning of said act, but on the contrary, all of said land is good arable land and can be successfully cultivated in a staple crop without any drainage whatever."

After a hearing at which both parties were represented and introduced evidence, the local officers decided against the State, and upon appeal your office affirmed the decision of the local officers, that the land in question is not of the character contemplated by the swamp grant and does not pass to the State under the same.

As in the case of State of Oregon (2 L. D., 651) the land in controversy is situated in a valley and is subject to an annual overflow in the late winter and early spring months, caused by rains and melting snow in the mountains, and after the subsidence of the overflow the land is dry. The overflow usually subsides in time for the harvesting of the hay which grows upon said land, and its growth is much promoted by such annual inundation. Hay is the principal crop of this and other lands of similar character in that locality.

There are many points of similarity between the case at bar and the case of the State of Oregon, *supra*.

A similar ruling was made in case of State of California (3 L. D., 521), upon a showing that the land was subject to periodical overflow in the winter or spring months, which subsided in time for the cultivation of the land.

Upon the authority of the cases cited above I conclude that the land in controversy is not of the kind contemplated by the swamp land act and that therefore it did not pass to the State of Oregon by the act of March 12, 1860, but is public land of the United States and as such was subject to timber culture entry by Moylan.

Your said decision is accordingly affirmed.

TIMBER CULTURE CONTEST—BREAKING.

MCKENZIE *v.* KILLGORE.

Breaking done on land by a former occupant, inures to the benefit of a timber culture entryman if it is properly utilized under the law.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 15, 1890.

I have considered the case of Roderick D. McKenzie *v.* Orington Killgore on the appeal of the former from your office decision of July 30, 1888, affirming the decision of the local officers, and dismissing the contest against the timber culture entry of Killgore for the SW. $\frac{1}{4}$ of Sec. 25 T. 127 N. R. 65 W., 5th P. M., Aberdeen Land District, South Dakota.

Killgore made his timber culture entry for said land August 23, 1884, and on October 12, 1885 McKenzie filed affidavit of contest against the same, alleging therein that—"Orington Killgore failed to break or plow five acres or any part thereof during the first year of said entry and

that said failure still exists." At same time he filed application for timber culture entry for the same land.

Notice of the said contest was given by publication. On January 19, 1886, a hearing was had, both parties being represented by attorneys, and the local officers decided in favor of the entryman and dismissed said contest. McKenzie appealed; your office decision of July 30, 1888, affirmed said decision. From this decision McKenzie again appealed.

The testimony clearly proves that no work was done on said tract from the date of entry, August 23, 1884, until November 1st to 8th, 1885; but it is also established that prior to August, 1884, about eleven acres had been broken; part in 1882, part in spring and part in fall of 1883; and a portion of it cropped that year; that in 1884 the tract was all backset. In 1885 some nine acres were plowed and about six acres prepared and planted to box elder and ash tree seeds. This was after notice of contest, and was on the land broken in 1882 and part of that broken in 1883. The land was plowed in June, 1884, but not cropped. The evidence shows that there were some weeds on the land in 1884 and more in 1885, but that it was in fair condition when the planting was done in the fall of 1885.

The attorney for appellant insists—1st, That it was error to hold that under the circumstances of the case the entryman had a right to avail himself of this breaking and plowing. His position can not be maintained for it is held if one purchases land which has been broken by another, the spirit of the law is as fully met as if he had personally performed the work. *Gahan v. Garrett* (1 L. D., 137); *Donley v. Spring*, 4 L. D., 542; *Flemington v. Eddy*, 3 L. D., 482. Again, "an entryman may take advantage of breaking upon the land at date of his entry." *Clark v. Timm* (4 L. D., 175).

In *Vargason v. McClellan* (6 L. D., 824), this question was fully discussed. It was there stated that "the entryman can not properly claim credit for the three acres of breaking done by some one else several years before . . . and having been left by the entrymen uncultivated and uncared for in any manner," but the principle announced in *Gahan v. Garrett*, and *Clark v. Timm*, *supra*, was recognized as correct. The length of time between former planting, and the work done by the entryman, being considered as important in determining whether or not the entryman should have credit for such former breaking or plowing. Each case depends upon the fact, whether or not the former plowing was so utilized by the entryman that it inured to the benefit of the land, to be used for tree culture.

I see no substantial reason for disturbing your conclusions in this case, therefore your decision affirming the local officers and dismissing the contest is affirmed.

NOTICE OF CANCELLATION—ATTORNEY.

THOMAS C. COOK.

Notice of the cancellation of an entry given to the attorney of the successful contestant is notice to the contestant and he is bound thereby.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 17, 1890.

On August 9, 1888, Thomas C. Cook made application to file declaratory statement for the NE. $\frac{1}{4}$ of Sec. 34, T. 7 S., R. 38 W., Oberlin, Kansas, and with said declaratory statement filed an application to be allowed to file for said land as a preferred entryman, by virtue of his contest against the entry of H. G. Hovendie, which was canceled for abandonment March 2, 1888, upon the contest of said Cook. He filed affidavits in support of said application, showing that he did not receive notice of said cancellation until July 20, 1888. He also asked that the filing upon said tract of one W. J. Holly, which was allowed July 12, 1888, be canceled. This application was disallowed by the local officers, and by them transmitted to your office.

By letter of October 31, 1888, your office dismissed the application for the cancellation of the filing of Holly, and returned the declaratory statement "for allowance, subject to Holly's prior right."

This tract was formerly embraced in the homestead entry of H. G. Hovendie, which was canceled March 2, 1888, upon the contest of Thomas C. Cook, and the cancellation entered upon the records of the local office, April 2, 1888. On the same day, F. O. Salisbury, attorney for Cook, at Oberlin, Kansas, was notified by registered letter, and the return card shows that he received said notice in due course of mail.

On July 12, 1888, William J. Hawley filed declaratory statement for said tract, alleging settlement April 16, 1888.

On August 9, 1888, Cook offered his declaratory statement alleging settlement August 6. In his affidavit Cook alleges that shortly after the cancellation of the entry, his attorney, Salisbury, absconded from his home in Oberlin, and that his whereabouts are unknown; that he never received notice through his said attorney, or through the local office, and never knew of the cancellation until informed by a neighbor, July 20, 1888. He does not deny that his attorney was notified.

Notice of the preference right of entry given to the attorney of the contestant is notice to the contestant, and he is bound thereby. George Premo, 9 L. D., 70.

This ruling may, and probably does, work a very serious hardship to the claimant. If so, he can blame no one but himself. If his attorney has proved unfaithful to his trust, the Department should not be held responsible therefor nor make Mr. Holly suffer on account thereof. Responsibility must rest somewhere, and as the Department comes in closer relation with the attorney than with the entryman on account of

his having charge of the case, it is but reasonable that the notice should be given him with the expectation that he would look after the interests of his client. In civil proceedings, notice of this character is usually served upon counsel and it is the universal holding of all courts, that the action of the attorney, within the scope of his authority or employment, is binding upon his client. While the Department regrets the fact in this case that counsel has proven so derelict in his duty and sacrificed Mr. Cook's claims, yet it is unable to relieve him from the consequences thereof.

The decision of your office is affirmed.

TIMBER CULTURE APPLICATION—PRELIMINARY AFFIDAVIT.

GEORGE H. MOREY.

The application for a timber culture entry should be presented within a reasonable time after the execution of the preliminary affidavit, and if not so presented a supplemental affidavit will be required.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 18, 1890.

On November 2, 1887, George H. Morey applied to make timber culture entry for the SW. $\frac{1}{4}$ of section 9, T. 56 N., R. 83 W., Buffalo, late Cheyenne, land district, Wyoming. Applicant's non-mineral and timber culture affidavits attached to the application bear date August 22, 1887. The local officers rejected the application "for the reason that the affidavit appears to have been sworn to at a date too long prior to its presentation."

Upon the appeal of Morey from this action of the local officers, your office by decision bearing date December 31, 1888, allowed the claimant, in the absence of any adverse claim, thirty days from notice of your said decision "in which to make an entry of this land upon the payment of the required fee and commissions and the filing of supplemental affidavits made before a proper officer.

The applicant appealed from your office decision to this Department. He takes exception to the demand for supplemental affidavits and requests that his application and accompanying papers be entered of record in the local office as of the date of their presentation.

The application for a timber culture entry should be presented at the local land office within a reasonable time after the making of the affidavits by law required to accompany applications. An applicant is required in the timber culture affidavit to depose among other matters that he has not theretofore made an entry under the timber culture act. If he can unreasonably delay the presentation of the application after the execution of the affidavit what assurance is there that he may not have entered other lands under the said act in the meantime. The

affidavit designed to be a protection against a second entry, ceases to be such if a long time intervenes between the making of it and its presentation to the proper office. Again, in the non-mineral affidavit an applicant swears that to his knowledge, the land is non-mineral in character. Should a long delay after the execution of the affidavit before it is presented be permitted, the affidavit may be true when made but not according to the facts when presented. The applicant may have found or discovered minerals on the land in the meantime.

Morey in the case at bar swore to his affidavits August 22, 1887, they were presented to the local land office November 2, the same year. More than two months therefore intervened and for this delay, the applicant offers no explanation. In absence of a proper explanation I deem such a delay unreasonable and am of the opinion that Morey must file the supplementary affidavits required by your office before his application to enter said lands can be accepted. Thirty days from notice of this decision are allowed to him to file said supplemental affidavits.

Your office decision is accordingly affirmed.

PRE-EMPTION—RESIDENCE—SECTION 3260, R. S.

GEORGE F. HERMANN.

Residence in good faith requires that the claimant shall make his home on the land to the exclusion of one elsewhere.

One who removes from land of his own to reside upon public land in the same State cannot acquire thereby the right of pre-emption.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 19, 1890.

I have considered the case of Geo. F. Hermann on his appeal from your office decision of December 11, 1888, rejecting his application to make pre-emption cash entry for SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, and NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, and E. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 31, T. 31 S., R. 65 W., Pueblo, Colorado, land district.

Claimant filed declaratory statement June 12, 1884, alleging settlement on the 3rd of the same month; he presented final proof on August 11, 1888, and on September 5, the local officers rejected the same for the reason that they were not satisfied from the evidence that claimant had resided upon the land in good faith, and found that his place of residence had been "oftener" upon the adjoining land where his family resided and that he had used said land for grazing and farming more than as a home.

Upon appeal your office in the decision complained of affirmed the local office.

The claimant admits that he stayed during the greater part of the time with his wife and family upon the adjoining land where they had

a comfortable house of several rooms, but he says his wife was "weak-minded" and that when he desired to pre-empt the land in controversy she absolutely refused to leave her comfortable and commodious house and remove to the small log cabin he had erected upon the pre-emption claim, and never did do so.

Claimant says he established his own residence upon the claim and remained there as much as was consistent with his duty to his wife whose condition was such as to make it necessary that he should be near her. His three sons for the most part resided with their mother.

It also appears that from September, 1887, to July, 1888, claimant did not reside upon the said claim at all, except that in the spring he spent three weeks putting in crops thereon and in harvest he put in about three weeks taking care of the crop. The rest of the time he was living upon some other land upon which he made a coal entry for one hundred and sixty acres.

There is no evidence in regard to the mental condition of claimant's wife except his own statements, and they are so meager that I can not conclude from the evidence that his excuse, explanatory of the character of residence established and maintained by him, is sufficient under the rulings of the Department.

I conclude therefore that the residence of claimant was not such as the law requires.

In addition to this I find in the record a statement made by claimant's counsel to the effect that,—

Claimant about eight years ago purchased and moved upon patented land adjoining this claim; afterwards it was asserted that the entry was fraudulent and suit was brought in the U. S. district court to cancel the entry; matters moved slowly and the suit is still pending and undecided. Claimant was somewhat advanced in years and impatient of the delay, in order to secure land for himself and his family filed his pre-emption declaratory statement.

From this statement it would seem that entry is also barred by section 2260, Revised Statutes.

In *Martin Graham* (6 L. D., 767) the claimant had entirely divested himself of title to the land from which he had removed before he offered final proof and yet it was held this did not remove the inhibition.

In *Frank H. Sellmeyer* (6 L. D., 792) it was held that the inhibition extended to the holder of an equitable title to the land from which he removed, and in *Ole K. Bergan* (7 L. D., 472) it was held that it extended to one who held the land removed from under a *contract* of purchase, although not yet paid for.

Your said decision is affirmed.

SIOUX INDIAN LANDS.

INSTRUCTIONS.

Under section 21, act of March 2, 1889, settlers on Sioux Indian lands are required to pay for the land taken by them when, having complied with the law in the matter of residence and cultivation, they submit final proof thereof at the local office.

The price which actual settlers are required to pay for said lands becomes fixed at the date of the original entry, and any subsequent settler on land so entered, and afterwards abandoned, will be required on final proof to pay the same amount per acre as the settler who made the first entry.

Secretary Noble to the Commissioner of the General Land Office, March 20, 1890.

I am in receipt of your communication, dated the 13th instant, relative to the proper construction of section twenty-one of the act of Congress, approved March 2, 1889 (25 Stat., 896), entitled, "An act to divide a portion of the reservation of the Sioux Nation of Indians, in Dakota, into separate reservations, and to secure the relinquishment of the Indian title to the remainder, and for other purposes."

After quoting from said section, the view is expressed by you "that a proper construction of the law would require that the one dollar and twenty-five cents per acre or other cash payment shall be made at the date of the entry by which the land is segregated in favor of the entryman," because: (1) The land, at date of entry, becomes practically the property of the entryman. (2) The payment for the land should be made at date of entry, in the absence of any statutory provision to the contrary. (3) The interest must be paid on the money to the Indians "from the time of sale;" and (4) If the entryman is not required to pay at date of entry, there is no security that payment for the land will ever be made, or that interest will ever begin to run.

That portion of said section twenty-one, relating to the disposition of lands to settlers, reads:

That all the lands in the Great Sioux Reservation outside of the separate reservations herein described are hereby restored to the public domain, except American Island, Farm Island, and Niobrara Island, and shall be disposed of by the United States to actual settlers only, under the provisions of the homestead law (except section two thousand three hundred and one thereof) and under the law relating to townsites: *Provided*, That each settler, under and in accordance with the provisions of said homestead acts, shall pay to the United States, for the land so taken by him, in addition to the fees provided by law, the sum of one dollar and twenty-five cents per acre for all lands disposed of within the first three years after the taking effect of this act, and the sum of seventy-five cents per acre for all lands disposed of within the next two years following thereafter, and fifty cents per acre for the residue of the lands then undisposed of, and shall be entitled to a patent therefor according to said homestead laws, and after the full payment of said sums; but 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 of the United States, shall not be abridged, except as to said sums: *Provided*, That all lands herein opened to settlement under this act remaining undisposed of at the end of ten years from the taking effect of this act shall be taken and accepted by the United States and paid for by said United States at fifty cents per acre, which amount shall be added to and credited to said Indians as part of their permanent fund, and said lands shall thereafter be part of the public domain of the United States, to be disposed of under the homestead laws of the United States, and the provisions of this act.

The precise question to be determined is, when is the settler, under the provision of said section, required to pay the purchase money for the land taken by him? Must he pay when he files his application to enter, or when, having complied with the terms of the homestead laws relative to residence upon and cultivation of the land claimed, he offers his final proof thereof in the local office?

The law does not specifically fix the time of payment. A careful consideration must be given to said act, and other legislation, relative to the same subject-matter, in order to ascertain the intention of Congress, and when that is once ascertained it must control the Department in the execution of the law. "The true intent and meaning of a statute is no doubt always to be regarded; and to such purpose only, says one of the sages of the law, ought the words to be construed." (Potter's *Dwarris on Statutes*, p. 237; *Maxwell on Interpretation of Statutes*, p. 1.)

In construing a statute, it is eminently proper to recur to the history of the times, at the date of its passage, in order to ascertain the reason, as well as the meaning of particular provisions therein. *United States v. Union Pacific Railroad Company* (91 U. S., 79). A brief statement of the circumstances connected with the enactment of said act of March 2, 1889, opening the Sioux Reservation may throw some light upon the question presented.

On April 29, 1868 (15 Stat., 635), a treaty was concluded with the Sioux Nation of Indians and commissioners on the part of the United States, and, by the express terms thereof, it was agreed that a certain tract of land, with designated boundaries, should be "set apart for the absolute and undisturbed use and occupation" of said Sioux Indians and "such other friendly tribes or individual Indians, as from time to time they may be willing, with the consent of the United States, to admit amongst them;" that, in addition to said tract so reserved, and adjoining thereto, other arable land should be set apart by the United States for the benefit of said Indians, so that each Indian desiring to cultivate the soil might have one hundred and sixty acres of tillable land upon which he could reside, or cultivate. The treaty further prescribed the manner of selecting lands by Indians desiring to commence farming, also for the issuance of patents therefor to the Indians, and that any Indian receiving such patent "shall thereby and from thenceforth become and be a citizen of the United States, and be entitled to all the privileges and immunities of such citizens, and shall, at the same

time, retain all his rights to benefits accruing to Indians under this treaty." Provision was, also, made for the education of the Indian children between the ages of six and sixteen, the United States agreeing to provide a school house and teacher for every thirty children, and the Indians promising "to compel" their children to attend school, and said agreement was to continue for twenty years. Other stipulations were entered into, relative to the right of the Indians to occupy territory outside of the reservation, the right to hunt on certain lands therein named, and it was, by the twelfth article of said treaty, expressly declared that—

No treaty for the cession of any portion or part of the reservation herein described which may be held in common shall be of any validity or force as against the said Indians, unless executed by at least three-fourths of all the adult male Indians, occupying or interested in the same; and no session by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him, as provided in article six of this treaty.

By the act of Congress, approved March 3, 1871 (16 Stat., 566; Sec-2079 R. S.), the policy of making treaties with the Indian tribes was changed, with the provision, however, that no lawful treaty obligation should be in any wise impaired.

By the act of February 28, 1877, (19 Stat., 254), the agreement made with said Indians, by the United States, on September 26, 1876, with certain exceptions, was ratified by Congress. The agreement, by article one, definitely fixed the boundaries of the reservation, abrogated article sixteen of said treaty, relative to the "unceded Indian territory," continued in force the provisions of said treaty of 1868, except as modified by said agreement, provided that Congress should, by appropriate legislation, secure to the Indians an orderly government, and that each individual shall be subject to the laws of the United States, and be protected in his rights of property, person, and life. The Indians further promised to select allotments of land, as soon as possible, after their removal to their permanent home. That portion of the agreement (article four), relative to the removal of the Indians to the Indian Territory, was not ratified by said act.

The act of April 30, 1888 (25 Stat., 94), proposed to divide a portion of said reservation into separate reservations and secure the relinquishment of the Indian title to the remainder. This act made provision for six separate reservations, with definite boundaries, confirmed allotments already made, and made further provision for allotting lands in severalty to said Indians, and the issuance of trust patents on said allotments: Provided, that the acceptance of said act by the Indians, as prescribed by said treaty of 1868, should operate as a release of the Indian title. Section seventeen continued the provisions of article seven of said treaty, relative to schools, for twenty years from the date of said act, provided for certain purchases for the benefit of the Indians, and

set apart a permanent fund of one million dollars, the interest of which at five per cent per annum was to be expended for the benefit of the Indians, and to promote their education and civilization. The act also continues in force the provisions of said treaty and agreement, not in conflict with its provisions. Said act also provides for the disposal of the money accruing from the disposal of said lands: namely, that after deducting the necessary expenses attending the sale thereof, the remainder should be applied to the reimbursement of the United States for all necessary and actual expenditures incurred under the provisions of said act, including the creation of said permanent fund, and after that to the increase of said fund. The act required the assent thereto of the different bands of Sioux Indians, as prescribed by the twelfth article of said treaty, due proof of which was required to be presented within one year to the President of the United States, who was required to proclaim the fact of acceptance and consent, and, if proof and proclamation were not duly made, said act was to become of no effect and null and void.

Mr. Secretary Vilas appointed a commission to secure the consent of the Indians to said act, which it failed to accomplish. Subsequently, a large delegation of said Indians came to this city, and stated to the Secretary of the Interior their objections to the provisions of said act. It was believed by said commission that a personal conference with the Secretary would remove the objections of the Indians and secure the acceptance of said act. The conference began October 13, 1888, and ended on the 19th of the same month. On the 15th, John Grass, one of the Indians, stating the objections to said act, complained of the failure of the government to give the annuities promised in the treaty of 1838; also that the boundaries of the reservation had not been correctly given; that the amount to be received for the land was not enough; that the treaty obligations, relative to education, had not been fulfilled by the United States; that the allotment allowed to each Indian was not enough, and should be three hundred and twenty acres. Other Indians complained of the price proposed to be paid for their land. On October 17, Secretary Vilas stated to the Indians in conference, that he had consulted fully with the President upon the objections presented by them, and was directed to say that, if the Indians would consent to it, the President would recommend to Congress to change said act, so that all the lands taken by homesteaders during the first three years after the opening of the reservation shall be paid for at the rate of one dollar per acre; that all the land that is taken in the next two years, after that, shall be paid for at the price of seventy-five cents per acre, and the land which is taken after five years, at fifty cents per acre; that after five years, Congress shall provide that the land not disposed of may be sold in some other way, and Congress may put to the credit of the Indians, in the United States Treasury, an amount equal to fifty cents per acre; that the permanent fund shall

be two million, instead of one, and a payment in cash of twenty dollars should be made within six months after said act takes effect, to every Indian, man, woman, and child, or, if the Indian should so desire, the whole amount should remain in the Treasury. The majority of said delegation did not accept the proposed amendments, but, on October 19, submitted to the Secretary a report, in which they asked to have placed to their credit in the United States Treasury a sum equal to one dollar and twenty-five cents per acre for all the lands, restored, "clear of all expense with interest at five per cent per annum. Objections were made to the provision in said act, relative to the purchase of cattle, for the reason that a sufficient allowance therefor was made in said treaty of 1868, articles eight and ten; to the clause requiring expenses of survey to be borne by the Indians; and to the school clause, which did not provide for the additional ten years of schooling, which they had not received under said treaty of 1868. The Indians asked the Secretary to bring said objections to the attention of Congress, and, if accepted, upon the act, as modified, being again presented for ratification, the Indians would do all in their power to have it duly accepted. (*Vide Ex. Doc., No. 17, 50 Cong., 2d Sess., pp. 227-249.*)

On December 14, 1888, Secretary Vilas, in response to the resolution of the United States Senate, transmitted to that body a copy of the proceedings of said commission, which is embodied in said executive document.

Said act of 1888 having become "null and void," on March 2, 1889, the act now under consideration was approved, by which another effort was made to secure the consent of the Indians to the division and opening up to settlement of said reservation.

The latter act is, in many respects, exactly like the former. The boundaries of the separate reservations are slightly changed; the price to be paid, in lieu of allotments, to the Flandreau band of Indians was raised from fifty cents to one dollar (see section seven). In section eight the amount of land to be allotted to each head of a family was increased from "one quarter-section" to "three hundred and twenty acres." Provision was made in section nine that allotments shall not be compulsory, except as to orphans, unless consented to by a majority of the adult members of the tribe. Section eleven adds the provision of section six of the act of February 8, 1887 (24 Stat., 390), and the quantity of land allowed to each member of the Ponca tribe is doubled by section thirteen. Section seventeen increases the permanent fund to three millions of dollars, prescribes the manner of the disbursement of the interest thereof, and also ten per cent of the principal annually, and provides that "at the end of fifty years from the passage of this act said fund shall be expended for the purpose of promoting education, civilization, and self-support among said Indians, or otherwise distributed among them, as Congress shall, from time to time, determine." In section eighteen the price of

land sold to missionary societies is raised from fifty cents to one dollar and fifty cents per acre, and in section twenty-one the price to be paid by the homestead settler is raised to "one dollar and twenty-five cents per acre for all lands disposed of within the first three years, after the taking effect of this act, and the sum of seventy-five cents per acre for all lands disposed of within the next two years, following thereafter, and fifty cents per acre for the residue of the lands then undisposed of."

The above quotation is inserted in said section, in lieu of the following in the same section of said act of 1888, "of fifty cents for each and every acre." The clause "in addition to the fees provided by law" and the clause "shall be entitled to a patent therefor, according to said homestead laws, and after the full payment of said sum" (or "sums") are in said section in each act. If now, we turn to the provisions of the homestead laws, we find that the applicant for land thereunder is required to file an affidavit, and on payment of five dollars, when the entry is of not more than eighty acres, and on payment of ten dollars, when the entry is for more than eighty acres, he shall thereupon be permitted to enter the amount of land specified. (Section 2290 U. S. Revised Statutes.)

Section 2291 of the Revised Statutes provides that no certificate shall be given "until the expiration of five years from the date of such entry," and the time for making due proof of compliance with the requirements of the homestead law is extended two years, or seven years from the date of the original entry.

By section 2238 of the Revised Statutes, third clause, the homestead applicant is required to pay a commission, "at the time of entry, of one per centum on the cash price, as fixed by law, of the land applied for; and a like commission when the claim is finally established, and the certificate therefor issued, as the basis of a patent."

It thus appears that, by the express provision of the statute, a part of the fees is not required to be paid until the "claim is finally established." This being so, it would seem to be a fair construction of the statute that the sum required to be paid by the applicant, "in addition to the fees," would not become due until the time had elapsed, so that the whole amount of fees could be paid. Moreover, said section expressly excepts therefrom the provisions of section 2301 of the Revised Statutes, allowing the applicant to commute his entry, "at any time before the expiration of the five years," thus, evidently, indicating a purpose on the part of the government to dispose of that portion of the reservation, restored to the public domain, to those actual settlers and only such, as have lived upon their claims the full period of five years, and not merely to secure either the highest price possible, or payment for the lands in the shortest time. The government had regard for the best interest of the Indians and was anxious to secure to them the benefits of civilization, and encourage them to become emancipated from their

tribal relations, and secure to them the rights of citizenship, as well as a fair price for the land to which they owned the right of occupancy.

The objections by the Indians, to the proposed amendments of said act of 1888, as stated by Mr. Secretary Vilas, were principally to the price per acre and the terms of payment. But the objection was not made by the Indians that the settlers were not required to pay the purchase money at the date of original entry, but, as stated by the Indians, themselves, in section two of their objections (Secretary's report, 1888, page 61), there was "no certainty that all of it (the land) would ever be taken at fifty cents per acre, and owing to the difficulty of procuring surveys, complications might arise which would deprive us of the advantage of the most favorable price proposed, namely, one dollar per acre for the first three years."

It was clearly the opinion of Secretary Vilas, that the act of 1888 did not require payment for the land at the date of entry, for he says (Report, p. 65):

The policy of Congress is wisely declared by the act to require the disposition of these lands only to homestead settlers, to be paid for after the full period of five years residence and improvement, which now entitles homesteaders upon the public domain elsewhere to a patent without price.

It must be remembered that a large portion of the land restored was admitted to be of inferior character and unfit for cultivation, and the Indians very naturally feared that they would never be taken by actual settlers. To obviate this objection, it was provided that, after ten years from the date when said act of 1889 became effective, the government should take and pay for all lands then "undisposed of" the sum of fifty cents per acre. There was no such provision in the act of 1888, but in the proposed amendment (section two), submitted by Secretary Vilas, it was stated:

That after the expiration of five years, Congress may provide for any disposition of the lands, remaining unsold, which shall be deemed proper: *Provided*, That not less than fifty cents an acre is placed to the credit of the funds derived therefrom for the benefit of said Indians.

It is quite evident, that it is for the best interest of the Indians, pecuniarily, that as large a portion as possible of said land should be entered within the first three years, for each acre so disposed of brings two and a half times the amount that the government agrees to pay for the land at the expiration of ten years.

It was the opinion of Secretary Vilas that it would be inexpedient to require the settler to pay one dollar and twenty-five cents per acre for the land at any time, for he says (Report, page 65):

To impose generally so large a price as a prerequisite to patent, after the full term of residence and improvement required by the homestead law, would doubtless operate to seriously discourage and retard the progress of settlement.

The construction of said act of 1888, relative to time of payment, by

Mr. Secretary Vilas, if not conclusive, is entitled to much weight. *United States v. Freeman* (3 How. 565).

The suggestion that the Indians would suffer injury by the loss of interest, during the period of time allowed the settler to make final proof, does not impress me forcibly. By the express provision of said section 17, there is appropriated to the use of said Indians, the interest, at five per cent. per annum, on three millions of dollars, the permanent fund, to be distributed under the direction of the Secretary of the Interior, as provided in said section, so that the Indians will receive the use of the interest on said fund from the date when said act became effective. In other words, the United States advances for the use of the Indians \$150,000 annually, without regard to the question whether the proceeds of the lands prior to the expiration of ten years from the date when said act takes effect, shall equal the amount so advanced as interest. If, as is highly probable, the requirement of pre-payment would hinder the settlement of the land during the first three years, every acre not settled upon or disposed of at the end of three years becomes reduced in price to seventy-five cents per acre, and all land not disposed of at the end of five years is reduced to fifty cents per acre, so that, the gain to the Indians in the enhanced price at which said lands would probably be sold would be more than the loss on account of interest on the purchase money from the date of entry to date of payment.

It is also suggested that, while the lands are reduced in price to fifty cents per acre at the expiration of five years, the government does not take them until the expiration of ten years, and does not pay any interest on the purchase money prior to that time.

In my opinion, the price which actual settlers are required to pay for said lands becomes fixed at the date of original entry, and any subsequent settler of land so entered and afterwards abandoned, should be required to pay the same amount per acre as the settler who made the first entry. Such requirement would obviate the inducement that might be held out to settlers to make entry and then, after the expiration of three or five years, as the case might be, relinquish or abandon the same for the purpose of allowing other settlers to enter the lands at a reduced price. Thus, if entry is duly made prior to the expiration of three years, the land so entered is "disposed of" in the same sense of the statute, or "legally appropriated," and the settler must pay for the same when he offers his final proof, at the rate of \$1.25 per acre, and in like manner other lands entered after three years and prior to five years from the taking of the act must be paid for at seventy five cents per acre, and all other lands entered must be paid for by actual settlers at fifty cents per acre. If any remain at the expiration of ten years, the government becomes the purchaser at fifty cents per acre.

It is not always necessary that lands should be sold and paid for in order that they shall be "disposed of." In *Wilcox v. Jackson* (13 Pet.,

513) the United States supreme court considering the effect of an order of withdrawal of a tract of land for a military post, by direction of the President under an act of Congress, held that

Whensoever a tract of land shall have been once legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands, and that no subsequent law, or proclamation, or sale, would be construed to embrace it or to operate upon it, although no reservation were made of it.

This decision was made in 1839, and has been uniformly adhered to ever since. Indeed it has been held by the supreme court that a homestead entry of record, valid in its face, is an appropriation of the land that segregates it from the public domain, and precludes it from a subsequent grant by Congress. *Vide* Hastings and Dakota R. R. Co. v. Whitney, decided December 9, 1889, 132 U. S., 357.

In the opinion of Attorney General Mac Veagh (dated July 15, 1881, 1 L. D., 30), a homestead entry of public lands, prior to the completion of full title in the settler, is an appropriation of the land covered by said entry, so that it could not be set apart by the President for a military reservation.

The construction of said act, as above indicated, is evidently in accordance with the intention of the parties affected thereby, and just alike to the Indians, the actual settlers, and the United States. You will, therefore, cause instructions to be prepared for the local officers, in accordance with the views herein expressed, and submit the same to the Department for approval.

PRE-EMPTION ENTRY—SECOND FILING.

WILLIAM L. CHURCH.

A second filing is not permissible though the first may have been allowed prior to the adoption of the Revised Statutes.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 20, 1890.

I have considered the case of Wm. L. Church on his appeal from your office decision of October 23, 1888, holding for cancellation his pre-emption cash entry for SW. $\frac{1}{4}$, SE. $\frac{1}{4}$ and S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 25, and SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 26, T. 35 N., R. 5 W., Lewiston, Idaho, land district.

It appears from the record that claimant filed declaratory statement June 30, 1884, alleging settlement on the same day and presented final proof and made cash entry for said land September 22, 1885.

Upon examination of his final proof in your office his entry was held for cancellation because it appeared that he exhausted his pre-emptive right by a prior filing and from this decision claimant appeals.

With his declaratory statement in the case at bar claimant filed his affidavit stating substantially that he had filed a former declaratory

statement on March 23, 1872, in Helena, Montana land office, but that at the time he made said filing he supposed that the Northern Pacific Railroad would be built in and through that vicinity and furnish the settlers with railroad facilities, but when the road was finally located some distance north he abandoned the land.

Upon appeal claimant assigns as a specification of error the holding by your office in said decision that the rule announced in *J. B. Raymond* (2 L. D., 854), should be applied, and argues that as Church's second declaratory statement was filed June 30, 1884, and he had stated fully under oath to the local officers the facts connected with his first filing, said officers could not yet have been informed of the decision in said *Raymond* case which was dated February 27, 1884, and that they were therefore acting under the rule in *California v. Pierce* (1 L. D., 442).

If the rule claimed in this argument were to be applied there could be no change of rulings. *Raymond* might have raised the same objection to the ruling in his case.

Your decision is fully sustained by the decisions of this Department in said *Raymond* case and in others since. See *Jonathan House* (4 L. D., 189); *Jose Maria Solaiza* (6 L. D., 20); *Bridges v. Curran* (7 L. D., 395).

Your decision is accordingly affirmed.

PRE-EMPTION—RESIDENCE—CULTIVATION.

ARCHIBALD MCINTYRE.

There is no rule of law or of the Department which requires the pre-emptor's continuous actual personal presence on his claim for six months immediately preceding the submission of final proof.

If the inhabitancy and improvements of the pre-emptor are sufficient to indicate a reasonable compliance with law, failure to show cultivation does not call for rejection of the proof.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 20, 1890.

This is an appeal by Archibald McIntyre from your office decision of January 11, 1887, suspending (with others) his pre-emption cash entry for the NE. $\frac{1}{4}$ Sec. 16, T. 131 N., R. 58 W., Fargo, Dakota, and allowing him sixty days in which to show cause why said entry should not be held for cancellation for failure to reside on the land for six months immediately preceding his pre-emption proof.

The township plat was filed January 17, 1884. The claimant filed his declaratory statement March 19, 1884, alleging settlement on the land May 24, 1883. He made proof and payment for the same at the local office August 27, 1884. It appears from said proof that he was a single man between twenty-two and twenty-three years of age, that he

made settlement on the land May 24, 1883, by building a house; that his residence, established the same day, was continuous except during the winter of 1883 and 1884, when "temporarily absent three months in Canada;" that his improvements, valued at \$250, comprised a house eight by ten feet, with window and door, a well nineteen feet deep and thirty acres broken but not cropped.

The claimant with the exception of three months during the winter of 1883 and 1884, inhabited the land from May, 1883 until he made proof in August, 1884.

Thus it appears that his actual residence on the land continued for about a year. That he was not personally present thereon for six months immediately preceding the date of his proof is not fatal to his entry. There is no rule of law or of the Department which requires the pre-emptor's continuous actual personal presence on his claim for six months immediately preceding the offering of his proof. *Mary A. Shanessy* (7 L. D., 62 and cases cited.)

Although the claimant does not appear to have cultivated the land his improvements are with his residence sufficient in my opinion to indicate a reasonable compliance with the law.

In view of the foregoing, I must find that the present record does not disclose a sufficient warrant for disturbing the entry in question.

PRE-EMPTION ENTRY—SECOND FILING.

EDWARD C. CLEMENT.

The right to make a second filing will be recognized, if through no fault or neglect of the pre-emptor consummation of title was not practicable under the first.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 20, 1890.

Edward C. Clement filed pre-emption declaratory statement March 22, 1888, alleging settlement the same day upon E. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 6, T. 21 S., R. 28 E., Visalia, California. Clement submitted proof at the local office December 20, 1888, showing that with his wife, he had lived on the said land from April 1, 1888, continuously and that his improvements valued at \$300, comprised a house fourteen by fourteen and between twenty and twenty-five acres cultivated.

The said proof was rejected at the local office for the reason that the claimant was thereby shown to have previously made a pre-emption filing in Idaho. This action was sustained by your office decision of January 23, 1889, from which the claimant appeals here.

The claimant's affidavit (not corroborated) filed with his said proof sets out that he made said filing at Boise City, some five or six years ago, that he had been led to believe that a company then organized would bring water to a point near the land embraced therein, that such

scheme was abandoned about two months after said filing, that water for family use was so "deep" that it could not be obtained without such great expense as to make the undertaking wholly impracticable, that there being no natural stream of water within four miles he and other settlers in the neighborhood were obliged to abandon their claims.

If the matters thus outlined are in accord with the actual facts, and if, as the claimant avers in effect in his affidavit, the land covered by his filing last referred to became by reason of difficulty in obtaining water practically uninhabitable, he should not in my opinion, be held to have exhausted his pre-emption right.

The right to make a second filing will be recognized where through no fault or neglect of the pre-emptor consummation of title was not practical under the first. *Paris Meadows et al.* (9 L. D., 41).

If therefore the claimant's failure to complete his claim under his former filing, was not the result of his fault or neglect, his present filing should not be disturbed.

The claimant will accordingly be permitted within a reasonable time to file additional evidence to show that his abandonment of the land embraced in his said former filing was brought about by matters beyond his control. Upon the evidence thus produced you will re-adjudicate the case.

In the event of the claimant's failure to furnish the evidence hereby required his said filing will stand canceled.

The decision appealed from is so modified.

PRACTICE—EVIDENCE—RESIDENCE.

STOWELL *v.* CLYATT.

An objection to the manner in which depositions are transmitted and filed comes too late when raised for the first time on appeal to the Department.

Residence in good faith requires the establishment of a home on the land to the exclusion of one elsewhere.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 20, 1890.

August 14, 1885, William M. Stowell entered under the homestead law (H. E. 15, 882) lot 8, Sec. 34, T. 33 S., R. 17 E., Gainesville district, Florida. March 29, 1886, William C. Clyatt made an affidavit of contest of said entry, charging that said land had not been settled and resided upon nor improved and cultivated by Stowell as required by law. On hearing held, August 18, 1886, the local officers found from the testimony adduced by the parties that, as charged in the affidavit of contest, Stowell had "not complied with the homestead laws" and "therefore recommended that his entry be canceled." Your office, by decision of November 8, 1888 (from which appeal is now taken), concurred in the finding of the local officers.

On examination of the evidence, I find the facts to be as found by your office and the local officers, namely, that Stowell went upon the land in November and December, 1885, and put barbed wire on the top of an old fence already erected by some one prior to Stowell's entry and cut the weeds and brush off an acre and a half or two acres of old clearing on which he planted orange trees; that in February, 1886, he built a shanty or shelter on the land, consisting of four posts with only three sides closed and no windows or floor, covered with palmetto fans, which afforded little protection against rain, and containing no furniture; that he *visited* the land sometimes as often as once a week, but spent nearly all his time "across the bay" on the main land, where he was (and appears to have been before making entry) engaged in raising vegetables for market. He claims that he could not make a living upon the claim and that his absences were necessary for that purpose. His improvements were not such as to render the claim habitable, and hence do not indicate an intent to reside thereon. On the state of facts disclosed by the record, I find no sufficient ground for setting aside the concurring decisions of your office and the local officers.

The testimony in the case was taken by depositions, and the appellant assigns as error authorizing the reversal of your office decision, that "nothing appears in the record showing said testimony was transmitted to the local officers as provided by Rule of Practice 30, or that it was opened by them and the endorsement made as required by Rule 31." It is not claimed that the testimony adduced was not that actually deposed to by the witnesses, or that appellant has been in any manner injured, and the objection applies equally to the testimony on both sides. If, as a matter of fact, said Rules of Practice were not complied with, objection should have been made *in limine* before the local officers to the admission in evidence of the depositions. Such objection comes too late when raised for the first time on appeal to this Department, and the appellant, by not making the point before the local officers, and introducing his own testimony, which was also affected by the alleged irregularity, must be held to have waived it and is estopped from now setting it up.

The decision of your office is affirmed.

PRE-EMPTION ENTRY—IMPROVEMENTS.

CHARLES L. GARNSEY.

The fact that the improvements are inconsiderable in value does not in itself warrant a finding of bad faith, if the final proof is satisfactory in other respects.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 20, 1890.

I have considered the case of Chas. L. Garnsey on his appeal from your office decision of November 20, 1888, rejecting his final proof in support of his pre-emption cash entry for E. $\frac{1}{2}$ NW. $\frac{1}{4}$ and E. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 15, T. 4 N., R. 32 W., McCook, Nebraska, land district.

It appears from the record that claimant filed his declaratory statement April 21, 1885, and submitted final proof October 15, 1885.

His evidence on final proof is to the effect that he made settlement upon the land April 10, 1885, by commencing the erection of a house and upon its completion within three or four days thereafter, established his residence therein and had made his residence continuous up to final proof.

He was unmarried, and the house built and occupied by him was a frame twelve by twenty-four feet with a door and window. The proof also shows that he broke six acres of ground and raised a crop of corn and potatoes thereon.

In your said decision the sole reason assigned for the rejection of proof is that "improvements, valued at \$50 to \$75, consisting of a frame house twelve by fourteen feet are not conclusive of good faith."

The fact that in addition to the erection of a house of reasonable size claimant had broken and cultivated six acres of ground, seems to have been overlooked in your said decision.

The fact that the improvements were as stated is not sufficient of itself to sustain a finding of bad faith or the rejection of proof under all the evidence in this case.

Your said decision is accordingly reversed.

TIMBER CULTURE CONTEST—AGENT.

DANFORD *v.* ELLSWORTH.

It is the duty of the entryman to properly protect the trees planted from the inroads of cattle and horses.

The government looks to the entryman only, and if the requirements of the law are not complied with, the entry must be canceled, though such non-compliance may be through the fault of the entryman's agent.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 21, 1890.

I have considered the case of Frank Danford *v.* Albert S. Ellsworth upon the appeal of the latter from your office decision of October 10, 1888, holding for cancellation his timber culture entry for the SE $\frac{1}{4}$ section 8, T. 12 S., R. 23 W., Wa Keeney land district, Kansas.

Ellsworth made timber culture entry for the said land November 11, 1879, and Danford commenced his contest against the entry March 18, 1886. The contest affidavit was amended on motion of the contestant and against the objection of Ellsworth June 21, 1886; it is charged that the said Ellsworth—

Has not since date of said entry November 11, 1879, to this date inclusive, planted or caused to be planted and kept growing or planted ten acres or any part or parcel of ten acres of trees upon said tract nor has he planted or caused to be planted seeds of trees within said mentioned period upon ten acres of said tract or any part thereof

and kept the same growing as is required by law; that no tree, switch or shrub of whatever size or character is now growing or has ever grown upon said tract of land, notwithstanding the wet and exceedingly favorable weather of the last three years in this county, and wholly failed to plant ten acres or any part of said land to cuttings since date of entry; that said entry was made and is now held for speculative purposes by said Ellsworth.

On the day set for the hearing, upon contest affidavit as amended, August 5, 1886, the contestant appeared in person and by his attorney. The defendant by his attorney, appeared specially for the purpose of moving to dismiss the contest for the reason that "no legal service of notice was ever made on him by publication or registered letter." The motion having been overruled the hearing proceeded on the said day and the testimony introduced on the part of the parties, plaintiff and defendant, was taken and heard before the local officers in person.

The local officers determining the case upon the testimony rendered their decision that "the testimony shows that said Ellsworth has not complied with the requirements of the timber culture law; that he has had said claim for several years and has not made any effort to cultivate or protect the seeds that he did plant." They recommended therefore the cancellation of the entry.

Ellsworth appealed. Your office by your said decision of October 10, 1888, affirmed the action of the local officers and held the entry for cancellation.

Again Ellsworth appealed. The alleged errors specified in his appeal go exclusively to the merits of the case; his dilatory pleas and other motions and objections made before the local officers at the trial are, therefore, waived, and can not be considered in the determination of the case before this Department.

The evidence shows the following facts: The claimant is a resident of Providence, Rhode Island, and never attended personally to his claim, its cultivation or the planting of trees or tree seeds. He acted through his agents exclusively; and it is shown by these and other witnesses that ten acres of the land were planted to tree seeds in the spring of 1883; this planting being a total failure, the same ten acres were thereafter replanted to tree seeds twice, fall 1884, and fall 1885, but each time to no purpose for on the day of the hearing the land was bare of trees with the exception of a few young locust, discovered on the land shortly before the day of trial by a special agent, E. L. Thomas. This agent says "I did not see a dozen." The cause of the failure of the growth of trees from the seeds planted is not positively shown. It appears that the land is well adapted to the growth of trees, that the weather during the three years before trial was favorable with the exception of perhaps a spell of dry weather for three weeks during the summer of 1885; and that in the vicinity of the tract on other lands during the said period trees were successfully grown. After more than six years from the day of entry this land is practically without trees and defendant's agents fail to give a reasonable explanation for such

an unfavorable result. In the case of *Phelps v. Rape* (7 L. D., 47), it is said "while the failure to have trees growing is not conclusive evidence of default on the part of the claimant yet it is *prima facie* evidence of such default and casts upon him the burden of showing that such failure is without fault on his part." It seems that this rule should be applied to the case at bar.

The failure to grow trees on the land after the planting and replanting of seeds three times may perhaps be explained by the neglect on the part of the agents to take proper care of the claim after the seeds were planted. The land was not fenced and it is shown by the testimony of the contestant, himself, that the cultivated part of the tract planted to tree seeds was continually overrun by cattle and horses. At times as many as forty head were seen on the claim. He says

It (the land) is literally honeycombed with the tracks of animals and I have frequently seen horses lariatied upon the cultivated portions. No man could hope or would presume to raise trees under such circumstances.

This testimony is not directly contradicted by the witnesses on the part of the defence but the attempt is made to ward off the effect of it by showing that the board of commissioners of Trego county, the county in which the land is situated, on September 25, 1879, passed a resolution as they might under the laws of the State of Kansas, forbidding horses, mules, asses or any neat cattle, hogs or sheep to run at large in the said county. This resolution will not protect the agents from the charge of negligence in allowing the inroads of cattle and horses upon the lands planted to trees, and the entryman, if he attends to his duties regarding his timber culture claim through agents is chargeable with their neglect. If they, for him, fail to comply with the requirements of the law, he is responsible to the government. The government looks to the entryman solely, and if the requirements of the law are not complied with, though it may be through the fault of the authorized agents of the entryman, the entry must be canceled.

I concur in the conclusions expressed in your said office decision and the same is therefore affirmed.

PATENT—JURISDICTION—DATE OF RECORD.

KLINE v. STEPHAN.

The issuance of a patent duly signed, sealed, countersigned, and recorded deprives the Department of further jurisdiction over the land or the title thereto.

The date of the patent must be taken as the date of the record, and parol testimony is not admissible to contradict the record.

Secretary Noble to the Commissioner of the General Land Office, March 22, 1890.

In the case of *Robert H. Kline v. Andrew Stephan*, appealed from the decision of your office dated November 21, 1887, the first question presented for determination is, has the Department the legal authority to now pass on the validity of said Stephan's entry?

The facts shown by the record in the case and essential to a proper understanding of this question are as follows:

June 10, 1884, Andrew Stephan made mineral entry No. 2213 for the Black Veil lode claim, embraced in survey No. 3519, at the Leadville land office Colorado.

June 28, 1886, Robert H. Kline by his attorney filed in your office a protest against said entry.

August 14, 1886, the protest was dismissed by your office and on September 7, following, Kline's attorney was notified of your action in the matter, and thereupon Stephan's entry was endorsed approved.

October 22, 1886, the draft of a patent was prepared for the land included in Stephan's entry and by your office letter of November 2, following it was transmitted to the President's Secretary and the Recorder of the General Land Office for their signatures. This instrument constitutes a part of the record in this case. It is dated November 3, 1886, and has all the formal requisites of a good and sufficient patent of the government granting to Andrew Stephan, and to his heirs and assigns, the land included and described in said survey and entry. It is signed for the President by his Secretary, sealed with the seal of the United States Land Office, countersigned by the Recorder of said office, and appears to be recorded in "Record Vol. 133, pages 221 to 224 inclusive."

October 30, 1886, Kline, by his attorney in fact, filed in the land office at Leadville, Colorado, a second protest against said entry, and against the issuance of a patent to Stephan for the land included therein. This protest was received at your office November 8th, and on November 15, 1886 a hearing was ordered upon the same to determine the validity of Stephan's said entry. If the instrument referred to above as having all the formal requisites of a patent is in fact a patent, then the Department has no legal authority to hear and determine the question of the validity or invalidity of said entry.

The Department has jurisdiction to determine the validity of entries, and the right of conflicting claimants to public lands so long as the legal title remains in the government, but the instant such title passes that jurisdiction ceases, and the question of rightful ownership can thereafter only be determined by the courts.

In the case of the United States (on the relation of McBride) *v.* Schurz (102 U. S. 378), Justice Miller, in delivering the opinion of the court says (on page 402)—

From the very nature of the functions performed by these officers (officers of the Land Department) and from the fact that a transfer of the title from the United States to another owner follows their favorable action, it must result that, at some stage or other of the proceedings their authority in the matter ceases. It is equally clear that this period is, at the latest, precisely when the last act in the series essential to the transfer of title has been performed. Whenever this takes place, the land has ceased to be the land of the government; or, to speak in technical language, the legal title has passed from the government, and the power of these officers to deal with it has also passed away . . . The act of Congress provides for the record of

all patents for land in an office, and in books kept for that purpose. An officer called the Recorder, is appointed to make and keep these records. He is required to record every patent before it is issued, and to countersign the instrument to be delivered to the grantee. This then is the final record of the transaction—the legally prescribed act which completes what Blackstone calls 'Title by record'; and when this is done the grantee is invested with that title.

We are of opinion that when all that we have mentioned has been consciously and purposely done by each officer engaged in it, and when these officers have been acting in a matter within the scope of their duties, the legal title to the land passes to the grantee, and with it the right to the possession of the patent.

The case cited is directly in point, the facts in the case being quite as strong, if not stronger, against the government.

Here the patent was prepared, signed, sealed and countersigned five days before Kline's protest reached your office. In the case cited a contest was instituted to secure the cancellation of McBride's entry February 24, 1877, and the patent was signed, etc., September 26, 1877, seven months thereafter.

From the steps taken in that case by the Commissioner of the General Land Office, and by the Secretary of the Interior to retain control of the patent, and to undo what had been done, it seems clear that the patent in that case had been issued improvidently and inadvertently; and apparently without the Commissioner having intended that it should be issued. Here nothing of the kind appears, the patent having been issued, in contemplation of law, five days before the Commissioner had any knowledge of Kline's protest. It is true that in the regular course of business in your office the clerical work of transcribing the patent in the record book kept for that purpose is not done till after the patent has been signed by the president, sealed with the seal of the General Land Office, and countersigned by the Recorder, and consequently this clerical work may not have been actually done till after the date of said order of hearing, November 15, 1886, and therefore not until after there was a constructive order by the Commissioner suspending further action in the matter of the issuance of said patent. In the case cited however, the same constructive order, on the part of the Commissioner, seems to have existed before any steps whatever were taken towards the issuance of a patent to McBride. In addition to this the date of the patent—the only date appearing upon the record of the same must be taken as the date of record, as it would not do to admit parol testimony to contradict the record.

The conclusion reached is, that the Department, since November 3, 1886, the date of the issuance of said patent, has no authority to pass on the question of the validity or invalidity of said entry, and Kline's said protest is, therefore, dismissed.

HOMESTEAD CONTEST—CHARGE OF ABANDONMENT AND CHANGE OF RESIDENCE.

DAVIS *v.* KAMINSKY.

A charge that claimant "has wholly abandoned said tract; that he has changed his residence therefrom for more than six months since making said entry; that said tract is not settled upon and cultivated by said party as required by law," is not an admission that residence had been established, and does not estop the contestant from proving the failure of the entryman to establish residence as required by law.

The improvement or cultivation of a tract of land, without actual residence thereon, confers no right under the homestead law.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 24, 1890.

Herman Kaminsky made homestead entry December 5, 1885, of the SE. $\frac{1}{4}$ of Sec. 34, T. 24 N., R. 41 E., Spokane Falls, Washington Territory. On June 9, 1886, Benjamin Davis filed contest against said entry, charging that claimant "has wholly abandoned said tract; that he has changed his residence therefrom for more than six months since making said entry; that said tract is not settled upon and cultivated by said party as required by law."

Pursuant to notice, a hearing was had, August 3, 1886, and upon the testimony taken at said hearing the local officers found in favor of the claimant.

Upon appeal, your office, by letter of November 8, 1888, reversed said decision and held the entry for cancellation, upon the ground that claimant never established a *bona fide* residence on the land. From this decision claimant appealed, alleging, substantially, the following grounds of error: (1) That the allegations in the contest do not warrant the proofs admitted, nor the conclusion reached by the Commissioner; (2) That the allegation of change of residence and abandonment admits that a residence was acquired, and it was error to admit evidence on this point, or to decide that residence was not acquired; (3) "That the charge is insufficient as the basis of the decision that the evidence fails to show that Kaminsky had acquired a residence on his homestead;" (4) That the evidence shows that claimant went on the land, cultivated, occupied, and improved it, with the intent to make it his home, and that it was error to hold that such occupation and improvement did not constitute residence.

The testimony shows conclusively that from the date of entry until service of notice of contest the claimant's actual residence was in the town of Cheney, where he was conducting the mercantile business of Kaminsky & Son. By his own testimony, he fails to show that he ever established an actual residence on the claim. He states that he had been on the land a good many times, in March, April and May, and at

certain times was sleeping and boarding there, but throughout the testimony it is shown that these visits were merely to overlook work that was being done for him on the claim. Campbell, his principal witness, who worked at times for claimant on the land, and who resided in the same section in which the land embraced in claimant's entry is situated, testified that, between December 5, 1885—the date of entry—and June 9, 1886—the date of contest—he knew that Kaminsky was on the land six or seven times, probably more; that he knew of his sleeping and cooking there, but could only testify as to one particular night, and he never knew of his being there two nights in succession.

It is true that claimant placed improvements on the claim to the extent of \$700, but improvement and cultivation of a tract of land with the intention of appropriating it to the claimant's use give him no right under the homestead law, without actual residence thereon.

The principal allegation of error, relied upon by claimant, is, that the matters alleged in the contest did not authorize the testimony admitted, nor the decision of the commissioner, for the reason that the allegation of change of residence and abandonment was an admission that residence had been established, and it was error to admit evidence thereon, or to decide that residence had not been acquired.

The contest contains three separate and specific charges: (1) That claimant had wholly abandoned the tract; (2) That he had changed his residence therefrom for more than six months; and (3) That the tract was not settled upon and cultivated as required by law.

Settlement upon a tract, as required by law, means establishing a residence. Under this charge the contestant could prove that the claimant had never established residence, and if he failed to establish this charge, he could then prove that he had abandoned the land, or changed his residence therefrom for more than six months. The allegation of abandonment or change of residence was not an admission that residence had been established, and did not estop the contestant from proving the failure of claimant to establish residence as required by law under the charge in the contest.

The decision of your office is affirmed.

SCHOOL LAND—SETTLEMENT PRIOR TO SURVEY.

GONZALES *v.* TOWNSITE OF FLAGSTAFF.

The lands excepted from the reservation for school purposes, by reason of settlement claims existing at date of survey, are only those tracts on which improvements are actually placed before survey, and the indemnity provided therefor is measured by the extent of the appropriation by the settler.

The existence of a settlement claim at date of survey excludes the land covered thereby from the reservation for school purposes, but if such claim is subsequently abandoned the land becomes subject to the reservation, and a purchaser, after survey, from the original settler acquires no right that will defeat said reservation.

Secretary Noble to the Commissioner of the General Land Office, March 24, 1890.

I have considered the case of Emma J. Gonzales *v.* E. W. French, trustee, for townsite of Flagstaff, on appeal by the former from your decision of November 14, 1889, awarding the land in controversy, viz: the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 16 T. 21 N., R. 7 E., of the Gila and Salt River meridian, Prescott Arizona land district to the defendant.

This township was surveyed in the field in the latter part of 1878, and the plat was filed in the local office February 3, 1879.

On May 16, 1887, the local officers transmitted to your office the appeal of Wm. O. O'Neil, probate judge, from their action rejecting his application to file a declaratory statement for the south half of said section for townsite purposes. This action was affirmed by your office because the land applied for was school land and not subject to such application. Afterwards, however, a hearing was ordered to determine as to the occupancy of said land by the citizens of Flagstaff prior to the survey thereof. Although notice of this action was given and a day set for such hearing, no further action was taken. Thus matters stood when on February 13, 1889, an act of Congress entitled "An act for the relief of the occupants of the town of Flagstaff, county of Yavapai, Territory of Arizona," (25 Stat., 668) was approved. This act authorized the probate judge of said county to enter in trust for the inhabitants of the town of Flagstaff the S. $\frac{1}{2}$ of said section 16, subject to the provisions of sections 2387, 2388, and 2389 of the Revised Statutes, and authorized the Territory of Arizona, through its proper officer to select land in lieu of said half section. Thereupon E. W. French, probate judge, on June 17, 1889, filed in the local office declaratory statement for said half section, and gave notice of his intention to make final proof on July 29th following. On that date final proof was made and at the same time Mrs. Gonzales filed her corroborated affidavit protesting against the allowance of an entry for the SE. $\frac{1}{4}$, of the SW. $\frac{1}{4}$, the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of said section, because of her prior

right thereto. On August 5th Mrs. Gonzales filed another corroborated affidavit in the nature of an amendment of her protest, setting up that she was a qualified pre-emptor; that she had improvements on said land of the value of \$2,500; that she settled upon said land in the spring of 1883; that prior to said settlement she purchased the improvements then upon said land from one Thos. F. McMillan; that in 1885 she applied to file pre-emption declaratory statement for said land, which application was refused by the local officers for the reason that said land was in a school section and not subject to entry; that said land upon the abandonment by McMillan did not become school land, but reverted to the public domain. Upon this affidavit the local officers ordered a hearing at which both parties appeared and submitted testimony. The local officers decided in favor of the townsite application and upon appeal that decision was affirmed by you.

In the formal appeal a number of grounds of error are set up, but in the argument filed it is said—

The grounds of appeal rest substantially upon three errors alleged to have been committed by the Commissioner:

1. That contestant is disqualified by coverture.
2. That the act of February 13, 1889, is an absolute grant to the contestee.
3. That the lands in question are school lands not subject to pre-emption.

If the land involved were not subject to appropriation under the pre-emption law, either because of being reserved as school land or for any other reason, the question as to the qualifications of Mrs. Gonzales as a pre-emptor is entirely immaterial, and need not be considered. For this reason I will first consider and determine as to the condition of the land involved at the date of the survey thereof.

Thomas F. McMillan, whose settlement at date of survey it is claimed prevented the withdrawal for school purposes taking effect on this land, testified at the hearing. He stated, he with two others, Fariner and Christy, went on to this section in July 1876. He settled on the NE. $\frac{1}{4}$ of said section and they put up a house or a part of a house on the S. $\frac{1}{2}$ of the section. Nobody, however, ever lived in or occupied it. In August they left there and went into Mohave county. When he and Fariner returned in May 1877—Christy having died in the meantime—they found this structure on the S. $\frac{1}{2}$ of the section had been burned. No other house was built by them on that part of the section. Afterwards Fariner in the spring of 1879, sold out his interest in the sheep-ranch and left that part of the country. He, McMillan, never improved or claimed any part of the S. $\frac{1}{2}$ of said section, and when he found his improvements on the NE. $\frac{1}{4}$ thereof were on a school section he sold them and did not afterwards make any claim to any part of said section. He further states that the first improvement made on the S. $\frac{1}{2}$ of said section was the building of a house by one J. W. Young in 1881, at about the time the railroad was being built.

Fulton testified that he went to Flagstaff in 1879, and nobody was living on the S. $\frac{1}{2}$ of said section 16 at that time.

W. J. Hill stated that he first saw the present site of Flagstaff in 1876, and no one was occupying or cultivating any part of the S. $\frac{1}{2}$ of said section 16. The first improvements at Antelope Spring were made in 1881.

J. L. Black stated that he was at the present site of Flagstaff in 1879, and had lived there since 1880; that at that time no person lived on the south half of said section 16; that no part of it was cultivated, and that there were then no improvements thereon. He further testified that the first improvement placed on said land was a house built in the spring of 1881, by a man named Young.

None of the witnesses for the pre-emption claimant knew the condition of this land at the time of the survey. This testimony clearly shows that there was no settler on the land in controversy at the time of the survey thereof, and that it was not excepted from the withdrawal or school purposes.

It is contended that "a settlement upon any part of a section withdraws the whole section from the school grant," and that therefore the settlement of McMillan on the NE. $\frac{1}{4}$ of said section existing at the date of the survey, served to except the whole section from the reservation for school purposes.

This proposition cannot, however, be entertained. In the argument filed in this case after quoting section 2775 R. S., and referring to the cases of *Geovanni Le Franchi* (3 L. D., 229) and *Mining Co. v. Consolidated Mining Co.*, (102 U. S., 167), it is said:—

It is to be noted that according to the law as prescribed by the statutes and Department by these decisions a settlement upon a part of a section withdraws the whole section from the school grant. The State or Territory is not recognized as entitled to take the fractional parts of the section for school purposes, upon which settlement has been made.

The decisions referred to do not in the remotest degree support this proposition, nor does the statute referred to justify any such conclusion. The section referred to provides:—

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.

If there were any doubt as to the meaning of the first clause it would be removed by the wording of the second. It was clearly the intention to grant to or reserve for the State or Territory, as the case might be, indemnity for all land excepted from the grant or reservation by reason of settlements. Indemnity was provided, however, for such lands only as might be patented by pre-emptors. The lands excepted from the grant or reservation were only those tracts on which improvements were actually placed before survey, and the indemnity provided for is measured by the extent of the appropriation by the settler.

The scheme of adjustment of these school grants adopted by this Department does recognize the right of the State to take and the Territory to select for reservation, parts of sections. In the circular of July 23, 1885 (4 L. D., 79) it is said—

Indemnity school selections should be so presented that the tract selected may be connected with a specific section or subdivision of a section as the basis of the selection.

It might, however, be admitted for the decision in this case that a settlement on any part of a school section served to except from the grant or reservation the entire section and the conclusion that this section was not excepted from the reservation would have to be adhered to. The position taken by the appellant that a settlement at the date of survey has the effect of withholding such land from the reservation and that upon the abandonment of such settlement the land reverts to the public domain, cannot be sustained. It is erroneous and misleading to speak in this case of the effect of a grant. There has been no grant of lands to this Territory for school purposes. It has been held by this Department through an uninterrupted line of decisions that the abandonment of such a settlement leaves the land subject to the operation of the reservation, and that a purchaser from the original settler acquires no right that will defeat such reservation.

Thomas E. Watson (4 L. D., 169); John Johansen (5 L. D., 408); Thomas E. Watson (on review) 6 L. D., 71; Thomas F. Talbot (8 L. D., 495); Odillon Marceau (9 L. D., 554).

This land then was not excepted from the operation of the withdrawal for school purposes, and was therefore not subject to appropriation under the settlement laws. This conclusion renders necessary the rejection of Mrs. Gonzales' application, and it is therefore unnecessary to consider any of the other questions arising in the case.

The decision appealed from is affirmed.

PRIVATE CASH ENTRY—MISSISSIPPI LANDS.

ALEXANDER HAMILTON.

The lands suspended from private cash entry by the joint resolutions of May 14, and July 16, 1888, were finally excluded from such disposition by the act of March 2, 1889.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 24, 1890.

December 15, 1888, Alexander Hamilton applied to make private cash entry of the SE $\frac{1}{4}$, Sec. 19, T. 6 N., R. 13 W., St. Stephens meridian, Jackson district, Mississippi. The local officers denied the application, for the reason, among others, that "under joint resolution of Congress, approved May 14, 1888, vacant lands in Mississippi are subject to home-

stead entry only." Your office, by decision of March 13, 1889 (from which Hamilton now appeals to this Department) affirmed the action of the local officers on said ground.

By said joint resolution of May 14, 1888 (25 Stat., 622), as amended July 16, 1888 (ib., 626), "public lands of Mississippi, Arkansas and Alabama subject to private sale as offered lands" are directed to be "disposed of under and according to the provisions of the homestead law only" until the close of that (50th) Congress. Before the close of that Congress, the act of March 2, 1889 (25 Stat., 854), was passed, by the first section of which it was enacted that, after the passage of said act, "no public lands of the United States, except those in the State of Missouri, shall be subject to private entry."

The land was not subject to private cash entry at the date of Hamilton's application (December 15, 1888), because of said joint resolutions of May 14, and July 16, 1888, and is now withheld from such entry by the act of March 2, 1889. The application was properly rejected, and your office decision is affirmed.

The application was not, as I understand your office decision, held by your office to have been properly rejected, on the ground alleged in the appeal, namely, because a military bounty land warrant was tendered in payment, but solely because, as above shown, the land was not subject to private cash entry.

TIMBER CULTURE CONTEST DEFENSE.

BRUNNER *v.* LUX.

Non-compliance with law will not be excused on the plea of sickness, where it appears that the claimant was in default at the time when he was disabled for further compliance with the law.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 24, 1890.

I have considered the case of F. H. Brunner *v.* Nicholas Lux upon the appeal of the former from your office decision of November 14, 1888, dismissing his contest against the timber culture entry of Lux for the NW $\frac{1}{4}$ of section 21, T. 31 N., R. 3 E., Niobrara land district, Nebraska.

Nicholas Lux made timber culture entry for the said land June 24, 1882, and on April 8, 1886, F. H. Brunner filed his affidavit of contest against the said entry. The affidavit was subsequently, June 10, 1886, amended. It charged that the entryman during the first year of his entry failed to break five acres of the said land, that he during the second year failed to break five acres and also failed to cultivate the first five acres, that during the third year of his entry he failed to cultivate five acres and also failed to plant to trees, tree seeds or cuttings five acres of the said land, and that these defaults continued at the time of the making of the contest affidavit.

The hearing of the contest was had October 20, 1886, both parties appeared by their respective attorneys.

The local officers rendered their decision in favor of the contestant and were of the opinion that the entry should be canceled. Your office on appeal, reversed this action of the local officers and dismissed the contest.

The contestant thereupon having appealed to this Department, the case is before me for consideration.

It clearly appears from the evidence that the entryman failed to comply with the requirements of the timber culture act each and every year of his entry. At the time of the hearing he had broken on the land amounting in the aggregate to a little over six and one half acres according to actual measurement. Of this, three acres, less a fraction, were broken during the summer of 1883, the rest in 1885. In the fall of 1884 one and one-tenth acres of the broken land were backset and planted to tree seeds. This is the extent of defendant's improvements and cultivation on the land.

The facts shown by the defence in excuse of defendant's default go far to enlist sympathy. The entryman is a married man, his family consists of a wife, and a child of three years of age. About three years before the hearing, fall of 1883, he was stricken with paralysis, in consequence of which the right side of his body was palsied, his power of speech lost and his mind deranged. He became wholly unfit to attend to his own affairs, and was cared for continually by his wife. At the time of the trial he had been in that state for more than two years. It was also shown that the entryman is exceedingly poor, that he owns no property aside from a homestead which is encumbered by a mortgage of three hundred dollars, the interest on which was paid for charity's sake by the neighbors.

Your office referring to the evidence in the case in the said decision of November 14, 1888, states—"It is manifest from the foregoing that the failure is through no fault of the claimant, but is due to the act of God, and therefore, excusable. *Carey v. Curry* (7 L. D., 27)."

With this opinion I cannot agree. The facts in the case of *Carey v. Curry*, *supra*, differ widely from the facts in the case at bar. *Curry*, the entryman, in the case cited had, up to the time that he became insane and incapable of attending to any business, fully complied with the requirements of the law, regarding his entry and when the hearing was had, there seemed to be a fair prospect, that through a guardian of the entryman, the land covered by the entry would be attended to and cared for in accordance with the provisions of the timber culture act.

Returning to the facts in the case at bar, it appears, that at the time that the entryman was paralyzed, in the fall of 1883, more than one year since his entry had elapsed and only about three acres had been broken on the land. The entryman then was clearly in default. I do not think that this subsequent sickness will excuse this default.

Again, in this case no prospect is shown nor an assurance given that the default of the entryman will ever be cured or that the requirement of the law will be complied with in the future. It seems that the condition of the entryman and his family is such that in all probability he never will be able to fulfill the conditions under which he made the entry, and without fulfilling those conditions the land will never be his. I am, therefore, constrained to reverse your action and hold the entry for cancellation. I regret that this must be my determination, but it should be remembered that not sympathy but rules of law must control and that hard cases are apt to make bad laws.

Your said decision is accordingly reversed.

SOLDIERS' ADDITIONAL HOMESTEAD—CERTIFICATION.

JOHN M. WALKER. (ON REVIEW.)

The right to make soldiers' additional homestead entry is not assignable, but is a personal right which can be exercised only by the soldier, or in case of his death, by his widow, if unmarried, or if she be dead or married, by the guardian of his minor children.

A certificate of the soldier's additional right will not be issued for the benefit of one claiming under an assignment of the soldier's interest therein. The circular of February 13, 1883, does not authorize the issuance of a certificate for the benefit of such assignee.

The exercise, in person, of the soldier's additional right, pending final disposition of an application for the certification of such right, precludes further action on said application.

Secretary Noble to the Commissioner of the General Land Office, March 25, 1890.

This is a motion for review and reconsideration of a decision of this Department, rendered December 24, 1888, in the case of John M. Walker *et al.* (7 L. D., 565.)

The motion is made by Sidney F. Marshall, Esq., who claims, as attorney, to represent said John M. Walker and C. M. Blair, D. C. W. Brashears, A. A. Harrison, Moses Roley, James R. Blades, Thomas O. George, W. D. Reynolds, E. S. Whittenberg, William Bohannon, John Pendleton, Leland Betterton, Caleb Sill, John F. Parrish and Edward Rush, parties to the record in said case.

By said departmental decision the several applications of said Walker and others, for certification of the soldier's additional homestead right, were denied, because it appeared from the record, that the parties originally entitled, respectively, to such additional homestead right, had attempted to dispose of the same for a valuable consideration, and had received part of the amount agreed on as the purchase price of the right; and that the applications were filed by the assignee of the parties with the understanding that he, and not the soldiers originally entitled,

should be the beneficiary of the certificates when issued. The Department held, (1) that the right to make soldier's additional homestead entry is not assignable, and (2) that, on the record presented, the applications in question were not protected by the last clause of the circular of February 13, 1883 (1 L. D., 654). This circular is given in full in the decision complained of, and the facts out of which the present controversy arose are substantially stated in that decision.

There are several specifications of error set forth in the motion for review, which, in effect, however, amount simply to a contention that the Department erred in its judgment upon each of the points decided. Two questions only, therefore, are involved in the motion: (1) Is the right to make soldier's additional homestead entry assignable, and (2) are the present applications, even if the first question be decided in the negative, protected by the circular of February 13, 1883?

The case has been elaborately argued by counsel, orally and by printed brief, both for and against the motion, and I have given the questions presented a careful consideration. They will be disposed of in the order herein stated.

The law granting to honorably discharged soldiers of the United States army, who served in the late war for the period of ninety days, or more, certain homestead privileges, additional to the ordinary right of entry under the original homestead act of 1862, is found in the act of April 4, 1872 (17 Stat., 49), as amended by the subsequent acts of June 8, 1872 (Id., 333), and March 3, 1873 (Id., 605). The provisions of the act are also found in the Revised Statutes of the United States, from sections 2304 to 2309, inclusive. The general granting clause thereof is reproduced in section 2304 of the Revised Statutes.

Section 2306, which is a reproduction of section two of the original act, as amended, provides that:—

Every person entitled, under the provisions of section twenty-three hundred and four, to enter a homestead who may have heretofore entered, under the homestead laws, a quantity of land less than one hundred and sixty acres, shall be permitted to enter so much land as, when added to the quantity previously entered, shall not exceed one hundred and sixty acres.

Section 2307 extends the benefits granted by section 2304, in case of the death of any soldier who would be thereto entitled, to his widow, if unmarried, or in case of her death or marriage, then to his minor orphan children.

It is most strenuously contended by counsel that the privilege conferred by section 2306 is alienable. It is so contended for the alleged reason that the privilege is a valuable right of property; the assignment of which is not expressly inhibited by the act itself.

I am not prepared to agree that this contention is sound, or that it can be sustained upon a reasonable construction of the statute.

The soldiers' homestead act, even though it be considered separately and apart from the provisions of the general homestead law, must, of

itself, be construed as a whole, in order to ascertain the real intent of Congress relative to its several provisions. By thus construing the act, it is clear to my mind that Congress did not intend the privilege, granted to the soldier by the second section thereof, should be made the subject of barter and sale, or of assignment to another. In my judgment, the right thus conferred is strictly a personal right. It is so because it depends, not only upon the existence of the soldier, but upon *his personal* qualifications to make the entry. It is not, in itself, properly speaking, a right of property, but is merely a right to acquire property in a certain way and upon a given state of facts, which without the right thus given could not be so acquired. It is, under the statute, essentially a personal right, which becomes, or ripens into a right of property, only when it is exercised by the soldier through *his personal* entry of a specific tract of the public land. It is not such a right as by the natural law of descents can descend to the heir, but is a mere personal right which lapses or becomes extinct upon the death of the party upon whose personality it depends. Nor can it be made the subject of devise or bequest by will. There is nothing in the mere right, unexercised, that can descend, independently of the statute, or that can be devised, or bequeathed.

It will hardly be seriously contended that a soldier, having the right to make an additional entry, could by will, in the event of his death before the exercise of such right, devise or bequeath the same to some one other than his widow or minor child, and thereby defeat the express provision of the statute (Sec. 3 of the original act), conferring the right to make the entry in such cases upon his widow, if unmarried, or in case of her death or marriage, upon his minor orphan children. That this can not be done is certainly beyond reasonable question, and yet such would be but the logical outcome of the theory contended for, that the right is in itself personal property, and, consequently, the subject of transfer, or assignment. If, therefore, the right, unexercised, can not be transferred to another by will, surely it can not be transferred to another by the soldier in his lifetime. Will it be contended that the right, unexercised, can be subjected to sale, in the courts, for debt. If property, why not? It is clear that, until the personal right of entry has been exercised by the beneficiary of the statute, no right of property is acquired which can legally be made the subject of devise, transfer, pledge, or sale.

The right to make soldier's additional homestead entry is not similar, as claimed by counsel, to a military bounty land warrant, or the right upon which the same is based, with respect to the assignability of such warrant or right. The statutes upon which the right to military bounty lands rests are very different, in many material respects, relative to the character of the right granted, from the act now under consideration. By the former (section 2423 Revised Statutes) it is expressly provided that every person entitled thereunder shall receive from the Depart-

ment of the Interior a warrant for the quantity of land to which he is so entitled, and, further, (section 2414 Revised Statutes) such warrant is expressly declared to be assignable by deed or instrument of writing; while under the latter, the issuance of a warrant is not required, nor is there any provision in the act requiring or authorizing the certification by the Land Department of the right thereby granted. The supposed analogy, therefore, upon which the argument of counsel is based does not in fact exist.

I must, therefore, hold that the right to make soldier's additional homestead entry under the statute is not assignable, but is a personal right which can be exercised only by the soldier, or, in case of his death, by his widow, if unmarried, or, if she be dead or married, by the guardian of his minor children. That if a soldier entitled to the right, but without having exercised it, dies, leaving no widow, or minor orphan children, the right of entry thereupon lapses or becomes extinct.

And this is not only the result of what seems to me to be the correct solution of the question involved, but it is in accord with what has been the uniform departmental construction of the statute ever since the date of its enactment.

By circular of your office, dated June 13, 1872 (1 C. L. L., 263), which was the first issued under the act, a form of affidavit, to be made by all applicants thereunder, was adopted, which amounted, in effect, to a construction that none of the rights granted by the act were assignable. (Form "C", p. 266). Other instructions were issued by your office under the act, after the amendment of March 3, 1873, abrogating the provision that the additional entry should be for land contiguous to the original entry, namely, on March 28, 1873, and November 3, 1873 (1 C. L. L., 277-278), which, however, in no wise changed, or modified, the construction contained in the circular of June 13, 1872, establishing the non-assignability of all rights granted by the act.

By departmental circular of August 5, 1874 (Id., 279), it was directed that thereafter any party entitled to an additional entry under the second section of the act might make the "required affidavit" before the clerk of any court of record for the county in which he resided, or before the register or receiver of any United States land office, and might transmit the same, with his application, proof of service, fees, etc., "by mail, or through an attorney, to the Land Office of the district in which the land applied for might be situated." The "required affidavit" referred to was that given in form "C" of the circular of June 13, 1872, whereby the applicant was required to swear that his entry was made for his "own exclusive use and benefit, and for the use and benefit of no other person or persons whomsoever." This was the first circular issued under the act with express departmental sanction (having been approved by Acting Secretary Smith), and by it the principle of non-assignability theretofore announced by your office in reference to these rights was adhered to. While under the circular

the entry could be made "through an attorney," it could only be made for the "exclusive use and benefit" of the soldier originally entitled, which necessarily negatives all idea of a sale or transfer of the right before entry. The real and only purpose of the circular was to relieve the applicant of the requirement of personal attendance at the land office of the district in which the land desired was situated.

The matter remained in this condition until May 17, 1876, when my predecessor, Secretary Chandler, acting upon a report previously made to him by the Commissioner of the General Land Office, on the subject of frauds in soldiers' additional homestead entries, which were the result of an ingeniously devised scheme, resorted to for the purpose of evading the true intent and meaning of the circular of August 5, 1874, and under which the right to make such entries had become the subject of sale and transfer, effected by means of two powers of attorney—one to make the entry, and the other to sell the land when entered, revoked the instructions embodied in said circular of August, 1874, and directed that thereafter all persons entitled to enter additional homesteads, should "be required to make their applications in person, with due proof of identity, at the land office of the district in which the desired land is situated, and that the affidavit required be made before the register or receiver of such office; and, further, that no entry of such homestead be permitted by attorney." It was, also, expressly held, that "the right to make the entry is not assignable, and in all cases the applicant should be required to make oath that he has not made or agreed to make any sale, transfer, pledge, or other disposition of his right to make the entry or the land which he applies to enter." (2 C. L. L., 486--7.) A departmental circular of instructions was issued on May 22, 1876 (*id.*, 488), which embodied these views in full.

On July 10, 1876, Secretary Chandler modified his order of May 17, 1876, so as to except from its operation all entries pending at its date. (*Id.*, 480.)

On March 10, 1877, the Secretary further modified said order, amongst other respects, so as to allow entries to be made by the agents or attorneys of the party originally entitled to the entry, but only after the claim had been presented to your office, and certified as valid, and that the party was entitled to the amount of land claimed. (*Id.*, 478.)

It is important to observe that this modification in no wise abrogated, or sought to abrogate, the principle announced in the original order, that the right to make the entry is not assignable. That principle was left unaffected by the modification, and was of force thereafter, in all respects as originally declared, the same as though the modification had never been made. Evidently, the only purpose of the modification, as the language plainly shows, was to allow entries to be made by "the agents or attorneys of the party originally entitled to the entry," with the added safeguard, or supposed safeguard, against a return to the

former abuse of speculation in these rights, that entries could only be so made after the claims had been presented to and examined and certified as valid by your office. It was but another effort to relieve the applicant from the necessity of his personal attendance at the local office in which he desired to make his entry, without again opening the door to the evasive and fraudulent practices which had prevailed prior to May 17, 1876.

By circular of May 17, 1877 (Id., 479), your office required certain papers to be presented with the application for additional entry, and that among them there should be filed a statement by the applicant, under his oath, declaring "that he has not in any manner exercised his right, either by previous entry or application, or by sale, transfer or power of attorney; but the same remains in him unimpaired." It was further provided by this circular, that "when these papers are filed and examined, they will, if found satisfactory, be returned with a certificate attached, recognizing the right of the party to make additional entry, under the law; and when presented with a proper application, either by the party entitled or his agent or attorney, they will be accepted;" and it was thus that the practice of certifying the right to make additional entry first originated.

It must be borne in mind, however, that the entry, even after certification of the right had been obtained, could be made only by the *party* entitled under the certificate, or by his agent or attorney. The device of certification was not intended to, nor did it in any way, authorize the sale or transfer of the right, but was adopted by the Department, as stated in the decision complained of, in its efforts to prevent speculation in these rights, and to secure to the soldier the benefits of the law. The fact that the entry was allowed to be made by the agent or attorney of the party entitled, furnishes no argument in support of the contention of counsel, that the purpose of the modification was to recognize past transfers of the right before entry, and "for the future to additionally secure the public in similar transfers." Nothing could be more foreign, in my judgment, to the true intent and meaning of Secretary Chandler's action. It was the soldier that the Secretary desired to secure in his rights under the law, and not "the public," in its claims against the law. The language used is conclusive, it seems to me, on this point. There can be no such person as an agent without a principal, and action by an agent as such is necessarily action for the principal. The same may be said of an attorney, acting as such, for another, whom he represents. The action, if by virtue of the attorneyship, can only be for the party creating it. Now, the provision that an entry may be made by the agent or attorney of the soldier entitled to it, necessarily implies that it must be made for the soldier himself, and not for another—to wit: the agent or attorney. If, therefore, a soldier entitled to make additional entry under the law could absolutely sell and trans-

fer his right to another before exercising it, there could thereafter be no such thing as an entry by the transferee, as the agent or attorney of the soldier, for the simple reason that the latter, having parted with his right, has no interest to be subserved by the entry, and the making thereof by the transferee, as agent, or attorney, would be by virtue of nothing more than an assumed agency, or attorneyship, which was not contemplated by the departmental regulation in question.

I find further that by circular instructions of September 1, 1879 (2 O. L. L., 485-6), the last issued on this subject prior to those of February 13, 1883, the applicant was required to swear "that I have not sold my additional homestead claim, and that I have not made any prior application for an additional homestead certificate."

By the circular of February 13, 1883 (1 L. D., 654), the practice of certifying the additional right, and of permitting the entry to be made by an agent or attorney, was discontinued, and it was directed that thereafter the applicant in all cases should present himself at the proper land office, make his application as in case of an original entry, and make certain affidavits showing his identity, etc., in the manner therein prescribed; but it was provided, in the last clause of the circular, that these changes in the practice should not be deemed to apply to cases where the additional right had already been certified, nor to cases then pending, or which might be filed prior to March 16, 1883. It was also declared by this circular that the right "is a personal one and is not transferable, nor subject to assignment or lien, nor can it be exercised by another. It can lawfully be exercised only by the soldier or by the widow or guardian, as the case may be, in his or her own proper person."

It thus appears that in its official instructions relative to the matter, the Department has constantly adhered to the principle that the right is not assignable. And to the same effect, also, are numerous adjudged cases on the subject.

Thus, in the case of William French (2 L. D., 235-7), decided August 30, 1883, it was expressly held that the right to make soldier's additional homestead entry is a personal right, founded on military service, and is not assignable. The controversy in this case arose prior to the circular of February 13, 1883, and the decision therein sustains the view hereinbefore expressed that, under the practice then existing, the assignability of the right was not recognized. To the same effect, substantially, in the case of John C. Ruland's children (2 L. D., 241).

Other cases, wherein the Department has expressly, or in effect, declared against the assignability of the right, are Lars Winquist (4 L. D., 323); Smith Hatfield *et al.* (6 L. D., 557); J. B. Haggin (7 L. D., 287); Chauncey Carpenter (7 L. D., 236); Hoffman *v.* Barnes (8 L. D., 608); Joseph W. Jones (9 L. D., 195). And I do not find any cases in which a departure from this principle has been announced. Several cases which have not been herein specifically mentioned are cited by counsel

as authority in favor of the opposite view, but, in my judgment, they do not go to the extent claimed for them.

It may be said, therefore, that, since the passage of the act under consideration, neither by official instructions nor by departmental adjudication has the assignability of the right of additional entry thereby granted ever been, as a principle, recognized or sanctioned; but that in all its instructions on the subject, and in all adjudicated cases wherein the question has been presented, the Department has invariably held to the contrary. Surely this established practice ought not now to be disturbed. Long continued construction of a statute by the officers legally appointed to execute it ought to have the force of judicial determination. (*United States v. Hill*, 120 U. S., 169-182, and cases therein cited.)

As against the principle thus so well established by executive construction, several cases are cited by counsel from the courts. They are *Knight v. Leary* (54 Wis., 459); *Mullen v. Wine* (26 Fed. Rep., 206); and *Rose v. Wood and Lumber Co.* (73 Cal., 385).

In *Knight v. Leary* it appeared that entry had been actually made by the soldier, and the only question was, whether he could sell *the land* after his entry, but before patent issued to him. It was held that in the absence of any express statutory restraint, he "might alienate the land before patent issued." That case is therefore not an authority on the question here. *Rose v. Wood and Lumber Company* seems to have been based on the decision of Judge Brewer of the United States Circuit Court for the District of Colorado, in the case of *Mullen v. Wine*. In that decision the learned Judge states:

My opinion in this case will be brief, because the character of the questions and the amount in controversy give, in addition to statements of counsel, assurance that the case will be taken to the supreme court for final decision.

He then holds, in an opinion of few words, that the right is "a thing of value," and "like all property" is "the subject of sale," even before entry is made. It is not claimed that this decision is binding upon the Department; and it is not, under the circumstances, sufficiently *persuasive*, in my judgment, to warrant a departure from the principle heretofore uniformly adhered to. There has as yet been no decision by the supreme court on the subject.

This brings me to consider the second question presented by the motion for review.

The decision complained of construes the last clause of the circular of February 13, 1883, as in no sense applying to the present applications, although they were pending at the date of the circular, or were filed prior to March 16, 1883; it being held, in effect, that the clause referred to was merely a proviso that the *rules* laid down in the circular should not apply to cases pending, or filed within the time named, and that consequently the other provisions of the circular, not embraced in these *rules*, were properly applicable to such pending cases, or cases

filed within the time prescribed. This is clearly shown by the following language used in the decision, namely: "That clause" (meaning the last clause of the circular mentioned)

merely provided that the rules laid down in the circular should not apply to cases then on file, or to those filed prior to March 16, 1883. The rules referred to are numbered 1, 2 and 3 in the circular, and provide that the applicant must present himself at the proper local office, make his application as in other cases, and make certain affidavits. But exemption from compliance with those rules in no way authorized the assignment of the additional homestead right, for the second clause of the same circular declares that the additional homestead right is a personal one, and is not transferable, nor subject to assignment or lien, nor can it be exercised by another. (7 L. D., 569.)

I am of the opinion, that this construction of the proviso in question works an abridgment of its legitimate scope and operation. Exemption from the entire circular could, in no sense, authorize the transfer or assignment of the additional homestead right, for, as we have seen, that principle had been, in effect, uniformly declared against in all previous circulars on the subject. The circular of 1883 was evidently intended as a means for the correction of evils attending the practice of certification, and its scope and effect are to be measured by that intention. (Elisha Lee, 7 L. D., 353.) It directed the discontinuance of the practice of issuing soldier's additional homestead certificates, and it was, in my judgment, for the purpose of protecting and saving harmless, those soldiers who had already secured their certificates, or had legally taken steps to secure them, under the former practice, that the clause in question was incorporated therein, which provides that cases wherein the additional right had been theretofore certified, and cases then pending, or which might be filed within a given time, would not be subject to the new rules. This proviso was clearly intended to exempt all such cases from the circular in its entirety, so far as it changed the then existing regulations in reference to the soldier's additional homestead right. If, therefore, pending claims, or claims filed prior to March 16, 1883, should be found upon examination entitled to certification, under the former rules and practice, they would be properly subject to such certification, by virtue of said saving clause, notwithstanding the inhibitory provision of the circular. This, in my judgment, was the object, and is the proper office of the proviso. The applications in question, therefore, being pending cases at the date of the circular, should have been determined under the former rules, and to the extent that the decision complained of holds adversely to this view, the same is hereby modified.

But said proviso did not guarantee that certificates would be issued in all pending cases, or cases filed prior to the date named. It guaranteed to such claims no more than an adjudication in accordance with the former rules.

Now, the facts in this case show that the certificates applied for, if issued, will enure, not to the benefit of the soldiers entitled respectively

to make additional entry, but to the benefit of a party who claims to be the assignee of their rights. The case presented is, therefore, one of attempted speculation in these rights, and to issue the certificates, in view of the facts stated, would be a virtual recognition of the assignee of the rights as such, and an endorsement of the sale and transfer by virtue of which he claims to be the present owner of such rights, and, for that reason, entitled to the certificates. It is expressly admitted by Wine (the supposed assignee) that he bargained for and purchased these rights, paying part of the consideration in cash, and agreeing to pay the balance (the greater part) when the rights were declared valid, and that he is to be the beneficiary of the certificates when issued. This is wholly contrary, as we have seen, to the plain intent and meaning of the rules and regulations of the Department in force prior to the circular of February 13, 1883, and it is therefore clear that upon the applications presented certificates should not be issued. It results from these views that there is no error in the decision I am asked to reconsider, of which the real party moving a reconsideration can complain. The soldiers originally interested are not complaining, nor do they now ask that certificates issue to them. The records of your office show that they have all made their additional entries in person, except C. M. Blair, Edward Rush and William Bohannon, since the circular of February 13, 1883. This action on their part precludes any necessity of certificates issuing to them. Their cases come clearly within the ruling of the Department in the case of L. D. Chandler (7 L. D., 356).

It thus appears that, although this motion is made in the names of these parties, by one claiming to be their attorney, it is really not made for their benefit, but for the benefit of the party claiming to be their assignee.

The death of C. M. Blair has been suggested since the motion was filed, by Messrs. Curtiss & Burdett, attorneys for Elizabeth C. Blair, his widow, who claims as such widow the right of additional entry under the statute. The letter suggesting such death is returned with the papers herein for appropriate action by your office, in view of the foregoing.

The decision of December 24, 1888, is modified so as to conform to the views herein expressed.

HOMESTEAD ENTRY—PRELIMINARY AFFIDAVIT.

F. H. MERRILL.

An application to make homestead entry can not be allowed if the non-mineral and the preliminary affidavit do not show the present status of the land, and present qualifications of the applicant.

Secretary Noble to the Commissioner of the General Land Office, March 26, 1890.

I have considered the case of F. H. Merrill on his appeal from your office decision of October 18, 1888, approving the action of the local officers in rejecting his application presented August 21, 1888, to make homestead entry for SW. $\frac{1}{4}$, NE. $\frac{1}{4}$, NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, and SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 4, T. 29 N., R. 13 E., Susanville, California, land district.

It appears from the record that claimant on December 30, 1886, made application to make homestead entry for the same, but it was rejected by the local officers for the reason that said land was embraced in the prior homestead entry of one John J. Halpine.

This rejection by the local officers was approved by your office decision of May 6, 1887, and from such ruling of your office no appeal was taken.

On February 21, 1887, said Halpine filed relinquishment of his said homestead entry and on August 21, 1888, Merrill presented his application to make homestead entry but instead of accompanying his application with homestead and non-mineral affidavits duly signed and sworn to he simply attached such affidavits without date or jurat but wrote in red ink across the face of each that a former affidavit duly sworn to might be found attached to his application to enter filed December 30, 1886.

This application was rejected by the local officers because said affidavits and application were not subscribed and sworn to by the applicant.

The affidavits attached to said former application to enter were made September 10, 1886. Upon appeal your office in the decision complained of held that such former affidavits "do not show Mr. Merrill's present qualifications or the present status of the land."

In your conclusion I concur. Your said decision is accordingly affirmed.

TIDE LANDS—VALENTINE SCRIP LOCATION.

FRANK BURNS.

Unsurveyed lands within the Territories, lying below high water mark, and above low water mark, are not "public lands" subject to the location of Valentine scrip. The location of scrip upon unsurveyed land confers only a preference right to perfect such location after survey as against the claim of all others except the United States, but, until the location is adjusted to the public surveys, the United States has full power and authority to dispose of the lands covered thereby. On the admission of a State to the Union it acquires by virtue of its inherent sovereignty absolute title to all tide lands on its borders to the exclusion of any rights under pending unadjusted scrip locations for such lands.

Secretary Noble to the Commissioner of the General Land Office, March 27, 1890.

On January 9, 1889, Frank Burns, Jr., made application to the register and receiver at Seattle, Washington Territory, to locate certain pieces of Valentine scrip, issued for tracts of forty acres each, upon a portion of the lands near Seattle, in Washington Territory, described in the application by metes and bounds. Said application was rejected, for the reason that the lands described therein are not public lands of the United States; within the meaning of the act of April 5, 1872 (17 Stat., 649), authorizing the issuance of said scrip and designating the character of lands upon which it may be located.

Upon appeal from this decision your office, on September 6, 1889, reversed the ruling of the local officers and allowed said application, upon the ground that, "the lands in question are public lands of the United States; that they are not mineral lands; that they are subject to disposal by the United States; that they are unoccupied and unappropriated, and that the claimant has the right to locate his scrip thereon."

While this appeal was pending before your office, the act of Congress of February 22, 1889 (25 Stat., 676), was passed enabling the people of Washington Territory to form a constitution and State government, and to be admitted into the Union on an equal footing with the original States. By authority of said act, the people of said Territory, on July 4, 1889, in convention assembled, formed a constitution and State government, in accordance with the provisions and conditions prescribed in the enabling act, and, on November 11, 1889, the President, by proclamation, declared the admission of said State into the Union to be complete.

After the decision of your office of September 6, was rendered, and prior to the proclamation of the President, the territorial authorities requested that, in view of the important public interests involved in said case, they be allowed to protest against the allowance of said locations and to file an appeal from the decision of your office, so as to protect the rights and interests of the future State of Washington.

Several protests were subsequently filed by other parties, claiming an interest in the lands in controversy, and, also, an appeal was filed by Bailey Gatzert, one of the protestants, from the decision of your office.

In view of the important interests involved, I directed that the record in the case be certified to me that a hearing may be had upon the legal questions involved in said case, to wit: whether said lands are subject to location as public lands of the United States, leaving all questions as to the respective rights of the several claimants to be disposed of hereafter, if it should be determined that said lands were public lands, subject to location and entry.

It is admitted that the lands embraced in this application are a portion of the shore of Duwamish Bay, an arm of Puget Sound, over which the tide daily ebbs and flows; that they are below high water mark, and above low water mark, and denominated by the Coast and Geodetic Survey as "Mud flats, bare at low water they have never been surveyed and are beyond the meander line of the official surveys made by the United States of lands bordering on said shore.

Your office held that all of the lands within the Territories of the United States, including lands on the shores between high and low water mark over which the tide daily ebbs and flows, belong to the United States, as proprietor, and are subject to its jurisdiction as sovereign; that, until the admission of a Territory as a State in the Union, the general government may, by virtue of such proprietary interest, grant or otherwise dispose of the title to the soil of tide waters as other public lands, subject only to the conditions and restrictions that govern a State in the disposal of such lands, after they have come within the jurisdiction and control of the State as sovereign.

The protestants contend that, while the legal title to all lands in the Territory, including lands known as tide lands, is in the United States and subject to its jurisdiction as sovereign, it holds such title merely as trustee for the people, and that such lands are not subject to disposal by general government, but must be held for the use and benefit of the future State, and this question has been thoroughly argued orally and in briefs of counsel on both sides.

It is, however, unnecessary for the disposition of this case to decide the question whether these lands were subject to be granted or otherwise disposed of by the general government prior to the admission of Washington Territory into the Union as a State. It may be conceded, for the sake of argument, that until the Territory was admitted as a State and invested with the jurisdiction of sovereignty over these lands, the United States, by virtue of its sovereignty and proprietary interest could have granted or otherwise disposed of them; but no such grant has been made, and the government has not pretended nor attempted to dispose of the specific lands claimed by the applicant. All that the applicant claims is, that they were public lands of the United

States, subject to location by Valentine scrip at the date of his application.

The act of Congress of April 5, 1872 (17 Stat., 649), authorized and required the circuit court of the United States for California to hear and decide upon the merits of the claim of Thomas B. Valentine, claiming title under a Mexican grant to Juan Miranda; but, as the lands embraced within the limits of the grant had been disposed of by the United States as public lands, and the proceeds covered into the Treasury, it was provided that:

In lieu thereof, the claimant, or his legal representatives, may select, and shall be allowed, patents for an equal quantity of the unoccupied and unappropriated public lands of the United States, not mineral, and in tracts not less than the subdivisions provided for in the United States land laws, and, if unsurveyed when taken, to conform, when surveyed, to the general system of United States land surveys; and the Commissioner of the General Land Office, under the direction of the Secretary of the Interior, shall be authorized to issue scrip, in legal subdivisions, to the said Valentine, or his legal representatives, in accordance with the provisions of this act.

The scrip issued under authority of this act can be located on any unoccupied, unappropriated "public lands" of the United States, whether surveyed or unsurveyed. The question therefore arises: were these lands "public lands" of the United States of the character contemplated by Congress in the act of April 5, 1872, authorizing the issuance of this scrip? The words "public lands" of the United States are used to designate such lands as are subject to sale and disposal under the general land laws, and do not include all lands to which the United States may have the legal title, or all lands that may be granted or disposed of by the United States. These words have a well defined meaning and all grants of "public lands" are made by the government and accepted by the grantee with a full knowledge of what lands are intended to be thereby conveyed.

In the case of *Newhall v. Sanger* (92 U. S., 761), the supreme court say: "The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws."

The same principle was recognized in the case of *Wilcox v. Jackson* (13 Peters, 498), and in *Leavenworth, Lawrence and Galveston R. R. v. United States* (92 U. S., 745), wherein the court say, "that whenever a tract of land shall have been once legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands." Also by Secretary Lamar in the case of *Kansas v. United States* (5 L. D., 712), in which he held that the act, providing for the payment to Kansas of five per cent. of the net proceeds resulting from the sale of lands, referred to public lands, and did not embrace sales made of Indian lands by the government as trustee.

So, in the case of the grant to the State of California of the sixteenth and thirty-sixth sections of "public lands" for school purposes, in which no express reservation was made of mineral lands; but the

court held that the grant was not intended to cover such lands, because they were by the settled policy of the government excluded from all grants. *Mining Company v. Consolidated Mining Company* (102 U. S., 167).

In the case of *Irvine v. Marshall* (20 How., 561), the supreme court said :

It cannot be denied that all the lands in the Territories, not appropriated by competent authority before they were acquired, are in the first instance the exclusive property of the United States, to be disposed of to such persons, at such times, and in such modes, and by such titles, as the government may deem most advantageous to the public use, or in other respects most politic. This right has been uniformly reserved by solemn compacts upon the admission of new States, and has heretofore been recognized and scrupulously respected by sovereign States within which large portions of the public lands have been comprised, and within which much of those lands is still remaining.

It has never been questioned that a State upon its admission into the Union immediately acquires title to and jurisdiction over all lands within its limits below ordinary high water mark. This title and control is not acquired by mere assertion of right and ownership, but by virtue of its sovereignty. There was no cession of these lands to the State, and none was necessary.

"It properly belongs to the States by virtue of their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its surveys and grants beyond the limits of high water." *Barney v. Keokuk* (94 U. S., 338).

Therefore, when the court says that upon the admission of new States the government reserved to itself by solemn compact the sole right to dispose of all the *public lands* within the limits of the State, it is evident that the words "public lands" only referred to lands subject to disposal under the general land laws, and did not include the lands between high and low water mark. If these lands are included in the term "public lands," the government would have the right to dispose of them by the terms of the compact, because no "public lands" are excepted from the operation of it.

Upon the admission of a new State into the Union it becomes entitled to all the rights of sovereignty and jurisdiction as to the soil of navigable waters as the older States,

and neither the right of the United States to the public lands, nor the power conferred upon Congress to make laws and regulations for the sale thereof, enables the general government to grant the shores and bed of such waters within the limits of a new State after its admission into the Union. *Gould on Law of Waters*, page 90.

In *Pollard v. Hagan*, 3 How., 212, the court say, that—

When Alabama was admitted into the Union on an equal footing with the original States, she succeeded to all the rights of sovereignty, jurisdiction and eminent domain which Georgia possessed at the date of the cession, except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States. . . . Nothing remained to the United States, according to the terms of the agreement, but the public lands. (Page 223.)

It is evident that the court did not consider that "public lands" embraced "tide lands," because the latter class of lands were subject to the jurisdiction and control of the State, while the right to dispose of "the public lands" was left to the general government. The general conclusions arrived at by the court, are—

First. The shores of navigable waters, and the soils under them, were not granted by the constitution to the United States, but were reserved to the States respectively.

Secondly. The new States have the same rights, sovereignty, and jurisdiction over this subject as the original States.

Thirdly. The right of the United States to the public lands and the power of Congress to make all needful rules and regulations for the sale and disposition thereof, conferred no power to grant to the plaintiffs the land in controversy in this case.

The same principle is announced and the same distinction drawn between "public lands of the United States" and lands which the State acquired upon her admission by virtue of her sovereignty, in the several decisions of the supreme court upon this question, from the earlier decision in the case of *Mobile v. Eslava* (16 Peters, 234) to the case of *Barney v. Keokuk* 94 U. S., 338.

In the enabling act of February 22, 1889 (25 Stat., 676) the Territory of Washington was required, as a condition of its admission into the Union, "to forever disclaim all right and title to the public lands lying within its boundaries." This disclaimer is made in the Constitution of the State of Washington, Art. 26, Sec. 2, which also declares that the public lands shall be and remain subject to the disposition of the United States; but, by article 17 of said Constitution it "asserts ownership to the beds and shores of all navigable waters in the State up to and including the line of ordinary high tide in waters where the tide ebbs and flows."

As before stated, the assertion of ownership in the Constitution of the State did not confer upon it the title to the tide lands. It acquired the title by virtue of its sovereignty. If it did not, the assertion of ownership in the absence of a grant or cession by the United States did not divest the United States of the title, and the disclaimer by the State of all right and title to the public lands conferred upon the United States the right to dispose of the tide lands, if they are "public lands" within the meaning of the act.

Furthermore, public lands are those lands over which the public surveys have been extended, or over which it is contemplated to extend them. In the survey of lands bordering on navigable waters, where the tide ebbs and flows, it has been the general policy of the government to extend the lines of survey only to ordinary high water mark. I am informed that the records of your office show that this has been the uniform and invariable rule, with the sole exception of the letter of Commissioner Wilson of August 26, 1853 (Vol. 1 Land Records, 151), in which he instructed the surveyor-general of Oregon, that "the public surveys are to be made to low water mark." But on April 14, 1875,

the Commissioner instructed the surveyor-general of Oregon to "extend lines of survey only to high water mark when surveying lands bounded by waters affected by the ebb and flow of tides."

Similar instructions at the same time were given to the surveyor-general of Washington Territory, and the lands in controversy were excluded from the public lands by the government surveys, made under these or similar instructions.

It is contended by counsel that the lands covered by the Miranda grant were composed of the same character of lands as those located by Burns, and that the conveyance by Valentine to the government of all right, title and interest in said lands conferred upon him under the act of 1872 the right to select lands of the United States of the same class as those found in the Miranda grant, which he relinquished to the government. Even if it be true that the title to this grant included the soil of tide waters, the act of 1872 did not confer upon Valentine the right to select lands of the same quality or character, but "an equal quantity" of unoccupied, unappropriated lands of the United States.

My attention has not been called to any peculiar feature or provision of this grant different from other grants of the same character of lands bordering on tide waters, and in the absence of an express grant of the shore (if such grant could be made at all) the boundary of the grant would only extend to the line of high water mark.

In the case of the *United States v. Pacheco* (2 Wall., 590), the court say:—

The position, that by the bay as a boundary is meant, in this case, the line of low-water mark, is equally unfounded. By the common law, the shore of the sea, and, of course, of arms of the sea, is the land between ordinary high and low-water mark, the land over which the daily tides ebb and flow. When, therefore, the sea, or a bay, is named as a boundary, the line of ordinary high-water mark is always intended where the common law prevails.

But, independently of the foregoing, Burns acquired no vested right by reason of his application, although made while the land was subject to the jurisdiction and control of the United States, because at the time the application was made, to wit, June 9, 1889, the land had not been surveyed.

The instructions issued by the General Land Office to the register and receiver relative to the location of this scrip, directs them to issue a receipt for the scrip, when application is made to locate it upon unsurveyed land, and that when the land is afterwards surveyed and the scrip has been adjusted to the survey, duplicate certificates of location shall be issued for the location. The location is thus consummated, and the land is from that moment segregated and has all the force and effect of an entry. But, until the land has been surveyed and the scrip adjusted to the survey, the right acquired by the application is a mere inchoate right, which is paramount to the rights of all others who have not an equal or superior claim to the land, but is not necessarily a valid claim against the United States.

The location of scrip upon unsurveyed lands is nothing more or less than a preference right to perfect such location after the survey of the land as against the claims of all others, except the United States, but, until the location takes the character of an entry by having the scrip adjusted to the public surveys, the United States has as full and ample power and authority to dispose of the lands covered thereby as it has to dispose of lands upon which settlement and improvement have been made with a view to pre-emption.

No portion of the public domain, unless it be in special cases not affecting the general rule, is open to sale until it has been surveyed and an approved plat of the township embracing the land has been returned to the local office. *Buxton v. Traver*, 130 U. S., 135.

It may be urged that the act of 1872 gives to the holder of this scrip the right to locate it upon unsurveyed lands. To this may be replied, that the pre-emption law also authorizes settlement upon unsurveyed lands with a view to pre-emption, and occupation and improvement of such lands confer upon the settler an inchoate right, which may be protected against the claim of every other person who has not an equal or superior right; but, say the court in *Frisbie v. Whitney*, 9 Wall., 187, it confers no vested right against the government in the land so occupied.

A settlement upon the public lands in advance of the surveys is allowed to parties who in good faith intend, when the surveys are made and returned to the local land office, to apply for their purchase, but the United States makes no provision to sell him the land, nor do they enter into any contract with him upon the subject.

When the surveys have been made, he may perfect the sale, unless the land has in the meantime been withdrawn from sale. *Buxton v. Traver*, *supra*. See also *Yosemite Valley* case, 15 Wall., 77.

In the case last cited, *Hutchings*, the defendant, settled upon a tract of unsurveyed land in the Yosemite Valley, and resided upon, improved and cultivated it with a view to perfect title to it under the pre-emption law. Thereafter Congress passed an act granting to the State of California the cleft or gorge known as the Yosemite Valley, as a public resort and park. At the time of *Hutchings'* settlement, the law authorized settlement upon unsurveyed lands in California, with a view to acquiring title under the pre-emption laws. But the court said:

The United States by those acts enter into no contract with the settler, and incur no obligation to any one that the land occupied by him shall ever be put up for sale. They simply declare that in case any of their lands are thrown open for sale the privilege to purchase them in limited quantities, at fixed prices, shall be first given to parties who have settled upon and improved them. The legislation thus adopted for the benefit of settlers was not intended to deprive Congress of the power to make any other disposition of the lands before they are offered for sale, or to appropriate them to any public use.

When a right has vested, it relates back to the initial act and cuts off all intervening claims; but, if the government disposes of the land before the right has vested, the initial act is unavailing for any purpose.

The admission of Washington as a State in the Union has all the force and effect of an absolute grant of Congress, and, therefore, having acquired absolute title to the lands in controversy by virtue of her inherent sovereignty, prior to the vesting of any right in the locators, the rights of the State are superior to those of the applicant, even if it be conceded that the lands in dispute were at the date of location subject to disposal by the general government as public lands of the United States.

The decision of your office is reversed, and the location allowed for the land in controversy will be canceled.

FINAL PROOF PROCEEDINGS—INDEFINITE NOTICE.

ALICE SUMMERFIELD.

Where final proof is submitted on indefinite notice, it may be accepted, in the absence of protest, after new notice given in due form.

Secretary Noble to the Commissioner of the General Land Office, March 28, 1890.

I have before me the appeal of Alice Summerfield (now Baird) from your office decision of December 22, 1887, wherein you require new notice and new proof in pre-emption cash entry No. 6801, NE. $\frac{1}{4}$ Sec. 30, T. 111 N., R. 77 W., Huron, Dakota.

In this case claimant filed declaratory statement on May 21, 1883, alleging settlement May 19, 1883.

On October 31, 1883, notice was duly issued, and published for the requisite legal period "that said proof will be made before a clerk of a court of record in and for Hughes county at Pierre, Dakota Territory, Wednesday January 9, 1884." Also giving name of claimant, number of declaratory statement, description of land, and the names of the proof witnesses.

In pursuance of the notice, claimant duly appeared before L. B. Albright, clerk of district court, Hughes county, Dakota, on the day advertised, namely January 9, 1884, with two of the witnesses named in the notice, and the proof was duly taken.

On January 11, 1884, claimant paid in full for the land, and on same day received final certificate. On October 9, 1885, the cash entry was marked "approved," by examining clerk in the general land office.

I find no other action taken on the case until your said office letter of December 22, 1887, wherein you require "new notice and new proof," and from which requirements claimant appeals.

In this case the notice to take final proof did not state definitely where the proof would be taken, only stating that same would be taken "before a clerk of court of record in and for Hughes county, at Pierre, D. T." Nor is it seen that any laches were committed by claimant. The publication was the same as required in homestead cases. (Rule

56, circular March 20, 1883, 1 L. D., 656.) And Rule 31 of said circular requires the settler "to file with the register . . . a written notice in the prescribed form," and also requires the register to publish said notice. Rule 57 of said circular says: "The final affidavit (in pre-emption cases) must be made before the register or receiver or before the clerk of a court of record in the county and State or Territory where the land is situated."

It will thus be seen that the fault was really in the register, who issued the defective notice. The real purpose of giving notice of intention to make final proof, and the published notice of the register in pursuance thereof, is to advise the public of such proceeding, and thus to enable any adverse claimant, or any agent of the government, to interpose valid grounds against the entry. The name of the entryman, the description of the land, the names of the proof witnesses, the exact time and place where the proof will be taken, and the person definitely and explicitly named before whom the proof will be taken—all this should be in the published notice, to enable the public to interpose valid objections to the final proof. "Where final proof is to be made before any person other than the local officers, the notice should describe that person definitely and explicitly." Jacob Semer (6 L. D., 345)

It will thus be seen that the notice as published in this case, "that said proof will be made before a clerk of a court of record," did not meet the rule as announced above, the wisdom and purpose of which is apparent.

The proof submitted shows, from the entry to date of final proof (about seven months), claimant's residence was continuous on the land. She had broken and cultivated ten acres, and built a frame house, ten by twelve feet. At the time of the entry there were no improvements whatever on the land, and I can not concur in your said office decision that the proofs submitted are "not conclusive as to claimant's good faith."

The claimant will be required to give new notice of her intention to submit final proof, and, if upon the day advertised for final proof no protest or objection is filed, then the proof hitherto made may be accepted as final. The decision of your office modified.

TIMBER CULTURE CONTEST—PLANTING.

GREGG v. HALLOCK.

A contest against a timber culture entry must fail, where, prior to the initiation thereof, the entryman has not only commenced to cure the default but has also made due provision for subsequent compliance with law.

Secretary Noble to the Commissioner of the General Land Office, March 28, 1890.

On January 25, 1883, Orange Hallock made timber culture entry for the SE.¼ Sec. 35, T. 31, R. 16 W., Niobrara land district, Nebraska.

On February 2, 1886, Niles W. Gregg initiated a contest against said entry alleging a failure to comply with the requirements of the law as to planting trees, seeds or cuttings during the third year after entry, and that the said failure existed at the time of said contest. The local officers ordered a hearing which was duly had before them, and on June 11, 1886, they found in favor of claimant and recommended that the contest be dismissed.

On December 31, 1886, contestant appealed, and on October 13, 1888, your office found from the evidence that there were not more than two and a half acres planted to tree seeds at the time of the initiation of the contest, "but at the time of the hearing claimant had ten acres planted to trees," thereby showing his good faith, and directed that—

Claimant will therefore be required within thirty days after due notice of this decision to amend his entry and relinquish eighty acres thereof, said entry to remain intact as to the remaining eighty acres, and to include the land planted to trees. On his failure to file such relinquishment within the time specified, his entry will be canceled.

From this decision each party filed an appeal.

R. A. Jones was the first witness examined on the part of contestant and he testified that he knew the tract in dispute and resided on the adjoining tract; that between January 26, 1885, and January 27, 1886, there was a row furrowed out around three sides of the claim and tree seed dropped in and covered over with a hoe; he crossed over said timber culture claim once every day in the spring and sometimes twice a day in the summer; that the seeds were planted in the spring of 1885, on the north, east and south sides, but none were growing there at the time this contest was initiated.

On his cross-examination witness testified that he saw the furrows on the north side opened and the tree seeds dropped in, and he afterwards saw them covered up; he thought there was five or six acres of cultivated land in the strip where the tree seeds were planted, but he could not tell how much breaking there was on the claim in the spring of 1885; he believed there was about sixty acres altogether; there was a fire guard around three sides of the tract; the breaking was done on the south side joining the fire guard.

C. A. Manville, C. E. Johnson, and the contestant were each sworn as witnesses against the entry, but their testimony does not materially strengthen the testimony given by Jones.

John Botts, Charles Jaques and claimant were sworn and testified in support of the entry and from their testimony it is shown that in the spring of the year 1883, claimant broke about six acres on the north, east and south sides of the tract covered by his entry, and in the spring of 1884, said first breaking was cultivated and sowed to oats and five additional acres broken, and a portion of it was sowed to sod corn; after the oats were harvested the stubble was plowed that fall; and in the spring of 1885, claimant had said first breaking cultivated and four rows of ash and box-elder tree seeds planted therein; one of said rows

being on the south side, one on the east side and two rows on the north side of said claim; each row was about one hundred and sixty rods in length; the two rows on the north side were about eight feet apart; beans were also planted on said six acres but not in the tree rows. Claimant raised a crop of corn on the second five acres, and broke twenty-five additional acres on said tract in 1885.

Claimant swore that he planted enough of tree seeds in the four rows to plant thirty acres in the manner required by law; that his object in doing so was to raise enough of young trees to plant in the second five acres, and to have enough to fill in with; that the tree seeds were in good condition and were properly planted, but that they failed to germinate or grow, owing to two months of very dry weather that visited that vicinity after the seeds were planted.

Claimant also testified,

In the fall of 1885, after I saw there were no trees coming up from the seed I planted in the spring, I contracted for forty-five thousand cottonwood trees to plant . . . and paid for over half of them at that time. I got the trees this spring and planted . . . over ten acres with trees and cuttings.

It seems from this testimony that the entryman did during the third year of his entry actually plant tree seeds upon the five acres of the land. This planting may not have been done in the best manner, but prior to the initiation of this contest the entryman had in buying young trees not only taken the steps to cure whatever default may have existed, but also to enable him to fully comply with the requirements for the next year's planting. I am of the opinion that under these circumstances this entry should be allowed to stand subject to future compliance with the requirements of law, and that the contest should be dismissed.

The decision of your office is accordingly modified.

STATUTORY DEDICATION—PORTERFIELD SCRIP.

GAMBLE *v.* SAULT STE. MARIE.

The proceedings under the act of September 26, 1850, and in conformity therewith, constitute a statutory dedication to the village of Sault Ste. Marie of the tract set apart for cemetery purposes, whereby the title passed from the United States, and, upon the incorporation of the village, vested in the municipal authorities thereof in trust for the purposes of the dedication.

By such dedication the government parted with the title to said tract, and all control thereof, and said land was not thereafter "public lands of the United States, not otherwise appropriated" and subject to the location of Porterfield scrip.

Secretary Noble to the Commissioner of the General Land Office, March 31, 1890.

On April 21, 1887, George H. Gamble made application at the Marquette land office, in the State of Michigan, to locate Porterfield scrip, which, by virtue of the act of April 11, 1860 (12 Stat., 836), authorized

the entry of forty acres or less of any of the surveyed public lands of the United States, not otherwise appropriated, "where the minimum price of the same shall not exceed the sum of one dollar and twenty-five cents per acre," upon two and eighty-four one-hundredths acres of land situated in the village of Sault Ste. Marie, in said State, designated as "cl. 135," and "village cemetery," on the official plat of said village, hereinafter more particularly referred to.

The local officers rejected the application of Gamble, "for the reason that the land applied for is not subject to entry, the same being designated and recognized as private claim No. 135, and a public cemetery in the village of Sault Ste. Marie."

From this finding Gamble appealed. Your office, however on July 27, 1888, affirmed the action of the local officers, and the case is now here on Gamble's appeal from your office decision.

The small tract of land in controversy originally came into the possession of the United States along with and as a part of the public domain acquired under the cession of the great northwest territory in 1787. The Indian title thereto was extinguished in 1820. (Treaty, June 16, 1820, 7 Stat., 206.) The tract lay in the immediate vicinity of the Rapids of St. Mary's river, and constituted, in part, what was for many years the site of a French trading post.

In 1822 the government established, substantially on the same site, a military post, known as "Fort Brady." This fort soon brought around it a small settlement, which was known as the "Sault Ste. Marie," which, in the course of time, grew into an extensive village, known as the village of Sault Ste. Marie.

Under this condition of things it became necessary, in order that the rights and interests of all concerned might be justly determined and protected, that some special action should be taken by Congress relative to the disposition of the government lands settled upon, improved and occupied by the inhabitants of the village. To meet the apparent exigency of the situation, the act of September 26, 1850 (9 Stat., 469), was passed.

The first section of this act authorized the register and receiver of the local land office to examine and report upon claims to lots at the Sault Ste. Marie, according to the provisions thereinafter contained, and pursuant to instructions to be given by the Commissioner of the General Land Office.

Section two provided, that there should be furnished by said Commissioner a map on a large scale of the lines of the public surveys at the Sault Ste. Marie, upon which there should be designated by the proper military officer, under the direction of the Secretary of War, on the application of the register and receiver,

the position and the extent of lots necessary for military purposes, as also the position and the extent of any other lot or lots, which may be required for other public purposes, and also the position and extent of the Indian agency tract, and the Indian reserve.

Sections three, four, five and six provided for the presentation of all *bona fide* claims to lots in said village, by the settlers thereon or occupants thereof, and for the adjudication and classification of all such claims by the register and receiver, and that the number and location of each claim, and the name of the claimant, should be designated by said officers, upon the map to be furnished as provided in the second section of the act, together with the estimated actual value of each claim and the assessment thereon of the sum which, in their judgment, should be paid for the same to the government.

By section seven, it was provided that, upon the completion by the local officers of the work required of them under the preceding sections, the surveyor-general of the State, on being notified thereof, should dispatch a skillful deputy to the Sault Ste. Marie, who should proceed forthwith to lay off and survey the village

into town lots, streets, avenues, public squares, out-lots, having regard to the lots and streets already actually surveyed, existing or established, and having regard also to the existing limits and extent of the lots, and to the existing limits and extent of the lots covered by the claims which shall have been adjudicated by the register and receiver.

It was further provided, that, after the completion of such survey, said deputy should—

prepare a plat exhibiting, in connection with the lines of the public surveys, the exterior lines of the whole village, also the squares, individual lots, and the *public lots*, and also the out-lots, designating the lots reserved for military or *other public purposes*, according to the extent and limits of the same as fixed by the proper military officers, pursuant to the requirements of the second section of this act, and specifying the name of each claimant of the individual lot, and whether confirmed or rejected, the sum assessed by the register and receiver as a payment, which should be made in each case by the party, and also designating the vacant in-lots and out-lots, subdividing the former into lots not exceeding one quarter of an acre each, and the latter into lots not exceeding two acres each; that it should be the duty of said deputy to specify, on the survey of each vacant lot, its "actual present estimated value," according to the best information he could obtain; that he should submit his plat of the actual surveys to the register and receiver, who, if they found it to be in accordance with their adjudications, were required to append thereto their certificate to that effect; and, thereupon, the deputy was directed to transmit said plat, with his field-notes, to the surveyor-general of the State, for his examination and approval.

By section eight it was made the duty of the surveyor-general, upon the approval of the work of his deputy, to return the latter's plat to the register and receiver, who were required thereupon to transmit the same with other papers and the record of all testimony submitted, to the Commissioner of the General Land Office, who was given power either to affirm, modify, or reverse the findings of the local officers; and it was further provided that his action in every case should "be final and binding upon the parties and the government," and that upon payment

being made, etc., for the lots, the claims to which might be finally confirmed, patents should issue therefor.

Section nine provided for the sale of all vacant lots, or lots the claim to which might be rejected, and for the issue of patents to the purchasers thereof.

By section ten it was made the duty of the proper accounting officers of the Treasury, after all the claims should have been adjudicated, surveyed, and the vacant lots sold, to ascertain the net amount of sales, after deducting all expenses incident to the execution of the act, which amount, it was provided, should be paid over by the Secretary of the Treasury to the trustees, or other constituted authorities of Sault Ste-Marie, to be expended by them in the improvement of the streets and erection of public buildings.

The record shows that in November, 1852, the surveyor-general of the State, having been officially notified by the register and receiver that they had completed their adjudications under the provisions of the act, dispatched Deputy-Surveyor William Edmons to the village, with authority to make the survey required by section seven. The survey and plat were made by Edmons, approved by the surveyor-general, and, in July, 1853, were transmitted by the register and receiver, together with a joint report of their action in the premises, the testimony taken, and other papers, to the Commissioner of the General Land Office, for his action thereon.

In their joint report, which gives an elaborate account of their actions, the register and receiver say, under the head of "Reservations," that,

In accordance with the second section of said act, (meaning the act of September 26, 1850), and the instructions, the military reservation of Fort Brady, the Indian reserve, and Indian agency reserve, and the Ste. Marie Canal reservation of four hundred feet in width have been designated on the plat of the public survey of said village and our adjudications have been confined strictly to claims outside of said reservations, and in no instance have we confirmed claims, or any portion of the same within said reservations.

Under the head of "Streets and Public Squares," they further say :

We have not felt authorized to lay out new, or widen old streets, or change the course of old and established streets, where they have materially conflicted with private claims; but, outside of the principal business portion of the village, several streets of usual width have been located and surveyed, as will appear from and on the plat of the village, and which will be an advantage both to the appearance and interests of the village, as well as to the out and in lots, to be sold for the benefit of the town. One public square of respectable size has been reserved, and one public burying ground, the location and extent of which will be seen on the plat.

In July, 1854, the Commissioner rejected the survey made by Edmons, because of certain inaccuracies therein, not material to the issue here involved, and instructed the surveyor-general to cause a new survey to be made. The new survey was accordingly made by Deputy Thomas Whelpley, and a new plat was prepared by him in conformity therewith. To this plat the register and receiver, on May 31, 1855, attached their certificate, to the effect that the same had been made under

their directions and in conformity with their adjudications. On September 4, 1855, the plat and survey were approved by the surveyor-general, as shown by his certificate attached to the plat. Upon receipt thereof by the Commissioner, they were accepted and approved, and the plat thus made became and now remains the official plat of the village, under said act of 1850.

On this plat there is designated, the location and extent of the military reservation, the Indian reservation, the Indian agency reservation, and the Ste. Marie canal reservation, as originally "fixed by the proper military officers, pursuant to the requirement of the second section of the act." The plat also shows the location and extent of the two lots reserved by the register and receiver, as stated in their said report, one being designated as a "public square," and the other as the "village cemetery," the latter of which is also marked on the plat as "Cl. 135," and as containing two and eighty-four one-hundredths acres of land. This is the lot which forms the subject of this controversy. It had been used as a public cemetery by the inhabitants of the village, for twenty years, or more, prior to the date of the survey, under the act of 1850, and was at that date still being so used. It was, furthermore, the only burial place at or near the village of Sault Ste. Marie, except that set apart for, and used exclusively by, the military post.

It further appears that on January 24, 1853, an application was filed with the register and receiver, on behalf of the township of Sault Ste. Marie, by one Stephen R. Wood, supervisor of said township, asserting a claim to said lot as a public cemetery. The application was twice considered by the register and receiver, who decided, substantially, that there was no authority under the act of 1850 for the confirmation of such a claim, and the same was practically rejected by them. In their findings they said, however, that "the claim is an equitable and just one;" that the "tract had been used a long time as a public burying ground, and is yet so used; . . . that it is the only public burying ground in the village of Sault Ste. Marie;" and they recommended, in effect, that the lot be confirmed to the village, as set apart and laid down on the plat and public survey thereof.

It does not appear that this claim was ever officially acted upon by the Commissioner of the General Land Office, or that there was ever any action upon the recommendation of the register and receiver, in respect thereto, further than the acceptance and approval, as aforesaid, of the survey and plat of the village.

After such survey and plat had been thus accepted, the approved claims, the vacant in and out lots, and rejected claims, with a few isolated exceptions, were disposed of in accordance with the provisions of said act of 1850, and with reference to the streets, avenues, public square, and village cemetery, as laid down and designated on the plat.

The cemetery continued to be used, as such, by the inhabitants of the village, for many years thereafter.

In 1874 the village became incorporated under the State laws of Michigan, and, thereupon, a president, and board of trustees, or village council, were elected. The northern portion of the cemetery had been inclosed and was at that time crowded with bodies. The village was growing rapidly, and it soon became apparent that another and larger place would have to be secured for the burial of its dead, in order to meet the reasonably expected demands of the future in that regard. An agreement was therefore made between the village council and one Thomas Ryan, by which the southern or uninclosed portion of the cemetery, which lay immediately west of Ashman street and north of Spruce street, according to the plat of said village, was exchanged for a tract of five acres of land to be used for cemetery purposes, lying on a bluff south of the village. Deeds were made by the parties, respectively, for the tracts thus exchanged. Ryan afterwards subdivided the portion of the cemetery thus acquired by him (in which but few, if any, bodies had been buried) into village lots, and sold the same to private parties, who have erected valuable residences and other buildings thereon. The inclosed portion of the cemetery continued to be used for burial purposes until the year 1883.

It further appears that in November, 1883, the council of the village, in response to the petition of over one hundred and fifty of its citizens, setting forth that the old cemetery was an injury to the growth of the town and endangered the health of the inhabitants thereof, passed a resolution, instructing the village attorney to institute proceedings in the courts of the State to cause the same to be vacated. Proceedings were accordingly instituted in the circuit court of Chippewa county, which, in 1884, resulted in a decree of said court ordering "that said cemetery be vacated in whole as a place of burial." This decretal order did not, however, embrace that portion of the original cemetery lot, which had been previously conveyed to Ryan, as hereinbefore mentioned, but covered all the residue of such original lot by specific description.

The use of the lot as a cemetery was thereupon given up by the inhabitants of the village, and the bodies theretofore buried therein, except in a few instances where the omission was due, perhaps, to want of proper search, were removed to the new cemetery purchased from said Ryan.

At this time the village had grown to be a city of considerable size, and in the years 1885 and 1886, after the removal of the bodies from the old cemetery lot, there was erected thereon a new city hall, at a cost of \$10,000, and, subsequently, an engine and hose house, at a cost of \$2,500. Valuable improvements had also been erected on the part sold to Ryan, as already stated, and it is shown, by several affidavits on file in the record, dated February 2, 1888, that at that date the whole premises in controversy, including the improvements, were worth about \$100,000. This, according to the record, was practically the condition

of the tract, except that the engine and hose house, probably, had not yet been built, when, in April, 1887, Gamble made his application to locate Porterfield scrip thereon.

It is proper further to state that at a meeting of the township board of the township of Sault Ste. Marie, held on March 9, 1887, certain resolutions were adopted by said board, which amounted, in effect, to an assertion of right in the public generally of said township to the use of the premises in question as a place of burial, and a protest against the diversion thereof to other uses. A copy of these resolutions is on file in the papers of the case.

These are the facts presented by the record, and, substantially, as set forth in the decision appealed from. In that decision it was held, in effect, (1) that the proceedings under the act of September 26, 1850, relative to the survey and plat of the village, the approval thereof by the Commissioner, and the subsequent sale of village lots in accordance therewith, and with reference to the streets, avenues, public square, and village cemetery thereon designated, amounted to an irrevocable dedication of the premises in question to the village of Sault Ste. Marie for cemetery purposes, whereby the jurisdiction over the same, the title thereto, and the right of possession and control thereof, passed from the United States and became vested in the village, upon its subsequent incorporation as a body politic, in trust for the purposes intended by the dedication; (2) that the subsequent act of the village authorities in causing the cemetery to be vacated, did not constitute an abandonment on the part of the beneficiaries of the trust; (3) that, if an abandonment were clearly and properly shown, it could not work a reversion of the tract to the government; (4) that even if a reversion could, in any event, result from abandonment, it would require a declaration of forfeiture by the government to make it effective, and (5) that even if a forfeiture based upon abandonment were declared, it would be ineffectual as such in this case, for the reason that by the dedication the complete title to the premises passed from the United States, and from their control forever thereafter, for any purpose whatever.

The errors assigned by Gamble in his appeal are very numerous, and need not be here set forth in detail. It is sufficient to say that they amount, in substance, (1) to a denial of the correctness of the several holdings of the Commissioner, and (2) to a contention that the proceedings under the act of 1850 constituted simply a reservation of the tract in question by the United States to a particular easement or use, the fee remaining in the United States; that the acts of the village authorities in causing the vacation of the cemetery and the removal of the bodies therefrom amounted to an abandonment of such easement or use by the beneficiaries, and that thereupon the tract, unencumbered by any reservation, fell back into the public domain and became subject to disposal under the general land laws, and was, therefore, at the date of Gamble's application, public land, subject to location with Porterfield scrip.

The case has been argued at great length by counsel, both for the appellant, Gamble, and for the village; as appellee.

It is most earnestly contended by appellant's counsel, in his printed brief, that no dedication of the tract in controversy ever existed; that the same was simply reserved by the government to a particular specified easement or use; and that such easement or use has been voluntarily surrendered and extinguished, leaving the government the full owner of the tract, free of all charges whatsoever. As opposed to this contention it is argued with equal earnestness, by counsel for the village, that the decision appealed from is substantially correct and should be affirmed.

A dedication is the act of devoting or giving property for some proper object, and in such manner as to conclude the owner. *Hunter v. Trustees of Sandy Hill* (6 Hill, N. Y., 407).

It is well settled that a dedication may be made by the United States, as well as by a private individual. In the case of the *United States v. Illinois Central Railroad Company* (2 Bissell's Reports, 174), it was held that the making and recording by a proper government agent of a plat of land belonging to the United States, a portion of which was designated on the plat as "Public ground forever to remain vacant of public buildings," constituted a dedication by the government of the portion thus designated to public use of the kind indicated. In the case of *Dubuque v. Maloney*, (9 Ia. 451) it was held that the general government—

by laying off the land on which the city of Dubuque is situated, into lots, streets, avenues, public squares and out-lots, as represented upon the plat returned to the General Land Office, and by the sale of the lots to the occupants thereof, and to other purchasers, the streets of the town of Dubuque were dedicated to public uses, in such sense that the general government, as the proprietor, was forever concluded from exercising any authority or setting up any title to the same.

It is not necessary, therefore, that the owner or dedicator should be a private person. A dedication may be made by, or presumed against, a corporate body, or the sovereign, and, in fact, in all cases where the state of the property is such that a dedication of the soil is possible. (22 Greenleaf on Evidence, Sec. 662; *Village of Mankato v. Willard*, (97 Am. Decs., 208).

Nor is it necessary that the dedication be made specifically to a corporate body capable of taking by grant. The dedication may be made to the general public, and, if accepted and used by the public in the manner intended, it works an estoppel *in pais*, precluding the owner and all claiming under him from asserting any ownership inconsistent with such use. *New Orleans v. United States*, 10 Peters, 662; *Village of Mankato v. Willard*, *supra*; *Brown v. Manning*, 6 Ohio, 298-303; *State v. Trask*, 27 Am. Decs., 554 *Cincinnati v. White*, 6 Peters, 431. If, at the time of a dedication to a village or town, the beneficiary has no corporate existence, all rights under the dedication will pass to the

corporation, as soon as created. (*Waugh v. Luch*, 28 Ill., 448; *Pella v. Scholte*, 24 Iowa, 283).

It is also well settled that land may be dedicated to pious or charitable purposes, as well as for public streets, public squares, and the like. Public sites for court-houses, churches, burial grounds, etc., are familiar instances of the application of the principle. They may all be established in the same manner as in the case of public streets and alleys, and the binding effect of such dedications is now too well settled to admit of question. *Hunter v. Trustees of Sandy Hill*, 6. Hill, N. Y., 411, and authorities cited; *State v. Trask*, 27 Am. Decs., note, p. 561.

In the application of the authorities cited to the facts and circumstances of the present case, two questions arise: 1. Did the proceedings under the act of 1850 constitute a dedication of the land in controversy by the United States to the village of Sault Ste. Marie for public use? 2. If so, did such dedication have the effect to divest the United States of their title to the land?

I am of the opinion that both of these questions must be answered in the affirmative.

There could scarcely be a case, in my judgment, where a dedication of land to public use is more clearly established than this one. The map or plat of the village of Sault Ste. Marie was made under express directions of the act of Congress, and was returned to and made a part of the public records of the General Land Office. On this map or plat certain lots were designated for military and other public purposes, as fixed by the proper military officer, in accordance with the provisions of the second section of the act, and, as thus set apart, were appropriated by the United States for specific purposes, for the most part directly connected with the use of the powers of the general government. There was also designated on the map or plat, in addition to the streets, avenues, etc., one lot marked "public square", and one *public lot* marked "village cemetery." This map or plat was made strictly in accordance with the provisions of the statute, which directed, among other things, that, in connection with the lines of the public surveys, the exterior lines of the village, "also the *squares*, individual lots, and *public lots*", and also, "lots *reserved* for military and other public purposes", should be exhibited thereon, and as thus made, the same was approved by the Commissioner of the General Land Office. The sale of the village lots, provided for in the act, was made in accordance with the plat, and with reference to the streets, avenues, public squares, and village cemetery as thereon exhibited. The cemetery had been used as a place of burial by the inhabitants of the village for more than twenty years prior to the enactment of the statute of 1850, and was then being so used. It is to be presumed that Congress at the time had full knowledge of the existence and location thereof, and of its long continued use as a place of burial; and having provided for "public lots" in the laying-off and platting of the village, as well as public squares, it

would seem that ample authority is given in the statute, and was intended to be so given, to set apart the cemetery as one of the public lots for the future use of the village as a place of burial. The lot so set apart was in no sense reserved to the United States. It was not designated on the plat by the military authorities, neither was the public square. The lots reserved to the United States were those designated by the military authorities for military and other public purposes connected with the general government. The public square and the cemetery lot were set apart, and marked on the map or plat by the register and receiver, in pursuance of the statute, as a part of the plan of the village, and for the use of its inhabitants and have, therefore, no connection with the lots required to be set apart for military or other public purposes, by the second section of the act.

If these proceedings constitute a dedication to the village of the public square by the United States, the same result must also have been wrought in reference to the cemetery. They both depend upon the statute, and are surrounded by the same facts and circumstances. It will scarcely be claimed that there was no dedication in the case of the public square—such a claim could have no foundation in law or reason.

I am therefore of the opinion that the proceedings under the act of 1850, as herein set forth, did constitute a dedication by the United States of the land in controversy to the use of the inhabitants of the village of Sault Ste. Marie, as a place for the burial of their dead. I am also of the opinion that by virtue of said act, and the proceedings in conformity therewith, the dedication was, technically speaking, a statutory dedication, whereby the title to the land passed from the United States, and, upon the incorporation of the village, vested in its municipal authorities in trust for the purposes of the dedication; that the United States thereby parted with their title to, and jurisdiction and control over the cemetery lot just as effectually as by the same means they parted with their title to and control of the streets, avenues, and public square designated on the plat. There could be no reversion in either case. The tract in question thereupon ceased to be a part of the public domain, and the United States have since had no interest in, or control of the same whatever. It was not, therefore, "public lands of the United States, not otherwise appropriated," at the date when Gamble made his application to locate Porterfield scrip thereon.

In this view of the case it is not deemed necessary to consider any questions relative to the action of the village authorities in causing the cemetery to be vacated, inasmuch as, whatever may be the legal effect of such action, as touching the public use to which the land was originally dedicated or the rights of those interested therein, it can make no difference so far as the question here presented is concerned. It may be said, however, that in the exchange of part of the cemetery lot for a larger lot, more suitable for burial purposes, the village authorities seem to have, in the spirit at least, attempted to execute and carry

into effect the original purpose of the dedication, at any rate, as to the part thus exchanged.*

Other questions are presented by the record and have been argued by counsel, but owing to the view I have taken of the case, they are not deemed material to the issue involved, and will not, therefore, be discussed.

For the reasons herein already stated, the decision which is the subject of this appeal, to the extent that it rejects the application of Gamble, must be, and the same is hereby, affirmed.

ACCOUNTS—WITNESS FEES—HEARING ON REPORT OF SPECIAL AGENT.

C. L. HIGDAY.

In proceedings by the government against an entry a witness who is summoned by the claimant and testifies in his behalf is not entitled to any fees from the United States.

Secretary Noble to the Commissioner of the General Land Office, March 31, 1890.

C. L. Higday appeals to this Department from the action of your office by letter of November 16, 1888, denying his application for allowance and payment of fees and expenses as a witness for the United States in the case of W. D. Holmes.

It appears from a report dated October 25, 1888, of Special Agent E. L. Thomas, to your office in reference to this matter, that he wrote to one M. S. Ketch, "requesting him to secure reliable witnesses for the government" in said case; that at the hearing, said Ketch, to the surprise of the special agent, appeared as attorney for the claimant, Holmes bringing with him Higday, who claimed to be a witness for the government; that the special agent "at once refused to recognize Higday, as a witness for the government, and so told him at the time;" that he charged Ketch "with trying to force witnesses" for the claimant on him (the special agent) "as witnesses for the government." It further appears that Higday, after the special agent had refused to recognize him as a witness for the government, was introduced by Ketch and testified in behalf of the claimant.

By circular of your office of May 25, 1885, and of this Department (Accounts Division) of December 4, 1889, special agents are required, before payment can be made to "certify to the transportation expenses of each witness" summoned by them for the government on hearings in land entries, "and the time necessarily employed" by them as such witnesses.

The special agent in this case refused to certify to Higday's account. Being summoned by the attorney for the claimant (who, on being requested by the special agent to procure witnesses for the government,

does not appear to have disclosed his relation to the case), and knowing when summoned, it must be presumed, that his testimony would be in the interest of the claimant, and having in fact testified as a witness for the claimant, the special agent was justified in refusing to certify to his account as a witness for the government.

The ruling of your office, "that he is not entitled to any fees from the United States," is affirmed.

RAILROAD GRANT—CONFLICTING SETTLEMENT CLAIM.

NORTHERN PACIFIC R. R. Co. v. BOGUE.

Under the grant to this company "occupation" by a homestead settler, instead of "entry," is made the test to determine whether lands are withdrawn on general route, or pass to the company under the grant.

Secretary Noble to the Commissioner of the General Land Office, March 31, 1890.

I have considered the motion for review of departmental decision (unreported) rendered April 13, 1889, filed by the Northern Pacific Railroad Company, by which the claim of said company to lots 5 and 6, the S $\frac{1}{2}$ of the SE $\frac{1}{4}$ of Sec. 19 T. 23 N., R. 6 E., Washington Territory, was rejected and Michael Bogue allowed to file his pre-emption declaratory statement for said tract, which was presented at the local office on September 27, 1884.

The grounds of said motion are: (1) Error in ruling "that mere occupancy suffices to except the tract from the operation of the withdrawal on general route, or from the grant on filing map of definite location;" and (2) Error in holding "that at date of Bogue's application to enter, said tracts were public lands subject to such entry."

The very same errors, with others, were insisted upon by the company in its appeal from the decision of your office. No new evidence is offered, and the motion for review, in effect, concedes that the land in question was occupied by settlers at the date of withdrawal on general route and at the date of the definite location of the line of its road. If this be true, the land was excepted from the withdrawal and from the grant. It will be unnecessary to consider the effect of the two alleged withdrawals on general route subsequent to the withdrawal of August 13, 1870, on general route, for it appears that at the date of each the land was so occupied as to except it therefrom.

In the case of said company v. Anrys (on review, 10 L. D., 258), the Department declined to grant the motion for review filed by the company, and held that under the terms of the grant to said company Congress "made occupation the test, instead of entry," to determine whether lands were withdrawn on general route or passed to the company under its grant.

Said ruling is decisive of the question presented by the motion in this case. The motion, therefore, must be, and it is hereby, denied.

PRE-EMPTION—FILING—PAYMENT.

RANEY *v.* EDMONDSTON.

Failure to file declaratory statement for offered land, within the statutory period, does not defeat the right of purchase, if the defect is cured prior to the intervention of an adverse right.

In the presence of an intervening adverse right, failure to make payment for offered land within twelve months from date of settlement defeats the right of pre-emption.

Secretary Noble to the Commissioner of the General Land Office, April 1, 1890.

I have considered the case of G. F. Raney *v.* Abner Edmondston on appeal of the former from your office decision of November 30, 1888, holding for cancellation his cash entry for NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 10, T. 24 N., R. 19 W., of 5th P. M., Springfield, Mo., land district.

It appears from the record that on March 15, 1887, Edmondston with his family settled and established residence upon, and on November 17, 1887, he filed his pre-emption declaratory statement for S. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 9, and SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, and NW. $\frac{1}{4}$, SW. $\frac{1}{4}$, Sec. 10, T. 24 N., R. 19, and on July 24, 1888, Raney made private cash entry for NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, of said section 10.

On September 3, 1888, Edmondston made application to transmute his pre-emption to a homestead claim, but said application was rejected by the local officers as to said NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, upon the protest of Raney who had been notified by claimant of his intention to apply to transmute, because he had settled in the spring of 1887, but had not filed his declaratory statement until November and they held that he had not complied with the requirements of law in regard to the time within which he should file after settlement.

On appeal your office overruled their decision and held that,—

As Edmondston applied to transmute his filing within a year after making it, with notice to Mr. Raney, who has made response, and as there was no adverse claim on the land when he made the filing, he could not be deprived of his right to homestead the land merely on account of the delay in filing.

The land was offered January 17, 1878, and Raney's cash entry was made subject to the filing of Edmondston.

Edmondston having filed his declaratory statement before the intervention of Raney's private cash entry his laches in respect to filing was cured under the rule in *Johnson v. Towsley* (13 Wall., 72), wherein it was held in construing a similar provision of section 2265, in regard to the time for filing a declaratory statement upon unoffered land, that,—

If no other party has made a settlement or has given notice of such intention, then no one has been injured by the delay beyond three months, and if at any time after the three months, while the party is still in possession, he makes his declaration, and this is done before any one else has initiated a right of pre-emption by settlement or declaration, we can see no purpose in forbidding him to make his declaration or in making it void when made.

In *Emmerson v. Central Pacific Railroad Company* (3 L. D., 117) it was said,—

Now the provision relating to offered land (Sec. 2264 R. S.), is so similar in language that the same construction must necessarily be given it. On default in filing, "the tract of land so settled and improved shall be subject to the entry of any other purchaser." There is no declaration of forfeiture here, as in the former section, and nothing to indicate that Congress intended to provide for an absolute forfeiture; and it follows inevitably that, as justly remarked by Mr. Secretary Delano, in *Walker and Walker* (1 C. L. L., 293), the construction in *Johnson v. Towsley* applies *a fortiori* to claims upon offered land. Such land therefore is subject to entry by other purchasers, after laches in filing by the settler, but is not forfeited as against the government.

But section 2264 Revised Statutes which provides the method of exercising the pre-emption right upon offered lands, requires that payment shall be made within a certain time after settlement, and this seems to have been entirely overlooked by your office in your said decision.

Said section is as follows,—

When any person settles or improves a tract of land subject at the time of settlement to private entry, and intends to purchase the same under the preceding provisions of this chapter, he shall, within thirty days after the date of such settlement, file with the register of the proper district a written statement, describing the land settled upon, and declaring his intention to claim the same under the pre-emption laws; and he shall, moreover, within twelve months after the date of such settlement, make the proof, affidavit, and payment hereinbefore required. If he fails to file such written statement, or to make such affidavit, proof and payment within the several periods named above, the tract of land so settled and improved shall be subject to the entry of any other purchaser.

It is, therefore true that a failure to pay for such land within the time provided in said section renders it subject to entry by other purchasers. Edmondston settled March 15, 1887, and it was necessary for him to make payment for the land "within twelve months after the date of such settlement," but having failed to do so, the tract of land in controversy, "became subject to the entry of any other purchaser," and Raney having made entry thereof has the superior right and Edmondston's entry will be canceled as to said NW. $\frac{1}{4}$, SW. $\frac{1}{4}$, Sec. 10.

Your said decision is accordingly reversed.

PRACTICE-NOTICE; RESIDENCE.

ANDERSON *v.* TANNEHILL ET AL.

Service of notice by registered letter is personal service as required by rule 15 of Practice.

Residence in good faith requires the establishment and maintenance of a home on the land to the exclusion of one elsewhere.

Secretary Noble to the Commissioner of the General Land Office, April 1, 1890.

I have considered the case of Andrew Anderson *v.* Alfred Tannehill upon the appeal of Olaf Stenson, transferee, from your office decision

of February 9, 1889, holding for cancellation the pre-emption cash entry of said Tannehill for SE. $\frac{1}{4}$, Sec. 10, T. 62, R. 13 W., Duluth, Minnesota, land district.

It appears from the record that Tannehill filed his pre-emption declaratory statement for said land November 18, 1881, alleging settlement on the 10th of the same month, and on July 10, 1882, he submitted final proof and made cash entry for said land.

On November 29, 1886, Anderson presented his affidavit of contest, alleging that said entry of Tannehill was made by the introduction of false and fraudulent proof and that said Tannehill had never in fact established actual residence on said land, and that he had not improved and cultivated the same.

By letter of December 15, 1886, your office ordered a hearing upon said contest and the local officers issued notice fixing July 25, 1887, for hearing.

On this date contestant's attorney appeared and filed an affidavit for publication of notice and on the same day notice was issued fixing September 8, 1887, for the hearing and an order of publication was made.

On August 31, 1887, Olaf Stenson appeared and filed a statement under oath that he was then owner of the said land and was allowed to intervene, and on September 8, on his motion proceedings under the notice were dismissed but upon a showing by contestant's attorney that the failure to publish notice had been an inadvertence upon his part the local office permitted him to proceed *de novo*, and issued a new notice fixing October 20, 1887, for the hearing and upon filing of proper affidavit made an order for publication. Said hearing was subsequently continued by consent to November 22, 1887, when on motion of Stenson, the local officers dismissed all proceedings under the notice for the reason that the record failed to show that the same was posted upon the land, but at the same time issued a new notice fixing January 11, 1888, for hearing, and upon a proper affidavit being filed publication was ordered.

On January 11, 1888, contestant and transferee appeared and this time again the transferee appeared specially and moved to dismiss because no personal service of said hearing was made upon him although he was a resident of the city of Duluth and the State of Minnesota. Upon a showing, however, that notice had been given said Stenson on December 3, 1887, by registered letter received on that date by Ole A. Berg, his partner in business and joint owner with him of the land in controversy, said motion was overruled and the hearing proceeded.

From the evidence I am satisfied that said Tannehill never established any *bona fide* residence upon the land but during all the time which residence is alleged in the final proof said Tannehill with his family was a resident of Duluth nearly one hundred miles from said land and if he at any time did live upon or commence the improvement of said land

such residence was not in good faith but was merely colorable and for the purpose of obtaining title to said land without actual compliance with law.

This conclusion leaves the questions of practice raised by the appeal to be disposed of. These questions are substantially embodied in the following propositions:

I. That the local office lost jurisdiction of the case when it made an order for publication of notice of the hearing to be held September 8, 1888, for the reason that no affidavit was filed showing effort to make personal service upon entryman.

II. That the local office erred in denying Stenson's motion to dismiss the contest filed January 11, 1888, upon the ground that said Stenson as a party in interest was entitled to personal service of notice of said hearing.

Upon examination of the record I do not find the allegation of fact in the first of the above propositions to be sustained, for I find an affidavit of contestant's attorney, dated July 25, 1887, showing such efforts to make personal service of notice as would fully justify an order of publication; but if this were not the case the transferee was not injured by such order of publication and no such publication was ever made. All proceedings under any and all former notices were dismissed November 22, 1887, and the proceedings thereafter were *de novo* and the matter was so treated by the local officers who issued new notice, upon the old affidavit it is true but with new affidavit for publication, new posting upon the land and new proof of publication.

The transferee finds no fault with notice to entryman, but only contends that he is entitled to the same kind of personal service as entryman would be if living within the State and his residence known to the local officers.

In the first place this objection is purely technical. As a matter of fact transferee was notified by registered letter December 3, 1887, and upon said notice appeared specially to move a dismissal and afterwards cross-examined contestant's witnesses and introduced witnesses on his own behalf, testifying himself, so that his opportunities for the introduction of testimony to sustain the entry have not been in any degree abridged.

In the second place, service by registered letter is personal service as required by Rule 15, of Practice. *Crowston v. Seal* (5 L. D., 213); *Wm. Waterhouse* (9 L. D., 131).

It must therefore be held that the transferee had legal notice of the hearing and that his assignments of error are not sustained.

Your said decision is accordingly affirmed.

MINING CLAIM—SURVEY—CONNECTING LINE.

JOHN C. HAUCK ET AL.

In the survey of a mineral claim a connecting line run to a section corner on a township line is sufficient, though such township may not be sub-divided.

Secretary Noble to the Commissioner of the General Land Office, April 1, 1890.

I have considered the case of John C. Hauck *et al.*, mineral claimants, on their appeal from your office decision of October 26, 1888, requiring a resurvey in part of their mineral entry No. 815, of lots 39 and 57, situated in Helena district, Montana.

The only question now remaining in the case is whether said mineral claimants shall be required in compliance with your order contained in said decision, to amend their survey by running a new line connecting their claim "either with the corner of a *surveyed township* or a United States *mineral monument* within two miles."

In your said decision you say that townships 11 north, in ranges 5 and 6 west, in said land district, "have not been subdivided; and consequently it will be necessary for the survey of said claim to be amended, etc."

In your said decision you seem to have overlooked the fact that the section corner to which the connecting line is run, upon the plat of survey of the said claim is upon the township line.

If connection had been made upon said plat with an alleged section corner in the interior of a township not subdivided the question would be a different one, but in the survey of township lines section 2395, Revised Statutes provides that each distance of a mile within the township corners must be distinctly marked, and this establishes all section corners falling upon the township line. The plats of surveys on file in your office show that the corner with which claimant's plat is connected was thus established.

In the circular of October 31, 1881, governing mineral entries regulation No. 43, providing in regard to the surveys of mineral entries says the corner of the claim shall be connected by a line upon the plat "with the nearest public corner of the United States surveys."

This has been done in the case at bar by connecting it with a corner established by law upon the township line.

Your said decision is accordingly reversed.

HOMESTEAD ENTRY—ACT OF JUNE 15, 1880.

PETER WEBER.

That a cash entry under section 2, of the act of June 15, 1880, was made during the pendency of a contest, is an objection thereto that can only be raised on behalf of the contestant.

A power of attorney executed by the entryman, and authorizing a sale of the land, is not evidence of a sale thereof, and will not defeat a subsequent purchase under said act, nor will a contract of sale made before entry.

Secretary Noble to the Commissioner of the General Land Office, April 1, 1890.

I have considered the case of Peter Weber on his appeal from your office decision of January 12, 1889, rejecting his application to make homestead entry for SW. $\frac{1}{4}$, Sec. 31, T. 19 S., R. 24 W., Wa-Keeney, Kansas, land district.

It appears from the record that on July 26, 1878, one George Striegel made homestead entry for said land at the local office, then at Hays City, and on August 20, 1885, he purchased said land under the act of June 15, 1880, after making due proof of his identity and that he had not transferred or attempted to transfer his homestead rights under said entry, nor assigned or attempted to assign, his right to receive the repayment of fees, commissions and excess payments paid thereon, and all other matters required by the local office.

On November 24, 1886, said Weber applied to make homestead entry for said land, and his application was rejected because said land was covered by the cash entry of said Striegel under the act of June 15, 1880.

From this decision Weber appealed alleging for cause substantially that it appeared of record that on the 18th day of August, 1885, more than thirty days before he made cash entry Striegel had executed a power of attorney to one McFarland authorizing him to sell said land and that therefore said cash entry was fraudulent and speculative and wholly void.

Also that a contest had been commenced against said entry before cash entry was made for failure on the part of Striegel to comply with the law, and that the pendency of contest prevented a valid entry.

As to the last specification it is sufficient to say that if the allegation be true that a contest was pending at the date of entry, the application to purchase would be suspended pending the determination of the contest, under the rule in *Freise v. Hobson* (4 L. D., 580), but the allowance of entry was in such a case an irregularity only, and the entry would be allowed to stand subject to the right of the contestant should he be successful. *Pierpoint v. Stadler* (on review) (9 L. D., 390).

Weber does not claim to be the contestant, and cannot be heard to complain in regard to this point.

Weber makes no allegation that the entryman had sold the land prior to making cash entry, but only that he had prior to entry executed power of attorney authorizing a sale, and that he sold the land on the day the entry was made.

A naked power of attorney, executed by the entryman and authorizing a sale of the land, is not evidence of a sale thereof, and will not defeat the purchase, under the act of June 15, 1880, nor will a contract of sale made before entry. *Andas v. Williams* (9 L. D., 311); *Geo. E. Sandford* (5 L. D., 535).

Your said decision is accordingly affirmed.

SWAMP GRANT—ACT OF MARCH 3, 1857—REPAYMENT.

STATE OF MISSISSIPPI.

If patent has issued to individual grantees for lands that are in fact subject to the swamp grant, the remedy of the State is in the courts.

Swamp lands, included within the alternate sections reserved to the United States from the grant to the State for railroad purposes, did not pass under the subsequent act of September 28, 1850.

Lands thus excepted from the swamp grant are not within the purview of the confirmatory act of March 3, 1857, as said act does not enlarge the original grant, but as to said grant only confirms selections of land granted thereunder.

If the State sells a tract of land claimed by it under the swamp grant, and it subsequently appears that said land was not included within said grant, the holder of such title has no claim against the United States for repayment.

Secretary Noble to the Commissioner of the General Land Office, April 2, 1890.

The State of Mississippi appeals from your office decision of February 12, 1889, holding for rejection her claim under the swamp land grant of September 28, 1850 (9 Stat., 519), for the NW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ and SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, Sec. 1, T. 8 N., R. 7 W., St. Stephens Meridian, Jackson district, Mississippi.

These tracts of land (it is stated in your office decision) were selected by the State under said grant, February 8, 1854, but the records of your office do not show that the selection has been approved or patent issued thereunder. It also appears, that the tracts, respectively, were, in the order in which they are described above, patented by the government to individual patentees, in the years 1859, 1860 and 1861.

This being the case, this Department has no jurisdiction to take further action in reference to the disposal of said lands, and the State, if aggrieved must seek her remedy in the courts. Moreover, said lands being in an odd numbered section within the six miles granted limits of the grant of September 20, 1850 (9 Stat., 466), to the States of Illinois, Mississippi and Alabama, to aid in the construction of a railroad from Chicago to Mobile, were, it is held by this Department, excepted

from said swamp land grant of September 28, 1850 (1 Lester, 521; 5 C. L. O., 124; 7 ib., 70; 2 C. L. L., 1069, 1071, 1072; 4 L. D., 3). Being so excepted, they do not come within the purview of the act of March 3, 1857 (11 Stat., 251), cited by appellant, as said act does not enlarge the grant of September 28, 1850, but as to said grant only confirms selections of lands granted thereunder.

Among the papers transmitted to this Department is an application by Sarah E. Davis for repayment of purchase money claimed to have been paid by her for the land. The alleged payment appears to have been made to W. P. Evans and Elizabeth Evans, claimants under the State, who in consideration thereof made a warranty deed of said land to Mrs. Davis. There is nothing whatever disclosed by the record to authorize a claim of repayment from the government.

The decision of your office is affirmed.

SWAMP GRANT—INDEMNITY—ACT OF MARCH 3, 1857.

STATE OF OHIO. (ON REVIEW).

The swamp lands included within the alternate sections reserved to the United States from the grant to the State for canal purposes, did not pass under the subsequent grant of swamp lands, and no indemnity can be allowed therefor.

Lands thus excepted from the swamp grant are not within the confirmatory provisions of the act of March 3, 1857, as said act does not enlarge the original grant, but as to said grant only confirms selections of land granted thereunder.

Secretary Noble to the Commissioner of the General Land Office, April 2, 1890.

This is a motion for review of the departmental decision of November 23, 1887 (6 L. D., 348), in the matter of the claim of the State of Ohio to indemnity for certain swamp and overflowed land, sold by the United States at two dollars and fifty cents per acre subsequently to the swamp land grant of September 28, 1850 (9 Stat., 519).

By act of May 24, 1828 (4 Stat., 348), granting a quantity of land to the State of Ohio "for the purpose of aiding said State in extending the Miami canal from Dayton to Lake Erie, each alternate section of land unsold" within the granted limits was reserved to the United States and made double minimum in price. The land for which the State claims indemnity in this case is in said alternate sections so reserved and enhanced in value. In the departmental decision under consideration, it was held:—

That "The act of May 24, 1828, making the grant to Ohio for canal purposes, contained the same reservation to the United States as does the act of September 20, 1850 (making the grant to the Mobile and Chicago R. R.), passed upon by Secretary McClelland (1 Lester, 521);" that "this reservation amounted to a disposal of the land and consequently prevented it from passing specifically by the swamp grant of 1850;" and that, therefore, no title having vested in the State, no basis exists for the claim to indemnity.

There is no question that the status, with reference to the swamp land grant of September 28, 1850, of the reservations of alternate sections of land to the government is the same under the canal grant of May 24, 1828, and railroad grant of September 20, 1850, and the said decision of Secretary McClelland of November 20, 1855 (1 Lester, 521), determining that status under the latter grant is directly in point, if not conclusive of the question involved in the present case. In said decision it is held, in substance, that the reservation to the government in the railroad grant being for the purpose of reimbursing the government for the lands granted and existing for that purpose at the date of the subsequent swamp land grant, the lands so reserved, although swamp lands, did not pass to the State by said swamp land grant, but remained in the government for the purpose named. It has been repeatedly held that this question is settled, so far as this Department is concerned, by said decision. (See decisions of Secretary Schurz, 5 C. L. O., 124, 7 ib., 70, 2 C. L. L., 1069, 1071; Opinion of Attorney General Devens, 2 C. L. L., 1072; Opinion of Court of Claims, 4 L. D., 3).

Attention is called by counsel for appellant to the decision of Secretary Schurz of May 2, 1878 (2 C. L. L., 1066), in which it is held that the act of March 3, 1857 (11 Stat., 251), entitled "An act to confirm to the several states the swamp and overflowed lands selected under the act of September 28, 1850," was "in effect a grant *de novo* of the selected lands and perfected the title of the State therein," and that the State's claim rested on the act of March 3, 1857, and, therefore, "The act of September 28, 1850, and the decision of Secretary McClelland, *supra*, were unimportant in the consideration of the question at issue." The proposition upon which this decision rests, namely, that the confirmatory act of March 3, 1857, was a grant *de novo* or enlargement of the original grant of September 28, 1850, and therefore that said act of 1850 and the decision of Secretary McClelland were "unimportant," in that case, is manifestly erroneous, and it is to this decision Secretary Schurz doubtless refers in his subsequent decision of March 2, 1881 (2 C. L. L., 1871), when he speaks of the decision of Secretary McClelland as having been followed since its date, November 20, 1855, "by the uniform practice of the government with a single inadvertent exception." The act of September 28, 1850, made it the "duty of the Secretary of the Interior, as soon as practicable after the passage of the act, to make out and transmit to the governors" of the States (grantees under the act) accurate lists and plats of the swamp and overflowed lands subject to the grant. As said by the supreme court of the United States

For some reason, not necessary to be inquired into now, but which has been the source of much controversy between the States and the Department of the Interior, and also of much litigation between parties claiming under the grant and those claiming adversely to it, the Secretary failed to make any such selections and lists of swamp lands as contemplated, except as he was induced to make partial and imperfect lists at the suggestion of persons acting for the States on various occasions"

(*Emigrant Co. v. County of Wright*, 7 Otto, 339), and, "It seems that seven years after the passage of the swamp-land grant, this failure of the Secretary to act had become a grievance, for which Congress deemed it necessary to provide a remedy by the act of March 3, 1857 (11 Stat., 251), which declares that 'the selection of swamp and overflowed lands granted to the States by the act of (September 28,) 1850, heretofore made and reported to the Commissioner of the General Land Office. . . . be and the same are hereby confirmed' (*Martin v. Marks*, 7 Otto, 345).

Counsel for appellant themselves admit that the decision of Secretary Schurz of May 2, 1878, cited by them, is erroneous as to said proposition upon which it is based, when they say, "That act" (act of March 3, 1857,) "the court" (Supreme Court, *Martin v. Marks*, *supra*.) "holds did not change the original grant, it only adopted another mode of ascertaining what lands were swamp—what lands passed, therefore, under the act of 1850." If, as is clear, the act of March 3, 1857, was not a grant *de novo* or "a change" and enlargement of the original grant of 1850, but was only confirmatory of selections of lands granted under said original grant, then said act of 1857 can not operate to make subject to the State's swamp land claim, lands which by virtue of their reservation to the government are held by Secretary McClelland in his decision of November 20, 1855, to have been excepted therefrom.

It is contended that the decision of Secretary McClelland of November 20, 1855, is erroneous and that the claim of the State of Ohio in this case can not be held to be *res judicata* under said decision, which relates to a similar claim of the State of Illinois. If not strictly speaking *res judicata*, there being no identity of subject matter and parties in the two cases, yet, the question involved being the same in both, the doctrine of *stare decisis* applies. "It should require very controlling considerations to induce any court to break down a former decision and lay again the foundations of the law" (7 How., Miss., 569), and, particularly, when, as in the present case, such decision has been uniformly followed in practice and recognized as sound and binding by subsequent decisions "with a single inadvertent exception" for a period now of nearly thirty-five years.

I do not wish to be understood, however, as intimating an opinion that the decision of November 20, 1855, is in fact erroneous. The language of the act of September 28, 1850, it is true, is general and sweeping, granting to the States in which such lands may be situated "the whole of those swamp and overflowed lands, made thereby unfit for cultivation, which shall remain unsold at the passage of the act," and it is claimed that lands reserved in the canal grant to the government and made double minimum in price, for the purpose of securing reimbursement to the government for the lands granted, do not fall within the exception of lands "sold" at the date of the act, that the "whole" of the lands of the character described in the act to which the government had full title are granted to the State, and that to hold the contrary is to import a word or term into the statute. In the case of *Wilcox v. Jackson* (13 Peters, 498), the President, by proclamation, had

ordered the sale of certain lands, without excepting therefrom a military reservation included within their boundaries. The proclamation was based on an act of Congress supposed to authorize it; but the supreme court held that the act did not apply, and then added—

We go further, and say, that whenever a tract of land shall have been once legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of the public lands; and that no subsequent law, proclamation or sale, would be construed to embrace or operate upon it, although no reservation were made of it.

In the case of *Leavenworth R. R. Co. v. United States* (2 Otto, p. 745), involving the effect of a railroad grant on a prior Indian reservation, the supreme court, in commenting on said rule of construction laid down in *Wilcox v. Jackson*, *supra*, uses this language:

It may be urged that it was not necessary in deciding that case (*Wilcox v. Jackson*) to pass upon the question; but, however this may be, the principle asserted is sound and reasonable, and we accept it as a rule of construction. The supreme courts of Wisconsin and Texas have adopted it in cases where the point was necessarily involved. 7 Tex. 76; 11 Wis., 274. It applies with more force to Indian than to military reservations. The latter are the absolute property of the government; in the former, other rights are vested. Congress cannot be supposed to grant them by a subsequent law general in terms. Specific language leaving no room for doubt as to the legislative will is required for such purpose * * * * * In construing a public grant, as we have seen, the intention of the grantor, gathered from the whole and every part of it, must prevail. If, on examination, there are doubts about that intention or, the extent of the grant, the government is to receive the benefit of them. * * * * * It would be strange, indeed, if, by such an act, Congress meant to give away property which a wise and just policy had devoted to other purposes. * * * * * Every tract set apart for special uses is reserved to the government, to enable it to enforce them. There is no difference, in this respect, whether it be appropriated for Indian or for other purposes.

Is the reservation by the government to itself of lands for the purpose of reimbursing itself for other lands granted, as in the present case, such an appropriation of the lands so reserved as will fall under said rule of construction and except such reserved lands from a subsequent grant general in its terms and not specifically embracing them? In making grants of public lands for canals, turnpikes and railroads, it was contended that Congress had not the constitutional power "to give these public lands for such purposes, unless she did it upon the principle that the remainder will be enhanced in value co-extensive with the amount granted; or, in other words, that each alternate section shall sell for two dollars and fifty cents per acre, when the whole of the sections would sell for only one dollar and twenty-five cents per acre." This was the purpose of the reservation to the government in the canal grant to Ohio of May 24, 1828, and the making the sections so reserved double minimum in value. Such has been the settled policy of the government from the origin of these grants, and the decisions of this Department have been in line with this policy, in holding that the reservation to the government amounts to such a disposition of the land as excepted it from a subsequent grant not specifically embracing it.

State of Michigan, 8 L. D., 313. The indemnity claimed by the State from the government is the proceeds of the sale of land reserved to the government for reimbursement for lands granted the State for canal purposes. This claim asserts a right in the State to both the granted and reserved lands under the canal grant, where the latter are swamp. The rule, that a grant by the United States is to be strictly construed against the grantee applies to grants to a State for canal purposes, and where "rights claimed under the government are set up against it, they must be so clearly defined that there can be no question of the purpose of Congress to confer them." *Leavenworth R. R. Co. v. United States, supra*; *Dubuque and Pacific R. R. Co. v. Litchfield*, 23 How., 66.

The motion for review is denied.

SWAMP GRANT—ACT OF MARCH 3, 1857.

STATE OF ILLINOIS.

Following the decisions rendered in the two preceding cases the claim of the State of Illinois to certain lands under the swamp grant was rejected by Secretary Noble, April 2, 1890.

TIMBER CULTURE CONTEST—ACT OF MAY 14, 1880.

GARDNER *v.* SPENCER ET AL.

A timber culture contest may be entertained though the contestant has no application to enter therewith; and the contestant, if successful in such case, is entitled to a preferred right of entry under section 2, act of May 14, 1880.

The right of a contestant to proceed against an entry is not defeated by a subsequent relinquishment thereof, and the intervening entry of another.

Secretary Noble to the Commissioner of the General Land Office, April 2, 1890.

I have considered the appeal of John D. Davies as intervenor from the decision of your office dated October 18, 1888, in the case of Joseph Gardner *v.* Joshua Spencer, holding for cancellation the latter's timber culture entry for the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ Sec. 18, T. 16 N., R. 2 W., Grand Island land district, Nebraska.

On September 20, 1880, Spencer made entry for said land under the timber culture act of June 14, 1878, and on March 13, 1886, Gardner initiated a contest against said entry alleging that "Joshua Spencer has failed to plant five (5) acres of said land to trees, seeds or cuttings."

A hearing was ordered and set for May 13, 1886, testimony of witnesses to be taken before H. F. J. Hockenberger at his office in Columbus, Nebraska, May 3, 1886.

On March 17, 1886, John D. Davies appeared at the local office and presented Spencer's relinquishment of his said entry; and at the same

time made application to enter said tract under the timber culture law; the said relinquishment was duly filed and timber culture receipt No. 5662 was issued to Davies for said land.

On May 3, 1886, contestant, Gardner, appeared in person and with his witnesses before H. F. J. Hockenberger, at his office and were duly sworn and testified against Spencer's entry. Spencer did not appear either in person or by attorney. The testimony of contestant and his witnesses was properly certified and transmitted to the local office.

On July 22, 1886, the register and receiver ordered a second hearing to ascertain whether Spencer's relinquishment was the result of Gardner's contest, or the contest the result of the relinquishment; and at the same time directed the testimony to be taken before a notary public at Columbus, Nebraska September 10, 1886, and final hearing at the local office, September 20, 1886.

On September 10, 1886, the contestant and contestee appeared in person at the place designated. John D. Davies as intervenor appeared in person and by attorney. Witnesses for the respective parties were sworn and testified and their testimony was transmitted to the local land office at Grand Island. On November 5, 1886, the register and receiver reported that contestant having failed to apply to enter said land either under the homestead or timber culture laws at the time he commenced his contest, they declined to consider the evidence adduced at either of said hearings, and recommended that Gardner's contest be dismissed.

On December 1, 1886, contestant appealed, and on October 18, 1888, your office reversed the action of the local office and held that Davies' entry was subject to the preference right of Gardner to enter the land as the successful contestant of Spencer's entry. On December 21, 1888, Davies as intervenor appealed to this Department.

The testimony produced by the contestant May 3, 1886 was in accordance with the published order of the local officers under Rule 35 of the Rules of practice.

Contestant's evidence clearly shows that during the period covered by Spencer's entry, he had failed to plant to tree seed, trees, nuts or cuttings more than two and a half acres upon the tract covered by his entry, and that for more than two years and up to the initiation of this contest Spencer had neglected to cultivate any portion of the trees growing upon said claim.

The evidence of contestant and his witnesses is uncontradicted and clearly shows a failure on the part of Spencer to comply with the requirements of the timber culture law.

Rule 1, of the Rules of Practice, gives to an adverse party or other person, the right to contest any entry, filing or other claim under the laws of Congress relating to the public lands for any sufficient cause affecting the legality or validity of the claim (4 L. D., 37), and as the contestant in the case at bar sustained the allegations in his affidavit

of contest, he was entitled to his preference right of entry under the provisions of the second section of the act of May 14, 1880 (21 Stat., 140); *Kingsbury v. Holt* (7 L. D., 9).

Inasmuch as the execution of Spencer's relinquishment March 15 1886, the filing thereof March 17, and the entry of Davies the same day were all subsequent to the filing of Gardner's contest affidavit, his rights under such contest were not defeated by that relinquishment and entry.

Gilmore v. Shriner (9 L. D., 269); *Hay v. Yager et al.* (10 L. D., 105).

The decision appealed from is accordingly affirmed.

HOMESTEAD ENTRY—FINAL PROOF.

HENRY ELMORE.

The Department has no authority to extend the statutory period within which a homesteader is required to submit final proof.

Permission to submit new proof may be accorded, where that submitted is found insufficient but good faith is apparent on the part of the entryman.

Secretary Noble to the Commissioner of the General Land Office, April 5, 1890.

I have considered the appeal of Henry Elmore from your office decision of March 3, 1889, rejecting his final proof in support of his homestead entry for the S. $\frac{1}{2}$ SW. $\frac{1}{4}$ of Sec. 23, and the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 26, T. 38, R. 18 W., Boonville, land district, Missouri.

Elmore made homestead entry for said land November 13, 1883, and on March 2, 1889, submitted final proof thereunder. This proof was rejected by the local officers "because he had not lived on the land for the length of time the law required." That action was affirmed by your office with the following qualification—

As there is no appearance of bad faith shown, you will notify him that he will be allowed to make new proof, after fully complying with the law by a continuous residence upon the land for a period of five years from date of moving thereon in October 1886, or before the A. D., 1892. This proof when submitted will in the absence of an adverse claim be considered upon equitable principles.

From the final proof it appears that at the time Elmore made his entry he was living with his uncle on land adjoining this tract; that he bought some improvements that were on the claim; that in the winter of 1883-84 he cleared and put in cultivation five acres of the land; he taught a term of school from three to five months each year, living on the land during the time. He was married in October 1886, and moved onto the claim soon afterwards, where he has since lived continuously. His house was built in 1886, and was inhabitable at all seasons. His

buildings at date of final proof consisting of a hewed log house, a smoke house and stable, he and one of his witnesses valued at \$75 the other witness placing the value at \$130. In addition to these improvements he had under cultivation twenty-five acres of the land on which he had raised crops five seasons. All his personal property consisting of house-hold furniture, wagon, plows, harrow, two horses, ten cattle, and twenty hogs were kept on this claim. He kept his property on the claim from date of entry.

This proof indicates that the entryman acted in good faith in this matter and satisfactorily shows a compliance with the requirements of the law as to improvements and cultivation. This proof however, shows that he did not build his house until some time in 1886, and did not actually reside thereon until after his marriage in October of that year.

The affidavit filed with this application to make entry, sets forth that he was then residing on the land and that his improvements consisted of a log house, stable, crib, and twenty acres in cultivation, all valued at \$100.

In his final affidavit, made March 2, 1889, he states among other matters "that I have made actual settlement upon, and have cultivated said land, having resided thereon since the 13th day of November 1883, to the present time;" While in his final proof he testified in answer to formal question "When did you move on this land and commence living permanently there? I was married in October 1886, and moved on claim shortly afterward, cannot give exact date."

There is a conflict between these statements, which may be reconciled, and there are discrepancies in his various statements that may be explained, but the weight of the evidence as it stands does not show that his residence on said land has been such as the law requires. The proof being unsatisfactory is rejected. The decision of your office, however, in effect, extends the time for making final proof beyond the lifetime of the entry, this the Department has no authority to do. See John C. Mounger (9 L. D., 291).

In view of the fact that there is no adverse claimant, and the further fact that the evidence shows good faith in the entryman; that he has made lasting and valuable improvements on said land; that he has made his home thereon since his marriage, and evidently intends so to do, he will be allowed to make new proof herein within the lifetime of his entry, setting forth fully and explicitly all the facts relating to his occupancy of said land from November 13, 1883, with any explanation he may have to give of the discrepancies in his various affidavits.

Your decision is modified accordingly.

SPECULATIVE CONTEST—APPLICATION TO ENTER.

HARRINGTON *v.* STOCKHAM ET AL.

An entry secured through a speculative and fraudulent contest is invalid, and must be canceled.

An application to enter should not be allowed during the pendency of a charge affecting the good faith of the applicant.

Secretary Noble to the Commissioner of the General Land Office, April 8, 1890.

On July 28, 1884, Harvey D. Stockham made homestead entry for the SE. $\frac{1}{4}$ of section 10, T. 10 N., R. 39 W., North Platte land district, Nebraska. Against this entry Jay E. Adams instituted a contest, the date of which is not disclosed by the record, hearing on such contest was appointed for May 26, 1886, and continued by stipulation of the parties to August 2, 1886.

On June 28, 1886, Dennis W. Harrington made and executed his contest affidavit before a notary public in Keith county, Nebraska, the same charges abandonment of the claim by the entryman Harvey D. Stockham and also

that one Jay E. Adams initiated contest on said land and that final hearing on the same has been continued to August 2, 1886, that the said Harvey D. Stockham has heretofore executed a relinquishment on said land and placed the same in the hands of the aforesaid Jay E. Adams and that the same was done for a valuable consideration. And that the said Jay E. Adams now holds said relinquishment for purposes of speculation and has offered to sell his interest in said relinquishment for a consideration. And that his said contest is now held on said land only for the purpose of keeping other parties from contesting said land.

This affidavit was transmitted to the local land office by mail; it came to the hands of the officers early enough to be endorsed by them as follows: "Filed June 30, 1886, 9 o'clock A. M." On what day or at what hour the letter containing the affidavit reached the office is not otherwise shown by the record.

On the said day, June 30, 1886, the local officers issued notice of contest on this affidavit, appointing August 13, 1886, for taking testimony before a commissioner and August 19, 1886, for final hearing. The defendants were duly served with notice; Adams personally, Stockham by publication.

On the same day, June 30, 1886, Jay E. Adams, filed in the local office the relinquishment of Stockham; it is endorsed by the register of the said office "Received at this office June 30, 1886, at 9 o'clock A. M., and entered upon the proper record." At the same time Adams made application for a homestead entry on the said land, which was allowed.

On August 13, 1886, the time appointed for the taking of the testimony before the commissioner in the contest of Harrington, Stockham

made default, Adams appeared specially and filed his verified motion for the dismissal of the contest on the grounds,—

First, that at the time said contest was filed affiant had homestead entry upon said land and that he filed his application and affidavit before the register and receiver for said land promptly at 9 o'clock on June 30, 1886, and that at the time said contest was filed the homestead entry of Harvey D. Stockham was canceled and that said homestead entry was made without the knowledge of any one going to contest said land. Second, that the contest affidavit does not contain facts sufficient to constitute a cause of action.

Thereupon the testimony was taken on the part of the contestant Harrington and on the part of the defendant Adams, the attorney of the latter cross-examining the witnesses of the plaintiff and introducing testimony on the part of the defence.

The local officers rendered their decision August 23, 1886; in it they say,

We find that the most decided preponderance of testimony shows that Adams obtained and held the relinquishment till the day he filed it for speculative purposes. The conclusion of bad faith on the part of Adams is irresistible. This disposes of his motion to dismiss by refusing it. We are therefore of the opinion that homestead entry No. 5261 (the entry of Stockham) should be canceled, that Adams has no good standing in the case and that this contest should be sustained.

Adams appealed. Your office having considered the evidence in the case in the decision of October 13, 1888, expresses itself as follows :

I am of opinion from the evidence that Adams initiated contest on this land not in good faith, but for speculative purposes, and that the whole transaction from its inception of the contest to and including the filing of Stockham's relinquishment, and his own application to enter was a scheme conceived and consummated for speculative purposes.

In rendering your said decision, you further say,

It appears that by your (the local officers') letter of August 19, 1886, you (the local officers) advised this office of the filing of Stockham's relinquishment, and the issue of homestead entry No. 10820 to Adams, apparently overlooking Harrington's contest and that this office in ignorance of that contest, by letter "C," of October 14, 1886, in view of the facts reported closed the case in favor of the contestant, Adams, as entitled to the preference right of entry. This action cannot of course, prejudice Harrington. The entry of Stockham having been canceled, it is necessary now that the entry of Adams No. 10820 be removed from the record and that Harrington be allowed the preference right of entry. Entry No. 10820 is, therefore, held for cancellation.

The decision of the local officers was therefore by your office modified accordingly.

From your said office decision, Adams appealed to this Department and the case as between Harrington and Adams is therefore before me for consideration.

Adams, in his appeal, specifies the following errors :

I. The evidence shown is wanting to show that claimant Jay E. Adams offered the relinquishment to the land in question for sale if it does show that he offered and sold relinquishments to other lands.

II. That the evidence does not justify the holding of claimants homestead entry No. 10820 for SE. $\frac{1}{4}$, Sec. 10, T. 10 N., of R. 39 W., for cancellation (See *Lee v. Goodmanson* (4 L. D., 363).

In your office letter of October 13, 1883, you correctly sum up the evidence in the case as follows:

The decided preponderance of testimony in this case is to the effect that Adams was a professional contestant, who had made business of contesting entries to such an extent, that he had been threatened by the settlers in the vicinity with lynch law, unless he ceased this disreputable business. It was his habit to contest claims with the object of forcing the claimants either to pay him to withdraw the contest or sell out their claims to him, and execute relinquishments to be held by him for sale to others. In this case he contested the entry of Stockham who is represented to have been a poor man unable to maintain the cost of contest and who was therefore, forced to sell to Adams. Adams took his relinquishment and on the same day obtained the signature of Stockham to an agreement for a continuance of the contest, his object being to gain time, during which he could dispose of the relinquishment to a third party, and thus make a profit on it, without having to exercise his right of entry, and the evidence shows that he did offer to sell the land to several parties after he had obtained the relinquishment. It appears that this was only one of several speculative contests initiated by Adams, either directly in his own name or indirectly, through others, one of the witnesses testifying that Adams told him that he had carried five relinquishments at one time, another that he heard him say that he had averaged one hundred dollars a week contesting claims, and another that he said he expected to make three thousand dollars this summer (1886) on his contests.

I might add that Adams himself testifies that he offered to withdraw his said contest against Stockham for a money consideration which it seems Stockham was unable to pay.

The evidence therefore clearly establishes the facts that Adams' contest for the land was fraudulent and speculative, that in pursuance of such fraud and speculation he procured the relinquishment of Stockham and the continuance of the hearing on the contest and I must add the entry itself. The entry is necessarily affected by the fraud and speculative character of the whole transaction.

In *Dayton v. Dayton* (8 L. D., 248), it is held that 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 that a contest with a view of making such an entry is in bad faith and that no preference right can be secured thereunder, and that an entry obtained by virtue of such a contest is invalid and should be canceled.

Adams in his appeal claims that the cancellation of his entry is not justified by the evidence and refers to the case of *Lee v. Goodmanson* (4 L. D., 363). In that case it was held that the filing of a relinquishment accompanied by a pre-emption declaratory statement defeats a simultaneous application to contest the entry thus vacated. One feature in the case appears to have been that there was no evidence in the case showing a collusion between the entryman who had relinquished and the pre-emptor. In the case at bar the evidence clearly shows that a collusion existed between Stockham and Adams for the fraudulent and speculative purposes of the latter. After Adams had commenced

his contest, after he had purchased Stockham's relinquishment and after the entryman had no further interest in the claim, they agreed between themselves that the hearing on the Adams contest which had been fixed for May 26, 1886, should be continued to August 2, 1886, more than sixty days. The relinquishment disposed of the contest and the continuance was agreed upon to enable Adams to accomplish his said purpose.

The charge of Harrington's contest affidavit in this respect is fully sustained by the evidence.

Assuming then that the filing of Adams' papers for his entry and Harrington's affidavit of contest in the local office were simultaneous this case presents facts widely different from the facts in the case referred to, and the latter can not be deemed an authority to control the case at bar.

When Adams presented his application for an entry at the local office it was met by the accusation of Harrington's contest affidavit, and the entry should not have been allowed until the charge against Adams had been legally disposed of by a proper trial. On the facts shown in this case the entry of Adams, if the contest had been directed against it, would have been canceled because fraudulent and speculative.

Should not the same facts upon proper charges as in this case prevent the allowance of the entry? I think they should. To some extent the late case of *Foreman v. Wolfe et al* (9 L. D., 314) and *Parris v. Hunt* (*idem.*, 225), sustain this view.

For reasons herein set forth your said office decision is affirmed.

PRACTICE—NOTICE—AMENDMENT—APPEARANCE.

McFARLAND *v.* JACKSON.

New notice to the defendant is not required, where an objection to the sufficiency of a charge is sustained and leave to amend allowed.

Where the defendant's attorney appears and cross-examines the witnesses, such appearance is "general," and the legal effect thereof can not be avoided by calling it "special."

That an amended affidavit of contest is not filed within the time allowed therefor, is an objection that can not be raised after trial.

Secretary Noble to the Commissioner of the General Land Office, April 8, 1890.

I have considered the case of James McFarland *v.* Amooth W. Jackson upon the appeal of the latter from your office decision of October 12, 1887, sustaining the contest against the homestead entry of said Jackson for the E. $\frac{1}{2}$ SW. $\frac{1}{4}$ and W. $\frac{1}{2}$ SE. $\frac{1}{4}$ Sec. 14, T. 21 S., R. 22 W., Larned land district, Kansas.

Amooth W. Jackson made homestead entry on November 6, 1884 for said land, and on December 22, 1885, James McFarland filed affidavit

of contest against the same alleging in said affidavit that said Jackson had wholly abandoned said tract; that he had changed his residence for more than six months since making said entry; that he had not settled upon and cultivated said tract as required by law.

The hearing was set for February 26, 1886, and on January 9, 1886, personal service of notice of said contest and of time and place of hearing the same was made upon him. On the day of hearing defendant appeared by attorney and filed a motion to dismiss the contest, and entered "a special appearance for the purpose of this motion only." The first ground of the motion is—

That there is no cause of action.

2nd. That the contest affidavit of plaintiff is defective in this; that plaintiff does not allege that defendant has failed to reside upon said tract, or has abandoned the land for six months next prior to the initiation of contest, and same defect in notice issued.

3rd. For want of prosecution.

This motion was sustained "subject to plaintiff's amending affidavit."

On April 27, 1886 (not on February 26th, as stated by the local officers) an amended affidavit was filed alleging:—

That Amoorth W. Jackson has wholly abandoned said tract for more than six months next preceding the date of his contest affidavit, to wit, December 22, 1885; that he has changed his residence therefrom for more than six months since making said entry and next preceding the date of the original affidavit, December 22, 1885; that said tract is not settled upon and cultivated by said party as required by law and said Amoorth W. Jackson was not at that date residing upon said tract and has never cultivated said tract of land.

Hearing was continued till April 27, 1886, at which time plaintiff appeared and defendant made "special" appearance, and hearing was passed to April 30, when defendant filed a motion setting forth that defendant was a resident of the State and could have been served with notice; that he had not been legally served to appear at this time and place; that the local officers had no jurisdiction in the case at this time and that defendant had a perfect defense when legally cited to appear; that no alias notice was issued after amending contest affidavit April 27, 1886, and no effort has been made to get service since amending affidavit; that the contest is for speculation; that there is no proof of service in the case; that the amended allegations, April 27, 1886, takes defendant by surprise, because he has had no notice thereof; that it is filed too late to be considered and he asks that the case be dismissed.

This motion was overruled, to which defendant excepted.

Thereupon the hearing proceeded, and the plaintiff offered evidence in support of his amended affidavit of contest the defendant appeared by attorney and cross examined the witnesses.

At the close of the evidence by plaintiff, the defendant by his attorney declined to offer any evidence and insisted upon his objection to the proceedings and notified the local officers that "when legally summoned to respond he has ample and sufficient defense."

The testimony shows that there was upon the land a sod house, about sixteen by eighteen feet, with a board roof; that there was no door or window in it, no stove, fire-place or flue; that less than a quarter of an acre had been broken to get sod to build the house. There is no evidence that the entryman ever lived in the house at all, the evidence on the contrary shows that he never did live in it; that he lived at Williamson's clerking in a store until Wier took the store and that he clerked for him until the fall of 1885, when he drove a mail wagon from Hodgeman to Jutmore, some twenty-three miles distant; that he stayed at Wier's while at the Hodgeman end of the line; that he continued at this business till spring of 1886 and then went to Larned.

There never was at any time any household furniture in the house, as shown by the evidence, nor any indications that any one had ever lived there. In the spring of 1886 the roof was taken off the house. Defendant was then living in Larned some forty miles distant, and nothing has been done to make the house habitable. It never was habitable.

The motion filed February 26, 1886, by defendant under a special appearance, was sustained "subject to plaintiff's amending affidavit." This was notice to him that he would be called upon to answer the amended affidavit if made, and was correct practice.

The affidavit of December 22, 1885, of contestant was defective, but it was sufficiently definite and certain, and contained facts sufficient to warrant the issuing and service of notice and was a sufficient affidavit for amendment to be made to. The amendment was properly allowed, and no further notice to defendant was necessary. See *White v. McGurk et al.* (6 L. D., 263); *Hartley v. Young* (10 L. D., 181).

Attorney for defendant in his appeal to this Department in the first specification, claims that there was error in allowing contestant to file an amended affidavit after the day fixed for filing same, he not having asked or obtained another order within which to file it later. If this were true, which does not appear of record, defendant made no motion to strike it from the files, for that reason, and having gone to trial on it, it is too late, after trial, to consider the objection. His third specification that the Commissioner erred in holding his *special* appearance, to be general has no force in view of the fact that he appeared and cross examined contestant's witnesses on the hearing. This was a general appearance and he could not avoid its legal effect by calling it "special".

The testimony clearly shows that the entryman did not make even a pretense of complying with the law relating to homesteads.

Your decision is affirmed.

PRACTICE—NOTICE OF APPEAL.

HUNTOON *v.* DEVEREUX.

A party in interest is entitled to notice of appeal, and in the absence of such notice the appeal will not be entertained.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 8, 1890.

On May 28, 1883, James Pryor made his sworn statement required by the timber land act of June 3, 1878, and on August 17, 1883, certificate of purchase No. 5607 was issued for the NW. $\frac{1}{4}$ of Sec. 22, T. 9 N., R. 1 E., H. M., Humboldt land district California.

On April 16, 1886, Pryor's entry was canceled upon the report of a special agent. On May 7, 1886, Thomas Devereux made his sworn statement for the same tract of timber, in accordance with the requirements of said act of 1878, and on August 2, 1886, Devereux made final proof and received final certificate of purchase No. 6911 for said tract of timber land.

On February 18, 1887, W. M. Huntoon, as transferee of James Pryor filed an application for a hearing, and on December 13, 1887, your office ordered a hearing in the premises and at the same time directed the local officers to give due notice of such hearing to all parties in interest and to "Thomas Devereux, and any party whom you know to be claiming the land through Devereux."

The hearing was held February 24, 1887, and on June 14, 1888, the local officers found in favor of Pryor's entry on the ground that the government failed to sustain the allegations contained in the report of the special agent.

In November 1888, Thomas Devereaux made application for a re-hearing, alleging in his corroborated affidavit that the local officer had failed to notify him of the former hearing, and that he had no knowledge whatever of said hearing until several weeks after the date of the said hearing, and then only by a letter from a friend.

On February 21, 1889, your office reversed the findings of the local officers, and decided that the charge of fraud against Pryor's entry was sufficiently sustained by the evidence adduced at the hearing; and further held that such conclusion would obviate the necessity of considering Devereux's application for a re-hearing.

On March 22, 1889, Huntoon, as transferee appealed to this Department, and on May 31, 1889, attorneys for Devereux filed a motion to dismiss Huntoon's appeal, for the reason that no copy of said appeal was served on their client as required by the Rules of Practice, and that having an uncanceled entry for the land in contest, he (Devereux) was a party in interest, and said rules required that he should be served with a copy of the appeal; that as Devereux's entry was made in strict conformity with the requirements of the law and the rules governing

such cases, Pryor's entry having been canceled by the proper officer, and as Huntoon did not appear during the period of Devereux's publication and assert his claim to the land, he can not now be heard to set up such a claim after Devereux has made proof and received his final certificate from the proper officers.

On June 28, 1889, the attorney for the transferee filed in the local office a reply to the motion to dismiss said appeal, but there is no proof herein tending to show that a copy of said reply was served either upon Devereux or his attorney.

Rule 86 of the Rules of Practice provides that—"Notice of an appeal from the Commissioner's decision must be filed in the General Land Office and served on the appellee or his counsel within sixty days from the date of the service of notice of such decision," and Rule 93 provides that—"A copy of the notice of appeal, specification of errors, and all arguments of either party shall be served on the opposite party within the time allowed for filing the same."

Devereux having an entry of record, was a party in interest and as such was, under the rules of practice, entitled to notice of appeal; not only was this true, but in the letter of your office directing a hearing, attention was explicitly called to Devereux's interest. The appellant has not complied with the rules governing such cases, and in fact seems to have made no effort to so do. Under these circumstances the appeal herein must be and is hereby dismissed.

Groom v. Missouri, Kansas and Texas Ry. Co. (9 L. D., 264); Bundy v. Fremont Townsite (id., 276).

TIMBER CULTURE PERIOD OF CULTIVATION—OSAGE ORANGE.

JACOB E. ENGLISH.

In a timber culture entry made prior to the regulations of June 27, 1887, the time occupied in the preparation of the soil, and planting the trees, may be computed on final proof as forming part of the statutory period of cultivation.

The osage orange may be regarded as a timber tree when cultivated for such purpose within the latitude where it attains its natural growth.

Secretary Noble to the Commissioner of the General Land Office, April 8, 1890.

On March 27, 1878, Jacob E. English made timber culture entry for the SW. $\frac{1}{4}$ Sec. 24 T. 14 S., R. 9 W., Salina land district, Kansas, and on March 30, 1886, Isaac A. Hopkins, as administrator of the estate of said entryman, offered final proof before the clerk of the district court of Ellsworth county, Kansas.

* * * * *

On April 1, 1886, the register rejected said proof on the ground that the timber now growing on the tract "is osage orange, a variety which is not recognized as timber."

On May 1, 1886, the administrator appealed, alleging among other

things that the osage orange trees were planted on said tract for the reason that they are considered in the neighborhood as of value for stakes, poles and wind-breaks.

In your said office decision of November 5, 1888, it was held that by the final proof it appears that the planting of five acres of the total of ten acres planted, did not take place until October 20, 1880, while said proof was made March 30, 1886, only five years, five months and ten days later: that under the ruling in the case of Henry Hooper (6 L. D., 624) the cultivation required under the timber culture law must be computed from the time the required acreage of trees, seeds or cuttings shall have been planted. The proof in this case was prematurely made. For these reasons the question as to the character of the trees will not be determined until new proof shall have been made showing a compliance with the above requirements.

The administrator did not appeal from your said office decision.

On February 6, 1889, one Gertrude E. English filed a statement dated at Chicago, Illinois, and not verified, representing herself as a daughter of the deceased entryman, and asking that the decision rejecting the final proof be reversed.

While this appeal is somewhat informal your office saw fit to accept and act upon it and I have concluded in the absence of an adverse claim to waive the informalities and to consider the case upon its merits.

The grounds upon which the local officers rejected the proof heretofore, that is, because osage orange is not recognized as timber, can not be sustained. *Lewis v. Clark* (9 L. D., 3). Nor are the reasons assigned in your office decision sufficient under the present rulings. As held in the cases of *John Lindback* (9 L. D., 284) and *Christian Isaak* (9 L. D., 624) "in cases of timber culture entry made prior to the regulations of June 27, 1887, the time occupied in the preparation of the soil and planting the trees may be computed on final proof, as forming a part of the statutory period of cultivation."

Under these rulings the decision of your office can not be sustained and it is therefore reversed.

HOMESTEAD—ACT OF JUNE 15, 1880.

PUCKETT *v.* KAUFMAN ET. AL.

An intervening pre-emption claim is sufficient to bar the right of purchase under section 2, act of June 15, 1880.

The right to make cash entry under said section is suspended during the pendency of a contest against the original entry.

A cash entry made under said section, subject to the superior right of a successful contestant, who, in the exercise of such right, makes a pre-emption filing for the land, may be suspended, pending final proof under such filing, or be relinquished with the right to apply for repayment.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 8, 1890.

The case of *George W. Puckett v. Fred Kaufman* is before me on appeal by Henry Arlen—who claims the land hereinafter described as

Kaufman's grantee—from the decision of your office, dated June 19, 1888.

The subject matter of this controversy is the NE. $\frac{1}{4}$ of Sec. 31, T. 19 S., R. 24 W., 6th principal meridian, Wa Keeney Kansas, which tract was entered under the homestead laws by Kaufman on July 3, 1878.

On December 2, 1885, Puckett instituted a contest against said entry, alleging that the described tract had been abandoned for more than five years. The defendant was served by publication, and the hearing in the case was set for January 11, 1886, before the register and receiver at Wa Keeney, Kansas. Defendant made default, and on the evidence produced by contestant said officers found that the described tract had been abandoned for more than five years, and recommended the cancellation of Kaufman's entry.

On April 8th following, Kaufman was permitted by the local officers to purchase the land involved herein under the provisions of the second section of the act of June 15, 1880, and thereupon said contest was dismissed.

From this action Puckett appealed, on May 7, 1886, and on June 1., 1888, your office held that the local office erred in allowing said cash entry to be made pending said contest, and that "Kaufman's application to purchase should have been received and held to await the final determination of the contest." Your office further held said homestead entry for cancellation, suspended Kaufman's cash entry, allowed Puckett thirty days from notice of said decision within which to enter said tract, and, in the event of Puckett's making entry in the time allowed, [directed] that Kaufman's said cash entry be canceled.

It appears from your office letter "H" of September 8, 1888, to the register and receiver at Wa Keeney that, on January 22, 1888, said officers canceled said homestead entry on the record, and sent a notice to Kaufman of that fact and of the action of your office suspending his cash entry. This notice was directed to Kaufman, at Garnett, Kansas, and was returned to the writer unclaimed. It further appears from said letter "H" that Puckett, within the thirty days allowed him to make entry, filed his declaratory statement, No. 14,647, for the land in controversy, and by said letter your office instructed the local office that Kaufman's cash entry would "remain suspended until Puckett shall comply with the law, submit proof, etc., when Kaufman's cash entry will be canceled;" and that "In the event of Puckett not complying with the law in the prescribed time, then Kaufman's cash entry will be carried to patent without delay."

The register's letter transmitting the appeal in this case to your office is dated September 13, 1888, five days after the instructions aforesaid were sent to the local office.

The appeal herein appears to have been filed in the local office on

August 20, 1888, and said appellant by his attorney insists that it was error—

- 1st. To hold said cash entry for cancellation.
- 2d. To allow a contest by any one against the homestead entry of said Fred Kaufman.
- 3d. To allow a right of entry to George W. Puckett.
- 4th. To allow the said George W. Puckett to file a declaratory tatement for this land.

And he asks that said decision be reversed, the cash entry of Kaufman allowed to stand, and that a patent issue accordingly.

The provision of the act of June 15, 1880, under which Kaufman purchased and was allowed to make cash entry, is as follows:—

Sec. 2. 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. (21 Stat., 237.)

In argument appellant contends that the right to purchase did not depend on compliance with the homestead law as to inhabitancy and cultivation, but was an absolute right conferred on Kaufman by the plain language of the statute; that no mere contestant, or party desiring to enter, is within said proviso and consequently that no such party can defeat the right of purchase; and that it is only when the right or claim of another, "who may have subsequently entered such lands under the homestead laws," has intervened, that the entryman is deprived of his said right. He further contends that a pre-emption filing can not deprive the entryman of the right conferred by said act, because a filing under the pre-emption law is not an entry under the homestead law; that, if Congress had intended that pre-emption filings, as well as homestead entries, should cut off the right of the prior homesteader to purchase, it would have said so, "would have said in substance—under the present laws, or under the land laws, or under the homestead and pre-emption laws—as it has done in other acts, where both laws are affected;" that "the homestead law is not the pre-emption law," and that a "pre-emptor is not a homesteader;" that the Department has never held that a pre-emptor, by virtue of a filing made prior to the passage of the act of June 15, 1880, could purchase under said act, and that, if he can not do so, no good reason can be given for construing the same identical words in the same act as conferring on the contestant herein the right of a homestead entryman.

The main question presented by this appeal has frequently been considered by this Department. As early as July, 1882, Secretary Teller held—case of Bishop, 1 L. D., 69—that the expression "homestead laws," as used in said proviso, was a generic term and comprehends in its meaning several laws for the acquisition of title to public lands.

In that case it was specifically made to include the timber-culture and pre-emption laws, and the Secretary held therein, that Congress

intended by its use "to protect all vested rights that might intervene prior to the application to purchase."

The ruling in the Bishop case has since been steadily followed, and is now the well settled law of this Department. *Nuttle v. Leach*, 7 L. D., 325, and cases cited.

The act "for the relief of settlers on public lands, approved May 14, 1880 (21 Stat., 140), allows, in all cases, the successful contestant of any homestead entry the preferred right of entry, and, when this act is considered in connection with the act of June 15, 1880—as was done in the case of *Freise v. Hobson*, 4 L. D., 580—the construction given the latter act in the cases cited seem to me to be consonant with sound reason; and the sanction given that construction by reason and authority forbids that it should now be disturbed.

Said cash entry was made under the rulings in force at the time it was allowed, and, in the absence of any evidence of bad faith on the part of Kaufman or his transferee, the entry should not be canceled, but should stand suspended to await the final proof of Puckett, or the entry may be duly relinquished and application filed for repayment. This would obviate any hardship that might arise from requiring the cash entryman or his transferee to wait until the pre-emptor makes final entry, before being allowed to make application for repayment.

The decision of your office is accordingly modified, and said transferee should be advised that said cash entry may remain suspended until the time for making final proof shall have expired, or in case he shall file a relinquishment of the cash entry, duly executed by Kaufman, it may be canceled, and an application for repayment will be duly considered.

PRACTICE—REVIEW—RES JUDICATA.

EPLEY *v.* TRICK (ON REVIEW).

Except when based upon newly discovered evidence, a motion for the review of a departmental decision must be filed within thirty days from notice of said decision.

That a decision has been overruled, and is no longer authority, is not a ground for the review thereof, if, under the rules of practice, it has become final as between the parties thereto.

Secretary Noble to the Commissioner of the General Land Office, April 8, 1890.

This is a motion by Charles Epley for review of the departmental decision of January 22, 1889, in the case of said *Epley v. Charles F. Trick* (8 L. D., 110), involving the NE. $\frac{1}{4}$ of Sec. 27, T. 21 S., R. 20 W., "Osage Indian trust and diminished reserve" land, Larned district, Kansas.

Trick, it appears, had filed a declaratory statement for the land, November 6, 1884, alleging settlement November 4, 1884, and after notice

tendered proof, May 25, 1885, when he was met by a protest from Epley, who had also made a filing on said land subsequent to that of Trick. A hearing was had, October 24, 1885, and the departmental decision concurs with your office in finding from the evidence taken at said hearing—

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.

On these facts, your office held that Epley's filing should be held "subject to Trick's completion of entry in due form," notwithstanding Trick's failure to make proof and payment within six months after his filing as required by the departmental regulations relating to the sale of "Osage" lands. (Circular of April 26, 1887, 5 L. D., 581). The departmental decision under consideration affirms this ruling of your office.

The motion for review is upon the ground that the departmental decision was contrary to the law and the former decisions of this Department in holding that failure to make proof and payment within six months after "Osage" filing does not render the claim thereunder subject to the intervening adverse right of a subsequent settler and claimant under such a filing.

Said decision was contrary to and expressly overruled the former departmental decisions on said question (*Rogers v. Lukens*, 6 L. D., 111; *Reed v. Buffington*, 7 ib., 154; *Elliot v. Ryan*, ib., 322; *Baker v. Hurst*, ib., 457), and has since itself been overruled in the case of *Hessong v. Burgan* (9 L. D. 353), decided September 16, 1889, in which it is held that failure to submit final proof and make payment within six months after "Osage" filing, as required by the departmental regulations, renders the claim thereunder subject to a valid intervening right.

While this is so, however, the motion for review was not filed until December 27, 1889, about eleven months after the rendition of the departmental decision and nearly eight months after the register reported (May 4, 1889,) to your office that notice of the decision had been served on the parties. "Except when based upon newly discovered evidence," motions for a review of a departmental decision "must be filed within thirty days from notice of such decision." (Rule of Practice 77). The motion not being upon the ground of "newly discovered evidence" and not having been filed within thirty days from notice of the decision, it became final, *res judicata*, as between the parties, Epley and Trick, and the subsequent overruling of the decision in another case in no way affected the rights of said parties thereunder. It appears that Trick, May 3, and 4, 1889, proceeded under said decision to enter the land by making proof and payment as required by law.

The motion for review is denied.

TIMBER LAND PURCHASE—TRANSFEREE.

RICHARDSON v. MOORE.

The right of purchase under the act of June 3, 1878, is not defeated by the intervention of an adverse claim, where, through error of the local office, the applicant failed to appear on the day fixed for making final proof and payment.

One who purchases land during the pendency of an appeal involving the validity of the title thereto, is charged with notice of such appeal.

A purchaser of land held under final certificate takes an equity only, and is charged with notice of all defects in the title.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 9, 1890.

I have considered the appeal of James T. Richardson from your office decision of December 27, 1888, wherein you hold cash entry of said Richardson, No. 9270 (act of June 3, 1878), dated December 6, 1887, for the N. $\frac{1}{2}$ of SE. $\frac{1}{4}$, SE. $\frac{1}{4}$ of SE. $\frac{1}{4}$, Sec. 10, SW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Sec. 11, T. 10 S., R. 25 E., M. D. M., Stockton, California, for cancellation, the same having been inadvertently allowed by the register and receiver of the local land office, while the application of Charles Moore to make entry of the same land under said act was pending before your office.

Appellant sets up the following specifications of error:

1. That said decision is against law.
2. That said decision is contrary to equity and against justice.

On July 18, 1887, Charles Moore filed his application in the local land office, at Stockton, California, to purchase same land under act of June 3, 1878. It appears that one Clyamon M. Vanderburgh had, on February 15, 1887, filed declaratory statement, No. 13,735, for said land, and appears to have abandoned the same soon after Moore's timber application. In pursuance of said Moore's application to purchase said land, the register caused due publication to be made, notifying all persons holding adverse claims thereto to present the same at the register's office within sixty days from the first publication of said notice, and particularly notifying Clyamon M. Vanderburgh, who had filed a declaratory statement for said land, to appear at the United States land office, Stockton, California, on Thursday, September 22, 1887, to enter said land. This notice was published in a weekly newspaper for ten successive weeks, commencing with July 20, 1887, and ending September 21, 1887.

On September 8, 1887, the register and receiver of the local office at Stockton addressed a communication to Charles Moore, at Riverdale, California, which was as follows:

In pursuance of recent instructions from the Commissioner of the General Land Office, you are hereby required to appear before us on Wednesday, the 5th day of October, 1887, at 10 o'clock A. M., in person and with two disinterested witnesses, and submit your proof on your timber application for (here describing said lands). All timber land proof must be made before the register and receiver to be valid.

On September 26, 1887, the receiver addressed another communication to Charles Moore, which was as follows:—

SIR:

Your timber notice was published and the day set for hearing was September 22, 1887. In sending out notices to the other parties by mistake another notice was sent to you, notifying you to appear here on October 5.

You not having appeared here on the first date named, your entry lapses, and you need not appear here on October 5.

On September 23, 1887, appellant, James T. Richardson, was allowed to file his application to enter said land as timber land, and notice was duly published fixing December 6, 1887, for the proof.

On October 5, 1887, Charles Moore, pursuant to the notice he received from the register and receiver of September 8, 1887, to appear at their office and make his proof, did appear with his witnesses, and the usual affidavits, regular in form and ample to show the character of the lands as contemplated in the act of June 3, 1878, were taken, and he also tendered the full amount of money in payment for the land and officers fees. The tender was acknowledged, but the payment refused, for the reason that the hearing on his said proofs was set for September 22, 1887, and so published, and not having appeared on that date, his filing *ipso facto* lapsed.

From this decision, Moore, on same day, appealed to your office, and, on April 12, 1888, your office decided that Moore was justified in appearing, October 5, 1887, to submit his proof. You reversed the action of the register and receiver, and directed that Moore be allowed to purchase the land.

Pursuant to appellant's (James T. Richardson's) notice, above referred to, the said Richardson, on December 6, 1887, made payment for said land and received the register's certificate, and the register and receiver on May 3, 1888, informed your office that the entry of Moore could not be allowed because of Richardson's said entry.

On September 12, 1888, your office advised said register and receiver that they erred in allowing Richardson's entry, while Moore's claim was pending. In same letter, you directed the register and receiver to allow Moore thirty days within which to complete his entry, and that, if said entry be made within the time allowed, Richardson's entry be canceled as invalid. The parties were duly notified, and Moore accordingly made tender of the amount necessary to complete his entry, and report of same was duly made to your office.

By your said letter of December 27, 1888, you held Richardson's entry for cancellation, and recognized Moore's claim as valid. From this decision, on March 6, 1889, Richardson appealed.

The second section of the act of June 3, 1878 (20 Stat., 89), provides that the register shall post a notice of the application in his office for a period of sixty days, and if no adverse claim shall have been filed, the person desiring to purchase shall furnish to the register of the land office satisfactory evidence that said notice of the application, prepared

by the register as aforesaid, was duly published in a newspaper, as required. Moore was bound to take notice of the date fixed in the published notice to make his proof, satisfactory evidence of which publication the law enjoined upon him to furnish to the register. Moore says in explanation of his absence on the day advertised—

I was all ready to come here on September 22, 1887, and was seventy miles from home, and when I came down to come here, I found a letter from you (the register and receiver) notifying me to come here on October 5, 1887, with two witnesses and make proof. On receipt of the notice I supposed that by his (Clyamou M. Vanderburgh's) abandoning his filing on his claim, you had postponed the date of hearing, and I did not have time to write and find out. I had secured the abandonment of Mr. C. M. Vanderburgh to the claim, and transmitted it to this office, and supposed that the case had been continued, and I came here to-day with my two witnesses in response to that latter notice. . . . When I was here on July 18 (date of application for land), I was notified that a pre-emption filing was on the land, and that a hearing would have to be held and a date set for the hearing, and that date fixed for the hearing was September 22, 1887, and was published.

I sent the abandonment of Vanderburgh to this office about a month or six weeks after filing my statement. I never received any communication from this office, in regard to that relinquishment. I received the notice from this office telling me to appear here October 5, on September 20, or 21, and I did not have time to write for an explanation, and then I thought it was not necessary. I had no idea that your office had made any error in fixing a different date. I afterwards received another letter, telling me not to appear on October 5.

In view of the facts above set out, I am of the opinion that your said office decision, holding Richardson's entry for cancellation, was correct. The letter of the register and receiver to Moore was an official communication. The law makes it the duty of the register to publish the notice for final proof; and, while Moore was compelled to take notice of the date advertised for his final proof, still he would reasonably suppose that the register, who fixes the day for proof and payment, had the power to continue the hearing to another date. And, while the register and receiver by their act in sending the letter, committed an error, which they acknowledged, still it would be manifestly unjust and inequitable to cause Moore to suffer by the mistake of the register and receiver.

Your said decision is accordingly affirmed, and Richardson's entry will be canceled and Moore permitted to pay for the land on the proofs submitted.

With Richardson's appeal, there is filed a petition of one William Ockenden, in which he alleges that in December, 1887, he purchased the lands in controversy from James T. Richardson, paying therefor \$1,000 in gold and receiving a deed from said Richardson; that he was induced to buy said land and relied on the receipt of the receiver of the Stockton land office to said Richardson for the purchase price of said land; that at the time of such purchase he did not know of any other claim to the land, and bought the same from Richardson in good faith—relying upon said receiver's receipt; that petitioner has possession of the land under said purchase, and that if patent issue to Moore, he is

liable to lose the \$1,000. He prays to be allowed to intervene, and asks that patent issue to James T. Richardson, that the same may inure to his, petitioner's, benefit. Copy of Richardson's deed to intervenor, conveying said land, is made part of the record in support of the petition; also receiver's receipt to Richardson for \$400 in payment for said land—dated December 6, 1887.

It will be seen that Richardson sold the land to intervenor, Ockenden, just seven days after he obtained the receiver's receipt, and, at that time, Moore's appeal from the register and receiver was pending, and Ockenden, as the grantee of Richardson, was charged with notice of this appeal. But, independently of these considerations, the claim of Ockenden as an innocent purchaser can not be sustained. He bought an equity only; and he took the land subject to existing equities and to any infirmities then existing. He was charged with notice of Moore's appeal—whether he had real notice or not. *Powers v. Courtney et al.* (9 L. D., 480.) The petition of Ockenden herein is accordingly denied.

FINAL PROOF PROCEEDINGS—REPUBLICATION.

THOMAS MORRISON.

Republication will be required where the proof is not submitted at the time fixed, and the proceedings therein are continued, but not to a day certain.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 9, 1890.

I have considered the appeal of Thomas Morrison from your office decision of December 13, 1888, in which you require said Morrison to make new publication and new proof on his pre-emption cash entry No. 393, for the SE $\frac{1}{4}$ of the NE $\frac{1}{4}$, N $\frac{1}{2}$ of the SE $\frac{1}{4}$ and SE $\frac{1}{4}$ of the SE $\frac{1}{4}$, Sec. 17, T. 15 S., R. 39 E., Oxford, Idaho.

Claimant filed his declatory statement for said tract on September 23, 1882, alleging settlement same day. On June 26, 1885, claimant filed notice of his intention to make final proof, said proof to be taken before the register and receiver at Oxford, Idaho, on August 17, 1885. By reason of his own sickness and that also of one of his proof-witnesses, he was unable to appear on the day advertised. Prior to the day advertised, claimant wrote to the register telling the latter that he (claimant) was sick and could not for that reason appear on August 17, and desired to know of the register if he (claimant) could not submit his proof on September 19, following, at the local office at Oxford. In reply to said letter, the register informed claimant that the rules allowed him, under the circumstances, to make said proof within a reasonable time after the day advertised. Claimant accordingly appeared before the register on September 19, 1885, and submitted his proof, and on the same day paid for the land and received the register's final certificate.

Your said office decision, under the above facts, requires the claimant to make new publication and new proof, the proof not being taken in accordance with the published notice. There is nothing in the record showing that the register postponed the taking of the proof from the day advertised for the same (August 17) to any day certain; and unless such day were fixed on the day advertised, the public would have no notice. The record being silent on this point, it cannot be assumed that the taking of the proof was postponed to a day certain. Claimant should, therefore, make new advertisement for his final proof, and if no protest or objection is then filed, the proof submitted on September 19 1885, may be accepted. (Rule 2, Circular July 17, 1889, 9 L. D., 123).

Your said office decision is accordingly modified.

SCHOOL LAND—SETTLEMENT RIGHTS.

MICHAEL DERMODY.

An applicant for school lands under the settlement laws can not set up the settlement right of another, acquired prior to survey, to defeat the grant of the State. Settlement rights under the homestead and pre-emption laws can not be maintained for different tracts at the same time.

A pre-emption entry can not be amended to include a tract that was not embraced within the original filing and entry, for the reason that the pre-emptor then supposed that said tract was not subject to such appropriation.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 9, 1890.

I have considered the appeal of Michael Dermody from the decision of your office dated August 20, 1889, rejecting his application to make homestead entry of N $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ sec. 16, T. 35 N., R. 9 W., Durango, Colorado.

The record shows that your office on April 17, 1889, directed the local officers to reject the homestead application of said Dermody for said tract, subject to the right of appeal, which was accordingly done, on June 11, 1889, for the reason that the land inured to the State of Colorado under the grant for school purposes. In his affidavit accompanying said application, Dermody swears that he settled upon said land November 8, 1875, and has actually resided thereon ever since his said settlement; that he has improvements thereon to the value of one hundred dollars. From the action of the local officers rejecting said application, an appeal was taken by Dermody. On August 20, 1889, your office found that it was shown by the affidavits filed by said appellant, and from the records of your office, that said Michael Dermody and his brother Peter, both unmarried, lived together, and cultivated said tract from November 8, 1875, until the death of the latter, some

eighteen months prior to the date of said decision of your office; that the township plat of survey was filed in the local office on April 27, 1877, which was suspended by your office letter dated July 6, 1882, and a corrected plat was filed on November 28, 1883; that Peter Dermody, on May 30, 1887, filed his pre-emption declaratory statement No. 738, for the SE $\frac{1}{4}$ of the SE $\frac{1}{4}$ of sec. 9, the NW $\frac{1}{4}$ of the NW $\frac{1}{4}$ of sec. 15, and the N $\frac{1}{2}$ of the NE $\frac{1}{4}$ of sec. 16, and on May 28, 1880, transmuted said filing to homestead entry No. 43, of said land; that on August 12, 1881, Secretary Kirkwood directed the cancellation of said entry as to the N $\frac{1}{2}$ of said NE $\frac{1}{4}$ of sec. 16, for the reason that he failed to make proof and payment within the time required by sections 2266 and 2267 Revised Statutes; that the appellant filed his pre-emption declaratory statement No. 361 on December 31, 1884, alleging settlement July 14, 1882, on the NW $\frac{1}{4}$ of the NW $\frac{1}{4}$ of said sec. 15, upon which final proof and payment were made on December 29, 1886, cash entry allowed No. 194.

Your office decided that the application of appellant, as the administrator of his brother, to enter said land as "an additional homestead to the adjoining patented homestead entry" of his brother under the act of March 2, 1889 (25 Stats., 854), or "as an additional homestead to his own pre-emption filing", must be denied because your office had no authority to review a decision of the Secretary of the Interior, and the fact that the rulings of the Department have been changed, does not give your office any authority "to re-open the case and apply the changed rulings." If the facts alleged by the applicant be true, the departmental decision would not necessarily preclude him from making homestead entry of said tract. That decision was a final disposition of the rights of Peter Dermody, and cannot be disturbed either by your office or by the Department on the same state of facts. But the application of Michael Dermody has not been passed upon by the Department. True, he can take nothing by virtue of the settlement of Peter Dermody, but he must stand upon his own rights. (Abraham L. Miner, 9 L. D., 408). The record shows, by his own admission, that Michael Dermody has perfected his pre-emption cash entry for said tract in section 15, and, therefore, he could not have resided upon said tract in section 16, and claim the same under the homestead law at the date of the survey in the field. He could not hold two settlement claims at one and the same time. Having perfected his pre-emption cash entry for said tract, his pre-emption right is exhausted, and he cannot be allowed to amend the same to include a tract which he neglected to enter upon the supposition that it belonged to the State under its school grant. (Upman v. Northern Pac. R. R., 7 L. D., 298; Alexander Norris, 9 L. D., 376).

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

FINAL PROOF PROCEEDINGS—PAYMENT.

ERASMUS D. ANGELL.

Delay in the execution of the final affidavit, and making payment for the land, should not, in the absence of an adverse claim, prejudice the right of the claimant, where such delay was caused by the advice of the local office.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 11, 1890.

I have before me the appeal of Erasmus D. Angell from your office decision of November 7, 1888, wherein you hold his pre-emption entry No. 8259 for the SW. $\frac{1}{4}$ of Sec. 31, T. 132 N., R. 61 W., Fargo, Dakota, for cancellation.

Claimant duly made and filed his declaratory statement No. 1882 in the local office, fixing his residence on said land March 30, 1883. On November 13, 1883, the register published notice of claimant's intention to submit final proof to establish his claim to the tract, stating that the testimony of claimant's witnesses would be taken before A. S. Moon, a notary public for La Moure county, Dakota Territory, at his office on the 22d day of December, 1883, and that the testimony of claimant would be taken at the United States land office, Fargo, Dakota Territory, on the 24th day of December, 1883. Accordingly, on the 22d day of December, 1883, the two witnesses named in the published notice appeared before A. S. Moon, the notary public, as advertised and their testimony was duly taken.

The testimony of claimant on his pre-emption proof shows on its face that the same was taken by the register of the local office on January 7, 1884, and not December 24, as advertised.

As to residence and improvement, the proof submitted shows good faith.

On January 7, 1884, payment for the land was accepted, receipt given, and register's final certificate issued, and the case reported to your office.

By your office letter of February 14, 1888, you required claimant to re-advertise and make new proof, unless he could show by corroborated affidavit that the delay was caused by circumstances beyond his control. On May 9, 1888, claimant filed an affidavit, fully corroborated by two witnesses, that he appeared at the local land office at Fargo, Dakota Territory, on December 24, 1883 (the date set for taking said proof), and was then informed by the receiver that he might defer payment a few days, if he so desired; that as nearly as he can remember, he signed said proof on the day set in the notice and that he could have made payment at that time, as well as January 7, 1884, had the receiver informed him that it would make any difference.

On consideration of this testimony, by your office letter of June 12, 1888, you adhered to the conclusions which you had theretofore reached

in your letter of February 14, 1888, and allowed claimant sixty days from service of written notice to make new notice and new proof as to himself, for the reason that the same was taken by the officer designated subsequent to the day named in the published notice.

Claimant was duly notified of your judgment and no action being taken by him thereon, on November 7, 1888, your office held his entry for cancellation, giving him sixty days within which to appeal from such order. From that decision he appealed to this Department.

The testimony of his witnesses was taken at the time and place advertised. He appeared before the register to give his own testimony in accordance with the published notice, and while the record shows on its face that his evidence was taken before the register on January 7, 1884, yet in a supplemental affidavit, fully corroborated by two witnesses, he shows that his proof was made on the day advertised. The act of the register on December 24, telling claimant that he might submit his proof and make payment in a few days, should not, in the absence of an adverse claim, prejudice the rights of the entryman, because it may be fairly inferred from the proof that he submitted his testimony on the day set; but the local officers deferred action upon it until the 7th day of January, when he made his final affidavit, paid the money and received final certificate. His residence upon the tract is satisfactory and his improvements thereon of that character which evince a bona fide intent to comply with the letter as well as the spirit of the pre-emption act. The objects of the law in giving the public notice of the time and place of making proof were substantially met, and any person interested in defeating his entry was given an opportunity to be heard. No objection is made by an adverse claimant, and under such circumstances it would be manifestly unjust and work a hardship to the entryman to hold his entry for cancellation.

Entertaining these views, it is my judgment that the land should pass to patent. Your decision is therefore reversed.

COAL LAND ENTRY—PURCHASE PRICE.

JOSEPH L. COLTON.

The status of coal land at date of proof and payment, with respect to its distance from a completed railroad, determines the price thereof, irrespective of its status when the preference right of entry is initiated and acquired.

Secretary Noble to the Commissioner of the General Land Office, April 11, 1890.

August 22, 1887, Joseph L. Colton filed a coal land declaratory statement under section 2349 of the Revised Statutes, for E. $\frac{1}{2}$ of SW. $\frac{1}{4}$, Sec. 18, T. 155 N., R. 83 W., Bismarek district, Dakota, and, August 22, 1888, applied to purchase said land, tendering \$10.00 per acre therefor. The

local officers rejected the application, on the ground that the land being within fifteen miles of a completed railroad at the date of the application, the purchase price thereof under the law (Sec. 2347, Rev. Stat.) was \$20.00 per acre. By decision of January 28, 1889, your office affirmed this action of the local officers, and Colton now appeals to this Department.

The appellant admits that the land was at the date of his application to purchase and had been since October, 1886, within fifteen miles of a completed railroad, but claims that he entered upon and improved it in October, 1883, and that his right of purchase should relate to said date, unaffected by a "subsequent change in the condition of the land."

By circulars of instruction of October 17, 1881, and July 31, 1882 (1 L. D., 540; *ib.*, 689, Sec. 12); this Department holds that "if at date of proof and payment" the land is less than fifteen miles from a completed railroad, the price should be not less than twenty dollars per acre, and that the price must be determined by the distance of the land from a completed railroad at said date "irrespective of the preference right of entry" acquired by the prior opening, improving and actual possession of the claim and filing a declaratory statement therefor within the prescribed time.

In support of the contention that the right of purchase shall relate to the date of entry upon and improvement of the land, the case of *Watson v. Missouri River R. R. Co.* (2 C. L. L., 902,) is cited. In that case the question was, whether Watson, who had filed a pre-emption declaratory statement for one hundred and sixty acres of land, then subject to pre-emption at one dollar and twenty-five cent per acre, might subsequently transmute his filing into a homestead entry under section 2289 of the Revised Statutes, for the *one hundred and sixty* acres, notwithstanding the land had at the date of the application to transmute been made double minimum in value by falling within the lands reserved to the United States in the railroad grant, and it was held that the application to transmute must be governed by the condition of the land at the date the pre-emption claim took effect, and consequently the entire tract of one hundred and sixty acres might be entered as a homestead. Section 2289 of the Revised Statutes gives to the qualified pre-emptor the right to enter as a homestead "one-quarter section of unappropriated public lands upon which he may have filed a pre-emption claim, or which may, at the time the application is made, be subject to pre-emption at one dollar and twenty-five cents per acre, or eighty acres or less of such land at two dollars and fifty cents per acre." Watson had filed a pre-emption claim on a quarter-section subject to pre-emption at one dollar and twenty-five cents per acre, and was expressly given by the statute the right to enter the whole of it under the homestead law. This right is not only directly deducible from the language of the law, but is in accord with the liberal policy of the government towards *bona fide* pre-emption and homestead settlers on the public lands, ex-

cepting the lands held by such settlers not only from subsequent grants, but also from subsequent enhancement in price as against the settler by reason of such grant. In the act making the grant to the Missouri River R. R. Company (14 Stat., 236), it is provided that "actual *bona fide* settlers under the pre-emption laws" may purchase the lands reserved by the act to the United States and made double minimum in value "at the price fixed for said lands at the date of settlement, improvement and occupation." The land not being enhanced in value as to such settlers, the limitation as to amount subject to homestead entry by reason of enhanced value could not apply to them. It is evident that the case cited is not analogous to the present.

The appellant further asserts that he was prevented from filing and making payment for the land while it was purchasable at ten dollars per acre by the suspension of the plats of survey by your office. This was done because of an unextinguished Indian claim (H. C. Green, 5 L. D., 557), deemed by your office sufficient reason for such action, and, if erroneous, was not such misconduct or wrongful act on the part of an officer of the government as can be invoked to sustain the appellant's claim of exemption from the plain requirement of the law. In the case of James McLean and Thomas Norton, decided May 10, 1882 (unreported), involving an application to purchase coal land at ten dollars per acre, which was subject to purchase at that price when filed for, but not at the date of payment, Secretary Teller, in sustaining the demand of an additional ten dollars, says: "The appellants appear to have acted in entire good faith. . . . I can not, however, regard the equities in their favor as against a strict requirement of the law." (See, also, Frank Foster *et al.*, 2 L. D., 730).

The decision of your office is affirmed.

HOMESTEAD ENTRY—SOLDIERS' ADDITIONAL.

PLATORA TOWNSITE *v.* REDIFER'S HEIRS.

The right to make soldiers' additional entry accorded to the minor child under section 2307 R. S., must be exercised prior to the expiration of his minority.

If the heir of a deceased soldier attains his majority prior to the completion of an additional entry theretofore made on his behalf, he must thereafter act in person, or through an agent duly authorized by him, in all matters pertaining to said entry.

Secretary Noble to the Commissioner of the General Land Office, April 11, 1890.

On November 27, 1888, there was filed in the local land office at Del Norte, Colorado, an application to make soldier's additional homestead entry for the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 23, T. 36 N., R. 4 E., N. M. M., Del Norte, Colorado land district. This application was rejected by the local officers because the land involved was probably mineral land, because a rich mining camp then being

opened in that vicinity rendered necessary the use of a large portion of this land for townsite purposes, and because the citizens of said camp had protested, in person and by letter against the allowance of any filing or entry upon said land. An appeal was taken from said action to your office. Under date of December 4, 1888, the register wrote to your office saying the papers in said application had been forwarded without the knowledge of the receiver or himself by the applicant procuring a clerk in the office to address an envelope to your office wherein he, the applicant, enclosed said papers. With this letter was one from C. W. Raymond to the register dated at Platora, October 29, 1888, and written "at the urgent request of several residents of this camp and citizens of the U. S.," stating that it was the intention of these parties "to shortly apply for townsite, there now being nearly the required forty residents or more," and protesting against the disposal of said land to other parties who had been making surveys for the purpose of taking up a portion of the land occupied by these protestants. With letter of December 18, 1888, the register forwarded to your office a protest signed and sworn to by thirty-six parties setting forth:

That the land applied for, to wit, the N. $\frac{1}{4}$ SW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SE. $\frac{1}{4}$ Sec. 23, T. 36 N., R. 4 E., N. M. P. M. by J. D. McCarthy as a homestead for a deceased soldier's heirs is essentially mineral land; that affiants are miners and know the land well, each and every part of it; that the discovered leads of this camp, bearing silver and gold, run through this land applied for; that the same is immediately contiguous to these mines and besides is indispensably necessary for occupancy by miners and the residents of the same for homes and residences, milling, mercantile and supply purposes.

The register reported also that when McCarthy presented this application his attention was called to the fact that the instrument purporting to appoint a substitute attorney, although acknowledged June 11, 1888, was not complete in that it contained no name as such substitute and that thereupon said McCarthy wrote in the body of such instrument his own name. The records show that at the time this application was made, one of the heirs for whose benefit the entry was claimed to be made had attained his majority and that the other heir would become of age on March 14, 1889. With all these facts presented by the papers in the case, your office by letter of January 31, 1889, directed the local officers as follows:—

You will allow McCarthy as the attorney in fact for the guardian of said orphan children to make the entry of the land above described, as applied for, and thereupon you will immediately order a hearing to determine whether each and every smallest legal subdivision of the land involved is more valuable for agricultural than for mineral purposes.

It was further said in that letter:—

In view of the fact that the record discloses that the youngest of the heirs above mentioned will become of age March 14, 1889, the guardian or his attorney in fact will be allowed to make this entry and submit to the ordeal of a hearing or this application may be withdrawn and the soldier's additional homestead certificate may be located upon other land legally subject to such appropriation.

Under these instructions the entry was allowed February 4, 1889. With letter of March 16, 1889, the register transmitted a petition by the Platora Town Company setting up that said company on January 15, 1889, had filed a townsite declaratory statement for the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of said section 23 and other lands alleging settlement thereon November 1, 1888, and asking that a hearing be ordered to determine as to the priority of right to said tract of land. By letter of March 28, 1889, the local officers were directed to extend the scope of the hearing already ordered so as to determine the priority of possession of the tract in controversy.

Afterwards the attorneys for the townsite claimants filed an appeal from your office decision allowing the homestead entry. The attorneys for the homestead claimant filed a motion to dismiss such appeal, upon the grounds that the matter contained in the decision of January 31, 1889, was interlocutory in character; that none of the appellants have entered or applied to enter said land and that the facts stated are not sufficient to constitute grounds for an appeal. The decision to the effect that the homestead entry should be allowed was in that respect final and subject to be reviewed on appeal. Although I find among the papers no formal application to enter this land for townsite purposes, yet the register reported that such application had been made and all the proceedings indicate that this land was claimed for that purpose. Under the circumstances said appeal will be considered.

The decision of your office was apparently based to a large degree upon the theory that the only way in which this minor's rights, if any he had, could be properly protected was by allowing said entry to be made before he attained his majority. The facts before your office were sufficient to justify a refusal to allow the application to enter until a thorough investigation should show that the land applied for was of the character of lands subject to such entries; that there was no prior conflicting claim therefor; that the person presenting the application was in fact duly authorized to act in the matter, and that such entry was sought to be made for the heirs of the deceased soldier. In view of the fact, however, that such entry could not have been made after the heir of the deceased soldier had attained his majority (W. S. Pine, 7 L. D., 547), and the further fact that the rights of all parties may be fully and properly ascertained and protected by the investigation now proposed to be made, I am not inclined at this time to cancel said entry. The appeal will for this reason be dismissed and you will cause the hearing heretofore ordered to be proceeded with at the earliest practicable date. Inasmuch as the minor for whose benefit this entry purports to have been made has reached his majority, the guardian has now no further interest in the matter. Notice of such hearing should be duly served on the heir and all action in defense of such entry should be taken by him in person or by some person duly authorized by him to act in the premises. At that hearing all those matters which, as herein said, might

properly have been investigated prior to the allowance of the entry, should be particularly inquired into. Inasmuch as the controversy between these parties is confined to eighty acres of the land included in this homestead entry, you should see that the interests of the government are properly looked after and protected at that hearing.

RAILROAD GRANT—SETTLEMENT CLAIM.

NORTHERN PACIFIC R. R. CO. *v.* ROBERTS.

A homestead entry of record excepts the lands covered thereby from the operation of the legislative withdrawal on general route.

The exception in favor of "homestead settlers" provided in the third section of the grant applies not only to settlers who have made entry of the lands claimed by them, but also to those who are entitled to make such entry; and the failure of such settlers to make the entry within the statutory period does not subject the land to the operation of the grant.

Secretary Noble to the Commissioner of the General Land Office, April 11, 1890.

I have considered the appeal of the Northern Pacific Railroad Company from the decision of your office, dated May 18, 1888, rejecting its claim for the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 3, T. 8 N., R. 2 E., Helena land district, in the Territory [State] of Montana, and allowing Nathan Roberts to make homestead entry of said land.

The record shows that said land is within the limits of the withdrawal on general route, dated February 21, 1872, and also within the primary limits of the grant by act of Congress approved July 2, 1864, (13 Stat., 365), upon the definite location of the road, the map of which was filed in your office on July 6, 1882.

It further appears that Lorenzo D. Newman filed his pre-emption declaratory statement, No. 394, for said land on February 17, 1869, alleging settlement thereon November 11, 1865; that John W. Henton filed his pre-emption declaratory statement, No. 721, for said land, on October 21, 1869, alleging settlement thereon March 6, same year; that said Henton, on June 15, 1871, made homestead entry No. 555 of the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of said section, and the same was canceled on July 16, 1872; that William F. Burt made homestead entry No. 634 on November 1, 1871, of the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of said section, with other land, and his entry was canceled on July 24, 1879; that the widow of said Burt was allowed to make cash entry, No. 1999, of the land covered by her husband's said entry, under the provisions of section two of the act of Congress approved June 15, 1880 (21 Stat., 237—see 3 L. D., 490); that Roberts, on September 6, 1884, applied to make homestead entry of the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the

W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of said section; that said company, upon being notified thereof, filed its protest, and, thereupon, a hearing was ordered to be had on February 11, 1885; that the company did not appear at said hearing, but the local officers, upon the testimony submitted by said Roberts, held that the land was excepted from said grant, and that Roberts' said application should be accepted.

On appeal, by the company, your office found that "the land was settled upon, improved and claimed at the date of withdrawal upon general route, and also at the date of definite location, which excepted it from the operation of the grant." The claim of the company was accordingly rejected, and Roberts allowed to enter said land, with the exception of the tract already entered by Elizabeth Burt, under said act of 1880.

In its appeal to the Department, the company insists that your office erred in holding that the "occupancy of Roberts at the date of the definite location of (said) road July 2, 1882", served to except said land from said grant, and that it was also error not to hold upon the authority of the case of *Buttz v. said Company* (119 U. S., p. 55), that upon the cancellation of Henton's said entry on July 16, 1872, there was a legislative withdrawal by virtue of the provisions of the sixth section of the granting act, and the settlement of Roberts was therefore illegal. The testimony taken at said hearing shows that said Henton purchased the improvements of two prior settlers who had lived on said land from 1866 until 1869; that Henton moved upon the land on March 4, 1869, and resided upon said land continuously until March 16, 1872; that he sold his improvements to one Walling who occupied the land until 1877, when said Roberts moved upon the land and has occupied it ever since; that in July, 1882, said Roberts had from thirty to forty acres in crop, an irrigating ditch, and his improvements were worth \$1500. There can be no question but that Roberts was occupying said land at the date of said definite location and had been in such occupancy since 1877. Moreover, it was not questioned by the company in its appeal from the decision of the local office that Roberts was occupying said land at the date of the definite location of said road. The company then insisted that the land was not excepted from said withdrawal on general route. But the land at the date of withdrawal on general route was covered by homestead entries, and was therefore excepted from said withdrawal. *Gale v. Northern Pac. R. R. Co.* (10 L. D., 307).

The learned counsel for the company has not cited a single one of the numerous decisions of the Department which, if adhered to, are decisive of the question at issue.

It is insisted by the counsel for the company that "the grant to the company is general in its terms, with a provision, however, that the lands had not been disposed of in certain designated ways," and that this proviso must be strictly construed, citing as authority for this contention the case of *United States v. Dickson*. (15 Peters, 165.)

By the third section of said act, there was granted to said company every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty sections of land 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 direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections.

It thus appears by the express terms of the granting act, that the only lands granted to the company were those which were "not reserved, sold, granted, or otherwise appropriated," and which were "free from pre-emption, or other claims or rights at the time the line of said road is definitely fixed," etc. Before the company can rightfully claim any single tract of land under said grant, it must show affirmatively that the land claimed is within the express terms of the grant. It is not enough that the land is in an odd numbered section within the lateral limits of the grant, it must appear, in addition thereto, that prior to the filing of the map of the definite location of the road, the land was (*inter alia*) "free from pre-emption or other claims or rights." And, if there is any well founded doubt as to the intention of Congress, then that doubt must be resolved in favor of the government, and against the grantee. Such has been the settled rulings of the courts and the Department.

In the case of the *United States v. Arredondo* (6 Peters, 738-9), the supreme court said:

Public grants convey nothing by implication; they are construed strictly in favor of the King; Dy. 362 a; Cro. Car., 169. Though such construction must be reasonable, such as will make the true intention of the King as expressed in his charter take effect, is for the King's honor, and stands with the rules of law.

To the same effect is the ruling of the court in the following cases: *Charles River Bridge v. Warren Bridge* (11 Peters, 420); *The Dubuque and Pacific Railroad Co. v. Litchfield* (23 How., 66); *Rice v. Minn. and Northwestern R. R. Co.* (1 Black., 380); *Leavenworth, R. R. Co. v. United States* (92 U. S., 740); *Rice v. Sioux City and St. Paul R. R. Co.* (110 U. S., 698); *Slidell v. Grandjean* (111 United States, 437); *St. Paul, Minneapolis and Manitoba Ry. Co. v. Gjuve* (1 L. D., 331); *Alabama and Chattanooga R. R. Co.* (3 L. D., 242); *St. Paul, Minneapolis and Manitoba Ry. Co. v. Northern Pacific R. R. Co.* (4 L. D., 426); *Southern Pacific R. R. Co. v. Dooley* (5 L. D., 380).

Since the land was public land at the date of Roberts's settlement, the question for determination in the case at bar is, did his settlement, existing at the date of the definite location of the road, serve to except said land from the grant. In other words, it having been proven that

Roberts was a qualified settler and had valuable improvements upon the land at the date of the definite location, can the land be said to be free from "pre-emption or other claims or rights?" Was it the intention of Congress that lands, upon which settlers had made valuable improvements, and were occupying at the date of the definite location, should pass to the company?

A careful examination of the granting act shows that such was not the intention of Congress. That portion of said section three, relative to lieu lands, provides, that "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," etc.

The sixth section of said act provided for a legislative withdrawal of the lands "hereby granted" from "sale, or entry, or pre-emption, before or after survey, except by said company."

It is evident that the legislative withdrawal could operate only upon the *granted lands*, and, if at the time of filing of the map designating the general route, lands in the odd numbered sections were entered under the homestead laws, they were clearly excepted from the operation of such withdrawal.

It is conceded, and the record shows, that the land in question was covered, at the date of the withdrawal on general route, namely, February 21, 1872, by the homestead entry of Henton, which was not canceled until July 16, same year. Upon the cancellation of Henton's entry, the land covered thereby became public land, subject to settlement and entry by any legal applicant. The withdrawal on general route did not, and could not, operate upon it. This was expressly ruled by my predecessor, Mr. Secretary Teller, in the case of Talbert against said company (2 L. D., 536), and that ruling has been uniformly followed by the Department. Northern Pacific R. R. Co. v. Burt (3 L. D., 490); Holmes v. Northern Pacific R. R. Co. (5 L. D., 333); Roeschlaub v. Union Pacific Ry. Co. (6 L. D., 750); Northern Pacific R. R. Co. v. Johnson (7 L. D., 357); Northern Pacific R. R. Co. v. Flaherty (8 L. D., 542). Nor is there any inconsistency in these rulings with the decision of the court, in the case of Buttz v. Northern Pacific R. R. Co. (119, U. S., 55), which held that the sixth section of said act operated as a legislative withdrawal of lands granted by the act upon the filing of the map of general route; that, although the lands were within what was known as the Indian country, "that fact did not prevent the grant of Congress from operating to pass the fee of the land to the company;" that "the Indians had merely the right of occupancy, a right to use the land, subject to the dominion and control of the government," and Congress, in said granting act, had expressly stipulated to extinguish the Indian title. The court, therefore, held that the pre-emptor could not acquire any pre-emption right upon said lands prior to the extinguishment of the Indian title, nor subsequently, for the reason that having been granted

by Congress to the company, the withdrawal upon general route operated to prevent their sale or disposal in any other manner than that specifically designated by the granting act. But it is not so with homestead or pre-emption settlers. They have something more than a mere right of occupancy such as the Indian had. They may acquire title to the land by complying in good faith with the provisions of law under which they claim. Congress did not undertake to "extinguish" the claims of homestead settlers, but in express terms granted the company the right to select "lieu" lands in place of those "occupied" by such settlers. But it is strenuously insisted by the company that the term "homestead settlers" can only be applied to those who have made entry of the lands claimed by them in the local land office. But this contention can not be maintained. The definite location of the road was on July 6, 1882, and by section three of the act of Congress, approved May 14, 1880, (21 Stat., 140), any homestead settler, after the passage of said act, either upon surveyed or unsurveyed lands, is "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 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."

It will be observed that there is no penalty prescribed for a failure to file in time, no forfeiture is declared, but the homestead settler is put upon an equal footing with the pre-emptor, and acquires a similar right by virtue of his settlement.

True, under the pre-emption laws (sections 2263, 2264 and 2265) the failure of the settler to file in time subjects the land to the next "purchaser" or "settler," as the case may be. But it has been held by a long line of decisions that the failure of the pre-emptor or homestead settler to file in time subjects the land to the claim of those only specifically designated in the statute, namely, "any other purchaser," and "the next settler," and not to the claim of a railroad company.

It can not be presumed that Congress intended that the improvements of the homestead settler, made upon lands which he had been invited by the government to occupy and bring into a state of cultivation, should be given to the railroad company, when the settler was wholly unable to file his application, because the land was unsurveyed. This would impute bad faith to the government.

In the case of *Rector v. Gibbon* (111 U. S., Op., p. 284-5), the supreme court said :

There was a time, in the early periods of the country, when a party who settled in advance of the public surveys was regarded as a trespasser, to be summarily and roughly ejected. But all this has been changed within the last half century. With the acquisition of new territory, new fields of enterprise have been opened, population has spread over the public lands, villages and towns have sprung up on them, and all the industries and institutions of a civilized and prosperous people have been established, with the church and school house by their side, before the surveyor with his quadrant and line appeared. With absolute confidence those pioneers have relied upon their government, and they have never been disappointed.

It would certainly be remarkable if the government, which protected so fully the claims of the early settlers of Oregon and California, had omitted to provide protection for those who had settled upon lands within the limits of the grant to said company, while the land was public land, and whose settlements continued beyond the date when the company's right attached.

It is only necessary to refer to the granting act and to the resolution of May 31, 1870 (Vol. 16, 378), providing a second indemnity belt of ten miles within which selections were allowed to make up the losses in the granted limits, to show that Congress was both generous to the company and just to the settlers. In the case of *Trepp v. said Company* (1 L. D., 380), Mr. Secretary Delano held that a pre-emption claim at the date of withdrawal on general route (not afterwards abandoned) excluded the land from the withdrawal, and from the grant, as effectually as if the map of definite location had been filed and accepted at the same time as the map of general route. In the case of the *Southern Pacific Railroad Company v. Wiggins and Kellar* (2 C. L. L., 937), Mr. Secretary Chandler said, that it had become the settled rule of this Department to recognize the validity of a pre-emption claim, based upon settlement and residence on unoffered land, without the filing of a declaratory statement, in the absence of a valid adverse claim by another *settler*.

In the case of *Perkins v. the Central Pacific R. R. Co.* (1 L. D., 336), Mr. Secretary Teller held—construing the third section of the act of Congress, approved July 1, 1862 (12 Stat., 489), which granted certain lands “not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed—that: “It was the intention of Congress that only such unoccupied lands as were not held under any claim recognized by the government should pass under the grant.”

In the case of the *Southern Pacific Railroad Company v. Lopez* (3 L. D., 130,) Mr. Secretary Teller, construing a grant upon the same terms as the *Northern Pacific*, said:

Construing together the granting words and those respecting the lieu land selection, it is evident that one of the ‘other claims or rights’ excepting land from the operation of the grant was ‘occupation by homestead settlers’ Congress was aware that by this act it was making grants of lands far beyond the line of the government surveys, in regions occupied and to be occupied largely by settlers awaiting the advent of the surveyor to prefer their claims Congress knew that unsurveyed land could not be ‘entered’ as homesteads and, therefore, in the use of the words ‘occupied by homestead settlers’ it intended to make such express exception, and to indicate a different kind of appropriation by a class of settlers not within the letter of homestead law, but clearly within its spirit.

This rule has been uniformly followed by this Department. *Texas and Pacific Railroad Company v. Gray* (*idem.* 253; *Central Pacific Railroad Company v. Wadman* (4 L. D., 341); *Schetka v. Northern Pacific*

R. R. Co. (5 L. D., 473); Southern Pacific R. R. Co. v. Saunders (6 L. D. 98); Northern Pacific R. R. Co. v. Evans (7 L. D., 131); Laity v. Northern Pacific R. R. Co. (8 L. D., 378).

In addition to the foregoing, an inspection of the records of your office shows that the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of said section 3 was patented on February 8, 1887, and so far as that tract is concerned, this Department has no further jurisdiction. But your office only allowed said Roberts to make entry of the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of said section 3, and refused his application for the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ for the reason that said last named tract was covered by said cash entry No. 1999, which, as above stated, has passed to patent.

It will be unnecessary to cite authority as to the effect of the long line of departmental decisions above cited.

They ought not to be overruled, unless clearly wrong. But so far from having doubt as to the correctness of said rulings, in my judgment, they are clearly right and should be adhered to. It follows, therefore, that the decision of your office is correct. It is accordingly affirmed.

PRACTICE—PROCEEDINGS UNDER RULE 35 OF PRACTICE.

WARNER v. FINNERTY.

Officers before whom testimony is taken under rule 35 of practice are governed by rules applicable to trials before the local office.

In the discretion of the Department a further hearing may be allowed where the claimant, acting in good faith, and believing that the officer before whom the testimony is to be taken is prejudiced and interested in the result of the contest, for that reason does not submit his testimony before such officer.

Secretary Noble to the Commissioner of the General Land Office, April 11, 1890.

I have considered the case of Henry Warner v. Frank Finnerty upon the appeal of the latter from your office decision of October 10, 1888, holding for cancellation his homestead entry for the N. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 26, and N. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 25, T. 104 N., R. 33 W., Mitchell land district, Dakota.

Finnerty made his homestead entry for the said land August 9, 1882, and against the entry Warner instituted a contest June 14, 1886, upon the charge that the entryman had abandoned the said claim and changed his residence therefrom for more than eleven months since making the entry and next prior to the date of said contest affidavit, that he never settled upon and cultivated the land as required by law and that his pretended residence on the land had been only occasional visits.

The local officers appointed a hearing for October 4, 1886, before W. B. Phelps a notary public, at his office in Montrose, Dakota, for the purpose of the taking of the testimony; the final hearing before the local officers was set for the twelfth of the said month. At the hearing before the said notary on the day appointed, the contestant appeared with his witnesses and their testimony was taken, the claimant was personally present but failed to take part in the proceedings.

At the hearing before the local officers on October 12, as aforesaid, claimant appeared by his attorney and filed his motion in writing that the testimony taken as aforesaid on behalf of the contestant "be disregarded and rejected for the reason as set forth in the attached affidavit herein."

The affidavit referred to is signed and sworn to by the said claimant and bears date October 12, 1886. It is alleged by him in his said affidavit among other matters, that he was well acquainted with W. B. Phelps the notary before whom the said testimony was taken, and knew that he, the affiant, could not get a fair and impartial hearing before said Phelps "for the reason that the said Phelps was a former contestant against said entry in the spring of 1883, and desired said tract of land for himself also that M. A. Butterfield who is a relative by marriage was his attorney at that time and is also the attorney for contestant in this case." He further deposes: "I verily believe that the present contest is in the interest of W. D. Phelps and Butterfield and is the outcropping of Phelps' former contest and is a conspiracy to beat and defeat me in holding this homestead." He also alleges on his oath—"that I was informed and believed that I would be allowed a hearing before the register and receiver, but learned subsequently that I should have submitted my testimony before the commissioner appointed under Rule 35, Rules of Practice, governing such cases."

He also states "that I have not been absent from said homestead at any one time to exceed three months and that I have made all the improvements upon said land that I was able to make, having cropped said land four seasons, that it is all the home I have to the exclusion of a home elsewhere."

The claimant therefore, asks in his said motion that in view of the facts alleged the testimony theretofore submitted be not considered by the local officers and that a new hearing be had before them.

The motion and prayer of the claimant were denied by the local officers. Deciding the case upon the testimony submitted on the part of the contestant they found that the latter, after a fair trial, had made out his case;

That from date of entry to date of contest Finnerty only visited his claim at long intervals, remaining a very short time at each visit that Finnerty has never spent half a dozen nights on this land since he took it for a home that at date of this contest, Finnerty's shanty was completely bare of furniture and was not fit to live in, that it presented an abandoned and desolate condition. The local officers, therefore recommended the cancellation of the entry.

The claimant appealed to your office upon the following grounds :

- I. The register and receiver erred in holding that claimant had a fair trial.
- II. The register and receiver erred in deciding the case upon *ex parte* testimony.
- III. The register and receiver erred in dismissing claimant's motion to reject the testimony taken before the commissioner at Montrose, D. T., and in refusing a fair and full hearing to claimant.

Your office by your said decision of October 10, 1888, affirmed the action of the local officers. Regarding the point raised by the said appeal you state "Your action in refusing a re-hearing was proper. Claimant stated no reason therefor, and the ground of objection to Phelps the notary, who took the testimony is not a good one. The mere fact that he had been a prior contestant did not disqualify him from acting in the capacity of notary in taking the testimony."

The claimant further appealed to this Department. His grounds therefor are stated by him,

- I. It was error to hold that W. B. Phelps was a proper person to take the testimony in this case.
- II. It was error to refuse claimant a hearing before the register and receiver considering the reasons as set forth by Finnerty.
- III. It was error to hold claimant's homestead entry for cancellation on *ex parte* statements by contestant.

Attached to the appeal is the affidavit of Finnerty corroborated by nine different witnesses. The affidavit bears date December 5, 1888. In it Finnerty deposes,—

That he is the identical Frank Finnerty who made homestead entry No. 21155 for the N. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 26 and N. $\frac{1}{2}$ SW. $\frac{1}{4}$, 25-104-53, August 9, 1882. I hired a man by the name of Newell Blow to build a house for me on this tract in September following but Blow failed to fulfill his contract with me and it was so far along in the winter that I was unable to build a house until the following spring, about May 17, 1883. Owing to my failure to have the house on the land before the first six months was out, my entry was contested by one W. B. Phelps. This contest was heard and dismissed and then re-opened, heard again and again dismissed. This case, though I won caused me great expense and being a poor man depending wholly upon day labor, I was obliged to leave my land and work out to earn money to pay these expenses, but I was never absent over sixty or ninety days at a time. When I succeeded in paying this expense, I concluded I would prove up and convert my homestead into a cash entry. When I came home in December, 1883, I found my house torn down and partly stolen away. I rebuilt my house eight by ten feet in size and made it habitable and comfortable for the winter. I had provisions put in enough for the winter; one hundred lbs. pork, fifty lbs. flour and other necessaries of life in proportion. While I was away during Christmas of that year all the provisions I had were stolen and I was obliged to be away for about forty days during the winter to earn enough to live on. With this exception I lived on the land constantly and continuously from December, 1880, until July, 1884. I advertised to prove up then, but was disappointed in getting money to make my cash entry with and was obliged to give up my proof. I then concluded to make a five years' proof on my land at the end of the 7th year after entry. I did what I was able towards improving my land and worked out wherever I could earn anything. In June, 1886, my homestead was again contested; this time by Henry Warner. The hearing in this case was set before W. B. Phelps the same man who had previously contested my land, and worked so hard to get it away from me. I was afraid to have my case go before a man so prejudiced

as I believed him to be, and besides this Warner had the same attorney who Phelps employed. I was satisfied that they would work together so far as they could to defeat my rights. I have had crops raised on this land for six seasons. I have worked hard all this time and put my earnings into this land and the expense of these various trials, and I now respectfully ask the Hon. Secretary to grant me a hearing which may be had before the local officers of the U. S. land office at Mitchell, D. T., where there will be no occasion for any prejudice.

Attached to the appeal is the affidavit of one John Cragon, bearing date December 5, 1888. This affidavit tends to show that the claimant improved his said claim and acted in good faith in the matter of his entry.

The contestant in answer to said appeal and affidavits filed various affidavits in his own behalf. The allegations of one affidavit, sworn to by three persons tend to show the truth of the charges of the contest affidavit. This affidavit further shows that several of the corroborating witnesses of the claimant in his said affidavit were not in the Territory of Dakota while many of the facts sworn to by Finnerty had occurred, and that none of the corroborating witnesses were living in close neighborhood of the said land.

From the said affidavit it further appears that several of Warner's witnesses, who lived near the land at the time of contest proceedings before the local office and who testified at the hearing in behalf of Warner, have since left the country, but their whereabouts are now unknown, and that without their testimony the contestant can not safely proceed to re-try the said contest.

Two other affidavits are attached in which it is alleged that a certain person representing himself as the agent of the claimant offered to sell the latter's relinquishment for the said land to the contestant for a small money consideration.

The merits of this case can not be tried on the affidavits filed by the parties; the evidence proper, that is the testimony taken on the part of the contestant at the hearing fully supports the finding of your office expressed in your said decision as follows: "The evidence conclusively shows that claimant had not by residence, improvements, or cultivation of the land shown his good faith. His residence consisted of occasional visits to the land which were pretence so far as complying with the law in this respect."

The question presents itself to me upon this appeal whether the entryman should at this late day be allowed a hearing at which he may introduce his part of the evidence. At the appointed time he neglected to present his testimony because he thought that the commissioner before whom it was to be taken was strongly prejudiced against him.

Officers not registers and receivers before whom testimony is taken, are governed by rules applicable to trials before registers and receivers. See subdivision 2 of Rule 35 of the Rules of Practice. The duties of such officers are therefore not solely ministerial. See Rules 36 to 42 inclusive. It is accordingly important that the officer selected to take

the testimony should be disinterested, unprejudiced and impartial. The rules do not point out the practice to be adopted by a litigant when an officer unfit on account of his prejudice or interest, is appointed under said rule 35. The course pursued by the claimant though his suspicions were founded on truth was erroneous, since, however, I am of the opinion that he acted in the matter in good faith and under the advice of counsel, I feel inclined to allow him an opportunity to present the testimony in his defense. The granting of this additional hearing is within the discretion of this Department. See John Steenerson (6 L. D., 39), and it is the policy of the government not to dispose of the interests of an entryman without giving him a full and fair opportunity of being heard in support of his claim.

Your office will therefore direct the local officers to appoint a hearing in this case before themselves between the said parties at which the claimant may produce proper testimony in his defense. The contestant's testimony now in the case remains and is considered a part of the evidence; the latter, however, is permitted to introduce proper additional testimony if he so chooses.

Your said decision is accordingly modified.

RAILROAD GRANT—ACTS OF JANUARY 13, 1881, AND AUGUST 13, 1888.

EVERITT *v.* ZIMMERMAN ET AL.

The right of purchase conferred by the act of January 13, 1881, can only be exercised by an actual settler, and does not extend to lands excepted from the operation of a railroad withdrawal.

Bona fide purchasers of the railroad title of certain lands lying in the vicinity of Denver are protected by the act of August 13, 1888, and authorized thereby to enter said lands at the government price.

Secretary Noble to the Commissioner of the General Land Office, April 11, 1890.

By your office letter dated November 18, 1886, were transmitted the papers in the case of John E. Everitt *v.* Uriah Zimmerman and the Union Pacific Railway Company, involving the NW $\frac{1}{4}$ of Sec. 15, T. 4 S., R. 69 W., Denver, Colorado, on appeal by Zimmerman and said Company from the decision of your office dated May 6, same year.

The record shows that said tract is within the limits of the grant to the Denver Pacific Railroad Company, now the Union Pacific Railway Company, and also within the withdrawal for the benefit of the Union Pacific Railway Company, eastern division, which was received at the local office on December 26, 1866; that the Denver Pacific line was definitely located on August 20, 1869; that one Phillip D. Callen filed his pre-emption declaratory statement No. 1010 for said tract on May 15, 1865, alleging settlement on the 13th of the same month;

that S. A. Rice filed his pre-emption declaratory statement No. 2396 for the same land on July 24, 1866, alleging settlement the same day; that on April 28, 1883, the company selected said tract, per list No. 4; that one Northrup on May 18, 1885, offered to enter said lands under the timber-culture laws, but was refused, and duly appealed, but afterwards, to wit: on March 23, 1886, he relinquished his said application; that said Everitt, on June 22, 1885, offered his pre-emption declaratory statement for said tract, alleging settlement thereon April 1, same year; that on August 18, 1885, said Zimmerman applied to purchase said tract under the act of January 13, 1881 (21 Stats., 315), which application was transmitted to your office on August 28, 1885; that a protest was filed by Everitt against the allowance of Zimmerman's application which was transmitted to your office on October 28, 1885, and that the company, on March 13, 1886, filed its motion asking that the applications of Northrup and Everitt be dismissed, or that a hearing be ordered to determine the rights of the respective claimants. Your office held that said filings excepted said land from said grant and withdrawal; that Zimmerman, not being an actual settler, could not purchase under the provisions of said act of 1881, and his said application was accordingly rejected; that the selection of said company should be held for cancellation, and that, in the event of said decision being final, Everitt's said application would be accepted. Since the rendition of said decision of your office, the act of August 13, 1888 (25 Stats 439), was passed by Congress

to protect purchasers of lands lying in the vicinity of Denver, Colorado, heretofore withdrawn by the Executive Department of the government as lying within the limits of certain railroad grants, and afterwards held to lie without such limits.

The act provides that certain purchasers from the railroad companies mentioned therein, prior to December 9, 1887, upon making proof that they purchased in good faith and held their title from the railroad company or its grantee, may enter and pay for said lands at the ordinary government price for like lands, and that patents shall issue for lands so purchased to the holder of such title and inure to the benefit of the original purchaser and all claiming under him. On November 6, 1888, you office transmitted the application of said Zimmerman to purchase said tract "under the special law enacted by Congress July 24 (presumably August 13), A. D. 1888." He alleges under oath that he is a natural born citizen of the United States; that said tract was purchased from said company by one Panthea M. Kendrick on February 6, 1882, who entered into the possession of the same, the consideration paid to said company being \$1,584; that the affiant purchased said premises from said Kendrick for the sum of \$5,200 on November 25, 1882, and entered into possession and made improvements on said land valued at \$2,000; that both Zimmerman and Kendrick relied in good faith upon the title of said company, and both of said purchases were for a valuable consideration; that after said affiant purchased and im-

proved said premises as aforesaid, he sold and conveyed the same to John E. Everitt and Charles M. Everitt for the sum of \$5,600, and received \$2,000 in cash and promissory notes for the remainder, in payment therefor; that afterwards, on account of the condition of his title, said purchasers have enjoined said affiant from the collection of said notes, wherefore he asks that he may be permitted to pay for said premises and receive patent therefor. This application was refused by the local office, and an appeal duly taken therefrom. The action of your office rejecting the former application of said Zimmerman to purchase under said act of 1881, was correct (see *Roeschlaub v. Union Pacific Ry. Co., et al*, 6 L. D., 750). But since said decision of your office was made, said act of 1888 has been passed, and, if the allegations of said Zimmerman be true, it would seem that a right of purchase was thereby conferred upon him. But, in order to determine the rights of the respective parties, the case should be remanded to the local office with directions to order a hearing, after due notice to all parties in interest. At said hearing Zimmerman will be allowed to offer proof in support of his application to purchase under said act of 1888, and Everitt, or any other party in interest, will be afforded an opportunity to present evidence in support of their respective claims, or in opposition to the proof offered by Zimmerman. Upon receipt of the report of the local officers upon the testimony taken at said hearing your office will re-adjudicate the case.

The decision of your office is accordingly modified.

PRACTICE—REVIEW—APPEAL.

CENTRAL PACIFIC R. R. CO. (ON REVIEW).

A motion for the review of a departmental decision affirming the action of the General Land Office, will not be entertained, where it appears that prior to the appeal from the General Land Office the appellant had acquiesced in the adverse judgment of said office, and subsequently proceeded in accordance therewith.

Secretary Noble to the Commissioner of the General Land Office, April 11, 1890.

By departmental decision of December 4, 1889 (9 L. D., 613), the decisions of your office of October 12, 1887, and of May 14, 1888, in the case of the Central Pacific Railroad Company *v.* Mineral Lands, were affirmed. A motion to review and reverse the departmental decision was filed in behalf of the company because of alleged errors of law and fact. It is insisted that said decision was rendered on an incomplete record, and hence the errors of fact into which the Department was led; and it is now asked that the case be reviewed, the entire record examined, and said errors corrected.

The case was one where certain lands within the granted limits of the railroad company, having been returned as mineral lands, testimony

had been submitted to the local officers to show error in the return, and that said lands were, in fact, non-mineral. Your office refused to consider the testimony so submitted, because (1) it did not appear that any formal application for a hearing had been made, or (2) application to select said lands by the company.

It is asserted in the motion for review that the record will show that application for hearing was formally made and due notice thereof was published and posted, and that the failure to list the lands can be cured under the departmental decision in the case of the same company, 9 L. D., 613.

Since the motion for review was filed, I have received from you a letter dated February 26, 1890, wherein you inform me that a report of the local officers shows that prior to the time when the attorney of the company, resident here, filed the appeal from your said office decisions, the company acquiesced in the first decision of October 12, 1887, and on January 13, 1888, filed in the local office its application to select the lands in controversy, and asked for a hearing to enable it to establish their non-mineral character; that said hearing was ordered and held March 2, 1888, testimony taken, on which the local officers rendered their decision, and the record has been received at your office.

The appeal to this Department was not taken until after your office, on May 14, 1888, refused to review and reverse its first decision, and it appears that prior to said appeal here, the judgment was acquiesced in, the hearing had and selections made in accordance with the requirements of your office. Had these facts been made to appear at the time, it may be questioned whether the Department would have entertained said appeal. With a knowledge of them now, I decline to act upon the motion for review at this time, and send you the papers in relation thereto, to be filed with the record, directing that you proceed to adjudicate the case anew, upon the whole record as it has been made.

RAILROAD GRANT—INDIAN SETTLEMENT CLAIM.

SPICER ET AL. v. NORTHERN PACIFIC R. R. CO.

The grant to the Northern Pacific Company does not authorize the filing and acceptance of but one map of general route, and a withdrawal based upon an amended map of said route is without authority or sanction of law.

The settlement, residence, and improvement of a tract by an Indian claimant under the homestead law, who has abandoned the tribal relation, existing at date of definite location, serve to except the land covered thereby from the operation of the grant.

Secretary Noble to the Commissioner of the General Land Office, April 12, 1890.

I am in receipt of your office letter of October 17, 1889, enclosing certain papers relative to the NE. $\frac{1}{4}$ of Sec. 19, T. 25 N., R. 43 E., Spokane Falls land district, in the State (then Territory) of Washington.

The land in question is within the primary or granted limits of the grant to the Northern Pacific Railroad Company, under the act of July

2, 1864 (13 Stat, 365), as shown by the map of amended general route of said company's road, filed February 21, 1872, and by the map of definite location thereof filed October 4, 1880.

It is stated in your letter that the tract has been twice listed by the company, as a part of its grant, namely on May 14, 1884, and June 27, 1888; and that the records of your office disclose no claim to the land adverse to that of the company, except as shown in a letter from the Indian Office, dated December 1, 1880, relative to the claims of certain Indians, as settlers on the public lands in Washington Territory and among them the claims of one Enoch and his father, covering, together, the E. $\frac{1}{2}$ of said section 19.

In said letter of December 1, 1880, and in a letter of even date therewith, addressed to this Department (records, Indian Division), it was stated, in effect, by the then acting Commissioner of Indian Affairs, that the Indians mentioned had occupied the lands claimed by them, respectively, for many years, and many of them had made valuable and lasting improvements thereon; and, with reference to those who had been and were then residing on lands found to be within the limits of railroad grants, it was specially recommended that "some action should be taken looking to the adjustment of these conflicting claims in favor of the Indians."

By the papers accompanying your said office letter, it appears that on September 4, 1889, there was filed in the local office a certain petition, or application, sworn to by R. E. Spicer, J. M. Hooker, and J. S. Bean, and signed by over one hundred persons, claiming to be residents on the tract in question. In said petition, or application, it is set forth, in substance, that at, and long prior to the dates when the railroad company filed its said maps of amended general route and definite location, the land in controversy was occupied and claimed by an Indian, named Enoch; that from the year 1868 to the year 1863 said Indian "occupied, possessed and cultivated said land, and had permanent improvements thereon, and during said time resided upon and claimed the same as his home;" that because of said Indian's possession and occupancy of the land, as aforesaid, the same did not pass to the company under its grant, but was excepted therefrom; that said Indian abandoned his claim in the year 1883; that thereupon the land, being a part of the public domain, became subject to entry under the townsite laws, and that the petitioners, or applicants, are residents thereon; that since the year 1883 a great many persons have settled on the tract, built business houses and dwellings, and at the date of the petition had established a town thereon of more than five hundred inhabitants; that since November 28, 1883, the tract has been within the corporate limits of the city of Spokane Falls, but the municipal authorities of the city have failed and neglected to have the same surveyed and platted, or to cause it to be entered as a townsite; whereupon the petitioners ask that the Secretary of the Interior cause the tract to be surveyed as a townsite, un-

der the laws of the United States, and to this end, if it be deemed necessary, that a hearing be ordered to determine whether the tract is public land, or belongs to the railroad company by virtue of its grant.

On September 21, 1889, a supplemental petition, or application, signed and sworn to by said R. E. Spicer and J. M. Hooker, and one William Nonamaker, on behalf of the original petitioners, was transmitted to this Department by one L. H. Prather, attorney for the parties, in which, after a substantial repetition of the same matters contained in the original petition, it is stated that the railroad company is about to take steps to remove the settlers from the tract, and to take forcible possession thereof, and for this reason immediate action by the Department in the premises is urged.

Accompanying your said office letter there is also the affidavit of said Indian, by the name of "Enoch Silliquowya, or Louis Enoch," which appears to have been made, and filed in the local office, in July, 1888, in which it is stated, in substance, that about twenty-five years previously thereto, the affiant settled on the NE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ of Sec. 19, T. 25 N., R. 43 E., in Spokane county, Washington Territory;

that he improved and cultivated the said land, and constantly lived upon and occupied the same as his home, with a purpose and *bona fide* design to procure title to himself as a homestead thereto, from the United States, when title could be procured; that he was living upon the said land, as his home, in 1872, and up until the year 1883; that about the latter date, affiant was induced, by the fraudulent representations of the railroad company, through its agent, one H. T. Cowley, to the effect that he, affiant, could not hold the land, or acquire title thereto, that he had better get off the same or he would be put off, and that the land was not worth more than \$1,000, to sell and convey his claim to said company, which he did, relying upon the representations made to him as having been made in good faith, for the price of \$2,000; that affiant resided thereon, as stated, solely for the purpose of acquiring title thereto from the United States, and he asks for a hearing in the premises.

The first question presented is, whether the facts thus set forth, relative to the settlement, residence and improvements of the Indian, Enoch, if true, are sufficient to except the land in question from the company's grant. If so, a hearing should be ordered to determine whether such matters are true.

In the case of Northern Pacific Railroad Company *v.* Guilford Miller (7 L. D., 100), it was held by the Department that the filing and acceptance of the company's map of amended general route, of February 21, 1872, and the executive withdrawal made thereon, were without authority or sanction of law, and, therefore, without validity for any purpose whatever. It is thus rendered unnecessary to consider the question presented, except with reference to the date of the definite location of the company's road, to wit, October 4, 1880.

The grant to the company was of certain odd numbered sections of land, to which

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 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, etc.

By section fifteen of the act of March 3, 1875 (18 Stat., 402-420), provision was made that any native-born Indian, twenty-one years of age, or the head of a family, having abandoned his tribal relations, should have the benefit of the homestead laws of the United States, with certain restrictions upon the title when obtained.

The provisions of this act were in force at the date when the company's rights attached on definite location of its road, and, if the matters alleged relative to the claim of the Indian, Enoch, be true, he was at that date, and had been for many years prior thereto, living upon the land in question, as his home, with the intention to acquire title thereto as a homestead; he had valuable and permanent improvements thereon, and had cultivated the same for many years, during all of which time he claimed it as his home. Such a claim, it seems to me, is clearly covered by the excepting clause of the grant to the company, and, if proven, would be sufficient, in my judgment, to defeat the claim of the company to the land.

True, the Indian had put no claim of record for the land, but it is well settled by departmental rulings that while such omission might defeat the claim as against a subsequent settler who duly places his claim of record, it will not defeat such claim as against the United States, and the land covered thereby will be excepted from the operation of any grant for the benefit of a railroad company attaching subsequently to the inception of the settlement right. *Northern Pacific Railroad Company v. Evans* (7 L. D., 131), and authorities there cited. It is also well settled that a claim resting on settlement, residence and improvements, acquired prior to the date when the company's rights attached under its grant, is sufficient to except the land covered thereby from the operation of such grant. *Northern Pacific Railroad Company v. Anrys* (8 L. D., 362), and authorities there cited; also same case, on review (10 L. D., 258).

I am of the opinion, therefore, that a hearing should be had to determine the status of the land in question at the date of the definite location of the company's road, and you are accordingly directed to cause such hearing to be had, after notice to all parties interested, or their attorneys. Upon the testimony submitted you will proceed to adjudicate the case as touching the claim of the railroad company, in accordance with the principles herein announced. The rights of other claimants to the land can better be settled after the claim of the company has been determined.

RAILROAD GRANT—INDEMNITY WITHDRAWAL—SETTLEMENT RIGHT.

SOUTHERN PACIFIC R. R. CO. *v.* MEYER.

The right of a qualified settler on lands withdrawn for indemnity purposes, existing at the date of the revocation of the withdrawal is superior to the right of the company under a subsequent selection.

The qualification of a pre-emptor in the matter of citizenship cannot be questioned by the company, where, on the date of its selection of a tract, a certificate of naturalization issues to such pre-emptor who is at that time on the land.

Secretary Noble to the Commissioner of the General Land Office, April 12, 1890.

This case comes before the Department upon the appeal of the Southern Pacific Railroad Company from the decision of your office of December 27, 1888, holding for cancellation the selection of the railroad company for the SW. $\frac{1}{4}$ of Sec. 19, T. 6 N., R. 4 W., S. B. M., Los Angeles, California.

The tract in controversy is within the indemnity limits of the grant to the Southern Pacific Railroad Company, which, it is claimed, was withdrawn for the benefit of the company in 1867, and again in 1870.

All withdrawals of indemnity lands for the benefit of said company were restored to the public domain and opened to settlement and entry by the order of August 15, 1887 (6 L. D., 93), revoking said orders of withdrawal, except as to lands covered by approved selections. At the date of the revocation of the order of withdrawal, this tract had not been selected by the company, but, on October 7, 1887, it selected the entire section. On the same day Charles Booth filed declaratory statement for the quarter section in controversy, alleging settlement August 19, 1887, and on November 1, 1887, Julius Meyer, Sr., filed declaratory statement for the same tract, alleging settlement September 6, 1885.

Pursuant to notice, Meyer appeared before the local officers on February 8, 1888, and submitted final proof in support of his claim, when Booth appeared and cross-examined the witnesses, and offered testimony for the purpose of showing his superior right to the land, and the railroad company at the same time appeared and filed a protest, claiming said tract under its indemnity selection of October 7, 1887.

The local officers found that "the railroad company lost any rights it may have had by failing to select; that contestant, Booth, acquired no rights by going upon land occupied by Meyer, and as Meyer has complied with the law that this contest should be dismissed, and the final proof of Meyer approved."

From this decision no appeal was taken by the contestant Booth, or the railroad company.

Your office, by letter of December 27, 1888, held the selection of the railroad company for cancellation and affirmed the action of the local officers dismissing Booth's contest, and as no appeal was taken by Booth from the decision of the local officers, the decision was declared final as to him.

It also appears that one John H. Quinton applied to make homestead entry of the tract August 11, 1885, which was rejected, and his appeal from said rejection was pending in your office at date of your decision. As to this claim, you held that as he failed to appear when Meyer offered final proof, it is presumed that he had abandoned all right to the land. His application was, therefore, "rejected, subject to appeal within sixty days," and the local officers were instructed to notify all parties in interest. The railroad company alone appealed from your said decision, and the company and Meyer are now the only parties before the Department claiming said tract.

At the date of the revocation of the order of withdrawal, the land was occupied by Meyer, who went upon it while it was in reservation, with permission of the railroad company, under an application to purchase, supposing that the land belonged to the company.

If Meyer was a qualified pre-emptor, and continued in the occupancy of said tract after it had been restored to settlement and entry under the general land laws and before selection by the company, his right would be superior to that of the company under a selection made subsequent to such settlement. The company having failed to select the tract prior to the revocation of the withdrawal, it had no right or claim to convey, and when the withdrawal was revoked Meyer, or any other settler, was free to claim and initiate a right adverse to the company.

It is, however, alleged by the company that Meyer was not a qualified pre-emptor at date of his alleged settlement, for the reason that he had not filed a declaratory statement at said date, having been admitted to citizenship October 7, 1887 under section 2167 of the Revised Statutes, which does not require the filing of a declaration of intention until the time of admission to citizenship.

It is unnecessary in this case to pass upon the question whether an alien, who came to this country during minority, can acquire any settlement right prior to his admission to citizenship, and who has not filed a declaration of intention, because I think it is sufficiently shown by the proof that Meyer became a citizen under section 2172 by the naturalization of his father during the minority of claimant. Besides, it can not be questioned that he was on the land October 7, 1887, the day he received his certificate of naturalization, and the date of the selection by the railroad company.

With the record in the case is a certificate by the county auditor, showing that the claimant paid taxes for 1887 on 1453 acres of land in San Bernardino county, standing in his name on the assessment rolls of said county, but it is shown by the evidence that all of said land, except sixty acres, was conveyed by claimant to his wife as trustee for their children in 1885, and said conveyance appears of record.

Upon a full consideration of the case, the decision of your office holding for cancellation the selection of the company and allowing the final proof of Meyer is affirmed.

SWAMP LANDS—CASH INDEMNITY.

STATE OF ILLINOIS (DOUGLAS COUNTY).

Section 2482 of the Revised Statutes does not provide for cash indemnity where swamp lands have been located by warrant or scrip.

Secretary Noble to the Commissioner of the General Land Office, April 12, 1890.

Your office, on May 25, 1886, held for rejection the claim of the State of Illinois for cash indemnity for the following tracts in Douglas county, Illinois: The SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 21, T. 16 N., R. 7 E.; The NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 29, T. 16 N., R. 7 E.; The SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 30, T. 16 N., R. 11 E.

From said decision the State, through its agent, Isaac R. Hitt, appealed, asserting—

That the testimony offered by the State is sufficient to prove that those tracts, or a majority of them were swamp or overflowed on the 28th of September, 1850.

Your office, by its letter of May 25, 1886, forwarding to the Department the record in the case above mentioned, transmits no "testimony offered by the State" relative to the tracts above described. Furthermore, the report of the special agent of your office, in referring to these tracts, says expressly in regard to each (see pages 7 and 16 of said report), "State waives."

It is not necessary to attempt to reconcile this discrepancy, since the books of your office disclose the fact that each of the tracts described was located by warrant, more than thirty years before the date of your said office decision appealed from; and the law under which indemnity is claimed by the State (U. S. Revised Statutes Sec. 2482), does not provide for cash indemnity where lands have been located by warrant or scrip.

Your office decision rejecting the claim of the State for indemnity is therefore affirmed.

PRACTICE—REVIEW—TRANSFEREE—NOTICE.

JOHN J. DEAN.

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 specifically the errors alleged.

If review is sought on the ground that the decision is not supported by the evidence, the motion should designate the particular evidence on which the change of ruling is claimed.

A transferee who files with the local officers a statement of his interest is entitled to notice of subsequent proceedings against the entry, but in the absence of such disclosure, he is not entitled to plead want of notice.

Secretary Noble to the Commissioner of the General Land Office, April 12, 1890.

The Laramie National Bank, through its cashier, Lewis C. Hanks, has filed an application for the re-instatement of the desert-land entry

of John J. Dean, embracing the SW. $\frac{1}{4}$ of Sec. 11, T. 15 N., R. 78 W., Cheyenne land district, Wyoming—being practically an application for review of departmental decision of November 2, 1888, directing the cancellation of said entry.

It does not appear when notice of decision was received by Dean or the bank; so it is not clear whether or not the application was filed within the period prescribed by the Rules of Practice. It is not accompanied by an affidavit "that the motion is made in good faith and not for the purpose of delay (Rule 78 of Practice). It contains no specifications of error, further than the general statement "that said Dean fully reclaimed said land, and in all respects complied with the law" (said decision having held that he had not done so). "The particular evidence on which the change of ruling is claimed should be set forth" (*Long v. Knotts*, 5 L. D., 150); "otherwise the Department would be compelled to twice examine every case wherein the defeated party or his attorney might see fit to allege simply that the decision was against the weight of evidence" (*Bright et al. v. Elkhorn Mining Co.*, 9 L. D., 503).

The principal—in fact, the only—ground upon which defendant's transferee (the bank) bases its application for a re-instatement of the entry is, that it received no notice of the hearing ordered to determine the validity of said entry. If the mortgagee had filed in the local office, under oath, a statement showing its interest in the pending entry, and had the same noted on the records of the office, it would have been entitled to notice of any adverse action in reference to said entry; but as it does not appear that this was done, the mortgagee is bound by the notice given to the entryman, and is concluded by the trial had upon such notice (*American Investment Company*, 5 L. D., 603; *Van Brunt v. Hammon*, 9 L. D., 561).

The application for re-instatement is dismissed.

PRE-EMPTION ENTRY—SECTION 2260 REVISED STATUTES.

FRANK M. SHOBAR.

One who removes from land of his own to reside on public land in the same State does not acquire the right of pre-emption thereby; and the statutory inhibition is applicable though the removal is from land incumbered by mortgage.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 12, 1890.

I have considered the case of Frank M. Shobar on his appeal from your office decision of February 5, 1889, rejecting his final proof offered in support of his pre-emption declaratory statement for W. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 34, T. 20 N., and lots 3 and 4 Sec. 3, T. 19 N., R. 53 W., Sidney, Nebraska, land district.

It appears from the record that claimant filed his declaratory statement May 4, 1886, alleging settlement the 30th of the previous April.

On December 10, 1888, claimant presented final proof which was rejected by the local office because claimant had removed from land of his own within the State of Nebraska to settle upon the land above described.

Your office on appeal sustained the decision of the local officers and held claimant's filing for cancellation.

It is admitted by claimant that he proved up on his homestead in Dawson county, Nebraska, February 2, 1886, and that he removed from said homestead to the land in controversy but he claims that his homestead was so heavily mortgaged that he had little hopes of redeeming it and could not at the time sell it. He says he consulted an attorney who advised him that he could file his declaratory statement before selling his homestead, and he thereupon removed to the land now claimed, something over one hundred and fifty miles from his former home, and when his homestead was sold, June 28, 1886, he used what was left after payment of mortgage, in the improvement of his present claim upon which he values the improvements at over \$1,000.

Claimant urges that the facts in his case are almost exactly like those in Thomas Ervine (4 L. D., 420), in which case the entry was sent to the board of equitable adjudication and that his case should also be so referred.

In the said Ervine case it will be noticed that the local officers had accepted his proof and had permitted Ervine to make cash entry and the matter was referred to said board upon the ground that the entry had been allowed through mistake; that it came within "the rules which provided for the equitable confirmation of entries made against and in ignorance of the law, where there has been otherwise a compliance with the requirements and the disability has been removed," while in the case at bar no such mistake has been made by the local officers, and no entry has been allowed.

The more recent rulings of the Department however are not in line with said Ervine case, and even had cash entry been allowed the claimant could not be benefited by the holding therein. See Clayton M. Reed (5 L. D., 413); *Allen v. Baird* (6 L. D., 298); *Martin Graham* (id. 767); *Frank E. Crosier* (7 L. D., 195).

That case is quite similar to the one under consideration, for Crosier had resided upon his homestead for several years, but owing to poor crops and various misfortunes, he was obliged to mortgage the same for the sum of \$2,150, the full value of the land. He offered to sell the tract to the mortgagee for the amount of the lien, but he refused to take the same at that price and under such circumstances he considered that he no longer had any interest in his homestead as he had virtually deeded it away to satisfy the liens.

Thereupon he made his pre-emption filing upon another tract and expended eighteen hundred dollars in improving the same, yet the Department held "that the fact that his homestead was under mortgage at the time of the removal therefrom will not operate to relieve the pre-emptor from the inhibition of the statute." Unquestionably, the circumstances surrounding the case under consideration are distressing and work a peculiar hardship to the claimant which the Department would cheerfully relieve him against if it could do so and observe the law.

Section 2260, of the Revised Statutes, provides in express terms that "No person who quits or abandons his residence on his own land in the same State or Territory," shall acquire any right of pre-emption under the act.

Under this mandatory provision, I see no escape for the claimant through this Department. Congress having prescribed the rule, it alone can relieve him from his unfortunate condition.

Your said decision is accordingly affirmed.

SUIT TO VACATE PATENT—BONA FIDE PURCHASER.

G. T. DICKINSON.

Suit to set aside patent, on the ground that it was procured by false and fraudulent proof, will not be advised where the evidence of the fraud is not convincing, and the land has passed into the hands of a *bona fide* purchaser without notice.

Secretary Noble to the Commissioner of the General Land Office, April 12, 1890.

By letter of September 20, 1887, were transmitted, from your office, certain papers relating to the homestead entry of George T. Dickinson, for the SW. $\frac{1}{4}$ of Sec. 22, T. 113 N., R. 78 W., made at the Huron land office, South Dakota, on April 5, 1883, on which final proof was made October 15, 1883, and patent issued November 31, 1884; and of which patent, it is recommended, the Attorney General be requested to institute suit to secure the cancellation, because "based upon false and fraudulent proof."

The testimony submitted at the time of making final proof is regular in form and sufficient in substance, showing the erection of a house, the establishment of residence therein April 14, 1883, eighteen acres of breaking, a crop raised that season, a continued and uninterrupted residence upon the land, without any absences, from the date of settlement to the time of making final proof.

On the other hand, are two affidavits, forwarded by Agent Braly. The two affiants, Hawes and Hamlink, state most positively that Dick-

inson never established residence on said tract; that about the 8th or 10th of October, 1883—a few days before making final proof—Dickinson erected a small shack on the land, and at that time he told Howe, who was assisting him, that he, Dickinson, had been living with his brother, who was located on the NW. $\frac{1}{4}$ of Sec. 23, in the same town; and then expressed anxiety to have the shack completed prior to the day fixed for making proof; and that after making proof, the shack was removed, about November 1st, and set up on the SW. $\frac{1}{4}$ of Sec. 15 of same town on which Dickinson filed pre-emption claim. The testimony of the other witness is to the same effect. The special agent also reports that on November 1, 1883, Dickinson mortgaged said tract to George Stone for the sum of \$225, and on May 6, 1884, sold it to Moses Miles for the sum of \$500, and the latter sold it, on October 16, 1884, to Matthias Haggland, who is in possession. These purchasers are not stated to have had any notice or knowledge of the alleged frauds.

In the Maxwell Land Grant case, 122 U. S., p. 381, the supreme court said that where it was sought to annul a written instrument for fraud in its execution, a court of equity would require the testimony should be “clear, unequivocal and convincing, and that it can not be done upon a bare preponderance of evidence which leaves the issue in doubt;” that this proposition, sound as to the ordinary contracts of private individuals, is much more to be “observed where the attempt is to annul the grants, the patents and other solemn evidences of title emanating from the government of the United States under its official seal. As to such cases, the court said, “it should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction shall make such an attempt successful.”

In this case, the claimant and his two witnesses swore, on final proof, to his continued residence, etc., upon the tract, and on this testimony, regularly taken after due public notice, by the proper officers of the law, patent was issued.

Now it is sought to assail the integrity of the patent on the testimony of two parties, who swear with equal positiveness that there was no proper residence on the land. This would not make even “a bare preponderance of evidence,” much less “that amount of it which produces conviction; for the most that can be said of the testimony, now submitted, is that it would, uncontradicted, be conflicting with that of the witnesses who testified on final proof. Such a conflict would not make successful the attempt to cancel the patent.

In addition to the foregoing, it appears further that after the issue of the final certificate to Dickinson, but before patent, he mortgaged the land, and afterwards sold it to Miles, who sold to Haggland, who is now in possession thereof; and it is not charged that these parties had any notice or knowledge of the alleged fraud.

Conceding, for the sake of argument, that the testimony submitted

is of that character and amount which "produces conviction" that the entryman never resided upon the land,

this undoubtedly constituted a fraud upon the United States sufficient in equity, as against the parties perpetrating it, or those claiming under them, with notice of it, to justify the cancellation of the patents issued to them. But it is not such a fraud as prevents the passing of the legal title by the patents. It follows that to a bill in equity to cancel the patents upon these grounds alone, the defense of a *bona fide* purchaser for value without notice is perfect. *Colorado Coal Company v. United States*, 123 U. S., 313.

In the case quoted, suit was brought to cancel sixty-one patents for as many pieces of land, some of which tracts had been purchased from the alleged entrymen after the issue of final certificate, but prior to the issue of patents thereon, as in this case, and some subsequent to the issue of patents. The court grouped all the cases together, and drew no distinction between the purchases made before and those made after issue of the patents, so far as the defense of *bona fide* purchaser for value without notice was involved.

In view of the weakness of the testimony, and the rulings of the court in the two cited cases, I doubt the propriety of bringing said suit, as requested, and decline to so recommend.

FINAL PROOF PROCEEDINGS—ADVERSE CLAIM—RES JUDICATA.

DICKSON *v.* BENNETT.

The invalidity of an alleged adverse claim having been determined in a decision that became final, as between the parties thereto, precludes the adverse claimant from again setting up his claim when the successful party offers final proof in accordance with the former decision.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 16, 1890.

I have considered the case of George Dickson against Wm. C. Bennett on appeal from your office decision of November 30, 1888, rejecting the final proof of Bennett and holding for cancellation his pre-emption entry for the SW. $\frac{1}{4}$ of Sec. 13, T. 7 S., R. 11 E., Stockton land district, California.

Dickson made his homestead entry for this tract on July 12, 1884. Bennett filed pre-emption declaratory statement therefor July 22, alleging settlement June 24, 1884, and in July 1885, submitted final proof, against the acceptance of which Dickson protested. As a result of a hearing had on said protest the local officers decided that Bennett made the first settlement on the lands; that his proof was sufficient, and that he should be allowed to make entry, therefor.

From this decision Dickson appealed to your office, and on May 29, 1886, you held that:—

Defendant made prior settlement upon the tract; that he established residence thereon about June 24, 1884; that he has made valuable improvement upon the tract and acted in good faith.

The plaintiff first saw the land about July 6, 1884, and knew that improvements had been made thereon. It is unnecessary to refer in detail to certain testimony showing very clearly, as I believe, that the plaintiff has never established an actual *bona fide* residence upon the land.

While the testimony establishes the defendant's prior right to the tract, I am however unable to concur with you that he should be allowed to perfect entry upon the proof already made for the reason that he has not shown a sufficient compliance with legal requirements in the matter of residence upon land. He is allowed, however, within the statutory period to make new publication and proof showing full compliance with law. Meanwhile the plaintiff's homestead entry may remain of record.

The parties were allowed the usual time for appeal, but no appeal was taken.

Pursuant to this decision, and permit, Bennett made publication, and on November 15, 1886, offered new final proof. Dickson was cited to appear at the hearing and he appeared in person and by attorney, and cross-examined the witnesses of Bennett and offered testimony relating to his own entry. Upon this testimony the local officers decided "that claimant should be allowed to enter and make payment for the tract in contest upon the proof submitted."

From this decision Dickson appealed to your office, and in your office decision of November 30, 1888, you find—

The testimony shows that Bennett first made settlement on said tract in the fall of 1883, by repairing an old cabin thereon and commencing a well. He states in his own testimony that he slept on the place December 13, 1883, and that repairing said cabin and digging said well were acts done preparatory to making "final settlement" which was made June 24, 1884. . . . It is manifest from the foregoing that Bennett was guilty of laches in not filing his D. S. within three months after settlement. His settlement though prior, cannot avail him as against 'the next settler in point of time who has complied with the law.' Section 2265 R. S. . . . Therefore without considering the question as to the sufficiency of Bennett's residence, your decision is reversed and said D. S. No. 12583 by Bennett is held for cancellation, his final proof rejected.

From this decision Bennet appealed and the case is before the Department for consideration.

The testimony shows that Bennett went upon this land in the fall of 1883 and did something toward repairing an old cabin standing thereon, began digging a well, and slept one night in December of that year on the place. In March 1884 he went to the land office and learned that the tract was not vacant, but he "kept his eye on the land" and worked a little from time to time thereon. In April or May 1884, he finished digging the well, and in June of that year he had the cabin repaired, his well timbered up and curbed, and moved into the cabin, made settlement and established his residence on the land.

In 1884, there was a crop of wheat growing upon a portion of the tract; he received the landlord's share except a portion to pay for seed and feed.

In the fall of that year he rented the entire tract to one Blewitt who seeded it to wheat giving him the landlord's share. He enlarged his house so that it contained three rooms. Blewitt and family occupied two of these and he occupied the other. He was an unmarried man, and lived in this room doing his own cooking; he had a stove, bed, dishes, chairs, and such household furniture as was necessary to his comfort.

In 1885 he harvested a volunteer crop of wheat that grew on the land, and in 1886 he had the tract, except forty-five acres plowed by Dickson, seeded to wheat.

His improvements, consisting of house, barn, some out-houses, well, corral fenced, garden, orchard and vineyard of about three acres were valued at from \$500 to \$600. He was absent from the land a portion of the time; twice he went to San Francisco on business—stayed three weeks at one time—and he spent at one time a week, camping in the mountains, but his residence has been on the land continuously since June 24, 1884.

At this hearing, Dickson who protested against Bennett's entry, offered testimony to prove his residence and improvements on the land under his homestead entry. The testimony was objected to upon the ground that by the decision of the Commissioner of the General Land Office, the only matter to be heard and determined was the question of Bennett's residence.

The testimony was taken by the local officers, subject to [exceptions.]

It is urged by counsel for Bennett that all questions except the single matter of the sufficiency of proof as to Bennett's residence, have been heard and determined, and are *res adjudicata*, in the first decision. Bennett's right to make entry being "generally" disputed put in issue all the facts material to an entry by a pre-emptor. The entryman had to establish the essential facts, and the time when he made his settlement on the land is a material fact to be proven. It was proven, on former hearing, to the satisfaction of the local office and your office; that issue was tried and determined.

Dickson also offered evidence, at former trial, as to his residence and improvements on this land and the question as to whether he had established bona fide residence upon the land was also heard and determined. From that decision there was no appeal.

The doctrine of *res adjudicata* is applicable to the proceedings before the Land Department as before courts of law and equity.

"Matters tried and determined by final decision cannot be made the subject of a second contest." *Sewell v. Rockafeller* (10 L. D., 232).

There was nothing, therefore, to be heard and determined at the hearing November 15, 1886, except the sufficiency of the proof of Bennett's

residence, and the objection to the testimony offered by Dickson was well taken.

The testimony shows that Bennett's residence upon the land has been such since June 24, 1884, as to fulfill the requirements of the law and entitle him to make entry and payment for the land.

The entry of George Dickson will be canceled. Your decision is reversed.

RAILROAD GRANT—INDEMNITY WITHDRAWAL—PRE-EMPTION.

LANE *v.* SOUTHERN PACIFIC R. R. Co.

A pre-emption filing should not be allowed for land included within a former indemnity withdrawal, and covered by a pending selection, without due notice to the company with opportunity to show cause why such filing should not be allowed.

Pre-emption final proof for land included within a former indemnity withdrawal may be accepted, though offered within less than six months after the restoration of said land to the public domain, where it appears that the pre-emptor had resided upon, cultivated and improved the land long prior to such restoration.

A settlement claim existing at the date of the revocation of an indemnity withdrawal is superior to a subsequent selection by the company.

Secretary Noble to the Commissioner of the General Land Office, April 16, 1890.

This case involves the right to the SE. $\frac{1}{4}$ of Sec. 1, T. 6 N., R. 5 W., S. B. M., Los Angeles, California, lying within the indemnity limits of the grant to the Southern Pacific Railroad Company.

The tract in controversy, which had been withdrawn for the benefit of said railroad company, was restored to the public domain and opened to settlement by the order of August 15, 1887 (6 L. D., 93) revoking the withdrawal of indemnity lands made for the benefit of said grant, except as to lands covered by approved selections.

At the date of the revocation of the order of withdrawal the tract had not been selected by the company, but, on October 7, 1887, it selected all of said section.

On October 13, 1887, Asa Lane filed declaratory statement for said tract, alleging settlement March 4, 1885, and after posting of publication of notice submitted final proof before the local officers on January 20, 1888, when the railroad company appeared and filed formal protest against the allowance of said proof, claiming the right to said tract under its selection, made October 7, 1887, as indemnity land. The local officers dismissed the protest of the company and rejected the proof of Lane, for the reason that it was presented before the expiration of six months since his legal settlement on the land, from which action both parties appealed.

Your office affirmed the decision of the local office dismissing the protest of the company, but reversed their decision rejecting the proof of Lane. From this decision the railroad company appealed.

It appears from the testimony that Lane settled upon this quarter section March 4, 1885, and on April 9, 1885, made application to purchase it from the railroad company; that he resided upon and improved the tract, with permission of the company, from that date to date of final proof.

At the date of the revocation of the order of withdrawal, when the land was opened to settlement and entry under the general land laws, it was occupied by Lane, a qualified pre-emptor, and although he went upon said land with permission of the railroad company while it was in reservation, yet the company, having failed to make selection prior to revocation of the withdrawal, the right of Lane attached immediately upon the restoration of the land to the public domain, by virtue of his settlement existing at that date. The company had no right or claim to convey prior to selection, and when the withdrawal was revoked, he was free to claim and initiate a right adversely to the company.

It is contended by the company that its selection of the section being of record before the filing of Lane was an appropriation of the land, and could only be contested in the way provided by the Rules of Practice.

The order of revocation provided that entries and filings might be made upon lands within said indemnity limits, covered by unapproved selections, and that when an application to file or enter is presented, showing that the land is not subject to the company's right of selection, notice should be given to the company, who will be allowed thirty days in which to present objections to the allowance of such entry or filing, and, if no response is made, the filing or entry should be allowed; but should the company appear and show cause, a hearing should be ordered to determine whether the land is subject to the company's right of selection. While the order evidently had reference to unapproved selections made prior to the revocation of the withdrawal, I can see no reason why it may not apply to selections made after the revocation, where the application to enter or file shows that the land is not subject to the company's right of selection. While it will be admitted that the filing of the declaratory statement in the presence of a selection of record, without giving notice to the company as provided by the order of withdrawal, was irregular, yet it was an error without injury, inasmuch as the company was notified of the intention of Lane to make final proof, and at that time appeared and protested, and has had full opportunity to present its claim.

One William W. Bemis also filed for the east half of said quarter section, October 13, 1887, alleging settlement December 1, 1881. He also protested against the allowance of Lane's proof, and cross-examined the witnesses, but the local officers dismissed his protest, from which he failed to appeal. That decision was declared by your office final, and the case closed as to him. He also failed to appeal from your said decision of October 27, 1888. As Bemis has waived all right to the tract

by failure to appeal from the decision of the local officers and of your office, and it not being necessary to consider his settlement and filing to determine the claims of Lane and the railroad company, his claim has not been considered.

It appears from the testimony that, while Lane made his final proof before the expiration of six months from restoration of the land to settlement and entry under the general land laws, he had resided upon, cultivated and improved the tract long prior thereto, and in addition to this he filed affidavits with his appeal from the decision of the local office showing that he had continued to reside upon and cultivate said land up to the date of said affidavits.

The decision of your office dismissing the protest of the company is affirmed.

WAGON ROAD GRANT—ACT OF MARCH 2, 1889.

WILLAMETTE VALLEY WAGON ROAD CO. v. MORTON.

The grant of July 5, 1866, is one of quantity to be selected within specified limits, and without selection the right of the company does not attach to any specific tract.

The definite location of the road or the construction thereof, does not cause said grant to attach to any specific tract of land, or withdraw from entry the lands within the limits fixed by location and construction.

A valid settlement claim existing at date of the executive withdrawal in aid of said grant, excepts the land covered thereby from the operation of said withdrawal and from the grant.

The act of March 2, 1889, does not deprive the Department of its jurisdiction over lands within this grant, or operate as a bar to the issuance of patents for lands excepted therefrom.

Secretary Noble to the Commissioner of the General Land Office, April 16, 1890.

On June 16, 1884, the Willamette Valley and Cascade Mountain Wagon Road Company selected with other tracts, the NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, and lots 1, 2, 3, 4, and 5, Sec. 15, T. 18 S., R. 47 E., La Grande, Oregon, under the grant of July 5, 1866 (14 Stats., 89). The local officers rejected the selection of the above described tracts by reason of conflict with the claim of Joseph A. Morton. By letter of October 12, 1888, your office affirmed the action of the local officers as to said tracts.

The company and Alexander Weill, assignee of the grant, appeal.

It appears from the record that on December 14, 1883, Morton made homestead entry for said tracts, and on February 1, 1887, after publication of notice made final proof without objection before the local office, whereupon final certificate issued to him. The final proof showed that Morton with his family, consisting of his wife and "five children at home," settled and established residence on this land on February 18, 1880; that his house, one story and a half high, is twenty-four by

sixteen feet, with an "L" sixteen by twenty feet, that he has a stable, blacksmith shop and other outbuildings, an orchard, all the usual farming implements, seventy-five head of cattle, two hundred and fifty head of horses, and his house well furnished. The land was mostly a sage brush plain, needing irrigation by artificial means. Claimant has cleared thirty acres of sage brush, and has about three acres in vegetables. His residence has been continuous since settlement. The improvements are assessed for taxation "at about \$1,000."

Your office held that these tracts are within the limits of the grant for said road, and were ordered withdrawn by letter of June 19, 1883, which was received at the local office the 30th of that month; that at the date of withdrawal the tracts were covered by the settlement claim of Morton, and at the date of selection, by his homestead entry and consequently were excepted from the grant.

It is urged that said settlement and entry could not operate to deprive the company of its right to select said tracts; that the land was not open to homestead entry after "the completion" of said road opposite thereto; or at least after the "certified completion" on October 2, 1871; that the grant operated by its own vigor to withdraw from pre-emption and homestead entry "each one of the six odd numbered sections within six miles of said road;" that the grant operated as "a grant of the right of choice" to the said company to select any one of the said six odd numbered sections within the six mile limits; that the withdrawal was effected by your office letter of June 2, 1871, etc.

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

Many of the points herein urged were presented in the case of Rinehart against said company (5 L. D., 650), wherein, after full discussion it was decided that the grant to aid in the construction of this road was not a grant of lands in place or specified lands, but a grant of quantity to be selected from the odd numbered sections within certain boundaries; and hence, without selection the right of the company did not attach to any specific tract, that the construction of the road and the filing of a map of definite location thereof does not cause the grant to attach to any particular tract of land, nor does it by its operation withdraw from entry the lands within the limits fixed thereby; and that a withdrawal of the lands under this grant, by the Executive does not become effective until notice of such withdrawal is filed at the local office.

No notice was ever sent to the local office affecting the status of the lands here involved until 1883. On June 19, 1883, your office wrote the local officers at La Grande, as follows:

In further reply to yours of the 15th ult., enclosed herewith I send a diagram showing the limits of the grant for the Willamette Valley and Cascade Mountain Military road in your district. As the diagram transmitted with office letter of June 2, 1871,

does not show the limits of said grant east of the line dividing ranges 46 and 47 east, you will note the withdrawal of the lands in townships 16, 17 and 18 south, of range 47 E., as shown by this diagram, which should be appended to the diagram heretofore transmitted to complete the same.

This letter was received at the local office on June 30, 1883.

The lands here in issue are in said township 18 S., R. 47 E.

When Morton settled, therefore, no right of the company had attached to these tracts, nor had any withdrawal been made of them. In other words they were vacant public lands. After the settlement right of claimant attached, and while it continued, a withdrawal would not affect the status of the lands so occupied. The settlement excepted the land from the operation of the withdrawal and from the grant. The subsequent selection by the company was made subject to the right of the settler.

By letter of May 16, 1889, your office states that you are in receipt of a letter from the attorneys of said company, who therein call attention to the act of March 2, 1889 (25 Stat., 850), and claim that all jurisdiction of the Land Department over the lands embraced in said grant, is by the operation of said act of March 2, 1889, suspended until after the final decision of the courts as provided in said act.

The object of said act was to direct the attorney general to bring suits, within six months from the passage thereof, to determine the questions of the seasonable and proper completion of this, and two other land-grant wagon roads in Oregon, the legal effect of the several certificates of the governors of the State of Oregon, and the right of resumption of such granted lands by the United States, and to obtain judgments, which the court was thereby authorized to render, declaring forfeited to the United States all of such lands as are coterminous with the part or parts of either of said wagon roads which were not constructed in accordance with requirements of the granting acts, and setting aside patents which have issued for any such lands, saving and preserving the rights of all *bona fide* purchasers, etc.

This act does not in terms purport to divest the Land Department of its ordinary jurisdiction over lands in this grant; nor does the argument of counsel convince me that a patent should be withheld from a settler who is found entitled thereto, notwithstanding the grant. In 1887 an examination of the line of route of said road, with two others in the same State, was made by direction of this Department, a report whereof was transmitted to the President by Secretary Vilas on March 13, 1888, who said,—

It shows that a personal examination of said roads has been made as directed, and that a large mass of testimony was taken at different points in said State, which has been transcribed at length, and is also herewith transmitted. The testimony is mainly that of witnesses living along these roads. In this investigation the road companies were represented by attorneys who cross-examined witnesses and submitted testimony on their own behalf. This testimony appears to conclusively establish that none of these wagon roads were constructed according to law, and that by a rightful administration of the grants and the trust, no lands should ever have become the property of the companies on whom they were attempted to be bestowed by the

State. . . . As far as concerns the lands not yet patented or surveyed, there would appear to be no question as to what ought to be done. The grants should be forfeited and further patenting forbidden. The Department can do no more than to withhold the patents to await the action of Congress. . . . It would seem, therefore, to be the fair duty of the government, not alone towards those citizens, who are better entitled to possess these lands for themselves but in reprehension and redress of a gross imposition and fraud, to press by a judicial inquiry and a just judgment the retributive results demanded by the history of the transaction now disclosed. Senate Ex. Doc., 124, 50th Cong., 1st Sess., page 2.

The entire record was transmitted to Congress by the President who expressed the hope "that the opportunity thus presented to demonstrate a sincere desire to preserve the public domain for settlers, and to frustrate unlawful attempts to appropriate the same may not be neglected."

Thereupon said act was passed.

This recital indicates the attitude of the Department toward this question. While said suit is pending no patents will be issued for said company or its assignee. But in cases of conflict between the company and individual adverse claimants, any judgment in favor of the individual must proceed on the basis that the grant is still in full force and effect. If on such basis the right of the individual is found to be superior, the company could not be injured by the issue of patent, for the land would be excepted from the grant, in any event.

Said decision is accordingly affirmed, and patent will issue to Morton.

CONTEST—PRACTICE—CONTINUANCE.

LEWIS *v.* SMITH.

An agreement of counsel to the indefinite postponement of a hearing is in effect a discontinuance of the contest.

Where two applications to contest an entry are pending, the only person that can object to a decision that awards the right of proceeding against the entry, is the applicant against whom the decision is rendered.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 16, 1890.

On December 11, 1880, Bryant Smith made homestead entry for the E. $\frac{1}{2}$ of NE. $\frac{1}{4}$, NW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ of SE. $\frac{1}{4}$, section 6, T. 17 S., R. 4 W., Montgomery land district, Alabama. He regularly submitted his final proof February 28, 1887; the same was accepted by the local officers and final certificate issued April 29, 1887.

On August 4, 1887, Homboley B. Lewis filed his affidavit of contest against the entry of Smith charging that the latter did not comply with the requirements of the homestead law; that he never resided upon the said land; that he has abandoned said tract and failed to settle thereon and cultivate the same.

The local officers thereupon ordered a hearing upon the said contest; they directed that the testimony should be taken before the clerk of the circuit court of the United States at Birmingham, Alabama, on October 7, 1887, and that the final hearing before themselves should be had at their office October 13, 1887.

On the day appointed parties appeared before the said clerk; Smith by his attorney filed his written objection to the taking of the testimony or further proceedings of any kind in the case because (1) Final certificate for said land after due final proof, had been issued to the entryman April 29, 1887; (2) Rule 5 of the Rules of Practice has not been complied with; (3) The contest was not authorized by the Commissioner of the General Land Office; (4) The contest was not instituted until after the issuance of the final receipt; (5) The local officers in absence of instructions from the Commissioner of the General Land Office have no jurisdiction in this cause. For these reasons Smith asked that the contest be dismissed.

The commissioner proceeded with the taking of the testimony against the objection of the defendant, who excepted to the proceeding and declined to examine or cross-examine any witnesses.

On October 11, 1887, the said Homboley B. Lewis filed a further affidavit of contest bearing date October 7, in which he adds to the charges against the said entryman alleged in his said first affidavit the allegations "that his final proof was false and that by said false proof he fraudulently obtained his final receivers' duplicate receipt."

On October 13, 1887, the parties appeared before the local officers. Smith by his attorney renewed his said motion and the local officers thereupon dismissed the contest. From this action Lewis appealed to your office; with this appeal his petition to your office is transmitted asking that a hearing be ordered upon the said second contest affidavit. The appeal and papers in the case were forwarded to your office December 21, 1887.

While these proceedings were in progress one Louis A. Truett on September 5, 1887, filed his affidavit of contest against the entry of Smith charging that the said Smith had not settled or resided upon the said land since making his entry and that this entry made December 11, 1880, was fraudulent and therefore illegal and void. Said Truett accordingly prayed that a hearing be ordered by your office.

This affidavit having been transmitted to your office September 15, 1887, you, in ignorance of the proceedings on the Lewis contest, on October 19, 1887, ordered a hearing on the Truett contest.

Hearing in this contest it appears was appointed for February 8, 1888.

On February 20, 1888, your office then being fully informed of the records and proceedings in the said case, rendered a decision by which the hearing ordered in the case of Truett was revoked and all proceedings thereunder set aside and a hearing ordered on the application of Lewis according to his said contest affidavit.

With said decision your office returned to the local officers the said contest affidavit of October 7, as the basis for said hearing.

From your said decision Smith appealed to this Department. He specifies as errors,—

I. The Hon. Commissioner erred in making his order authorizing Truett to contest and permitting Lewis to renew his contest during the pendency of Truett's contest.

II. The rules of practice are the only rules by which litigants can be governed in such cases.

III. The Hon. Commissioner virtually ignored rule 5 of Rules of Practice in this case.

IV. Lewis could not legally during the pendency of a contest authorized by the Hon. Commissioner be allowed to renew a contest which had not been initiated in conformity with the Rules of Practice.

In his statement of the case attached to the appeal Smith sets out among other matters as follows: "On November 15, 1887, the contestee in this case had a notice of contest served upon him by and in favor of one Lewis A. Truett, said contest having been initiated by direction of the Hon. Commissioner and said notice bears date November 1, 1887, said cause was set for a hearing before a register and receiver on February 8, 1888, but by agreement of counsel was indefinitely postponed." This agreement is in effect a discontinuance of the contest. The only person that could object to the decree given preference to the Lewis contest over the contest of Truett, is Truett himself. By the agreement the latter is out of the case and no objection remains to proceed forthwith with the hearing in the Lewis contest on the affidavit filed October 11, 1887.

Your said office decision is accordingly affirmed.

PRE-EMPTION CONTEST—2260, REVISED STATUTES.

GLENN *v.* OWENS.

The right of pre-emption can not be exercised by one who is the owner of three hundred and twenty acres of land, and the statutory inhibition to that effect can not be defeated by a pretended transfer of title.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 16, 1890.

I have considered the case of Thomas L. Glenn *v.* Aquilla C. Owens upon appeal of the latter from your office decision of December 13, 1888, holding for cancellation his pre-emption cash entry for SE. $\frac{1}{4}$ NE. $\frac{1}{4}$ Sec. 19 and S. $\frac{1}{2}$ NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ NW. $\frac{1}{4}$ Sec. 20, T. 29 N., R. 1 E., M. D. M., Shasta, California, land district.

It appears from the record that said Owens filed his pre-emption declaratory statement October 4, 1875, alleging settlement July 25, 1864, and made final proof January 17, 1876, but the certificate was not issued until March 11, 1878.

On March 27, 1878, Thomas L. Glenn filed a petition to be allowed to contest said entry, and a hearing was ordered by your office which was duly held June 10, 1880, and upon the evidence then introduced the local officers recommended the cancellation of the entry, but your office on appeal reversed their decision, which was sustained by this department by its decision on appeal dated May 24, 1884.

Subsequently Glenn filed a petition to re-open said cause, alleging that at the time Owens made final proof he was not a qualified pre-emptor for the reason he was then, January 17, 1876, the owner of three hundred and twenty acres of other land, and on February 27, 1885, Secretary Teller ordered a hearing to determine this question.

After several continuances such hearing was finally concluded September 28, 1885, and on March 6, 1887, the local officers decided adversely to Owens and recommended cancellation of the entry.

The evidence shows that on October 4, 1875, the date upon which Owens filed his declaratory statement, he was the owner of over eight hundred acres of land, but on October 12, 1875, he conveyed four hundred and forty acres of it to his son Frank, the consideration stated in the deed being \$1,500, and on December 18, 1875, he conveyed to the said son three hundred and twenty acres more, the consideration named being \$2,000.

All these lands were reconveyed by Frank to his father December 30, 1878.

The testimony shows that at the time Owens conveyed these lands to his son, the said son was about twenty-two years of age, and was engaged in herding sheep for his father, and had never been known to be the owner of any property but a saddle horse.

It further appears that during the time the title to the said seven hundred and sixty acres stood in the name of Frank Owens, the father, A. C. Owens, had possession of them as before, enjoyed the use, rents and profits thereof and paid the taxes and assessments thereon, and it further appears that in April, 1878, Frank Owens gave in to the assessor four hundred and eighty acres of said land under oath as the property of his father. It also appears that the same lands were assessed to A. C. Owens for the years 1875, 1876, and 1877.

The evidence further shows that the conveyance for the three hundred and twenty acre tract made by A. C. Owens to Frank Owens, December 18, 1875, was executed in the absence of said Frank Owens and was never delivered to him at all, but was recorded at the request of A. C. Owens, and the deed itself still remained in the recorder's office at the date of the hearing. Neither is there any showing that the other deed was delivered to Frank.

An affidavit alleged to have been made by Frank Owens, I find with the record but it is *ex parte* and not admissible and has not been considered by me.

After careful examination of the whole record I am of the opinion that the deeds of conveyance from A. C. Owens to Frank Owens were

made without consideration and were executed for the sole purpose of evading the inhibition of section 2260 Revised Statutes, and that the said transfer of title was merely a pretended transfer and as such did not defeat the inhibitory provisions of said section. See Croghan Graves (9 L. D., 463). The Croghan Graves case was one of a pretended transfer to the entryman's wife of the land from which he had removed to settle upon his pre-emption claim, but the reasons which would prevent a pretended transfer from removing the bar of the second inhibition, will apply equally to the first. See also Anderson v. Bailey (7 L. D., 513); McDonald v. Fallon (3 L. D., 56).

Your decision is accordingly affirmed.

ALIEN—NATURALIZATION—RAILROAD GRANT.

TITAMORE v. SOUTHERN PACIFIC R. R. CO.

An alien can acquire no right to public land before filing his declaration of intention to become a citizen, and his subsequent qualification will not relate back so as to defeat an intervening right.

The settlement of an alien upon land within the indemnity limits of a railroad grant does not operate as a bar to selection.

Secretary Noble to the Commissioner of the General Land Office, April 16, 1890.

This appeal is filed by the railroad company from the decision of your office of December 1, 1888, holding for cancellation the selection of said company of the W. $\frac{1}{2}$ of SE. $\frac{1}{4}$ and E. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of Sec. 29, T. 15 S., R. 3 E., M. D. M., San Francisco, California, and directing that the final proof upon the pre-emption claim of Herbert E. Titamore for said tract be returned to the local officers for allowance.

The material facts as shown by the record are as follows:

The tract is within the indemnity limits of the grant to the Southern Pacific Railroad Company, and was withdrawn for the benefit of the company May 8, 1867, and was selected by the company as indemnity October 18, 1884.

Herbert E. Titamore filed declaratory statement for said tract June 10, 1886, alleging settlement July 1, 1883, and offered final proof upon said claim March 30, 1888, at which time the company appeared and filed a protest against the allowance of said proof. The local officers rejected said proof, for the reason that the land had been regularly selected by the railroad company, October 18, 1884. Your office reversed the decision of the local officers and held that under the decision of the Department in the case of Guilford Miller v. Northern Pacific Railroad Company (7 L. D., 100), holding that the withdrawal of indemnity lands was without authority, the final proof of Titamore should be approved, because it is clearly shown that he was a settler on the land at the date of selection by the company.

It is shown by the record that Titamore filed his application to make homestead entry of this tract September 12, 1885, in which he alleged that he had declared his intention to become a citizen of the United States. This application was refused by the local officers, and an appeal taken, which does not appear from the records to have been disposed of.

On June 10, 1886, he filed declaratory statement for the tract, alleging settlement July 1, 1883, but in his final proof he testified that his first settlement upon the tract was July 1, 1884. He also testified that he was a "native born citizen of the United States." But his counsel has filed with the record a copy of his declaration to become a citizen of the United States, made June 28, 1885, before the clerk of the superior court for the county of Monterey, in the State of California.

Waiving all question as to the validity of the withdrawal of this land for the benefit of the road, it appears that at the date the company selected the tract, Titamore was not a qualified pre-emptor, and his settlement upon the land while he was an alien would not prevent its selection by the company, even if no withdrawal had been made for its benefit. His subsequent qualification could not relate back so as to defeat an intervening right. An alien can acquire no right to public land before filing his declaration of intention to become a citizen. *Southern Pacific Railroad Company v. Saunders*, 6 L. D., 98; *McMurdie v. Central Pacific R. R.*, 8. C. L. O., 36; *Kelly v. Quast*, 2 L. D., 627.

Your decision is reversed.

RAILROAD GRANT—CONFLICTING SETTLEMENT CLAIM.

ICARD v. CENTRAL PACIFIC R. R. Co.

In a controversy as to the status of a tract of land lying within the limits of a railroad grant, the uncontradicted testimony of one witness may be accepted as sufficient to establish the fact that said land was covered by a pre-emption claim at the date when the grant became effective.

The existence of a pre-emption claim at the date of withdrawal and definite location excepts the land covered thereby from the operation of the grant.

Secretary Noble to the Commissioner of the General Land Office, April 16, 1890.

The attorney for the Central Pacific R. R. Co. has filed a motion for review of departmental decision of March 15, 1889, in the case of said company against Clara Icard involving the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 19, T. 16 N., R. 8 E., M. D. M., Sacramento, California, land district.

This motion is made upon the following ground,—

- I. That the true construction of the law does not warrant the holding of this land as excepted from the company's grant.
- II. The ruling in the Ramage case is not decisive of this case, the cases being different in essential particulars.

This land is within the limits of the withdrawal of August 2, 1862 (notice of which was received at the local office September 12, 1862) for the benefit of said road under the grant of July 1, 1862 (12 Stats., 489). This grant was enlarged by act of July 2, 1864, (13 Stats., 356), and the land here in question fell within the limits of said grant as shown by the map of definite location filed October 27, 1866. These lands were included in the company's application for patent as shown by list No. 12 of December 3, 1885.

Township plat was filed February 20, 1868. On August 6, 1886, Clara Icard applied to make homestead entry for said lands filing with her application the corroborated affidavit of John Icard setting forth that said lands were at the dates of the grant, the withdrawal and the filing of map of definite location occupied by a pre-emption settler and therefore excepted from the operation of said grant.

A hearing was ordered by your office and had before the local officers who decided in favor of the company. Upon examination in your office it was found that no question had been asked as to the status of the land at the date of the withdrawal September 12, 1862, and a rehearing was ordered. The local officers decided against the homestead applicant because only one witness was examined in her behalf. Your office reversed this decision, found that the testimony showed "that John Icard settled on the land in question in connection with the NE. $\frac{1}{4}$ NE. $\frac{1}{4}$ of said section 19 (upon which latter tract his house was situated) in the year 1854, and enclosed the same with a substantial fence—and resided thereon continuously until after the railroad company's map of definite location had been filed claiming said land under the pre-emption law," that he subsequently abandoned his claim to this land and filed for other land and held that this residence and possession were sufficient to except the land from the grant citing *Ramage v. Central Pacific R. R. Co.* (5 L. D., 274 and 616). Upon appeal to this Department that decision was affirmed.

At the first hearing John Icard the father of this applicant was the only witness examined and he testified that during the years 1865, 1866 and 1867, he was living on the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of said section 19, his improvements thereon consisting of a house, barn, stables, etc., being of the value of \$2,000; that he had under fence about three hundred acres of land including the three tracts now in controversy, a part of each of which tracts he cultivated every season, that up to the time the land was surveyed he claimed these three tracts and the one his house was on, or portions of them, as his pre-emption claim; that when the land was surveyed he took other lands in sections 18 and 20, instead of the three tracts in controversy because it was to his advantage to do so. The records of your office show that on May 7, 1868, John Icard filed pre-emption declaratory statement for the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of section 19, the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of section 18 and the NW. $\frac{1}{4}$ of

the NW. $\frac{1}{4}$ of section 20, in said township and on May 2, 1873, made pre-emption cash entry therefor.

At the second hearing John Icard was again the only witness and he testified that he enclosed the tracts with other land in 1859 by a board and post fence, and kept them so enclosed using them for grazing and cultivation until about 1870; that the fencing and clearing on these three tracts cost him \$600 to \$700; that he intended to include these tracts in his pre-emption filing but when he went to the local office he found that to save his improvements he had to leave these tracts out and take some land east of his house that he had not intended to take; that the local officers "would not let me file it as I laid it out. It didn't butt in square enough for them. It was in too much of a string and they filed me upon the bed-rock of Randolph Hill and I couldn't do any better." He further testified that he was a native born citizen of the United States and up to the year 1868 had not exercised either his pre-emption or homestead right and was not then the owner of any land.

It is claimed on the part of the company that the decision of the local officers should have been affirmed "because one witness could not prove a pre-emption right." This same question was presented by this company in the case of *Central Pacific R. R. Co. v. Shepherd* (9 L. D., 213), and decided adversely to the company's claim. The rule there laid down is the correct one and will be followed here. It is further claimed that the facts established by the evidence are not sufficient to except the land from the grant. This evidence shows that at the respective dates of the withdrawal and the filing of map of definite location these tracts were claimed and actually occupied by one qualified and actually, as he swears, intending to take them under the pre-emption law.

These facts certainly bring this case within the rule laid down in the case of *Central Pacific R. R. Co. v. Rees* (10 L. D., 281). The fact that after the right of the road attached and upon survey being made the intended pre-emptor was compelled, in order to retain his improvements to abandon his claim to these tracts in controversy would not affect the question, the condition of the land at the time of the attachment of the company's rights determining whether it passed under the grant.

For the reasons herein stated the motion for review must be and is hereby denied.

RAILROAD GRANT—SUIT TO VACATE PATENT.

UNITED STATES *v.* CENTRAL PACIFIC R. R. CO.

Suit to vacate patent issued under the grant to the Central Pacific advised, where the lands in question were covered by the settlement claim of a pre-emptor at date of withdrawal on general route and definite location of the road.

Secretary Noble to the Attorney-General, April 16, 1890.

Herewith I send a report of the Commissioner of the General Land Office and accompanying papers, relating to the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and

the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 3, T. 14 N., R. 8 E., M. D. M., Sacramento land district, California.

The described tract was within the limits of the withdrawal on general route, made August 2, 1862, for the Central Pacific Railroad Company, under its grant made by act of July 1, 1862 (12 Stat., 489), and fell within the limits of the grant to said company, as shown by the map of definite location of its road, filed opposite thereto March 26, 1864. The plat of survey of said township was filed June 10, 1870, and a patent for the described tract was issued to the railroad company June 23, 1883.

The affidavit of John Ragsdale, corroborated by Nahum Eames and G. W. Cunningham, states that the tract was settled upon as far back as 1865 by Bowen and Traylor, citizens of the United States, who continuously occupied the same from 1859 to 1866 "as bona fide settlers intending to obtain title from the United States." It is stated that Bowen and Traylor sold their possessory right to said Ragsdale; and Peter Trounson claims to have settled upon the tract in 1883, and shortly thereafter made application to enter the same under the homestead law, which application was refused. He claims to have valuable improvements on the land, and to have resided thereon ever since.

On these statements the Commissioner of the General Land Office recommends that you be requested to instruct the proper United States district attorney for California to investigate the facts, and, if the same warrant, to bring suit in behalf of the United States to secure the vacation of said patent.

By section three of the act of July 1, 1862, *supra*, a present grant was made to said company, of five odd numbered sections, per mile, on each side of its road, not sold, reserved, or otherwise disposed of, and "to which a pre-emption or homestead claim may not have attached, at the time the line of said road is definitely fixed."

By section four of the act of July 2, 1864 (13 Stat., 356), said grant was enlarged to ten sections per mile on each side of the road; and it was declared that "Any lands granted by this act or the act to which this is an amendment shall not defeat or impair any pre-emption, homestead, swamp land, or other lawful claim."

If the matters stated in the accompanying affidavits be true, it would seem that the settlement upon the tract in question before and at the time of the withdrawal on general route, continued until after the definite location of the road, was sufficient to place the land within the exception to the grant, and consequently it was erroneously patented to the company. I therefore approve of the recommendation of the Commissioner of the General Land Office and request that, if you concur in these views, you will cause such action to be taken in the matter as may seem to you to be proper.

PRE-EMPTION ENTRY—FINAL PROOF.

MILTON JONES.

That the improvements placed on the land by the pre-emptor are limited in extent and value does not warrant the rejection of his final proof, if his good faith is otherwise apparent.

A misdescription of the land in the published notice of intention to submit proof calls for a republication of the notice.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 16, 1890.

On March 12, 1885, Milton Jones made pre-emption cash entry based upon declaratory statement filed June 13, 1884, alleging settlement the 16th of the same month upon the NW. $\frac{1}{4}$ Sec. 15, T. 116 N., R. 72 W., Huron, Dakota.

On November 2, 1887, your office finding the improvements shown by the claimant's pre-emption proof to be "insufficient" to show his good faith rejected said proof and required him within ninety days "to re-advertise and make new proof."

From this action the claimant has appealed to the Department.

The said proof made December 20, 1884, before the judge and *ex officio* clerk of the probate court for Hyde county, shows that the claimant, a single man 27 years of age, made settlement on the land June 16, 1884, by building a house; that his residence thereon, established the following day, was continuous and that his improvements valued at \$100, comprised a frame house eight by twelve feet with board roof and floor and five acres of breaking from which he had removed the rock.

Although his improvements appear to have been somewhat meager the proof shows that the claimant for a period of six months resided on the land continuously.

As the record does not impeach the claimant's good faith the said proof which makes out a *prima facie* case of compliance with the law should, in my opinion, be accepted if the same was in other respects regular.

It appears, however, that in the claimant's published notice of intention to make said proof the tract in question was erroneously described as the NW. $\frac{1}{4}$ of "section 5," in the said town and range. It will, therefore, be necessary for the claimant within a reasonable time to republish for the prescribed period, his notice of intention to make proof in support of his claim. John C. Weber (9 L. D., 434).

If no adverse claim shall have been filed on or before the time designated in such republication for so making proof, the proof heretofore submitted will be accepted. Should claimant fail to make the republication thus required the entry in question will stand canceled.

The decision appealed from is modified accordingly.

HOMESTEAD ENTRY—FEE AND COMMISSIONS.

SARAH J. TATE

On the allowance of a second homestead entry the applicant is not entitled to credit for the fee and commissions paid on the first, but repayment thereof may be allowed on due application.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 16, 1890.

On September 27, 1887, Sarah J. Tate, made homestead entry No. 15,654, for the NE. $\frac{1}{4}$ Sec. 12, T. 23, R. 42, Garden City, land district, Kansas.

January 18, 1888, she presented at the local office a relinquishment of her said entry, and at the same time made application to make homestead entry for the N. $\frac{1}{2}$ NE. $\frac{1}{4}$ and N. $\frac{1}{2}$ NW. $\frac{1}{4}$ Sec. 8, T. 22 S., R. 42 W., in said land district. Claimant's relinquishment and application were accompanied by her own corroborated affidavit in which she alleged "that after making said entry she returned to Windsor, Henry Co., Mo., for the purpose of adjusting her affairs at that place, and with the bona fide intention of returning to the land, covered by her entry, or rather to the land she had selected as a homestead, supposing, and in fact having been told by parties that the correct numbers, as shown by the official survey, was the land covered by her entry; that while in Missouri, she learned for the first time that the land designated in her receipt was not the land she had selected, and that one George W. Dixon, was a bona fide settler on the NE. $\frac{1}{4}$ of Sec. 12, in T. 23 S., R. 42 W., under his pre-emption D. S. 6375 filed May 10, 1886, and further that the land she desired and intended to enter * * * was also covered by the homestead entry No. 12,457 of Michael Finity guardian of Milo and Virgitea Yoder, minor orphan children of Noah Webster Yoder, deceased, made November 29, 1886;" that she acted in good faith in making said entry and as soon as she discovered the complications before her, took immediate steps to obtain relief in the premises.

The local officers transmitted said relinquishment and application to your office for decision, and on October 11, 1888 your office held that—"While more care should have been exercised in locating the entry aforesaid, I am satisfied, however, of Mrs. Tate's honesty of purpose and good faith in the matter and accordingly have this day canceled her entry," and directed the local officers—"You will advise her hereof, and she will be allowed thirty days within which to perfect her homestead entry for the land covered by her application herewith returned subject to the usual restrictions in such cases."

Claimant appeared at the local office January 14, 1889, and presented her application to make said second entry, which application was re-

jected by the local officers "for the reason that the fees and commissions were not tendered nor paid."

January 17, 1889, claimant appealed, and on February 28, 1889, your office affirmed the action of the local office on the ground that the same was in accordance with the rulings of your office as required by circular of December 1, 1883.

March 14, 1889, claimant appealed to this Department alleging that it was error to sustain the action of the local office rejecting her application; that the fee had been paid for a former entry, and there is no law authorizing the government to exact two homestead entry fees from one person for one and the same entry; that said entry was simply an amendment, and the fees had been tendered, paid and received by the government, and it was contrary to law to collect them a second time, and would be a hardship and an injury to claimant.

On December 1, 1883, Secretary Teller issued instructions for the guidance of your office and the local offices, of which the following is a part, viz:

GENTLEMEN: The practice of allowing parties making a homestead or timber culture entry credit for the fee and commissions paid by them on a canceled prior entry, is discontinued. The fee and commissions paid on entries of the above mentioned character, canceled for conflict or because they have been erroneously allowed and cannot be confirmed, will be repaid to the proper parties upon their making application therefor, as provided in the second section of the act of Congress approved June 16, 1880, embodied in circular of instructions of August 6, 1880. (2 L. D., 660).

As claimant's application was not an application to amend, but an application to make a second entry after the cancellation upon the record of her former entry; and as the foregoing circular of instructions has not been revoked by any order or decision of this Department, James C. Keen (8 L. D., 239), and as I find said instructions of December 1, 1883, to be in conformity with the requirements of law, I am of the opinion that the decision of your office affirming the action of the local office was proper, and the same is accordingly affirmed.

TIMBER CULTURE CONTEST—PLANTING.

BURGESS *v.* HOGABOOM.

A timber culture contest, based on the alleged failure of the claimant to plant the requisite acreage within the statutory period, must fail if it appears that such failure was solely due to the unusual inclemency of the weather.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 18, 1890.

I have considered the appeal of John A. Burgess, from the decision of your office dated October 10, 1888, in the case of John A. Burgess *v.* Franklin D. Hogaboom, dismissing the former's contest against the

latter's timber culture entry for the NE. $\frac{1}{4}$ Sec. 2, T. 130 N., R. 47 W., Fergus Falls land district, Minnesota.

April 23, 1881 Hogaboom made a timber culture entry for said tract, and on May 6, 1884, Burgess initiated a contest against said entry alleging that Hogaboom "has failed to plant or cause to be planted to trees, tree seeds, or cuttings the five acres required to be planted during the third year after making said entry."

Hearing was duly ordered and had, and on June 12, 1884, the register and receiver found in favor of claimant and dismissed the contest. July 13, 1884, contestant appealed, and on February 24, 1885, your office affirmed the action of the local office.

March 11, 1885, contestant appealed, and on July 15, 1885, this Department modified your said office decision of February 24, 1885, and directed that the hearing be continued. After taking further testimony in the case, the successors of the former local officers, on November 6, 1886, found in favor of contestant.

December 10, 1886, claimant appealed, and October 10, 1888, your office reversed the findings of the local office and dismissed the contest.

December 14, 1888, contestant again appealed to this Department, alleging the following grounds of error, viz:—

1. It is contrary to law and evidence in the case.
2. In holding that claimant, prior to April 23, 1884, had bought trees and tree seeds to plant the second five acres.
3. In holding that at the time for planting the second five acres an unusual wet season set in and made it impossible to plant the said five acres within the time prescribed by law.
4. In holding that claimant has manifested good faith and honestly endeavored to comply with the timber culture law.
5. In holding that the failure by claimant to comply with the law upon said timber culture entry was no fault of his, but owing to unfavorable weather and unavoidable.
6. In not holding the entry for cancellation.

It is my judgment that these positions are untenable, as I am satisfied that the preponderance of the evidence in this case shows that during the first year after entry, claimant broke five acres, and during the second year the first five acres were plowed and planted to crop and the second five acres broken, and during the third year and prior to April 20, 1884, he had about sixty acres broken and under cultivation and five acres were plowed, harrowed and properly marked out one way, ready to plant to tree seeds and trees. Between the 15th and 20th of April, 1884, he had bought and paid for eight thousand young box-elder trees, also a bushel and a half of box-elder and ash tree seeds to plant on his claim, all of which he had brought to the premises, intending to have them planted thereon before the expiration of the third year. It is shown by the uncontradicted evidence adduced at the hearing, that about the 20th of April, 1884, a severe rain storm

set in which continued until April 29th, thus preventing claimant from planting his trees and tree seeds within the time required by law.

I think it clearly appears that the tract in dispute is situated in a low flat country, commonly known as "the Breckenridge Flats," which has depressions and pockets in it which fill with water whenever it rains and on account thereof the tract became so wet and soft as to make it imprudent to cultivate the same for several days after the rain had ceased. To have done so would have made the land lumpy and less friable than to await the drainage thereof. During the first week in May, 1884, the land having become sufficiently rid of surface water, claimant planted five acres to trees, and tree seeds, and before the end of said month he planted five additional acres to trees and tree seeds, thus fairly fulfilling the reasonable requirements of the timber culture law. At any rate, evincing no element of bad faith, as the evidence discloses that the only reason the first five acres were not planted before the expiration of the third year after entry, was owing to the unusual inclemency of the weather, a fortuitous circumstance over which the entryman had no control and was unforeseen, and as the weight of evidence shows that as soon as the ground was in a fair condition for such purpose, the claimant promptly complied with the law, and as there is not any evidence of bad faith on his part, I am of the opinion that the decision of your office was correct, and in harmony with the decisions of this Department. See case of *Purmort v. Zerfing* (9 L. D., 180); *Lingle v. Headen* (10 L. D., 153).

The timber-culture act is not run in a cast iron mould and must be construed in the light of reason. Where it is made to appear from the testimony and the circumstances surrounding the case that the entryman has made reasonable efforts to comply with the letter as well as the spirit of the act, he should not be despoiled of his entry upon purely technical grounds and for insuperable causes due to the elements. Believing that the claimant in this case has brought himself within the rule as herein stated, your said office decision is affirmed.

PRACTICE—APPEAL—RESIDENCE.

HENRY ST. GEORGE L. HOPKINS.

In appeals from the General Land Office each case should be separately transmitted. Mere visits to the land to keep up the fiction of a residence do not constitute compliance with the law.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 17, 1890.

I have considered the case of Henry St. George L. Hopkins upon his appeal from your office decision of September 22, 1886, rejecting his final proof offered in support of his application to make pre-emption

cash entry for E. $\frac{1}{2}$ NW. $\frac{1}{4}$ and lots 1 and 2, Sec. 30, T. 9 S., R. 21 E., Stockton, California, land district.

I gather from the record that claimant filed his declaratory statement June 25, 1884, alleging settlement on the 18th of the same month, and that on May 27, 1886, he presented his final proof.

There appears to be no decision of the local officers in the record, except the memorandum indorsed on the back of the record, as follows: "Rejected June 4, 1866, V. 35, 409—30 days for appeal. No appeal."

Your letter of September 22, 1886, in passing upon this case, shows it to have been considered by you in connection with the case of Wm. E. Hopkins, which involves a different tract of land from the one in question. To thus unite separate appeals and different cases, tends to confusion and is violative of the departmental order of April 27, 1883, in *Griffin v. Marsh* and *Doyle v. Wilson*, 2 L. D., 28, directing that in appeals from your office each case should be separately transmitted. See also *Southern Minn. Ry. Co. v. Gallipean* (3 L. D., 166), and *Davidson v. Parkhurst* (id. 445).

As the rule is wholesome and salutary in its effect and a disregard thereof pernicious in its results, I attribute your failure to observe the same to an inadvertence, well knowing that upon your attention being called thereto that the practice of uniting two cases in one decision will be discontinued. Considering the case I find attached to the affidavits of the claimant and each of his witnesses, submitted for final proof, the questions and answers on cross-examination by the local officers. These affidavits show that the entryman in the fall of 1884 built a one-story frame house, sixteen by twenty feet, with two rooms, two doors, two windows, and a board floor on the land and staid there for one day and one night with his family, consisting of himself and four minor children, his wife being dead. The house was comfortable and was furnished with the necessary household and kitchen furniture. He had dug out and walled up a spring and had broken and fenced about six or eight acres, and farmed it to crops for two seasons.

On cross-examination claimant replied to questions as follows:—

Q. How much of the time have you been absent from this land since you began to reside there, and for what purposes were you absent?

A. I have been there a day and a night of each month during that time. My absence was for the purpose of practicing my profession, being a physician and surgeon, to make a living for my family and to procure means to improve my place. I am a poor man and cannot make a living on this land until I can improve the same, which I have not yet been able to do.

I have also been absent four times as an expert witness on surgery in a murder case. . . . The four times aggregated eighty-six days.

Q. Did your family or any portion of them remain and live on the land during your absence?

A. One of my boys remained there a great part of the time. My children are young and could not stay alone much of the time. My youngest is a daughter only ten years old. My oldest daughter is at school. My oldest boy is seventeen years but an invalid and the other boy is sixteen.

This, in my judgment, is not such a *bona fide* residence as the law requires. The entryman must have known, when he made his filing, that he would be compelled to reside in Fresno where he was practicing his profession and that he could only make periodical visits to his claim. It is claimed by him in his argument on this appeal that he lived on the land one night and two days in each month for two years. That is, he would drive out from the town of Fresno, thirty-five miles to his claim, stay there over night and return the next day. Conceding all this, yet it is held that mere visits to the land to keep up the fiction of a residence do not constitute a compliance with the law." *Strawn v. Maher* (4 L. D., 235), *West v. Owen* (4 L. D., 412).

Following this rule, your decision so far as it affects the claimant's proof is concerned is affirmed.

HOMESTEAD CONTEST—CITIZENSHIP.

LYMAN *v.* ELLING.

A charge of illegality in a final homestead entry, in that the entryman is not a citizen, must fail if the defect is cured prior to notice of contest, and such action is not induced by the initiation of said contest.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 17, 1890.

The question presented by the appeal in this case is whether an alien, who had declared his intention to become a citizen at the date of his entry, but who made final proof and received certificate before taking out his final naturalization papers, can cure the defect by becoming naturalized afterwards, so as to defeat a contest alleging that the entryman is not a citizen, commenced prior to naturalization.

Wilhelm Elling having declared his intention to become a citizen of the United States, made homestead entry of the N. $\frac{1}{2}$ NE. $\frac{1}{4}$ Sec. 34 T. 98, R. 41, Des Moines, Iowa, August 30, 1871. On August 21, 1877, he made final proof and received final certificate. On June 22, 1886, Albert H. Lyman filed contest against said entry charging that "the said Wilhelm Elling is not a citizen of the United States, and has not declared his intention to become a citizen; that his homestead entry No. 5319 was illegal and fraudulent at its inception and his final proof per final certificate No. 4290 Sioux City series, was also illegal and fraudulent." On June 23, 1886, Elling was admitted as a citizen of the United States by the district court of Woodbury county, Iowa, and naturalization certificate was issued of that date. Upon a hearing before the local officers they held his entry should be canceled for want of citizenship; but upon appeal you reversed this ruling, holding that the naturalization after contest has been commenced "cures the defect in his final proof in so far as it was objectionable for want of record evidence

of his admission to citizenship," and that "there is no right in contestant to require the United States to withhold from this entryman a privilege, which would in the absence of a contest be accorded him in equitable consideration and fair dealing."

I think it may be assumed that the failure of the entryman to attain citizenship before offering final proof, was not from any design to perpetrate a fraud upon the government, but rather from ignorance of the requirements of the law in this particular, and further that if there is no adverse claim he may be permitted to make new proof and to have the entry submitted to the Board of Equitable Adjudication under Rule 24 (General Circular p. 122).

The homestead law authorizes entries of public lands by a person who has filed his declaration to become a citizen of the United States, but Sec. 2291 Revised Statutes, provides that—

No certificate, however, shall be given, or patent issued therefor, until the expiration of five years from date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry; or if he be dead, his widow; or in case of her death, his heirs or devisee; or in case of a widow making such entry, her heirs or devisee, in case of her death, proves by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated, except as provided in section twenty-two hundred and eighty-eight, and that he, she or they, will bear true allegiance to the government of the United States; then, in such case, he, she, or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law.

The regulations issued by the Land Department for the enforcement of the law requires that at the date of offering final proof, the entryman shall be required to make a final affidavit in which among other things he swears that he is a "citizen of the United States." This affidavit is a part of the final proof, and unless the entryman has the qualifications and has performed the acts and fulfilled all the conditions required by said affidavit, he is not qualified to make final proof upon his entry. But if his final proof has been made and final certificate issued thereon, it is not absolutely void because the disability of alienage may be removed by subsequently attaining citizenship.

In the case of Jacob H. Edens (7 L. D., 229) the Secretary said—

Without deciding whether proof made by an alien will be accepted, there is no doubt under the rulings in the cases of Ole O. Krogstad (4 L. D., 564), Mann v. Huk (3 L. D., 452) and Kelly v. Quast (2 L. D., 627), that the defect of alienage was cured when the claimant became a citizen in March, 1886, and in the absence of any adverse claim, his right to the land relates back to the date of his settlement, notwithstanding the fact that he was an alien when it was made.

In the case cited new proof was required for the reason that the final proof was not satisfactory; but if the proof is satisfactory in all respects save that it was at a time when the entryman was disqualified from making proof, it would be validated by subsequent qualification,

because if the right of the entryman relates back to the date of entry, in the absence of an adverse claim it cures all defects or irregularities intervening.

At the date of his entry, Elling was a qualified homesteader by having declared his intention to become a citizen, and no other qualification was required of him during the period of residence and cultivation required by law to entitle him to the land. While the final certificate was improperly issued, yet, as stated by the supreme court in *Osterman v. Baldwin* (6 Wall., 122), "his present status is that of a person naturalized, and that naturalization has a retroactive effect, so as to be deemed a waiver of all liability to forfeiture, and a confirmation of his former title."

The contestant is not a "claimant or pre-emptor" and the only ground upon which it can be urged that his contest is an adverse claim, is by reason of the fact that if he can successfully contest the entry, he would be entitled to the preference right of entry of the tract under the act of May 14, 1880.

The contest against the entry was filed June 22, and on the day following Elling received his final naturalization papers. The contest affidavit was not served until August 21, 1886, and at that date Elling had become qualified to make final proof. It has been held by the Department that jurisdiction is acquired by service of notice and not by the contest affidavit (*Seitz v. Wallace*, 6 L. D., 299), and that if the default charged is in good faith cured prior to the service of notice, the contest must fail. *Stayton v. Carroll* (7 L. D., 198); *St. John v. Raff* (8 L. D., 552); *Hall v. Fox* (9 L. D., 153). These decisions are predicated upon the theory that the curing of the default was not induced by the filing of the affidavit of contest.

In this case the contest affidavit was filed in the local office at Des Moines, June 22, and at the same time the contestant made application to have the testimony of witnesses taken at Sibley, Iowa, more than one hundred and fifty miles from the land office. When the contest was received the local officers forwarded it to the General Land Office, and it may be fairly presumed that Elling had no notice of said contest until service was made in Osceola county, where the land is situated and which adjoins the extreme northwest county of the State. As the claimant had cured the default in respect to citizenship prior to service of notice, a contest upon that ground merely can not be sustained and should be dismissed.

From the record in this case, I am satisfied that the failure of the claimant to attain citizenship before making final proof was the result of ignorance of the requirements of the law, and not from any design to perpetrate a fraud. In the first place, there does not appear to be any motive for such conduct, and from the fact that he does not speak the English language, it does not follow that he was informed that citizenship was required before making proof, even if it be true that he was

told in English that he must be a citizen before making final proof. But in his own testimony he swears that nothing was said to him about citizenship.

Your decision is affirmed.

PRACTICE—NOTICE OF CONTEST.

ACKERSON *v.* DEAN.

A notice of contest must be served in accordance with the departmental rules of practice, and not under the civil procedure of the State.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 17, 1890.

I have considered the appeal of Joseph Ackerson from the decision of your office dated June 28, 1888, in the case of said Ackerson *v.* Ephraim J. Dean, dismissing Ackerson's contest against Dean's timber culture entry for the SE. $\frac{1}{4}$ Sec. 27, T. 108 N., R. 65 W., Mitchell land district, South Dakota.

On October 3, 1885, Dean made timber culture entry for said described tract, and on October 4, 1886, Ackerson initiated a contest against said entry alleging that "E. J. Dean, has failed to break or plow or cause to be broken or plowed five acres the first year after filing on said land, and said failure exists up to present date."

Hearing was ordered and set for November 30, 1886, before the local officers, testimony of witnesses to be taken before the clerk of the district court at Wessington Springs November 22, 1886, at ten o'clock A. M.

At the hour appointed for the taking of testimony contestant appeared in person and by attorney; claimant appeared and asked for an adjournment of the proceedings until two o'clock P. M., to enable him to procure counsel; claimant's motion was allowed, and at two o'clock P. M., the parties appeared in person and by their respective counsel claimant moved to dismiss the contest said motion was based upon his own affidavit, which was filed in the case and marked exhibit "A." He alleges therein that notice of said contest was not served upon him until November 6, 1886; and that before the expiration of the first year he had a portion of the first five acres broken, and prior to the service of the notice of the contest upon him he had the whole of the first five acres broken. The clerk did not pass upon said motion and contestant and three other persons were sworn and testified against said entry; and six persons including the claimant were sworn and testified in defence of the entry.

On November 24, 1886, the clerk transmitted the record and testimony in said case to the local office, and upon examination thereof the register and receiver found that claimant was not legally notified of the contest,

and that as claimant on the hearing day, at the first moment, moved to dismiss the contest because of insufficient notice; the local office had not acquired jurisdiction in the premises. They further found that the testimony was unsatisfactory and set aside the proceedings, and ordered that a new notice of contest be issued upon the affidavit of contest already on file. The respective parties having been notified and no appeal having been taken from said decision, the register on November 1, 1887, issued a new notice of contest authorizing the same clerk of the district court to act as commissioner in taking the testimony of said parties at his office on December 14, 1887, papers in the case to be returned to the local office "on or before December 24, 1887."

On the day appointed for the taking of testimony, contestant appeared in person and by attorney and offered proof of service of the notice of contest upon claimant; said proof was written across the back of the original notice, which was filed in this case and is as follows, viz:

TERRITORY OF DAKOTA, *County of Beadle, ss:*

Arthur Morrison being first duly sworn (says) that the within notice of contest came into my hand on the 11th day of November, A. D., 1887; that I made due service thereof by delivering to and leaving a true copy of the within notice with Mary J. Ferry, a person over fourteen years of age and in the presence of a member of her family over the age of fourteen years, at the residence of E. J. Dean, the within named defendant, in the City of Huron, Territory of Dakota, county of Beadle, on the 11th day of November, 1887.

The contestant and two of his former witnesses were sworn and testified against the entry. The claimant did not appear either in person or by attorney, and the Commissioner having transmitted the record and testimony to the local office, the register and receiver found in favor of contestant.

On February 10, 1888, claimant filed a motion to dismiss the proceedings for the reason that due service of the notice of the hearing was not served upon him; that at the time of the alleged service of notice, and for some time prior thereto he (claimant) was not residing or boarding in the Ferry House at Huron, but was residing on the SW. $\frac{1}{4}$ of Sec. 27, T. 108, R. 65, adjoining the tract in dispute; and that he had no knowledge whatever of the hearing prior to receiving notice that his said timber culture entry had been "adjudged forfeited." Claimant further alleged, "that up to the present date he has fully complied with timber culture law."

On March 19, 1888, the local officers sustained claimant's motion and ordered that, "All of the proceedings in the foregoing case be set aside, and that new notice under the original affidavit of contest may issue upon application of the contestant."

On April 9, 1888, contestant appealed, alleging that all a notice is issued for is that the parties may appear and defend, which was fully done under the first notice; that the second notice was served in ac-

cordance with the provisions of Chapter 37 of the laws of Dakota of 1881, and the Code of civil procedure of said Territory, and that as the evidence showed that the timber culture law had not been complied with in any particular, the entry should be canceled and contestant allowed his preference right of entry.

On June 28, 1888, your office affirmed the findings of the local office; and on September 11, 1888, contestant appealed to this Department alleging the following grounds of error, viz:

1st. In dismissing said contest.

2nd. In not allowing the facts and circumstances of the first hearing to be read and considered in the decision of said case.

3rd. In not holding said entry for cancellation upon the evidence produced by contestant.

4th. In not reading and passing on the evidence introduced at both hearings in said contest.

It may be the appearance made in the first instance was general and would have justified the local officers in proceeding to a disposition of the case on its merits. This, however, was not done, but it was directed that a new notice issue. This decision not having been appealed from, became final and was binding upon the contestant. The entryman had a right to rely on this decision, and governing himself thereby, to await service of a new notice before taking further steps in defense of his entry. The question then arises upon the service of the second notice. It is not claimed that a copy of this notice was delivered to the entryman in person, but that service thereof was made in conformity with the requirements of the code of civil procedure in the Territory of Dakota. The rules governing the practice before the land officers, prescribe the mode of service of notice in such cases; which is that "Personal service shall be made in all cases when possible, if the party is a resident of the State or Territory in which the land is situated, and shall consist in the delivery of a copy of the notice to each person to be served." (Rule 9). The service in this case as set forth in the return thereon is not a compliance with this rule. To this notice the entryman made no appearance and denies any knowledge of the hearing had thereunder. Under these circumstances I must concur in the decision of your office affirming the local office in ordering that "All of the proceedings in the foregoing case be set aside and that new notice under the original affidavit of contest may issue upon application of the contestant."

For the reasons herein stated, your [said office] decision is hereby affirmed.

PRACTICE—DEPOSITIONS—CONTINUANCE—RULE 35 OF PRACTICE.

CHINN *v.* CAGE.

The local office may issue a commission to take depositions, and grant a continuance for such purpose, although an order has been made for the submission of testimony before a commissioner under rule 35 of practice, and such order duly executed.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 17, 1890.

I have before me the case of Stanley S. Chinn *v.* Gustavus A. W. Cage on appeal by Chinn from your decision of August 16, 1888, affirming the action of the local officers and dismissing his contest against Cage's timber culture entry for the SW. $\frac{1}{4}$, section 1, T. 4 N., R. 59 W., 6th P. M., Denver land district, Colorado.

From the record it appears that Cage made his entry December 19, 1881, and that Chinn filed affidavit of contest April 1, 1886, alleging,

That said Cage did not properly irrigate and cultivate the first five acres planted to trees, but negligently allowed said trees to die. That he did not replant the same as required by law; that he did not prepare the ground for planting the second five acres in the manner required by law; that he did not properly plant said second five acres and did not properly irrigate and cultivate the trees planted thereon, but negligently allowed them to die and that in consequence of his negligence he now has but a few trees growing upon the land.

Personal service of notice of contest was made upon Cage and the hearing set for May 25, 1886. May 17, prior thereto, was fixed as the time for taking the testimony before George W. Warner, notary public at Fort Morgan, Weld county, Colorado, at which time and place both parties appeared, and the testimony was taken and duly returned to the local officers.

On "the day set for hearing," the parties appeared, and the contestee made his application for a continuance and also to have the depositions of certain witnesses taken which was supported by an affidavit substantially complying with rule 24, and was accompanied by interrogatories to be propounded to the witnesses. The application for the appointment of a commissioner to take the testimony, a copy of the interrogatories were served on the contestant.

The local officers granted the postponement, and appointed a commissioner to take the testimony, and fixed the hearing for a future day, to all of which the contestant objected and excepted.

On September 6, 1886, pursuant to said continuance, the case was heard and the local officers decided "that there has been a substantial compliance with the timber culture law, and we therefore dismiss the contest."

From this decision Chinn appealed to your office and your decision of August 16, 1888, affirmed the ruling of the local office. From your judgment Chinn appealed and the case is before this Department for consideration.

In your decision you hold that the local officers are precluded from granting a continuance for the purpose of taking further testimony after they have appointed a commissioner under rule 35, and he has closed the testimony taken by him. I can not concur with you in this construction of the rules of practice.

Rule 23 provides that testimony may be taken by depositions in certain cases and rule 24 prescribes the regulations to be complied with by the party desiring to take depositions. The defendant, Cage, seems to have brought himself within the provisions, and to have complied with the requirements of these rules. The facts surrounding this application are very similar to those in connection with a like application in the case of *Harper v. Bell* (8 L. D., 197). In the decision in that case after reciting the showing made it is said :

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 on 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.

The fact that the testimony was in the first instance to be taken before some other person instead of before the local officers, does not prevent the rules for taking depositions applying to this case, nor should either party because of that fact, be deprived of the testimony of witnesses who are unable or refuse to attend before the officer designated under rule 35 to take the evidence.

Motions for continuance are addressed to the sound discretion of the local officers, subject to review for the abuse of such discretion. *Dayton v. Dayton* (6 L. D., 164-165). *United States v. Conner et al.*, (5 L. D., 647).

The testimony so taken by way of depositions was properly considered by the local officers.

Now, passing upon the merits of the case, the evidence shows that the entryman broke twenty acres on the tract in 1882 and that he cultivated this in 1883 and broke about eighty acres additional land on the tract. During the year 1884, he planted five acres to trees, and cultivated the land theretofore subdued. During the year 1885, he planted over five acres of trees. But it appears that a part of the land selected for tree culture turned out to be unfavorable for the growth of timber and many of the trees died in 1884 and 1885 due in part to the injury which they had received from a severe hail-storm.

In 1886, before the initiation of the contest, the entryman procured about 9,000 young trees to replant on the land where the trees had failed to grow, these were planted, but not until after notice of contest was served. In my opinion the preponderance of the testimony does not sustain the allegations of the affidavit of contest and your decision, with the modification herein indicated is affirmed.

CONTEST—SOLDIERS' AND SAILORS' HOMESTEAD.

ALEXANDER *v.* ELLSBURY.

A contest, on the ground of non-compliance with law, against a homestead entry made for the minor heirs of a deceased seaman, must fail if it appears that the land was cultivated and improved for five years immediately succeeding the date of entry.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 19, 1890.

I have considered the case of Erastus Alexander *v.* George H. Ellsbury, guardian of the minor heirs of Richard W. Underwood, deceased, on appeal by the said Alexander from your office decision of October 15, 1888, dismissing his contest against the homestead entry of said Ellsbury, (guardian,) for the NW. $\frac{1}{4}$ Sec. 28, T. 140 N., R. 56 W., Fargo land district, North Dakota.

On December 17, 1879, Ellsbury, as guardian of the minor heirs of Richard W. Underwood, deceased, who was a seaman, made homestead entry under the act of June 8, 1872, for said tract of land. On June 12, 1886, Alexander filed affidavit of contest, alleging "that the said George H. Ellsbury, guardian of said heirs, nor said heirs, nor any one in their behalf, have cultivated any part or portion of said tract for the two years next preceding the date hereof." Notice of said contest was duly given, and the case was set for hearing August 5, 1886, at which time both parties appeared, and testimony was taken on part of contestant, and the hearing was adjourned to September 1, 1886, at which time the contestee offered testimony, and the local officers decided that the said homestead entry should be canceled. On application for review, they held that there was not an actual abandonment, but a failure to comply with the requirements of the homestead law, such as would warrant the cancellation of the entry, and they so "decree."

From this decision Ellsbury (guardian) appealed to your office.

On December 17, 1886 Ellsbury (guardian) made application to make final proof under his homestead entry. This was "rejected for the reason that there is a contest pending against said entry, decided adversely to said claimant." From this decision Ellsbury appealed to your office. Your office decision of October 18, 1888 modified the decision of the local officers, affirmed their rejection of the application to make final proof, reversed their decision adjudging the entry forfeited, and dismissed the contest. From so much of your decision as dismissed the contest, Alexander appealed to this Department. There was no appeal from the other branch of your decision.

The testimony in the case shows that the homestead entry was made December 17, 1879; that the entryman (guardian) broke twenty acres in 1880; in 1881 he cultivated the twenty acres, and broke twenty acres more; in 1882 he cultivated thirty acres of the land, and cultivated the

same number of acres in 1883 and 1884. In 1885 he made a contract with one G. W. Wing to cultivate the land, but he failed to do so; but in July, 1886, the entryman "summer-fallowed" twenty-seven acres, to be cropped the next year. The application for homestead entry was made for the minor heirs of a deceased seaman. The testimony shows that the deceased father of the wards of Ellsbury enlisted for one year in the United States Navy, and served on the ship "Ohio" a portion of his enlistment (over six months), and was discharged on account of disability.

The evidence shows cultivation and improvement of this land for five years immediately succeeding the date of the entry and it does not in any manner indicate an intention of abandoning the land. The allegations in the contest affidavit are not sustained. The decision dismissing said contest is affirmed.

PRACTICE—MOTION FOR REVIEW—REHEARING.

COBBY *v.* FOX. (ON REVIEW.)

That the applicant's attorney did not conduct the case as skillfully as it might have been conducted affords no ground for review or rehearing. Newly discovered evidence to justify a rehearing must be such as could not have been, by reasonable diligence, discovered in time for the trial. An allegation that a witness for the applicant was prevented by intimidation from testifying fully as to the facts will not warrant review unless it is made to appear that the decision was affected by the testimony of said witness.

Secretary Noble to the Commissioner of the General Land Office, April 19, 1890.

Thomas H. Cobby has filed a motion for review and reconsideration of departmental decision of October 22, 1889 (9 L. D., 501), in the case of said Cobby *v.* Leland W. Fox, involving their conflicting pre-emption claims to the SE. $\frac{1}{4}$ of Sec. 2, T. 12 S., R. 19 E., Stockton land district, California.

The application alleges no specific error in the decision sought to be reviewed (Rule 88); on the contrary, it assumes that the decision of the Department was correct, in view of the facts placed before it.

The first ground upon which a review is asked is that, if an opportunity is afforded for a review before the Department or a rehearing before the local office, the applicant can produce "Evidence in his favor relative to his residence on the land that was not brought out when said case was tried in the local office, showing a prior residence to Fox."

In support of this he attaches the affidavit of one of the witnesses at the hearing, Seth R. Root, who alleges: "That a part of his testimony was withheld or not given, as the proper questions were not asked him by the then attorney for Thomas H. Cobby."

The affidavit of Nellie F. Cook, another of the witnesses, contains a statement to the same effect.

The allegation that applicant's attorney did not conduct the case as skillfully as it might have been conducted affords no ground for a review. Myer's Fed. Dec., Vol. 26, 2452, 2516, 2521).

(2.) Newly discovered evidence relative to the residence of Leland Fox at the time he claims settlement on the land in contest.

The "newly discovered evidence" referred to appears from the affidavits accompanying the application to be that of Seth B. Root and Nellie F. Cook (*supra*), both of whom were witnesses at one (if not both) of the hearings already had. It would require a very strong showing to explain why the evidence of these witnesses could not by reasonable diligence have been procured at the time they were on the witness stand; and no reason whatever is given. "It is not enough for the applicant to state that he did not know of the testimony in time to produce it for the trial; it must appear that he could not have ascertained it by reasonable diligence" (*Weldon v. McLean*, 6 L. D., 10; *Kelly v. Moran*, 9 L. D., 583). In any event, it bears upon a subject which was very fully gone into at the hearing heretofore had, and carefully considered in the departmental decision hitherto rendered; being of the same kind, to the same point, and by the same witnesses, it is merely cumulative, and not of a character to justify a rehearing or reconsideration (*Kelly v. Moran*, *supra*).

(3.) Evidence that one Seth B. Root, an important witness for your petitioner, was intimidated by one William A. Howard, a brother-in-law of the said Leland W. Fox—a fact unknown to your petitioner until lately.

The affidavit of Seth B. Root relative to this matter is that he—

Desires that he be permitted to testify again in said cause, if a rehearing be granted, and that he may then show that threats were made against deponent by William A. Howard to do his property injury.

This showing comes very far short of being sufficient to justify a rehearing. The affidavit does not allege that the threats to injure the property of the witness were made for the purpose of compelling him to testify falsely or to suppress the truth at the hearing; nor that because of such threats he did testify falsely or suppress the truth. The only testimony which he anywhere intimates was suppressed was that which was not elicited because of the failure of Cobby's attorney to ask him the proper questions. Even if it were made to appear that, because of threats, the witness failed to testify to the truth, it would still be necessary to make it appear that the testimony of this witness was of such vital importance that the departmental decision heretofore rendered was affected thereby, before a state of facts would be shown justifying a review of said decision.

(4.) Newly discovered evidence that the said Leland W. Fox is and was the owner or claimant to three hundred and twenty acres of land, and left land of his own to settle on the land in contest.

If it were clearly shown that Fox was owner of three hundred and twenty acres, or that he removed from land of his own, when he settled upon the land in controversy, such fact would at least invalidate *his* claim under the pre-emption law. But nothing is presented to make out even a *prima facie* case justifying examination into this question. The applicant merely says:

If a rehearing is granted he *expects to be able to prove* that said Fox is the owner of three hundred and twenty acres of State land to which he acquired title since he claims entry and residence on the above described land; and that to acquire such title said Fox is required by the laws of the State of California to prove residence and occupation of said land so purchased from the State of California.

This is not such an allegation or showing as would justify an allowance of the motion.

No sufficient reason appearing for disturbing said departmental decision of October 22, 1889, the application for review is denied.

PRE-EMPTION—ADJOINING FARM HOMESTEAD.

THATCHER *v.* BERNHARD.

An intervening adjoining farm entry constitutes an adverse settlement claim that will defeat the pre-emptive right of a settler who fails to file his declaratory statement within the statutory period.

Secretary Noble to the Commissioner of the General Land Office, April 19, 1890.

This is a motion by Jefferson T. Thatcher for a review of the departmental decision of September 17, 1888, in the case of said Thatcher against Benj. Bernhard, involving the latter's adjoining farm homestead entry for the SW. $\frac{1}{4}$ of SW. $\frac{1}{4}$, Sec. 15, T. 12 N., R. 8 E., Mt. Diablo Meridian, California.

Bernhard, it appears, has resided since 1868 on the NW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of said Sec. 15, and near the south line of said quarter quarter section. In June and December, 1870, he purchased from different parties "possessory rights" to a ten acre tract and a thirty acre tract, lying east of a county road, which runs north and south from the forty acre tract involved herein and near its eastern boundary, leaving a narrow strip of 3.20 acres of said tract east of said road. The tracts covered by said purchase embraced said 3.20 acres of the land in dispute, and, in 1871, Bernhard enclosed a field of 12.41 acres of the tracts covered by his purchase east of and contiguous to said road and embracing said 3.20 acres, and has ever since held and cultivated the land so enclosed. In 1875 he built a brush fence around ten or twelve acres of the forty acre tract in controversy, west of and adjoining said road, clearing the brush from the land for that purpose. As to this ten or twelve acres so enclosed, Bernhard does not appear to have since done anything or

exercised any acts of ownership thereon, though he states that he has claimed the forty acre tract in dispute since enclosing said land. The only acts of Bernhard, upon which he could base a settlement claim to the land involved herein, (unless residence on adjoining land since 1868 be such) are his enclosing, in 1871, with the tract fenced in by him east of the county road, the 3.20 acres of said land east of said road and his subsequent holding and cultivation thereof, and his partial clearing and enclosing with a brush fence said ten or twelve acres west of said road, in 1875.

Section fifteen, in which the forty acre tract in controversy is located, is within the granted limits of the Central Pacific Railroad Company, the line of whose road crosses said tract. In July, 1877, Thatcher settled upon that portion of said tract west of the county road, supposing (as he states) that it was vacant railroad land. He at first attempted to hold it as against the railroad company by locating a mineral claim thereon; subsequently, however, he recognized the company's claim by renting a portion of the land from the company, and, June 24, 1884, he purchased from the company, for \$120 (receiving a quit-claim deed therefor), 14.65 acres of said tract, being that part of it on which his improvements were located. Since his settlement in 1877, Thatcher, with his family, has continuously resided on the tract in dispute, and has cultivated a small part of it and improved it extensively—his improvements being valued at from \$1,000 to \$1,400, and consisting of a dwelling, barn, garden, vineyard, alfalfa patch, small grain field, fencing, and a well.

It is claimed on the part of Thatcher that Bernhard, since Thatcher's settlement in 1877, has only claimed the 3.20 acres of the tract east of the county road, which he had enclosed with other land in 1871 and had since held and cultivated and which was part of one of the tracts the possessory interest in which he had bought in 1870, and that he had never since Thatcher's said settlement thereon asserted any claim to the land west of said road, but had acquiesced in Thatcher's claim thereto. Bernhard testifies that he had throughout claimed the whole of the tract, and several of his witnesses state that his claim thereto was generally known in the community.

The matter stood as indicated by the facts hereinbefore recited until May 28, 1883, when Bernhard applied to file a pre-emption declaratory statement for the land involved (the SW. $\frac{1}{4}$ of SW. $\frac{1}{4}$) and also the N. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of said Sec. 15. He accompanied his application with affidavits, setting forth that the land was settled upon and improved at the date of the railroad grant, and on a hearing ordered on said application and had July 21, 1883, the local officers decided in favor of Bernhard. From said decision the railroad company did not appeal, but, prior to said decision (June 23, 1883), patent had been inadvertently issued to the company for said N. $\frac{1}{2}$ of SW. $\frac{1}{4}$, while Bernhard's application was pending, but your office held that Bernhard might be permitted to file

on the SW. $\frac{1}{4}$ of SW. $\frac{1}{4}$, the tract in controversy. February 1, 1884, he made homestead entry of said tract, and this entry was on his application, April 28, 1884, changed to an adjoining farm homestead entry. On applying to make the latter entry, he made affidavit that he owned and resided upon an original farm of 42.40 acres (purchased by him in January, 1884, from the Central Pacific Railroad Company), the same being a part of the N. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of said Sec. 15 and contiguous to the tract applied for, and that he had settled upon said original farm in 1868, and had since continuously resided there with his family and erected improvements thereon of the value of over \$30,000.

June 24, 1884, nearly two months after Bernhard's adjoining farm homestead entry had been made, Thatcher purchased (as before stated) a part of the tract in controversy, upon which his improvements were located, from the railroad company, and, June 3, 1885, over a year after Bernhard's said entry, Thatcher applied to make a pre-emption filing on the land. This application was denied by the local officers, and, Thatcher having appealed, your office ordered a hearing, which was had January 5, and 6, 1886, and the facts hereinbefore recited were developed by the testimony taken at said hearing. The local officers decided in favor of Thatcher. Your office, January 10, 1887, reversed the decision of the local officers, and, on appeal by Thatcher, this Department, by the decision of September 17, 1888 (now sought to be reviewed), concurred in your office decision, by which the entry of Bernhard was allowed to stand and the application of Thatcher rejected.

In the motion for review and argument thereon, it is claimed by Thatcher, in substance, that (1) the evidence did not authorize the finding by this Department, to the effect that Bernhard had established settlement prior to Thatcher and maintained the same; and (2) that the rule, that "a settler who fails to protect his claim and settlement by legal filing within the time prescribed by the statute forfeits such claim" as against an intervening adverse claimant, can be invoked only by and in favor of "another settler on the same tract," and has no application to "a claim that does not require settlement."

The first proposition is that the finding in the departmental decision as to settlement is contrary to the weight of evidence, and review thereof is asked on that ground. Review on such a ground, "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." (Mary Campbell, 8 L. D., 331.) As, however, Thatcher did not apply to file for the land until about eight years after his settlement, and over a year after Bernhard's entry, the question whether or not he was the prior settler and maintained such settlement becomes immaterial, if Bernhard's entry was such an intervening adverse claim as would be a bar to the exercise by Thatcher of the preemptive right. The second proposition stated above asserts that, in order to have that effect, Bernhard's claim must be one that requires

settlement on the land involved, and it is contended that the claim of an adjoining farm homestead entryman is, as respects settlement, analogous to that of a timber-culture entryman. This contention as to the analogy between these classes of entries can not be maintained. The provision for adjoining farm homestead entries is a part of the homestead law (Revised Statutes, 2289), and is based upon ownership of the original farm and residence thereon for the length of time prescribed for ordinary homestead entries, and residence on the original farm prior to the adjoining farm entry can not be computed as a part of said period of residence. (William C. Field, 1 L. D., 68; *Hall v. Dearth*, 5 L. D., 172.) When such entry is made, the land entered constitutes with the original farm one tract or an entirety, and settlement and residence on the original farm is after such entry imputed to, and becomes in contemplation of law settlement and residence on, the land entered, just as settlement and residence on one forty of a homestead tract is settlement and residence on the whole. There is no analogy, therefore, between timber-culture entries and adjoining farm homestead entries, as contended, and the cases cited relating to the former are not in point.

I am of the opinion that an adjoining farm homestead entry, based (as such entry must be and is in this case) on settlement and residence on a contiguous tract of land owned by the entryman, is such an intervening adverse claim as will defeat an application to pre-empt the land, made after such entry and after the expiration of the statutory period for asserting the pre-emptive right.

It may be further remarked that Thatcher did not settle on the land with a view of claiming under the *settlement laws* and evinced no such intention until he made application to file for it, June 13, 1885, which was two years after Bernhard had successfully contested the railroad claim and over a year after he made his entry. On the contrary, he first attempted to hold it as a mineral claim and afterwards to the date of his application held it under the railroad company.

It is contended by counsel for Thatcher, that from January 31, 1865, when (it is claimed) the withdrawal in favor of the Central Pacific Railroad became effective, until July 21, 1883, when Bernhard's contest of the claim of said road was sustained, the land was not subject to entry or filing and that Thatcher being on the land at the latter date, thereby "became the first settler on its restoration to settlement." As the land was found on the contest by Bernhard of the railroad claim, to have been excepted from the railroad grant *at the date thereof* and of the withdrawal thereunder, it would seem that said withdrawal did not operate to withhold it from entry or filing, but admitting that (as contended) it was so withdrawn until July 21, 1883, Thatcher, if then the only bona fide settler thereon, forfeited his right by not filing thereon within the statutory period or thereafter and before the adverse claim of Bernhard had attached.

The motion for review is denied.

REVIEW—ABANDONED MILITARY RESERVATION.

CONNELLY *v.* BOYD. (ON REVIEW.)

A motion for review on the ground of newly discovered evidence must show that the evidence was not known to the applicant at the time of the trial, and could not have been discovered by the exercise of proper diligence.

The protection extended by the act of July 5, 1884, to settlers on abandoned military reservations was not intended to legalize settlements made with full knowledge that the lands were reserved and not subject to settlement.

Secretary Noble to the Commissioner of the General Land Office, April 22, 1890.

By letter of April 3, 1889, your office transmitted a motion by W. M. Boyd for review of the decision of the Department, dated October 18, 1888 (7 L. D., 369), in the case of T. F. Connelly against said Boyd, involving lot 1, in the NE. $\frac{1}{4}$, Sec. 1, T. 13 S., R. 34 E., and the W. $\frac{1}{2}$ of lot 1, in the NW. $\frac{1}{4}$ of Sec. 6, T. 13 S., R. 35 E., Bodie, California.

This motion for review was not filed until March 22, 1889, more than five months after the decision was rendered, but one of the grounds alleged is, "newly discovered evidence, showing that Boyd was an actual resident upon the tract claimed by him, November 1, 1883, and has continued to reside there to the present time.

The alleged newly discovered evidence, as set forth in the affidavits filed in support thereof, merely shows what has been done by Boyd as to the improvement of the tract since the hearing, or is cumulative of the testimony offered on the hearing as to the occupancy and cultivation of the tract by Boyd prior to January 1, 1884. Besides, it is not shown that the evidence was not known to Boyd at the time of the hearing and that it could not have been discovered by the exercise of proper diligence, and, hence, he has not brought himself within the rule governing the granting of new trials upon newly discovered evidence. Having failed to file the motion within the time prescribed by the rules, and the case having been closed, it should be denied upon this ground. But, independently of this, I see no error in the ruling of the Department.

It may be conceded that Boyd went upon the land in November, 1883, and has continued to reside thereon and to improve the tract from that time to the present, as stated in his affidavits, but from the facts in the case it does not appear that he is entitled to make homestead entry of the tract in controversy. Boyd made homestead entry of the tract September 5, 1884, under the act of July 5, 1884 (23 Stat., 103), alleging settlement November 25, 1883. This entry was contested by Connelly, and a hearing was had to ascertain all the facts in relation to the settlement and improvement of the respective parties. The local officers decided that Boyd had made a real settlement and improvements, while Connelly had failed to do either in person. Your office decided

that neither party had any right to make homestead entry of the land, under the provisions of the act of July 5, 1884, and the Department affirmed that decision.

The land in controversy lay within a military reservation, known as Camp Independence, which, it seems, was abandoned by the military authorities in 1877, and placed under the control of this Department, by executive order of July 22, 1884, for disposal under said act of July 5, 1884. On November 20, 1883, the buildings on the reservation were sold, it appears, by the military authorities, and notice was given that the buildings should be "removed" within ninety days. Boyd bought a house at the sale, situated on his claim.

The act under which Boyd made his entry provides a general method for disposing of abandoned military reservations, after they had been put under the control of this Department by the President. It provides for the survey, appraisal, and public sale of the lands, saving the claims of those who made settlement prior to January 1, 1884, and were qualified to make homestead entry, as follows :

Provided, That any settler who was in actual occupation of any portion of any such reservation prior to the location of such reservation, or settled thereon prior to January first, eighteen hundred and eighty-four, in good faith for the purpose of securing a home and of entering the same under the general land laws, and has continued in such occupation to the present time, and is by law entitled to make a homestead entry, shall be entitled to enter the land so occupied, not exceeding one hundred and sixty acres in a body, according to the government surveys and subdivisions.

While it is true that Boyd settled on the land prior to January 1, 1884, yet he did so only by purchasing an abandoned government building, which he had agreed to remove within ninety days. When he purchased the building in 1883, he knew that it was a military reservation, and therefore not subject to entry.

The act of July 5, 1884, provides that any settler who settled upon said reservation prior to January 1, 1884, "*in good faith*, for the purpose of securing a home and of entering the same under the general land laws," etc., shall be entitled to enter the land so occupied. If Boyd knew that it was a military reservation and therefore not subject to entry under any of the laws of the United States, how can it be said that he went upon the land in good faith for the purpose of entering it under the general laws. The very fact of his having purchased the building, with the distinct agreement and understanding that it was to be removed within ninety days, is evidence that he did not go upon the land in good faith for the purpose of securing a home and of entering it under the general laws, and his occupancy of the premises after the expiration of the ninety days was that of a trespasser, because at that time the lands were not subject to settlement. The proviso to the act was not intended to legalize such settlements, but was intended for the protection of *bona fide* settlers, who settled upon the land with the intention of securing it under the general land laws, and without knowledge of the fact that it was not subject to entry.

The motion is denied.

ELLIOTT *v.* RYAN.

Motion for the review of the departmental decision rendered September 19, 1888 (7 L. D., 322), in the above entitled case, overruled by Secretary Noble April 22, 1890.

PRACTICE APPEAL CERTIORARI.

STILES *v.* NEWMAN.

Certiorari will not be granted if it does not appear that the right of appeal has been denied, and that such denial results in a serious injury to the applicant.

Secretary Noble to the Commissioner of the General Land Office, April 24, 1890.

Cephas C. Newman has applied for an order directing your office to certify to the Department the record of proceedings in the case of Henry C. Stiles *v.* said Newman, involving the timber-culture entry made by the latter, October 16, 1883, for the SW. $\frac{1}{4}$ of Sec. 15, T. 130, R. 51, Fargo land district, Dakota.

The affidavit of contest alleged, if a full and correct copy is given in your office decision of February 27, 1890—

That the said Cephas C. Newman has wholly failed and neglected to plant ten acres of said tract to trees, seeds or cuttings, and cultivate the same as required by law.

On return day, the contestant filed a motion for continuance, on the ground of absent witnesses. The defendant appeared specially and filed a motion to dismiss the contest, because the allegations contained in the affidavit and notice of contest did not state a cause of action—in that it did not allege that the default continued to exist until the initiation of contest.

The local officers granted the motion and dismissed the contest.

The contestant appealed to your office, which, on February 27, 1890, held that "the plaintiff's affidavit of contest stated a good cause of action, and it was error to dismiss the case on the defendant's motion;" and you remanded the case for a rehearing.

Thereupon the defendant applies for a writ of certiorari.

The application is irregular in this—that it does not appear that the applicant has sought to appeal from your office and been denied. The supervisory authority of the Department, directing that the papers in a case be transmitted, can not properly be invoked until your office has refused to transmit them. Aside from this, the appeal is from an order for a hearing—which is a matter resting largely in the discretion of the Commissioner, and his action will not be interfered with, unless it be shown that great injustice has been done. As it does not appear (1) that applicant has attempted to appeal and been denied, nor (2) that such denial will result in serious injury to the applicant, the application is refused.

FINAL PROOF—COMMUTATION—RESIDENCE.

LEWIS F. J. MEYER.

The continuity of residence is not broken by temporary absences made necessary by the poverty of the claimant.

Supplemental proof may be accepted, when, in the absence of fraud or concealment of facts, an entry is allowed on insufficient proof.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 25, 1890.

March 26, 1883, Lewis F. J. Meyer made homestead entry, No. 24459, for the NE. $\frac{1}{4}$, Sec. 3, T. 107 N., R. 61 W., Mitchell district, Dakota Territory, and about fifteen months thereafter, June 16, 1884, he made final commutation proof thereon.

The testimony of Meyer and his witnesses on making said proof was, that he went upon the land June 15, 1883, and established residence thereon the following day; that his improvements were of the value of \$100.00, and consisted of a house, eight by twelve feet, and eleven acres of breaking (on which he raised a crop one season); and that from August 15, 1883, to December 25, 1883, and from January 5, 1884, to May 27, 1884, he was absent from the land, earning a "subsistence by teaching."

This proof was approved by the local officers the day it was offered, June 16, 1884, and payment (\$193.25) having been made for the land, final receipt and certificate were at the same date issued to Meyer. Nearly four and a half years thereafter, on November 3, 1888, your office rejected the proof and suspended the entry "to allow claimant an opportunity to submit new proof without advertisement during" the lifetime of the entry. This action was upon the grounds, that Meyer, while claiming to be a naturalized citizen, did "not produce the proper evidence of such fact, the copy of naturalization papers with the said proof being certified to by a notary public," and that "the residence and entire nature of the proof . . . shown was unsatisfactory." Meyer appeals from your office decision.

Accompanying the appeal is a copy of Meyer's naturalization papers, dated January 5, 1883, duly certified to by the clerk of the circuit court of St. Joseph county, Indiana, in which court the naturalization proceedings in his case were had.

According to the proof, Meyer had established residence and his subsequent absences were necessary for the purpose of earning a "subsistence," which he did by teaching during the school season. Absences so made necessary and with the intent of returning to the land (which he did) do not constitute abandonment, and, hence the continuity of the residence acquired was not broken thereby. (Patrick Manning, 7 L. D., 144.) The proof showed, also, that he had improved and cultivated the land. If, however, as stated by your office, the proof was

“unsatisfactory,” the following language used by Secretary Teller, in the case of James H. Marshall (3 L. D., 411), seems applicable to it:

I do not find any evidence of fraud in Marshall's proceedings. He was very frank in submitting the particulars as to residence when he offered his final proof. If there was a failure to satisfy the register and receiver of his good faith at that time, they should have held him to further residence before admitting the entry. But with the facts voluntarily stated by him, they accepted his proof. At the most it was merely deficient—not fraudulent. He took no advantage by concealment, and if error was committed it was error of the government.

With his appeal, Meyer also files an affidavit—

That since final proof he has not abandoned the land, but has continued to cultivate and improve the same; that he has built another house, shingle roof, of the value of about \$50.00, and has cropped the broken lands, and in addition has broken twelve acres and cropped the same last year; that he has paid taxes in the sum of \$88.27 since final proof, receipts whereof are herewith attached as Exhibit C.” (Tax receipts for said amount are attached); and “that he is at present taking a course in law at the Union College of Law in Chicago, Ill.

It appears from said affidavit that since the approval of the proof and allowance of the entry, Meyer has not abandoned the land, but (doubtless, on the faith of said action of the local officers, allowed so long to stand) has continued to improve and cultivate the land and has expended a considerable sum of money on it.

Conceding that claimant's proof was defective, the most that should have been required was supplemental proof in aid of it, and that is probably what was contemplated by your office in calling for “new proof without advertisement.” As the action of your office was so long delayed and the evidence of naturalization is now properly made, I am of the opinion the affidavit of Meyer should be accepted as sufficient supplemental proof to cure any further defect there may have been in the original proof.

The decision of your office is modified accordingly, and, there being no further objection, the entry will be reinstated and passed to patent.

PRE-EMPTION FILING—TRANSMUTATION.

JOHN C. HONE.

The transmutation of a pre-emption claim to a homestead entry that is subsequently carried to final certificate exhausts the pre-emption right.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 25, 1890.

On May 24, 1875, John C. Hone filed pre-emption declaratory statement alleging settlement February 25, preceding upon W. $\frac{1}{2}$ NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SW. $\frac{1}{4}$ Sec. 18, T. 2 S., R. 10 W., Kirwin, Kansas.

On June 12, 1878 he made timber culture entry for the tract named.

On February 16, 1884, he made pre-emption proof (showing continu-

ous residence from February 25, 1875, and improvements valued at \$800) and cash entry under his said filing.

By letter of December 8, 1885, your office (by reason of the said timber culture entry) suspended the said cash entry and directed the local office to report why the same had been allowed while the said timber culture entry was intact.

Thereupon the register by letter dated June 26, 1888, reported that the records of the local office showed such cash entry to have been made in the name of "John C. House."

It appearing, however, by the records of your office that Hone had made both entries the local officers were instructed by your office letter dated August 13, 1888, to "ascertain the facts" and if "both entries represent the same person" to advise the entryman (Hone) that "before favorable action will be taken on said cash entry he will be required to furnish a duly executed relinquishment of his timber culture entry."

Such relinquishment executed September 21, 1888, was forwarded from the local office November 20, 1888, and its receipt is acknowledged by your office letter of December 28, 1888.

By the same letter, however, the said cash entry was held for cancellation for the reason that Hone by a prior filing had exhausted his pre-emption right and he was allowed to withdraw his said timber culture relinquishment and "perfect title to the land under the timber culture law should he so elect."

From the action of your office in holding his said entry for cancellation Hone (by his attorneys) appeals and alleges that having made no proof under his first filing his second filing was valid under the practice then prevailing.

The records of your office show that Hone filed pre-emption declaratory statement for land in the adjoining township on April 29, 1872, and that on October 28, following, he transmuted such filing to homestead entry for which "final" certificate was issued on December 10, 1874.

It appears that when Hone filed for the tract involved he had exhausted his pre-emption right. Alfred E. Sanford (6 L. D., 103); Orrin C. Rashaw (id., 570); James F. Bright (id., 602), and that he consequently was then disqualified as a pre-emptor. It follows that the cash entry in question is invalid and that it has been properly held for cancellation.

The decision appealed from is accordingly affirmed.

In addition to the matter hereinbefore set out it appears that pending the said appeal of Hone, one Stockmann applied to contest the said cash entry and that after the affirmation by your office of the rejection of such contest at the local office he (Stockmann) filed a withdrawal (forwarded by your office letter dated January 2, 1890,) of the same.

It further appears that Hone on March 10, 1884, sold and conveyed for \$2,200, the said tract to Bolivar Byers its present owner.

The attention of your office is therefore called to the argument filed in behalf of the appeal wherein counsel ask that if the cash entry in question be canceled the application of said Byers to make homestead entry for the land be allowed.

DESERT LAND ENTRY.—NON-IRRIGABLE LAND.

JOHN G. COY.

The non-irrigable character of a portion of the land included within a desert entry will not defeat the right to patent thereunder, if the land susceptible of irrigation is reclaimed in good faith, and the remainder of no value to the government.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 26, 1890.

I have considered the appeal of John G. Coy, from the decision of your office of January 26, 1889, requiring him to relinquish the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 10, and the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 11, T. 24 N., R. 61 W., lying within his entry (No. 869) of desert land, in the Cheyenne district of Wyoming Territory.

The said John G. Coy, on the 18th of September, 1883, filed a declaration of his intention to reclaim under the desert land act of March 3, 1877, (19 Stats., 377) the SE. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 10; the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 11; the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 14; and the NE. $\frac{1}{4}$ of Sec. 15.

He proceeded to reclaim this land by irrigation, and on the 13th of September, 1886, submitted his final proof, and at the same offered to relinquish the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 10; the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, and the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 11, for the reason that he had not been able, up to that time, to conduct water to the said subdivisions.

His final proof was rejected because it bore evidence within itself that only about half of the land had been irrigated; his offer to relinquish the subdivisions above mentioned was also rejected on the ground that such relinquishment, if allowed, would destroy the compact form of the entry: He was advised, however, that this objection could be removed by his relinquishing the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 10, in addition to the subdivisions above named; but he declined this proposition for the reason that the last named quarter-section had already been reclaimed and rendered valuable.

He then renewed his efforts to secure more thorough irrigation, and succeeded in conducting water to some part of every legal subdivision within his entry except the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 11, which by reason of its elevated and rocky condition was found to be irreclaimable, and this quarter-section he relinquished, and it was subsequently canceled.

The other lands of his entry not irrigated, according to the evidence being about 5 acres in the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 10, 35 acres in the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 10, 8 acres in the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 10, 35 acres in the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 11, 5 acres in the SW. $\frac{1}{4}$, of the SW. $\frac{1}{4}$ of Sec. 11, 5 acres in the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 14, and amounting, in the aggregate, to about ninety-three acres in his entry of six hundred and forty acres, after deducting the forty acres above referred to as relinquished and canceled.

On the 3rd day of June, 1887, he submitted his supplemental final proof, which shows that every subdivision of the land in his entry, with the exceptions above mentioned, had been irrigated and made to produce crops.

This proof was forwarded to your office by the local officers who recommended that the entry be allowed. By letter bearing date August 10, 1887, the said proof was returned by your office to the local officers and they were authorized to exercise their discretion and perfect the entry provided they found the evidence satisfactory. Acting on this authority the local officers accepted the final proof, received the balance of the purchase money and issued final certificate (No. 768) August 23, 1887.

Thus the matter stood until the 26th of January, 1888, when your office, by letter of that date, directed the local officers to call upon the entryman to relinquish the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 10, and the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of section 11, on the ground that only about ten acres of the land in these subdivisions had been irrigated, leaving about seventy acres unreclaimed, and on the further ground that without such relinquishment the entry would not be compact in form. The entryman refused to relinquish claiming that a large proportion of the land within this entry had been irrigated and reclaimed, and therefore, he appealed to this Department, alleging that the decision of your office is erroneous, (1) in holding that the relinquishments should be made, because land sufficient in the said two subdivisions had not been irrigated; and (2) in holding that the relinquishment of the same is necessary to preserve the compact form of the entry.

The evidence found in the record shows, that the entryman was qualified to make the entry under the desert land act; that the land is desert in character; that water has been conducted to each and every subdivision; and that the entryman, acting in good faith, has irrigated and reclaimed the lands of his entry, and the different parts thereof, as far as they are susceptible of irrigation, at an expense of from twenty-five hundred to three thousand dollars.

Such being the facts of the case, the principles of law involved are of easy application.

The case under consideration bears a striking resemblance to that of Levi Wood reported in 5 L. D., 481.

The entry of Wood, after having been reduced by a prior and conflicting claim, contained only a hundred and twenty acres, divided into three parcels of forty acres each. About eighty acres of this land had been irrigated and reclaimed, but the remaining portion of forty acres, owing to its elevated and rocky character, was found to be irreclaimable, and the local officers recommended the cancellation of the entry. Your office sustained their view of the case, but this Department, on appeal, reversed the decision, and held, in substance, that "the non-irrigation of rocky and hilly portions of the land does not defeat the right of entry, where the claim is made in good faith, and substantial reclamation of the irrigable portion thereof is shown."

In the Wood case, forty acres out of a hundred and twenty were found to be non-irrigable: in the case under consideration the proportion of non-irrigable land as shown above, is about ninety-three acres out of an entry of six hundred.

The decision of this Department in the case of David Gilchrist (8 L. D., 48), strengthens the views expressed and the decision rendered in the case of Lévi Wood.

In the Gilchrist case, it was shown that only about four hundred acres had been reclaimed, at the time of making final proof, out of an entry of six hundred and forty, and that one entire subdivision of forty acres, by reason of its hilly condition could not be irrigated, yet the entryman was allowed to retain the unreclaimed subdivision, and all the rest of the land embraced in his entry.

In the late case of Andrew Leslie (9 L. D., 204), the entry contained only forty acres, and less than half of that was susceptible of irrigation. It was shown in final proof that only about fifteen acres of the entire forty had been reclaimed, but it was also shown that all the lands of the entry which were susceptible of irrigation, had been reclaimed, and that the remaining portion, owing to its hilly and rocky condition, was absolutely worthless, and could not be made productive.

Under this state of facts, the decision of your office, adverse to the entry, was reversed, and the entry allowed.

The facts of the case under advisement are very similar to those in the cases above cited. All the land of the entry that can be irrigated has been supplied with water, and made to produce one or more crops: the irreclaimable land is of no value to the government, or to any one unless to the entryman, who has it in possession, and has paid for it at the rate of a dollar and twenty-five cents per acre; he holds a patent certificate for all the lands of his entry, reclaimed or unreclaimed, except the quarter section relinquished and canceled, and as he has shown good faith throughout, and no adverse claim has been made, his entry should pass to patent.

The decision of your office is therefore reversed.

SCHOOL INDEMNITY—FRACTIONAL TOWNSHIP.

STATE OF OREGON.

If the exterior lines of a fractional township are established, and the loss to the State of section thirty six is thereby made certain, indemnity for such loss may be allowed, though the township is not sub-divided.

Selections on behalf of different fractional townships should be so apportioned that each township will receive credit for the amount to which it is entitled.

Secretary Noble to the Commissioner of the General Land Office, April 26, 1890.

The State of Oregon appeals from the decision of your office of November 5, 1888, which (together with letter of April 23, 1889,) holds for cancellation certain indemnity school selections embraced in list No. 22 of such selections in the Lakeview district, Oregon.

These selections were based upon alleged deficiencies in T. 41 S., R. 22 E. and T. 41 S., R. 28 E. The ground for cancellation stated by your office is, that "these two townships have never been surveyed, and this" (your) "office has no means of knowing what deficiencies in their school lands may exist. They are, therefore, unavailable as a basis for selections of indemnity, since indemnity cannot be allowed upon conjecture."

In the appeal it is alleged, that your office erred "in finding that it had no means of knowing what deficiencies may exist in the school lands in said townships," and that the exterior lines of both townships having been surveyed, "by examination it will appear obvious that each of said townships embrace more than 11,520 acres" and as "each exterior line on the west and east extends not more than four miles south," where it strikes the boundary line between Oregon and California, section 36 in each of said townships must be lost to the State of Oregon.

The surveyor-general of Oregon reported, by letter of April 10, 1889, to your office, that the "exterior lines of both townships have been surveyed." On examination of the diagrams on file in your office of said townships, and also the diagrams of the townships of similar dimensions on the east and west of the townships in question, subdivisational survey of which has been made, it appears there is no room to doubt that the area of each of said townships is between a half (11,520 acres) and three-fourths of an entire township, and that the distance they extend south before reaching the boundary line between Oregon and California is not over four miles.

As section thirty-six falls in the extreme southeast corner of a township five miles south from the north line, it is certain that section in both said townships will be, as is contended by the appellant, lost to the State of Oregon. Said State (Oregon) being entitled to sections sixteen and thirty-six of each entire township for school purposes (9 Stat., 330, and 11 Stat., 383), and there being in each of said townships

so made fractional between a half (11,520 acres) and three-fourths of a township, the maximum amount of land the State would be authorized to select as indemnity in case both sections sixteen and thirty-six were lost, would be three-quarters of two sections, nine hundred and sixty acres for each township. (Revised Statutes, 2276; *O'Donald v. State of California*, 6 L. D., 696). Deducting section sixteen (six hundred and forty acres) not lost, there is left three hundred and twenty acres in each township for which indemnity selections may be made. From an examination of said list No. 22 of selections, it appears those selections for deficiencies in T. 41, R. 22, amount in the aggregate to 234.22 acres, which is 85.78 acres less than the amount to which the State is entitled on account of such deficiencies, but the selections for deficiencies in T. 41, R. 28, aggregate 405.57 acre, which is 85.57 acres in excess of the amount the State is entitled to for said township. The amount of deficiency 85.78 acres, in the former township, for which indemnity selection has not been made, is twenty-one one hundredths acres more than the excess over deficiency in the latter, 85.57 acres, for which such selection has been improperly made. It thus appears that while the State is entitled to the entire amount selected for the two townships, that amount is not properly distributed between them, as under the selections as made T. 41, R. 28, gets 85.57 acres to which T. 41, R. 22, is entitled. It is directed that the State be required within ninety days from notice of this decision to rectify or amend said selections so as to properly apportion them between the two townships, and, on this being done, the selections will be re-instated.

The decision of your office is modified accordingly.

RAILROAD GRANT—INDEMNITY SELECTION—SETTLEMENT CLAIM.

CENTRAL PACIFIC R. R. Co. *v.* BASS.

A claim based upon occupancy and cultivation, existing at date of indemnity withdrawal under the act of July 25, 1866, excepts the land covered thereby from the operation of said withdrawal.

An indemnity selection of land included within an unexpired pre-emption filing is subject to the rights of the pre-emptor, and the company cannot take advantage of his failure to occupy and improve the land.

Secretary Noble to the Commissioner of the General Land Office, April 26, 1890.

This appeal is filed by the Central Pacific Railroad Company from the decision of your office, rendered January 11, 1889, rejecting the selection of the Central Pacific Railroad Company of lots 2, 3, 5, 6, and 8, of Sec. 31, T. 35 N., R. 1 E., M. D. M., Shasta, California, and directing that Herbert Bass be allowed to make final entry for said tract upon his proof submitted August 20, 1888.

The tract in controversy is within the indemnity limits of the grant to the California and Oregon Railroad Company (now Central Pacific Railroad Company), made July 25, 1866 (14 Stat., 239), and was embraced in the withdrawal, after definite location, for the benefit of said road, which was received at the local office September 6, 1871. This withdrawal was subsequently modified, and the local officers were instructed that the unsurveyed odd sections would only be withdrawn from the time the plats of survey were filed in the local office. The plat of the township embracing this section was filed in the local office August 1, 1874. Bass filed pre-emption declaratory statement for said lots 2, 3, 5, 6 and 8, of said Sec. 31, October 12, 1885, alleging settlement October 10, 1885. The Central Pacific Railroad Company applied to select said tract January 7, 1886, which was noted on the records of the local office.

On June 21, 1888, Bass filed notice of intention to make final proof upon said claim, and, in pursuance of said notice, he appeared before the local officers on August 20, 1888, and submitted final proof upon his claim, when the Central Pacific Railroad Company appeared, by counsel, and protested against the allowance of said proof and entry of Bass, the company having been specially cited to appear and submit evidence to show cause why the entry of Bass should not be allowed upon presentation of proper proofs.

Besides, the usual proof showing compliance with the law on the part of the pre-emptor as to inhabitancy, cultivation and improvements, it was shown upon the cross-examination of the witnesses that the tract in controversy was occupied by James K. Smith from March, 1871, to some time in 1872, when he sold to Joseph Price his improvements and possessory right. During the same year Price sold to Samuel Wolf, who resided upon, cultivated and improved it until some time during the year 1874, when he sold his right and improvements to Leander Powers, who resided upon, cultivated and improved it until some time in 1880, when he sold his possessory right and improvements to Bass.

It appears from the testimony that Bass did not actually reside upon the land until January, 1888, but the failure of Bass to occupy and improve the tract could only be taken advantage of by another settler and not by the company. The land was excepted from the operation of the withdrawal by the occupancy and cultivation of it by Smith and others who succeeded him from 1871 to 1880, and the selection of the land by the company, made January 7, 1887, was subject to the rights of Bass, under his pre-emption declaratory statement, filed October 12, 1885, it being an unexpired filing of record when the company applied to select the land and when Bass moved upon the land in January, 1888, with his family, and made actual residence thereon, since which time he has complied with the pre-emption law as to inhabitancy, cultivation and improvements.

The decision of your office is affirmed.

TIMBER CULTURE PROOF—PUBLICATION.

WILLIAM THOMPSON.

The time occupied in the preparation of the soil and planting the trees, may be computed in final timber culture proof as forming a part of the statutory period of cultivation where the entry was made prior to the regulations of June 27, 1887.

The requirements of said regulations, in the matter of publishing notice of intention to submit final timber culture proof, are not enforced where the entry was made prior to September 15, 1887.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 26, 1890.

I have considered the case of William Thompson, on appeal from your office decision of November 22, 1885, rejecting his final proof in support of his timber culture entry for the SE. $\frac{1}{4}$ section 22, T. 139 N., R. 80 W., Bismarck land district, North Dakota.

On May 13, 1876, he made a timber-culture entry for said tract and on August 30, 1886, submitted proof in support of the same and received from the local officers a certificate in due form, entitling him to a patent.

January 18, 1887, your office rejected said proof, and on February 18, 1887, Thompson filed a motion for a reconsideration and modification of said decision.

March 18, 1887, while said motion was pending before your office, he appealed, from said decision to this Department and on June 8, 1887, he was informed that "the appeal being filed, your office could not consider the motion for review, although the evidence on file was probably sufficient to modify or rescind the former decision."

June 13, 1887, said appeal was withdrawn, "with the proviso that should the action of the Commissioner upon the motion to reconsider be unfavorable to claimant, the appeal may be renewed".

October 13, 1887, the case came up before your office on the "motion for a reconsideration of said decision of January 18, 1887," and your office letter "C" October 13, 1887, states:—"From the proof submitted I am satisfied that the claimant has complied with all requirements of law. The decision above mentioned is therefore rescinded. In due course of business the proof will receive final consideration."

On November 22, 1888, the case came up for "final consideration" and your office decision states,—

Final timber culture proof William Thompson original entry No. 11, made May 18, 1876, is hereby rejected. The planting of entire acreage was completed in the spring of 1880, proof was offered August 30, 1886, without publication. Eight years' cultivation has not been shown as required by law and under the ruling of the Secretary in the case of Henry Hooper (6 L. D., 624), advise the claimant that his entry is suspended and that he may make new proof but that new proof must be preceded by proper advertisement If native born he must so state in his affidavit, and if naturalized he will have to furnish a copy of his naturalization certificate.

From this decision Thompson appealed, to this Department.

The testimony shows that in the spring of 1878 the entryman had

broken, on the tract, about sixteen acres. In 1879 the broken land was plowed and sowed to oats. In the fall of 1879 he had about six acres plowed, harrowed, furrowed (about four feet apart) and planted to tree seeds, ash and box-elder. During the summer of 1880, the ground was cultivated, by plowing and hoeing—similar to the cultivation of corn ground. In the fall of 1880 he plowed, harrowed, furrowed, and planted to tree seeds, enough land adjoining the former parcel to make by measurement about 13½ acres. He has carefully cultivated this land each year and had in August, 1886, about 10,000 thrifty trees growing thereon. The land was in good condition, free from weeds.

This entry was made prior to June 27, 1887. The regulations then in force did not require eight years of cultivation of trees, but allowed the time occupied in the preparation of soil and planting to be computed on final proof. See John M. Lindback (9 L. D., 284).

The same principle of law applies to publication of notice, and circular of December 3, 1889 (9 L. D., 672), provided—“The requirements of circular of June 27 approved July 12, 1887, (6 L. D., 280) as to publication of notice of intention to make final proof on timber culture entries will not be insisted on, in cases where the original entry was made prior to September 15, 1887.”

The entryman has filed an affidavit stating that he is a native born citizen of the United States, evidently in compliance with the requirements of your office. It is, therefore, not necessary to consider that matter further.

Your decision rejecting the said final proof is reversed and the said entry will be passed to patent.

EQUITABLE ADJUDICATION—ADDITIONAL RULES.

*Commissioner of the General Land Office to the Secretary of the Interior,
April 10, 1890.*

Referring to your letter of instructions of the 13th ultimo, 10 L. D., 299, relative to the proper method of proceeding for the confirmation on equitable grounds of suspended entries according to the provisions of sections 2450 to 2457 U. S. Revised Statutes, I have the honor herewith to submit for your consideration and the consideration of the Honorable the Attorney-General, proposed additional rules thereunder, Nos. 31, 32, and 33.

*Secretary of the Interior to the Commissioner of the General Land Office,
April 28, 1890.*

I return herewith, approved by the Attorney-General and myself acting as a board, the three additional rules numbered 31, 32 and 33, which were submitted with your letter to the Department, dated the 10th instant, and which are for your guidance in submitting suspended entries to the board of equitable adjudication under the provisions of sections 2450-2457 Revised Statutes.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 10, 1890.

The following rules are hereby established, with the concurrence of the Secretary of the Interior and Attorney-General, as additional to the regulations in accordance with which suspended claims are decided under sections 2450 to 2457, Revised Statutes, as amended by the act of Congress of February 27, 1877, viz :

31. All pre-emption, homestead, commutation of homestead, and timber-culture entries, in which final proof has been made, and in which compliance with one or more legal requirements with reference to the final proof notice or in other respects, does not appear in the papers, because of the neglect or inattention of the district land officers, in allowing the final proof and payment to be made notwithstanding such defect, but where in fact notice was given and in which no adverse claim appears, and the existing testimony shows a substantial, *bona fide* compliance with the law as to residence and improvement in pre-emption, homestead and commutation of homestead entries, or as to the required planting, cultivating and protecting of the timber, in timber culture entries, or where such facts were satisfactorily shown to the district land officers by proof which was lost in transmission to the General Land Office, and can not now be renewed by reason of the death of witnesses or other cause.

32. All homestead and timber culture entries in which the party has shown good faith and a substantial compliance with the legal requirements of residence and cultivation of the land in homestead entries, or the required planting, cultivating, and protecting of the timber, in timber culture entries, but in which the party did not, through ignorance of the law, declare his intention to become a citizen of the United States until after he had made his entry, or, in homestead entries, did not from like cause perfect citizenship until after the making of final proof, and in which there is no adverse claim.

33. All homestead and timber culture entries in which good faith appears, and a substantial compliance with law, and in which there is no adverse claim, but in which full compliance with law was not effected, or final proof made within the period prescribed or residence established on the land in homestead entries within the time fixed therefor by statute or official regulation based thereon, and in which such failure was caused by ignorance of the law, by accident or mistake, by sickness of the party or his family or by other obstacle which he could not control.

LEWIS A. GROFF,

Commissioner of the General Land Office.

We concur in the foregoing additional rules.

JOHN W. NOBLE,
Secretary of the Interior.

W. H. H. MILLER,

Attorney General.

APRIL 24, 1890.

RAILROAD GRANT—INDEMNITY LANDS—SETTLEMENT RIGHTS.

MISSOURI, KANSAS AND TEXAS RY. CO. *v.* BEAL.

When application is made to enter lands included within the limits of a revoked indemnity withdrawal and covered by a prior unapproved selection, the issue as between the applicant and the company is whether the land is subject to such selection, and the burden is upon the former to show *prima facie* that it is not subject to selection.

Prior to selection the right to indemnity lands is only a float; and the right acquired by selection is dependent upon the status of the lands at date of selection and not at date of withdrawal.

A pre-emptive right is not acquired by the purchase of the possessory right of a prior pre-emption claimant.

A deed executed by the company, prior to selection, for land within its grant of indemnity, does not alter the status of the tract as "public land," or preclude the subsequent selection thereof, as such act is necessary to the perfection of the title held by the grantee of the company.

Secretary Noble to the Commissioner of the General Land Office, April 28, 1890.

This is an appeal by the Missouri, Kansas and Texas Railway Company from the decision of your office of July 5, 1888, in the case of said company against George W. Beal, and involves the E. $\frac{1}{2}$ of NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ of NW. $\frac{1}{4}$, Sec. 23, T. 25 S., R. 15 E., Independence district, Kansas.

It is claimed by the counsel for appellant, that this land fell within the withdrawal, by your office letter of March 19, 1863, in favor of the Leavenworth, Lawrence and Kansas Railroad, under the grant of March 3, 1863 (12 Stat., 772); but it appears from an inspection of the records of your office, that (as stated in your office decision) this is not the case. The land is, however, situated within the *indemnity* limits of the appellant's road, under the grant of July 25, 1866 (14 Stat., 236), a withdrawal on which was ordered by your office, March 19, 1867.

It appears from your office decision, that the appellant selected the land, October 11, 1877, but said selection is unapproved. October 15, 1887, George W. Beal applied to enter the land under the homestead law. The appellant having been notified by the local officers of this application, protested against its allowance, and a hearing was thereupon ordered and held, January 11, 1888. On the hearing it was shown, that Isaac Nelson settled on and filed a pre-emption declaratory statement for the land about July 7, 1866, but it does not appear how long he resided there, or whether or not he had abandoned the claim before the withdrawal of March 19, 1867; that in August, 1869, J. J. Layton commenced cultivating the land and improved and cultivated it until July, 1883; that in June, 1870, Layton purchased Nelson's claim or filing of one Cook, and "proposed to renew it" on the land, but the local officers would not allow him to do so, because, as they claimed, it was railroad land, and, on December 5, 1876, he purchased the land of ap-

pellant for eight hundred dollars, and in June, 1883, he sold it to the appellee, George W. Beal, for \$1,682.00, and said Beal has since (nearly five years at date of hearing) resided upon the land with his family, making it his home to the exclusion of one elsewhere and cultivating it to a large extent and erecting upon it permanent improvements of great value. The evidence further showed, that in the spring of 1872, Layton moved a house upon the land and staid there from a week to ten days, but then took the house to the land on which his residence was for use as a stable; and that from the time he went on the land in August, 1869, until he sold it to Beal in June, 1883, his residence was on another tract of land and about three quarters of mile from that in dispute.

By letter of August 25, 1887, your office wrote the local officers at Independence, Kansas, as follows:—

Under instructions from the Honorable Secretary of the Interior, you are directed to restore to the public domain and open to settlement under the general land laws, all lands in your district heretofore withdrawn for indemnity purposes under the grant of July 25, 1866, for the Missouri, Kansas and Texas Railway Company, except such lands as may be covered by approved selections As to lands covered by unapproved selections, application to make filings or entries thereon may be received, held and noted, subject to the claim of the company. Whenever such application to file or enter is presented, alleging upon sufficient *prima facie* showing, that the land is 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. (See Atlantic and Pacific R. R. Co., 6 L. D., 91.)

The land involved in the present case falls within the category of lands referred to above as "withdrawn for indemnity purposes" under the grant to appellant and "covered by unapproved selections." Under said instructions of the Secretary of the Interior, when application is made to enter or file upon such lands, the issue to be tried as between the applicant and the railroad company is, whether the land was "subject to the company's right of selection," and the burden is upon the former to show *prima facie*, that it is not subject to such selection. The land being "lieu" or indemnity land, the appellant's "right prior to selection was only a float, and attached to the land at the date of selection and was dependent upon the status of the land at that date, and not at the date of the withdrawal. (Ryan v. Railroad Company, 99 U. S., 382; Counterman v. Missouri, Kansas and Texas Ry Co., 8 L. D., 237). The question then is, was the status of the land under the facts recited herein as shown at the hearing such at the date of its selection by the company as to render it subject to such selection. If it was, it was not subject to Beal's homestead application.

If the United States had not "sold" the land, or "the right of pre-emption or homestead settlement" had not attached to it (or if such right had attached but had been abandoned and had ceased to exist prior to selection) or it had not "been reserved by the United States for any purpose whatever"—in other words, if it was "public land"—at

the date of selection, then it was subject thereto. (Sec. 1, Act of July 25, 1866, 14 Stat., 236). The land had not been sold or reserved by the government and the inquiry is narrowed to this, was the land at date of selection, October 11, 1877, covered by any "right of pre-emption or homestead settlement"? The pre-emption claim of Nelson had been abandoned and had ceased to exist for many years before the selection. Layton claims to have bought from one Cook in 1870 the "filing" of Nelson. By such a purchase he could not acquire a pre-emptive right or initiate a pre-emption claim (Rev. Stat., Secs. 2259, 2263; *Myers v. Croft*, 13 Wall., p. 296). In order to initiate a pre-emption claim, Layton should have settled upon and improved the land and in the prescribed time have filed a declaratory statement therefor in his own right, and not have made application, as he stated he did, to "renew Nelson's filing." Layton appears not to have been a settler on the land at the time he applied to "renew Nelson's filing," or at any time, as his residence from the time he commenced cultivating the land, August, 1869, until he sold to Beal, July, 1883, was upon another and distinct tract. He, therefore, never acquired any right of pre-emption to the land in his own right. Conceding, however, for argument's sake, that his application to "renew the filing of Nelson," was intended by him and could and should have been treated by the local officers as an application to file a declaratory statement in his own right, and was erroneously rejected, still by failing to appeal and by subsequent residence on another tract and purchasing from the appellant (December 5, 1876,) and thereby recognizing its right, and thereafter selling the land under the right so acquired to the appellee (Beal), he must be held to have abandoned all claim to the land under the settlement laws. (*Neilson v. Northern Pacific R. R. Co. et al.*, 9 L. D., 402.) At the date of selection (October 11, 1877), therefore, there was no "right of homestead or pre-emption settlement" on the land in Layton or any one. Layton was then holding and using it for cultivation under a warranty deed of conveyance from appellant and not under the settlement laws. The land not having been sold or reserved for any purpose by the government and there being no "right of homestead or pre-emption settlement" thereon, it was "public land" at the date of selection within the meaning of the act, and therefore "subject to selection." The appellant's warranty deed to Layton of the land (to which its right had not then attached by selection) did not affect the status of the land as "public land," but when by subsequent selection of the land, appellant's right attached, that right inured to said grantee (Layton) under the deed. Nor was appellant estopped by making the deed from afterwards selecting the land, as such selection was a necessary step towards perfecting the claim of its grantee and carrying out its obligation under the deed to make good the title conveyed. This right or title so acquired, Layton in 1883 conveyed to the appellee Beal.

The decision of your office holding the selection for cancellation is reversed.

RAILROAD GRANT—STATE LEGISLATION.

ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO. *v.* THOMPSON.

The railroad company in accepting the benefits of the act, enacted by the State March 1, 1877, accepted also the conditions and limitations of said act, and thereby relinquished its claim to lands occupied by actual settlers at the date of the act, and authorized reconveyance by the governor of the State.

Secretary Noble to the Commissioner of the General Land Office, April 28, 1890.

I have considered the case of the St. Paul, Minneapolis and Manitoba Railway Company *v.* Alexander Thompson, on the appeal of said company from your office decision of August 5, 1887, awarding to said Thompson the right to enter the S. $\frac{1}{2}$ NW. $\frac{1}{4}$ and lots 3 and 4 (fractional NW. $\frac{1}{4}$) section 3, T. 131 N., R. 44 W., 5 P. M., Fergus Falls, Minnesota, land district.

The tract is within the ten mile (granted) limits of the St. Paul, Minneapolis and Manitoba Ry. Co. (St. Vincent Extension) and was included among lands listed for the benefit of that company March 12, 1880.

On June 23, 1880, the governor of Minnesota under an act of the legislature of the State of Minnesota approved March 1, 1877 (Special Laws Minnesota 1877, p. 257), reconveyed the tract in controversy to the United States for the benefit of said Thompson as a settler thereon.

On February 4, 1881, as stated in your said decision, the land was inadvertently certified to the State on account of said railway.

On November 20, 1883, said Thompson applied to enter said land as a homestead, and a hearing was had at the local office which resulted in a decision of the register and receiver in favor of Thompson's right to enter the tract; the railway company appealed and your office affirmed the local officers.

Subsequently the facts in the case were by your office presented to the governor of Minnesota and he was requested to again reconvey the said tract to the United States, and in response thereto the said governor executed such deed of reconveyance on July 21, 1887, and after causing the same to be recorded in book "A" of the records of the Land Office of the State of Minnesota on pages 10, 11 and 12, he transmitted said deed to your office and it is now with the record in the case.

The hearing before the local officers was held on January 28, 1884, and the evidence introduced shows that said Thompson is duly qualified to make homestead entry; that he settled upon said tract with his family in June, 1875, with the intent to make homestead entry therefor and has since continuously resided thereon and that on the first day of March, 1877, he had improvements on said land of the value of \$500.

The terms of the acts of Congress making the grants under which said railway company claims, viz., March 3, 1857, (11 Stats., 195), and March 3, 1865 (13 id., 526), made the construction of the road a con-

dition precedent to the conveyance of any land by the State to the company, except of that granted for the first twenty miles of the road.

The company of which the present company is the successor, failed to build its road, opposite the land in controversy within the time required by law, and on March 1, 1877, the legislature of the State enacted said law providing for an extension of the time within which the road was to be built (Special Laws Minnesota 1877, p. 257) and in section 10, of said act it is provided that any company accepting the benefits of said act and completing the road should acquire no rights in lands within the grant upon which settlement had been made in good faith prior to the passage of the act.

The facts in the case at bar are similar in all material respects to those in *St. Paul, Minneapolis and Manitoba Ry. Co. v. Chadwick* (6 L. D., 128), in which it was held that the company by accepting the benefits of said act of the legislature accepted also the conditions and limitations of the act, and thereby relinquished its claim to lands occupied by actual settlers at the date of the act and authorized reconveyance by the governor of the State. See also *St. Paul, Minneapolis and Manitoba Ry. Co. v. Moling* (7 L. D., 184), and *St. Paul, Minneapolis and Manitoba Ry. Co. v. Morrison* (4 L. D., 300-509).

Your said decision is accordingly affirmed.

COAL LAND—DECLARATORY STATEMENT—SECOND FILING.

ALFRED GRUNSFELD.

The right of purchase under a coal declaratory statement is not forfeited, in the absence of a valid adverse right, by failure to make proof and payment within the statutory period accorded therefor.

An applicant for the right of purchase under the coal land law, who has failed to make proof and payment within the statutory period, can not secure further protection through a second filing for the same tract.

Applicants under said law who fail to make proof and payment within the statutory period should be required to comply with the law, and upon failure to do so, after due notice, their filings should be canceled.

Secretary Noble to the Commissioner of the General Land Office, April 29, 1890.

On February 5, 1887, Alfred Grunsfeld made application to the local officers to file coal declaratory statement for the E. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 20, T. 15 N., R. 19 W., Santa Fé, New Mexico, which was rejected, for the reason that he had exhausted his right by a former filing. The action of the local officers was affirmed by your office, and he appealed to the Department.

The decision of your office was set aside by the Department, for the reason that neither the declaratory statement, nor a copy of it appeared in the record, and you were directed to notify the applicant to file a new declaratory statement and accompanying papers, in place of the originals alleged to have been destroyed by fire, setting forth as nearly as

possible the same facts alleged in the original application, which will be received by the local officers as of the date the original was offered.

In pursuance of said instructions, the applicant filed a new declaratory statement, which was forwarded to your office, and your office again rejected the application of Grunsfeld, for the reason that he had exhausted his right by a former filing. From this decision he appealed, alleging error in said decision, for the reason—

That the filing of a coal declaratory statement unless completed and payment made for the land embraced therein, as provided by law, does not exhaust the right of the applicant and upon the expiration of such a filing there is nothing in the laws or regulations to prohibit the filing of a second coal declaratory statement by the same party.

It appears from the record that, on February 5, 1886, Alfred Grunsfeld filed coal declaratory statement, No. 183, for the E. $\frac{1}{2}$ of SE. $\frac{1}{4}$, Sec. 20, T. 15 N., R. 19 W., Santa Fé, New Mexico. This filing is still of record and uncanceled, and final proof and payment have not been made thereon. On February 5, 1887, he applied to file declaratory statement for the same tract, which was rejected, for the reasons above stated.

The act of March 3, 1873 (17 Stat., 607), providing for the sale of coal lands, is embraced in the Revised Statutes, from section 2347 to section 2352, inclusive. The act provides that every person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become a citizen, and who has opened and improved, or who shall hereafter open and improve, any coal mine or mines upon the public lands, and shall be in actual possession of the same, shall be entitled to a preference right of entry of the mines so opened and improved, not exceeding one hundred and sixty acres to each individual person. All such claims must be presented to the local officers within sixty days after the date of actual possession and the commencement of improvements on the land by the filing of a declaratory statement. It then provides (Sec. 2350, R. S.)—

The three preceding sections shall be held to authorize only one entry by the same person or association of persons; and no association of persons, any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof; and no member of any association which shall have taken the benefit of such sections shall enter or hold any other lands under their provisions; and all persons claiming under section twenty-three hundred and forty-eight shall be required to prove their respective rights, and pay for the lands filed upon within one year from the time prescribed for filing their respective claims; and upon failure to file the proper notice, or to pay for the land within the required period, the same shall be subject to entry by any other qualified applicant.

The rules and regulations adopted by the Department to enforce and carry out the provisions of said law declare that:

A party who otherwise complies with the law may enter after the expiration of said year, provided no valid adverse right shall have intervened. He postpones his

entry beyond said year at his own risk, and the government cannot thereafter protect him against another who complies with the law, and the value of his improvements can have no weight in his favor.

(Sec. 31. Coal-Land Laws and Regulations thereunder, approved July 31, 1882.)

The question as to whether the filing of a declaratory statement under the coal land laws exhausts the right to file a second declaratory statement as in the pre-emption law, does not arise in this case, because the applicant has already an uncanceled filing of record for the same tract, and this is a sufficient ground for the rejection of his second application. The expiration of the statutory time does not forfeit his right to offer final proof and payment for the land, provided no valid adverse right has intervened. No purpose can be subserved by the filing of a second declaratory statement, except to commence a new statutory period, which could not avail as against an adverse claimant who went upon the tract after the expiration of twelve months from the date of the first filing. While the failure to make proof and payment within the statutory period will not of itself work a forfeiture of the right of the claimant to make proof and payment therefor after the expiration of said period, yet it was clearly the purpose of the law to require payment within said period, and when persons have filed declaratory statements for mines opened and improved by them, and fail to prove up and make payment within the statutory period, they should be required to comply with the provisions of the law, and upon failure to do so after due notice, their filings should be canceled.

You will therefore direct the local officers to give notice to the claimant that he will be required to submit proof and make payment for said land within sixty days from notice of this decision, and upon failure to comply with said notice, his filing will be canceled.

Your decision rejecting his application of February 5, 1887, to file for said land, is affirmed.

SETTLEMENT RIGHTS—APPLICATION TO ENTER.

GRIFFIN *v.* PETTIGREW.

One who remains on land by permission of others, asserting no right in himself, and fails to perform any of the acts required by the settlement laws, can not, while such conditions continue, be regarded as a settler under said laws.

An application to make homestead entry reserves the land covered thereby from any other disposition until final action thereon.

A charge of abandonment will not lie against a homestead claimant prior to the allowance of his application to enter.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 29, 1890.

I have considered the case of William Griffin *v.* John H. Pettigrew on appeal of the latter from your office decision of October 17, 1888, awarding to Griffin the superior right to the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, N. $\frac{1}{2}$ SE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ NE. $\frac{1}{4}$ Sec. 9, T. 14 N., R. 6 E., M. D. M., Marysville, California.

It appears that in 1868 one Alfred Hodnett filed declaratory statement for these tracts, but the claim was never perfected; and that in 1873 one Felix G. Hendrix applied to make a pre-emption filing for the same which was rejected by your office after hearing, on account of the claim of the Central Pacific railroad company. On April 15, 1884, said Griffin offered homestead application for the tract which was rejected by the local officers on account of the railroad claim. Your office on appeal decided against the company and the Department on July 15, 1886, (5 L. D., 12), held that said tract was excepted from the grant for said company by the pre-emption claims above alluded to, and concluded,— “Some question having arisen between Mr. Griffin and another party claiming to have purchased the improvements of Hodnett, as to priority of right, and that question not having been passed upon by your office, I return herewith all papers in the case for such further action as may be necessary in the premises.” The other party referred to was said John H. Pettigrew, who on January 27, 1885, had applied to make homestead entry for said tract. Hearing was ordered by your office and held December 9, 1886. The local officers decided in favor of Pettigrew; your office reversed that decision.

The testimony of Pettigrew showed that he was seventy-five years of age and occupied in “raising a little poultry at present,” that since 1858 he had lived on the tract in a cabin, which seems to have belonged to Pettigrew’s brother and said Alfred Hodnett partners in the business of raising sheep. The testimony further shows that the brother died in 1870. At that time there were on the tract the cabin, a blacksmith shop, corral for chickens and turkeys, and a chicken house valued in all at \$50. In 1871 John M. Howlett and one Trefry bought the improvements and the “right” to use the tract as a sheep range from said Hodnett for \$75.

Howlett says there were then on the tract a house and a little field fenced in, about five or six acres, also some little sheds dilapidated and broken down. Pettigrew continued to live in the cabin with Howlett and the latter furnished “the grub.” Pettigrew made no claim adverse to Howlett’s. The latter used the place as a sheep range. In 1872 said parties sold the improvements to one B. D. Anderson who testifies that Pettigrew made no claim to them. He told Pettigrew that he had bought them and was going to corral his sheep there. The latter answered, “I will move right out. I don’t claim nothing.” Anderson told him to remain as long as he desired. After about two years Anderson sold the improvements again to Howlett and Trefry. After Hendrix filed for the tract Howlett paid him \$50 a year for the use of it while the former maintained his claim. Hendrix told Pettigrew that he intended to pre-empt the land and asked him if he would object; to which he replied that he would not, that he was too old to do anything with the land. He thereupon agreed to be a witness for Hendrix and acted in that capacity, and testified that he had no inter-

est in the claim. In 1881 Howlett sold to one Frank Hunt for \$60. These various claimants allowed Pettigrew to remain in the cabin, and they and others supplied his wants. He made no improvements on the land and says he allowed those already there to decay and the well to become filled up, and thereafter got water from another claim. He says the improvements are now worth about \$25 or \$30. Hunt paid the expenses of Pettigrew's application to enter. The latter says he did not enter the land for the reason that the register told him about February, 1881, that it belonged to the railroad company. He says he had some correspondence with the land agent of the company in that year with reference to the tract.

Your office was of opinion that Pettigrew never intended to secure the tract by complying with the homestead law, but that he is now contending for it in the interest of said Hunt.

While it may be that Pettigrew in 1881 intended to assert a claim to this tract he never formally did so. By his conduct at all times when the matter was in issue he disclaimed ownership in anything on the premises. He remained on the land merely by sufferance.

The term "settler" as used in the public land laws has a well defined technical meaning. A person is a settler who intending to initiate a claim under one of those laws, does some act connecting himself with the particular tract claimed, said act being equivalent to the announcement of such intention, and from which the public generally may have notice of his claim. *Allman v. Thulon* (1 C. L. L., 690), *Samuel M. Frank* (2 L. D., 628) and cases cited. A person who remains on land by permission of others asserting no right in himself and fails to perform any of the acts required by the settlement laws, cannot, while such conditions continue, be regarded as a settler under those laws.

This was the condition of things when Griffin applied to enter. His application while pending withdraws the land from any other disposition until final action thereon. *Pfaff v. Williams* (4 L. D., 455); *Maria C. Arter* (7 L. D., 136). This decision finally passes on the application. The application of Pettigrew pending Griffin's appeal was properly rejected.

The testimony shows that about July, 1885, Griffin with his family took up his residence on the tract and has resided there continuously, that his improvements consist of a dwelling, chicken house, barn, a fence around the house, two wells, and some young trees set out, valued in all at about \$235.

The attorneys for Pettigrew urge that as Griffin did not take up his residence until some seventeen months after his application he had abandoned the tract. In support of this proposition the cases of *Byrne v. Dorward* (5 L. D., 104), and *Swain v. Call* (9 L. D., 22), are cited. These cases hold that pending a contest against an entry for failure to comply with the law, the entryman to protect himself must continue to comply. These cases are broadly distinguished from the one at bar in

this, that the application of Griffin to make entry was rejected, and the claim of the railroad was not finally declared invalid until July 15, 1886, *supra*. Until that date the entry of Griffin could not have been allowed. Before that time at least he had no entry, and the charge of abandonment would not lie.

For the reasons herein set out the decision appealed from is affirmed. Pettigrew's application is rejected.

PUYALLUP INDIAN RESERVATION—HOMESTEAD.

GEORGE HERRIOTT ET AL.

The authority of the executive in making the treaty of December 26, 1854, carried with it the right to reserve the lands therein set apart for the use and occupancy of the Indians, and empowered the President to make such other, or additional, reservations as might be found necessary to a faithful execution of the purposes of the treaty.

The additional reservation created by executive order of January 20, 1857, was within the scope of the authority conferred upon the President by the sixth article of said treaty.

The construction of said treaty adopted by the executive, with the assent of the Indians, in the matter of said additional reservation, having been recognized and endorsed by subsequent Congressional action, should be accepted as conclusive.

The act of September 27, 1850, relative to public lands in Oregon, and the acts amendatory thereof, do not impose upon the executive any restriction in the matter of creating Indian reservations, or limit the amount of lands that may be reserved for such purpose.

No rights can be secured under the homestead laws to lands reserved by competent authority from settlement and entry.

Secretary Noble to the Commissioner of the General Land Office, April 30, 1890.

The record in this case shows that on October 23, 1887, the following applications to make homestead entry were filed in the local land office at Olympia, Washington Territory, namely:

George Herriott, for lots 4 and 5, and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, Sec. 10, T. 20 N., R. 3 E., containing 74.80 acres.

James M. Morrison, for the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and lot 2, Sec. 10, T. 20 N., R. 3 E., containing 97.66 acres.

Richard Roediger, for lot 3 and the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, Sec. 10, and lot 6, Sec. 3, T. 20 N., R. 3 E., containing 55.59 acres.

William A. Barry, for lot 6 and the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, and the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, Sec. 10, T. 20 N., R. 3 E., containing 142.36 acres, and—

William McIntyre, for lots 5, 7 and 8, Sec. 3, and the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, Sec. 10, T. 20 N., R. 3 E., containing 122.13 acres.

These applications were severally rejected by the local officers, on the day they were filed, "for the reason that the tracts for which the application is made are within the limits of the Puyallup Indian reservation."

From this action a joint appeal was taken by the several applicants. The errors complained of are briefly assigned, and, in effect, amount simply to an assertion that the lands in question are not within the limits of the Puyallup Indian reservation, or any other reservation; that they have never been, in fact, withdrawn from settlement under the homestead laws of the United States, and are therefore subject to homestead entry.

In view of the magnitude of the interests involved, the appeal was, on application of appellants, made special by your office, and was heard out of its regular order. The hearing resulted in an affirmance, by Acting Commissioner Stockslager, on February 25, 1888, of the finding of the local officers.

The papers are now before this Department on the joint appeal by the several applicants, from said decision. Precisely the same questions are involved in such application, and in view thereof, although a joint appeal is contrary to the general practice, the cases have been considered, and will be disposed of together.

The errors assigned here are the same as alleged in the appeal from the finding of the local officers. They are predicated upon the theory and contention that the lands in question are not legally a part of any Indian or other reservation; that although situated within the designated limits of the Puyallup reservation, so called, they have never been lawfully reserved, or withdrawn from entry under the public land laws, because the President, in making such reservation, exceeded his powers under the constitution and laws of the United States, in consequence of which the same is null and void, and should be now so treated by this Department, and the several tracts in question be treated as vacant land.

The questions presented have been argued at great length by counsel for appellants, but there is no appearance of record for the Indians whose reservation is thus attacked, and no argument has been made, or brief filed, in their behalf. This condition of things has made it important to examine the questions raised with the greatest care, in order to insure just protection to the rights of all parties interested, and has entailed a greater extent of labor and research than would probably have been necessary if the benefit of full argument on both sides had been furnished.

The following statement of facts will illustrate the manner in which the reservation in question was made:

On December 26, 1854, a treaty was negotiated between the United States, by Isaac I. Stevens, Governor of Washington Territory and *ex-officio* Superintendent of Indian Affairs for that Territory, and the Nisqually, Puyallup and other bands of Indians, by their respective chiefs, head-men and delegates, which was ratified by the Senate March 3, 1855, and proclaimed by the President April 10, 1855, whereby the said tribes, or bands of Indians ceded, relinquished and conveyed to the

United States all their right, title and interest in and to a large area of country, then occupied by them in said Territory, in which was included the lands here in question. There was expressly reserved, however, for the use and occupation of said tribes or bands a small island called Klachemin, situated near the mouths of Hammersley's and Totten's inlets, containing about two sections of land; also a square tract containing two sections, situated on Puget sound, near Shenahnam creek, and another square tract of two sections lying on the south side of Commencement bay; all of which tracts were to be "set apart, and, as far as necessary, surveyed and marked out" for the exclusive use of said tribes and bands.

By the sixth article of the treaty, it was provided, among other things, that

The President may hereafter, when in his opinion the interests of the territory may require, and the welfare of the said Indians be promoted, remove them from either or all of said reservations to such other suitable place or places within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands. And he may further, at his discretion, cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable.

Provision was made in the treaty for the payment of the sum of thirty-two thousand and five hundred dollars for the lands thereby ceded, in annual installments extending over the period of twenty years, and by the tenth article thereof, the United States further agreed

to establish, at the general agency for the district of Puget Sound, within one year from the ratification hereof, and to support for a period of twenty years, an agricultural and industrial school, to be free to children of the said tribes and bands, in common with those of other tribes of said district, and to provide the said school with a suitable instructor or instructors, and also to provide a smithy and carpenter's shop, and furnish them with the necessary tools, and employ a blacksmith, carpenter, and farmer, for the term of twenty years, to instruct the Indians in their respective occupations; . . . to employ a physician to reside at the said central agency, who shall furnish medicine and advice to their sick, and shall vaccinate them; the expenses of the said school, shops, employes, and medical attendance, to be defrayed by the United States, and not deducted from the annuities. (10 Stat., 1132.)

It appears that after this treaty was made, it was found that great difficulty would be encountered in order to secure settlement of the Indians on the reservations therein provided, and while it is doubtful whether such settlement was effected as to any of the tracts named, it is certain that no settlement, in pursuance of the treaty, was ever made on the tract of two sections at the south side of Commencement bay. This portion of the land reserved by the treaty was never selected thereunder, for the Indians, or "surveyed and marked out for their exclusive use."

On January 19, 1857, the Commissioner of Indian Affairs, in a communication on the subject of these reservations, addressed to the Secretary of the Interior (Hon. R. McClelland), stated :

The treaty negotiated on the 29th of December, 1854, with certain bands of Nisqually, Puyallup, and other Indians of Puget's Sound, Washington Territory (article 2), provided for the establishment of reservations for the colonization of Indians, as follows: 1st. The small island called Klah-chemin. 2d. A square tract containing two sections near the mouth of the She-nah-nam creek. 3d. Two sections on the south side of Commencement bay.

The sixth article of the treaty gives the President authority to remove the Indians from those locations to other suitable places within Washington Territory, or to consolidate them with friendly bands.

So far as this office is advised a permanent settlement of the Indians has not yet been effected under the treaty. Governor Stevens has formed the opinion that the locations named in the first article of the treaty were not altogether suitable for the purpose of establishing Indian colonies. One objection was that they are not sufficiently extensive. He reported that seven hundred and fifty Indians had been collected from the various bands for settlement.

I have the honor now to submit for your consideration and action of the President, should you deem it necessary and proper, a report recently received from Governor Stevens, dated December 5, 1856, with the reports and maps therewith, and as therein stated, from which it will be observed that he has arranged a plan of colonization which involves the assignment of a much greater quantity of land to the Indians, under the sixth article of the treaty, than was named in the first article. He proposes the enlargement of the Puyallup Reserve at the south end of Commencement bay to accommodate five hundred Indians; the change in the location, and the enlargement of the Nisqually Reserve, and the establishment of a new location, Muckleshoot Prairie, where there is a military station that is about to be abandoned.

The quantity of land he proposes to assign is not, in my opinion, too great for the settlement of the number of Indians he reports for colonization; and as the governor recommends the approval of these locations, and reports that the Indians assent thereto, I would respectfully suggest that they be approved by the President, my opinion being that, should it be found practicable hereafter to consolidate the bands for whom these reserves are intended, or to unite other bands of Indians on the same reserves, the authority to effect such objects will still remain with the President under the sixth article of the treaty.

Within the Puyallup Reserve there have been private locations, and the value of the claims and improvements has been appraised by a board appointed for that purpose at an aggregate of \$4,917.

On January 20, 1857, Secretary McClelland transmitted said communication to the President of the United States, accompanied by a request that the reservations selected, as therein indicated, be approved, and they were accordingly approved by President Pierce on the same day. (Report, Commissioner of Indian Affairs, 1856, page 372.)

By this order of the Executive, there was set apart and reserved for the Puyallup Indians, under the sixth article of the treaty, in lieu of the square tract of two sections at the south end of Commencement bay, mentioned in the second article thereof, about eighteen thousand acres of land lying immediately south and east of said bay. The tract thus reserved had been previously surveyed under directions of Governor Stevens, and a map thereof was transmitted with his report of December 5, 1856, referred to in the above communication to Secretary McClelland.

On September 6, 1873, a further executive order, relative to said reservation was made by President Grant, in which it was stated that,

Agreeable to the recommendation of the Acting Secretary of the Interior, it is hereby ordered that the Puyallup reservation in Washington Territory be so extended as to include within its limits all that portion of section 34, township 21 north, range 3 east, not already included within the reservation.

The recommendation of the acting Secretary, referred to in the order was based upon a communication from the Acting Commissioner of Indian Affairs, dated August 26, 1873, from which it appeared that by an inadvertence or mistake in the original survey of the Puyallup reservation as set apart by the executive order of January 20, 1857, the Indians were deprived of the full water frontage along the eastern shore of Commencement bay, which it was intended should be secured to them when the reservation was made. The extension made by the order was recommended with a view to relieving the Indians from the consequences of this mistake in the original survey. (See Report, *supra*, 374-5.)

The exact date when the agricultural and industrial school, for which provision is made in the tenth article of said treaty, was established, is not shown by the record, nor have I been able to obtain any definite information concerning the same from the records of the Indian Bureau. It satisfactorily appears, however, that such school was established, in obedience to the treaty, about the date or shortly thereafter, of said executive order of January 1857. Appropriations were annually made thereafter, by Congress, for its maintenance and to meet the requirements of the treaty in reference thereto. The school was located directly south of Commencement bay, and for its purposes and uses, and for general agency purposes, there have been set apart all that portion of Sec. 10, T. 20 N., R. 3 E., lying inside the reservation, and also parts of sections 3 and 11 of the same township and range. These tracts contain in the aggregate something over five hundred acres of land, and constitute what is now known as the "School Farm." It is within the limits of this school farm that the lands now sought to be entered are situated. These lands lie in close proximity to the growing city of Tacoma, and by reason thereof, and of their adaptability to agricultural and townsite purposes, are of great value, variously estimated from \$300 to \$700 per acre.

All the residue of said reservation has been allotted and assigned to the Indians under the sixth article of the treaty, and on January 30, 1886, patents were issued therefor to the parties thereto entitled, in accordance with the provisions of article six of the Omaha treaty (10 Stat., 1043), referred to in the treaty of 1854, as aforesaid, which provides, that the President may, at any time in his discretion, after a person or family has made a location on the land assigned, as a permanent home, issue a patent to such person or family for the land so assigned, with certain conditions, restricting the alienation thereof, etc.

Such are the facts relative to the establishment of the reservation in question, and the present status of the land embraced therein.

In support of the errors assigned, it is contended by counsel for appellants, in effect, that there is no jurisdiction under the constitution, in the treaty making power, to appropriate or reserve, or to authorize the appropriation or reservation of any part of the public domain; that the President has no constitutional or inherent power or authority over the public lands and can make no reservation of any portion thereof, for any purpose, except in pursuance of some act of Congress specially authorizing him; that no authority was conferred upon the President by the treaty of 1854, to make the reservation in question, and that the making of said reservation, in the manner and to the extent stated, was expressly prohibited by Congress in certain previous legislation, more particular mention of which will be hereinafter made.

The first two of these contentions of counsel will be considered together; the latter two, separately.

A treaty made under the authority of the United States is declared by the constitution to be the supreme law of the land. The binding force and effect of treaties made by the Federal Government with Indian tribes have been so long recognized by the highest courts of the country, that the principle may be considered so well and firmly settled as not to admit of further question. *Cherokee Nation v. Georgia*, 5 Peters, 1; *Worcester v. Georgia*, 6 Peters, 515; *United States v. Forty-Three Gallons of Whiskey*, 93 U. S., 192; *Foster v. Neilson*, 2 Peters, 314; *Meigs v. McClung*, 9 Cranch, 11.

By the treaty of 1854 several tracts of land in Washington Territory were reserved for the use and occupancy of the Indians therein mentioned, and certain discretionary powers were granted the President relative to their removal from these reservations "to such other suitable place or places in said Territory as he may deem fit." The authority thus given the President, if of any effect at all, carried with it, as a matter of course, the right to select the place or places to which the Indians were to be removed. Otherwise, the authority given would have been simply nugatory. Did the power which made this treaty have the right to make these reservations and grant to the President the authority mentioned? I think this question must be answered in the affirmative. It has frequently been recognized by the courts that the treaty making power has the right to convey title to the public lands without the aid of an act of Congress, and if the treaty acts directly upon the subject of the grant, it is equivalent to an act of Congress, and the grantee takes a good title. *Holden v. Joy*, 17 Wall., 211-247; *United States v. Brooks*, 10 Howard, 442; *United States v. Payne*, 2 McCrary, 289-295. Now, if the treaty making power can convey title, it certainly can *reserve* a part of the public domain, or authorize the reservation thereof by the President, for a specific purpose, for this is but the exercise of a less power than that required to convey title. *United States v. Payne*, *supra*; *Doe v. Wilson*, 23 Howard, 457. So can the President, by an executive order, reserve a part of the pub-

lic domain for a specific lawful purpose. *Wolcott v. Des Moines Co.*, 5 Wall, 681; *Grisar v. McDowell*, 6 Wall., 363-381. In the latter case, the land in question had been withdrawn from sale and reserved for public purposes by an order of the President. In pronouncing its opinion, the supreme court said:

From an early period in the history of the government, it has been the practice of the President to order, from time to time, as the exigences of the public service required, parcels of land belonging to the United States to be reserved from sale and set apart for public uses.

The same principle was enunciated in *Homestead Company v. Valley Railroad*, 17 Wall., 153, and in *United States v. Leathers*, 6 Sawyer, 20-21. In some of the cases cited the reservations were for military purposes, but establishing a reservation for Indians is equally for a *public purpose*, and these cases are therefore authority in support of the President's right to make such a reservation.

Very extensive powers are given to the President in the management of the affairs of the Indians by sections 462 to 465 of the Revised Statutes, and might well be held to include the power to establish such reservations as are necessary to the proper administration of a just and humane governmental policy toward this unfortunate race of people, if there were no other acts in relation to the matter. The authority of the President in this respect, however, is recognized by numerous acts of Congress; and, indeed, the usual method of making an Indian reservation is by an executive order withdrawing certain lands from sale or entry, and setting them apart for the use and occupancy of the Indians. (Public Domain, 243.)

It is not questioned that Congress has the power to reserve portions of the public domain, and we thus find that reservations for public purposes may be made either by treaty, executive order, or by act of Congress. All these methods are expressly recognized by the pre-emption and homestead laws. By the pre-emption act of 1841, "Lands included in any reservation by any treaty, law, or proclamation of the President, for any purpose" are exempted from entry thereunder, and the same is true of the homestead act of 1862, for under the latter only such lands as "may, at the time the application is made, be subject to pre-emption," can be entered as a homestead. I have, therefore, no difficulty in concluding that the power which made this treaty with the Puyallup and other Indian tribes had the right to reserve the lands therein set apart for the use and occupancy of these Indians, and to authorize the President to make such other or additional reservations as might be found necessary to a faithful execution of the purposes of the treaty; that the President, independently of the treaty making power, has the right and authority to direct the reservation of portions of the public lands for specific public purposes, and that his power and authority in this respect have been recognized, from an early period in the history of the government, by both the legislative and judicial branches thereof.

Did the President in making the reservation in question act within the scope of the authority conferred upon him by the sixth article of the treaty?

A treaty, like a statute, must be construed, if possible, to give effect to its provisions. In construing this treaty we have the right to look to the situation of the parties thereto, and the subject matter thereof, at the time it was made, and to take into consideration the intention and purposes of the parties making the same. I can think of no surer way in which to get at this intention than to consider the construction which the parties to the treaty have given it, and what has been their action under it. If both parties to the treaty have agreed upon the same construction, that construction should be taken as the true one, unless the parties were mutually led into it by fraud or mistake, or the construction be plainly in the face of the language of the treaty, and the rights of third parties have intervened. *United States v. Payne, supra.* Now, there can be no doubt that in making the reservation, the President acted upon the theory and belief that authority therefor was conferred by the treaty. This is shown by his approval, as aforesaid, of the communication from the Commissioner of Indian Affairs, recommending such reservation. Neither is there any doubt that the Indians who were to be affected thereby agreed with the President in his construction, for this is shown by the report of Governor Stevens, upon which the communication and recommendations aforesaid are based, in which it is expressly stated that the Indians *assent* to the reservations therein recommended. But further than this: by an act of Congress, approved March 3, 1857, less than two months after the reservation was made, we find that there was appropriated:

For defraying the expenses of the removal and subsistence of Indians of Washington Territory to the reservations therein, aiding them in procuring their own subsistence, purchase of provisions and presents, compensation of laborers and necessary employés, sixty thousand dollars: *Provided*, That a part of said sum, not exceeding four thousand nine hundred and seventeen dollars, may, by the direction of the Secretary of the Interior, be applied for the payment of the just value of lands, improvements and pre-emption claims, owned by whites located within the Indian reservation established on the south side of Commencement bay, in Washington Territory, for the Puyallup and other bands of Indians, on the relinquishment of said lands, improvements, and claims to the United States.

The passage of this act, providing, among other things, for the payment of the exact sum of money appraised as the value of the claims and improvements mentioned in the letter of recommendation upon which the President acted in making the reservation, was a clear recognition and endorsement by Congress of the aforesaid interpretation of the treaty, and a ratification of the reservation thus made.

We thus find, that both the United States and the Indians affected by the treaty agree to the same construction thereof. There is, therefore, no reason why this construction should not be accepted as the true one. Certainly no rights have been acquired by the appellants to

prevent it. It must be remembered that the government is the custodian of all its lands, whether reserved or unreserved, and has the power and province to say, either by law, treaty, or executive order, when such lands shall, and when they shall not be open to settlement and entry. Whether the lands in question are considered as having been reserved from settlement and entry, by authority conferred by the treaty, or without such authority, can make little or no difference so far as the rights of the appellants are concerned, for as a matter of fact such lands have been, by competent authority, kept in a state of reservation ever since 1857, and while in that condition no rights thereto could be acquired under the homestead laws. The construction given the treaty can, therefore, work no hardship to the appellants. Nor do I think such construction necessitates, as claimed by counsel, a strained interpretation of the language used in the treaty. The tracts originally reserved for the Indians being so very small as compared with the large amount of territory previously occupied by them, it is not strange that the insufficiency thereof was so soon discovered, and it is not at all unreasonable to suppose that such a contingency was contemplated by the parties when the treaty was made, and that the general and discretionary powers given the President by article six were intended, in part, as authority to him, in the event of such contingency, and in order that the purposes of the treaty might not be defeated, to select such other and more suitable place or places for the colonization of the Indians, as their welfare and the interests of the Territory might demand.

But lastly, it is claimed by appellants that the making of a reservation of the character and extent of that here in question, was expressly inhibited by certain legislation of Congress relative to the public lands in the Territory of Oregon, enacted before the division of that Territory, and the formation, from a part thereof, of the Territory of Washington. The latter Territory was established by act of March 2, 1853 (10 Stat., 172). The legislation referred to is found in an act of Congress, approved September 27, 1850 (9 Stat., 496), entitled "An act to create the office of Surveyor-general of the public lands in Oregon, and to provide for the survey, and to make donations to settlers of the said public lands," the fourteenth section of which reads as follows:

And be it further enacted, That no mineral lands, nor lands reserved for salines, shall be liable to any claim under and by virtue of the provisions of this act; and that such portions of the public lands as may be designated under the authority of the President of the United States, for forts, magazines, arsenals, dock-yards, and other needful public uses, shall be reserved and excepted from the operation of this act: *Provided,* That if it shall be deemed necessary, in the judgment of the President, to include in any such reservation the improvements of any settler made previous to the passage of this act, it shall in such case be the duty of the Secretary of War to cause the value of such improvements to be ascertained, and the amount so ascertained, shall be paid to the party entitled thereto, out of any money not otherwise appropriated.

Also an act amendatory thereto, approved February 14, 1853 (10 Stat., 158), the ninth section of which provides :

That all reservations heretofore, as well as hereafter, made in pursuance of the fourteenth section of the act to which this is an amendment, shall, for magazines, arsenals, dock-yards, and other needful public uses, except for forts, be limited to an amount not exceeding twenty acres for each and every of said objects at any one point or place, and for forts to an amount not exceeding six hundred and forty acres at any one point or place.

By another act, amendatory of both these acts, approved July 17, 1854 (10 Stat., 305), it was provided in the sixth section thereof, "that all the provisions of this act, and the acts of which it is amendatory, shall be extended to all the lands in Oregon and Washington Territories."

It is expressly admitted by counsel that if said section fourteen of the original act stood alone, there would be no doubt of the President's authority to make the reservation in question, but it is strenuously contended that the language of said section nine of the amendatory act, restricting reservations, made in pursuance of said section fourteen, "for magazines, arsenals, dock-yards, and other needful public uses, except for forts," to an amount not exceeding twenty acres each, and for forts, not exceeding six hundred and forty acres, at any one point or place, positively prohibited the making of such reservation, either by the President, or by the treaty making power under the constitution. This contention can not, in my judgment, be sustained. I do not think it was the intention of Congress that the section mentioned should apply to Indian reservations.

It is a general rule, too well settled to need citation of authority to support it, that every legislative act must have reasonable construction, and that every interpretation which leads to an absurdity ought to be rejected. Again, interpretation should always tend to the discovery of the will of the legislature, and when the meaning of the language used is ambiguous, or the clauses confused, or the words such as might admit of two senses, that construction should be adopted which will best carry into effect the reasonable intention of the legislature. Potter's Dwaris on Statutes, 208.

Before adopting any proposed construction of language susceptible of more than one meaning, it is necessary to consider the effects, or consequences, which would result from it, for they very often point to the genuine meaning of the words. Maxwell's Interpretation of Statutes, 65. Now, can it be reasonably claimed that Congress intended, by the passage of the amendatory acts aforesaid, to destroy, absolutely, the authority of the President and the treaty making power, to make Indian reservations in Washington Territory? Such a construction would be just as reasonable as that contended for by the appellants, because if it be held that Congress, by the use of the general words, "other needful public uses," in said section nine, intended them to apply to Indian reservations, it must necessarily be presumed that Congress further intended

Indian reservations in Washington Territory to be made of tracts of land *not exceeding twenty acres* each. This construction would reduce the statute to an absurdity, and should, for that reason alone, be rejected.

Moreover, one of the presumptions especially applicable to the interpretation of general words is, that the law making power does not intend any alteration in the law beyond that which it explicitly declares, either in express terms or by unmistakable implication; and it is an established rule of construction "that general words and phrases, however wide and comprehensive in their literal sense, must be construed as bearing only on the immediate object of the act, and as not altering the general policy of the law, unless, of course, no reasonable sense can be applied to them consistently with the intention of preserving that policy untouched." *Idem.*, 66. The construction contended for, if allowed, would not only change, but practically destroy, the general policy of the law in matters relative to Indian affairs, as far as Oregon and Washington Territory are concerned, a thing which is not declared either expressly or by implication, and thus another reason is furnished for its rejection.

But again, another well settled rule of construction is, that general words which follow particular and specific words of the same nature, take their meaning from the particular and specific words, and are presumed to be restricted to the same genus as those words; and as comprehending only things of the same kind as those designated by them, unless, of course, there be something to show that a wider sense was intended. *Maxwell*, 297-8. The specific reservations which are restricted as to quantity by said section nine, are those made in pursuance of section fourteen of the original act, for "magazines arsenals, dock-yards," and "forts," and they are followed by the general words, for "other needful public uses." Now, under the principle of the rule last mentioned, these general words must be held to apply only to "public uses," *ejusdem generis* with a magazine, arsenal, dock-yard, or fort; for example, to military and naval uses, or those of like nature, unless there is something in the act showing that they were intended to be used in a wider sense. I find nothing in the act showing such intention, and I am thoroughly satisfied it was never contemplated by Congress that these general words should include or apply to such a "public use" as an Indian reservation, thereby restricting the extent of the same to twenty acres of land.

Furthermore, it may be said of this reservation, that in addition to the ratification thereof by the act of March 3, 1857, as aforesaid, the validity of the same has been, time and again, recognized by subsequent legislation of Congress in appropriating moneys for its maintenance, in fulfillment of the obligations assumed by the treaty, by authority of which it was made, as we have seen, and for other purposes relative thereto.

For instance, by act of May 5, 1858 (11 Stat., 280) the following appropriation was made:—

For fourth installment, in part payment for relinquishment of title to lands, to be applied to beneficial objects, per fourth article, treaty, twenty-sixth December, eighteen hundred and fifty-four, two thousand dollars. For fourth of twenty installments for pay of instructor, smith, physician, carpenter, farmer, and assistant, if necessary, per tenth article treaty, twenty-sixth December, eighteen hundred and fifty-four, four thousand dollars.

Again, by act of February 28, 1859 (11 Stat., 395), provision was made for the payment of the fifth installments under said treaty; and we find that Congress continued to make these appropriations, annually, until the obligations of the treaty were fully met, the last being made by act of June 22, 1874 (18 Stat., 160). But further than this: by act of July 14, 1884 (23 Stat., 88), there was appropriated the sum of \$3,000,

to enable the President to cause to be surveyed such portion of the Puyallup reservation in Washington Territory into lots as he may deem advisable and direct, and the same assign to such individual Indians or families of such reservation as are willing to avail themselves of the privilege and will locate on the same as permanent homes in accordance with the terms of article six of the treaty made on December 26, 1854.

This legislation, enacted in full view of all the facts and circumstances relative to the establishment of the reservation in question, is, it seems to me, a clear recognition on the part of Congress, of the validity of such reservation, and of the stipulations of the treaty of 1854, as applicable thereto. *Wells v. Nickles*, 104 U. S., 444.

A large number of authorities have been cited by counsel for appellants, and they have been examined and carefully considered. It is not deemed necessary to refer specially to these authorities, further than to say, that, in my opinion, they do not sustain the positions taken by counsel, as hereinbefore stated.

The integrity of this reservation is also attacked on the alleged grounds that the lands have been allotted and patented in many instances to persons not entitled thereto. The answer to this is, that this question was finally adjudicated in favor of the Indians when it was directed that the patents should issue to them, and it is not now within the jurisdiction of the Department to inquire into the same.

Upon mature consideration of the whole matter, I must affirm the decision of your office, rejecting the applications in question.

HOMESTEAD ENTRY.—APPROXIMATION.

BENJAMIN L. WILSON.

A homestead entry must approximate one hundred and sixty acres, in cases of excess, where the land taken is not a technical quarter section.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 30, 1890.

I have considered the case of Benj. L. Wilson on his appeal from your office decision of November 1, 1888, requiring him to elect which

subdivision he would relinquish in order to approximate to one hundred and sixty acres his commuted homestead entry for lots 1, 2, 3 and 4, Sec. 18, T. 160 N., R. 52 W., Grand Forks, Dakota, land district.

It appears from the record that June 5, 1882, claimant made homestead entry for said tracts, lots 1 and 2, being in the NW. $\frac{1}{4}$ of said section and lots 3 and 4, being in the SW. $\frac{1}{4}$ of said section 18, and areas respectively as follows: lot 1, 49.36 acres; lot 2, 48.96 acres; lot 3, 48.56 acres, and lot 4, 48.16 acres, in all 195.04 acres.

On December 9, 1882, he presented commutation proof and was permitted to make cash entry for said premises, certificate being issued January 2, 1883.

By your office letter of July 15, 1885, claimant was required to approximate his entry to one hundred and sixty acres.

In response to this claimant filed his affidavit that he had made valuable improvement on each of the four lots and could not relinquish one without material injury to himself.

Thereupon your office rendered the decision of November 1, 1888, and from this claimant appeals. In his argument on appeal it is said,—

Claimant admits that had his original homestead entry been made subsequent to the ruling of September 17, 1883 (Henry P. Sayles, 2 L. D., 88), said rule would apply to his entry, but his entry having been made and proof accepted months prior to the date of said rule, the said rule should not be given a retroactive effect and thereby entail a serious loss upon this claimant. (Joseph H. McComb, 5 L. D., 295).

It will be observed that to diminish the entry by the smallest legal subdivision thereof will leave 146.83 acres being 13.12 less than one hundred and sixty, while as the entry now stands it is 35.04 acres in excess of one hundred and sixty, and even to exclude the largest lot would leave the entry but 14.32 acres less than one hundred and sixty.

It has been the uniform rule of the Department that in cases of excess where the tract is not a *technical quarter-section* the entry must approximate to one hundred and sixty acres. In cases where the excess is small and the subtraction of a subdivision would force the claimant to lose an area below one hundred and sixty acres, greater than the excess applied for, the entry has been allowed. See C. G. Shaw, July 12, 1871 (and note), 1 C. L. L., 309). See also William C. Elson (6 L. D., 797), and cases cited.

The cases of Henry P. Sayles (2 L. D., 88), and Richard Martin (ib., 128), are not in point, each of those cases being entries of a technical quarter-section which was in excess of one hundred and sixty acres and they changed the rule in such cases, but the former practice was afterwards restored by case of William C. Elson, *supra*. The ruling, however, in cases where the tracts extended into different quarter-sections, has for many years been that of approximation as above stated. In J. B. Burns (7 L. D., 20) the claimant was required to relinquish one subdivision although he had improvement thereon to the extent of five

acres of breaking, and the rule of law as announced in case of C. G. Shaw, *supra*, was re-affirmed.

Some exceptions have been made to this rule upon equitable grounds, Joseph H. McComb (5 L. D., 295); Alexander Bouret (*ib.*, 298); Lafayette Council (*ib.*, 631). In the case at bar however no such equities have been presented, the claimant merely stating in a general way that he has "made valuable improvements in each of the four lots."

Claimant will be required to relinquish one of the smallest legal subdivisions of his said entry, choosing such an one as will leave the entry still in contiguous tracts and he will be allowed sixty days from notice hereof to elect and make such relinquishment, otherwise his entry will be canceled.

Your said decision is accordingly affirmed.

COMMUTED HOMESTEAD—RESIDENCE—CULTIVATION.

ROSA B. RIGGS.

A temporary absence, occasioned by the fatal illness of a friend, can not be held to interrupt the continuity of claimant's residence.

Where settlement is made too late in the season for a crop, breaking may be accepted as satisfactory proof of cultivation.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 30, 1890.

I have considered the case of Rosa B. Riggs upon her appeal from your office decision of December 27, 1887, rejecting her proof in her commutation homestead entry for NE. $\frac{1}{4}$ section 15, T. 114 N., R. 60 W., Huron, Dakota, land district.

It appears from the record that the claimant made homestead entry for said tract July 17, established residence July 23, 1883, and on February 7, 1884, after due publication of notice presented final proof in commutation and received cash certificate.

The proof being reached for action in your office was rejected in your said decision in which you say,—

Her final testimony shows that she is a single woman. On the tract she has a house ten by twelve feet, a stable eight by ten feet, and $6\frac{1}{2}$ acres of breaking. Total value \$100. She says "I have been absent but once to attend a friend through sickness and death—for twenty-eight days."

This proof is not conclusive as to good faith and is rejected. You will advise claimant that her entry is suspended and she may submit new proof during the lifetime of her entry which must show compliance with law in all respects.

As claimant's absence rendering the last services to her friend upon her death-bed cannot, under numerous rulings of the Department in regard to absences caused by sickness, be held to have interrupted the continuity of claimant's residence, and as I find among the papers a memorandum which says "no crop shown, require new proof and pub-

lication," I conclude that it is solely because no crops were raised upon the land prior to proof that claimant's proof is rejected.

Your office seems to have overlooked the fact that settlement was made in July after the cropping season for the year was over and that the proof was made in February before the next was begun.

Breaking was preparation to raise a crop and her compliance with law seems to have been satisfactory in all other respects.

I can see nothing in the proof tending to show bad faith.

See Jennie Burton (7 L. D., 451); John W. Alderson (8 L. D., 517); T. H. Quigley (ib. 551); Caroline Welo (ib., 612); Thos. C. Burns (9 L. D., 432).

Your said decision is accordingly reversed and the entry may be passed to patent.

HOMESTEAD ENTRY—MARRIED WOMAN.

WILBER v. GOODE.

A married woman, the head of a family, is qualified to make homestead entry.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 30, 1890.

I have considered the case of Curtis H. Wilber v. Mary Goode on appeal of the former from your office decision of May 31, 1888, rejecting his application to make homestead entry for SW. $\frac{1}{4}$ Sec. 27, T. 16 S., R. 28 W., Wa Keeney, Kansas, land district.

It appears from the record that on May 7, 1886, the said Mary Goode made application at the local office to make homestead entry for said land, stating in her affidavit that she had been deserted by her husband. Her application was rejected by the local office because it affirmatively appeared that applicant was "a married woman and consequently not legally qualified to make an entry under the homestead laws."

From this decision Goode appealed and in your said decision of May 31, 1888, you directed that her entry be allowed.

Pending the appeal of Goode and on June 9, 1887, Wilber made application to make homestead entry for said land but the same was rejected by the local officers for the reason that Goode's application was then pending on appeal.

Wilber appealed from such rejection and in your said decision of May 31, 1888, you approved the rejection of Wilber's application by the local officers.

From this decision he appeals upon the ground that said Goode was at the time of her application a married woman and not qualified to make entry under the homestead law.

In Goode's original application she swore that she had been deserted by her husband and she also stated in said affidavit that she was the head of a family. With her appeal from the decision of the local officers she filed her affidavit corroborated by two others stating that she was married to W. H. Goode on October 19, 1884, and had one child by him which was still living, that on March 7, 1885, her said husband deserted her, and that since said date he had not lived with her nor aided in the support of herself and child.

Wilber has filed no new evidence with his appeal from your said decision, and with his appeal to your office the allegations of his affidavits were simply that Goode was a married woman and therefore not qualified to make homestead entry, but in no place is it controverted that her husband had deserted her.

The only issue then is can a married woman the mother of a child then living and whose husband has deserted her make a homestead entry?

It is a settled ruling of the Department that a deserted wife depending upon her own resources for support is qualified to make homestead entry. See *Kamanski v. Riggs* (9 L. D., 186), and cases cited.

Your said decision is accordingly affirmed.

SOLDIERS' HOMESTEAD—MINOR—RESIDENCE.

LAMB *v.* ULLERY.

Residence is not required under a homestead entry made by a guardian for the benefit of the minor orphan child of a deceased soldier.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 30, 1890.

I have considered the case of Louis D. Lamb *v.* Alonzo B. Ullery, guardian of the minor heirs of Samuel Jacobs, a deceased soldier, on appeal by Lamb from your decision dismissing his contest against the homestead entry of Ullery, as guardian, for the NE. $\frac{1}{4}$ of Sec. 10, T. 3 S., R. 66 W., Denver land district, Colorado, and also upon the appeal of Ullery from your decision rejecting his final proof.

On March 17, 1884, Ullery as guardian of the minor heirs of Samuel Jacobs deceased made homestead entry for the tract of land in controversy.

On February 17, 1886, he offered final proof and the local officers decided that "the evidence of improvement and cultivation were not satisfactory," and rejected the proof. Ullery appealed to your office and on July 20, 1886, you affirmed said decision; from your decision he appealed to this Department.

On June 1, 1886, Lamb filed affidavit of contest alleging—

That neither the said Alonzo B. Ullery, Samuel Jacobs nor Mary Jacobs has ever become a resident of said land that they have wholly abandoned said tract; that they have changed their residence therefrom for more than six months since making said entry; that said tract is not settled upon and cultivated by said parties as required by law.

Notice of contest was duly given, and at the hearing thereof on July 6, 1886, both parties appeared, and the entryman filed a motion in writing,—

to dismiss the hearing in said case on the ground that the validity of said entry is now under consideration before the Honorable Commissioner of the General Land Office, upon appeal from a decision of the Register and Receiver, dated February 18, 1886.

This motion was overruled by the local officers, to which said ruling claimant excepted. The hearing was then set down for November 11, 1886, at which time both parties appeared, and upon hearing the testimony the local officers decided that the contest was sustained, and recommended the entry for cancellation.

From this decision the entryman appealed to your office.

When the appeal from the decision rejecting the final proof was considered in this Department it was found that evidence of the marriage of the mother of those minors, and also evidence from the War Department of the military service of their father, had been furnished after the case had been decided by your office and that the papers in the contest case of Lamb *v.* Ullery, guardian, had been transmitted, whereupon this Department by letter of May 5, 1888, returned the case with all of said papers to your office, "for due and proper consideration and disposition."

Your office, after again considering the case, by decision of November 19, 1889, decided that the pendency of the appeal from the decision rejecting final proof was not a bar to the hearing of the contest, but dismissed the contest on the evidence. You failed, however, to pass in express terms on the sufficiency of the final proof. From the decision dismissing the contest, Lamb appealed to this Department.

The testimony shows that Ullery was the legal guardian of these minors; that their father had served over four years in the United States army; that their mother was remarried; and the guardian, as such made settlement on this land in the spring of 1884; he purchased a house standing on the land, belonging to an entryman who had relinquished his claim to the tract; he employed a man to break five acres of land in the spring of 1884 (owing to the ground being hard to break, only three acres were broken); this was cultivated in 1884, and replowed and cultivated in 1885; carrots, turnips, etc., were raised on it. The heirs for whom this entry was made were quite young and lived with their mother, who had remarried. Their guardian, Ullery, lived in Denver, Colorado, and was an attorney at law. They had no estate, except a small pension—\$8 per month, and \$2 each additional per month until July 30, 1886, when they would both be sixteen years of age.

In 1885, some person went upon the land and carried away said house. There was no money belonging to the estates of the heirs or either of them to rebuild it. Some four witnesses who live adjoining the land testify concerning the cultivation of it, and as to the house being taken away. The cost of the house, and expense of the plowing, etc., amount to about \$300.

The contestant had seen the land only once before filing his affidavit, and he and the man who pointed the land out to him testified to the want of cultivation. They say the parcel broken did not look like it had been recently cultivated. Neither of them are farmers, and both comparative strangers to the land. They saw no house on the land. I do not think this testimony sufficient to sustain the affidavit of contest.

The first error assigned by counsel for appellant is:

Error in holding that where a homestead entry is made by a guardian in the name of, or for the benefit of a minor orphan child of a deceased soldier, residence on the land is not required either by said guardian or said minor.

In *Dorame v. Towers* (2 C. L. O., 131, December 4, 1875), this Department held:

I am also of opinion that the proper construction of section 2291 does not require the heir or devisee to reside in person upon the land, but that its provisions are substantially complied with by continual cultivation of the tract for the prescribed period of five years.

This decision was not reversed or modified, and remained the rule until 1884, when the following was inserted in the Circular of the General Land Office, page 23.

If the land is cultivated in good faith the law will be regarded as substantially complied with, although the widow or children may not actually reside upon the land.

This entry was made while that rule was in force.

In *Cleary v. Smith* (3 L. D., 465), this Department cited with approval *Dorame v. Towers* (*supra*).

In *Tauer v. The Heirs of Walter A. Mann* (4 L. D., 433), this Department again cited *Dorame v. Towers*, and also *Cleary v. Smith* (*supra*) and after quoting from the former case at length, added "The rule must be held the same whether the party in interest be the widow, or the heir or devisee."

The same principle was applied in case of *Peter W. Bennett* (6 L. D., 672), and in *Skiddie V. Cook* (7 L. D., 309).

In the circular from the General Land Office, January 1, 1889 (page 26) the rule laid down in 1884 was inserted *verbatim* and is still in force.

In *Swanson v. Wisely's Heir* (9 L. D., 31), the testimony showed that the entry was made March 7, 1883, and the entryman died August 26, 1883. It was not shown that he ever settled upon the land. The heir at law commenced the erection of a sod house on the tract and broke and cultivated several acres of land. This Department held that: "The heirs are not required to reside upon the land but only to culti-

vate it," and cited *Tauer v. The Heirs of Mann*, *supra*, also *Stewart v. Jacobs* (1 L. D., 636).

In *Alexander v. Ellsberry*, Guardian, etc. (10 L. D., 482, dated April 19, 1890), the same rule was followed. In that case the entry was made by the guardian of the minor heirs of a deceased seaman, the heirs who were quite young, never saw the land and the guardian never resided upon it.

"Homestead rights cannot be established or maintained by tenancies." *Leon v. Grijalva* (3 L. D., 362). See also *West v. Owen* (4 L. D., 412).

Such being the law the guardian cannot put a tenant on the land to hold possession or make a residence for the heirs, hence the rule in *Dorame v. Towers* and in *Cleary v. Smith* (*supra*),

The possession of an administrator or executor of a deceased claimant's estate is constructively the heirs' or devisees' possession. Such possession is maintained by continued cultivation, not by residence upon the land.

It cannot be reasonably demanded that a guardian should leave his home and business to go in person upon a homestead to make a residence for the sole benefit of his wards, and he could then only make a residence by virtue of his fiduciary capacity, and by the favor of the law; if he gives the land attention and cultivation, the law excuses his actual residence on it. If the heirs were compelled to make actual residence on the land, the object of the statute would be defeated in all cases where the children were too young to care for themselves.

Section 2305 Revised Statutes relates to homestead settlers, who have served in the army, navy or marine corps, and who being in full life make entry. Such entrymen must make settlement, and they must reside upon, improve and cultivate the land for the period of at least one year, no matter if their term of service was over four years.

Section 2307 provides—

In case of the death of any person who would be entitled (if living) to a homestead under the provisions of section 2304 . . . his minor orphan children, by a guardian . . . shall be entitled to all the benefits enumerated in this chapter, subject to all the provisions as to settlement and improvement therein contained, etc.

The word "residence" is omitted, and we cannot assume that it was accidentally left out of the requirements, nor can we enlarge the statute by a departmental decision.

If an entryman under section 2305, die after making entry, either before or after settlement, but before the one year residence required of him, his widow, if living, or minor heirs, come immediately under the provisions of section 2307, and are relieved from residing upon the land.

There was no error in the ruling that residence is not required of the guardian or his wards.

The four years service of Samuel Jacobs, deceased, left only one year of cultivation to complete the five years required by the homestead law, and the breaking one year and plowing the second year of the three acres would be sufficient to make a substantial compliance with the law. Your decision dismissing the contest is affirmed.

Notwithstanding the direction in letter of May 5, 1888, you failed in your decision of November 19, 1888, to pass upon the sufficiency of the final proof, in express terms, although you show that the entryman has clearly complied with the law. The facts in this case show satisfactorily a compliance with the requirements of law, and said final proof is therefore approved, and patent directed to issue thereon.

TIMBER CULTURE CONTEST—APPLICATION TO ENTER.

CARSON *v.* FINITY.

The pendency of an application to enter, filed by a second contestant with his affidavit of contest against a timber culture entry, operates to reserve the land subject only to the rights of the first contestant.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 1, 1890.

I have considered the case of Lee J. Carson *v.* John H. Finity, on appeal of the latter from your decision of December 11, 1888, cancelling his timber culture entry for the SW. $\frac{1}{4}$ Sec. 27, T. 8 N., R. 36 W., McCook land district, Nebraska.

On December 3, 1883, James T. Johnson made timber culture entry for said land.

On June 10, 1886, one Albert Redden instituted contest proceedings against said entry. Notice was given, the hearing was set for August 10, 1886, Johnson made default and decision was rendered for contestant.

On March 21, 1887, Redden filed a withdrawal of the case, at the same time Lee J. Carson filed affidavit of contest against said timber culture entry of Johnson, and also filed his application to make timber culture entry for said tract of land.

On December 8, 1887, the entry of Johnson was canceled on the records of the local office in accordance with directions from your office of November 14, 1887.

On December 8, 1887, John H. Finity made application to make timber culture entry for said tract, which was allowed subject to any rights of contestants.

On December 10, 1887, Carson again appeared at the local office and insisted upon his application, which was rejected for the reason that Finity had been allowed to make entry as above stated, and the local officers decided that Carson acquired no rights by virtue of his contest. From

this decision Carson appealed to your office, and on May 21, 1888, by your office decision you affirmed the decision of the local officers.

On July 17, 1888, Carson by his attorney filed in your office his motion for a review of your said decision and on October 13, 1888, having taken said motion under consideration, and in accordance with the principle laid down in *Kiser v. Keech et al* (7 L.D., 25), you sustained said motion and revoked your former decision of May 21, 1888, allowing Finity thirty days within which to show cause why his entry should not be canceled, and the application of Carson be allowed.

On November 13, 1888, Finity filed in the local office his affidavit setting forth the facts and circumstances of his entry. This was transmitted to your office, and filed December 11, 1888, and on said day upon consideration of the case in connection therewith, your office decision was rendered holding that Finity's right to enter was subject to Carson's preference right, and Carson was allowed thirty days in which to show that he is qualified to make such entry, in which case Finity's entry will be canceled.

From this decision Finity appealed, and the case is before this Department for consideration.

Counsel for Finity insist that Carson's application to make entry was made prior to the cancellation of Johnson's entry and pending the contest of Redden, and that his (Carson's) contest, being second to Redden's, gave him no rights as a contestant, under former rulings of this Department in force at the time Finity made entry, and that the decision of the Department in *Kiser v. Keech et al* (7 L.D., 25), would be retroactive if applied to the case at bar.

In *Kiser v. Keech et al.*, *supra*, it was held that—

Kiser having presented his application to enter the land in question, along with his contest filed March 13, 1886, such application operated, upon the ascertainment of the default, to reserve the land, subject only to rights of first contestant, Gore. The entry of Purdy was therefore made subject to the rights of both Gore and Kiser.

Counsel for appellant fail to show wherein the application of this principal, would be retroactive or what "former rulings and decisions" it violates, reverses or modifies.

In *Pfaff v. Williams et al.* (4 L. D., 455), it was decided that—

A legal application to enter is, while pending, equivalent to actual entry, so far as the applicant's rights are concerned, and its effect is to withdraw the land embraced therein from any disposition, until such time as it may be finally acted upon.

Carson made application to enter this tract on March 21, 1887. The application could not be acted upon until "the ascertainment of the default," of Johnson. Carson's application was subject only to Redden's right of entry. Redden failing to make entry, Carson's application, being on file, should have been acted upon. On December 10, 1887, he appeared and asked that it be allowed, but Finity had, upon December 8th, been allowed to make entry, notwithstanding the pendency of Carson's application. Finity knew of Carson's contest against

Johnson's entry, and of his application on file to enter if Johnson's entry should be canceled, and he knew of Redden's rights. He went upon a tract already in litigation, taking the chances that Redden might claim the land as contestant, or that Carson, Redding failing to enter, might hold it under his application, which was prior in time to his. He took his chances of securing title and is not in condition to complain. He filed subject to the rights of the contestant, and also to the rights of prior applicants.

Your decision is affirmed.

MINING CLAIM APPLICATION-RELOCATION-PROTEST.

CONTINENTAL GOLD AND SILVER MINING CO. v. GAGE.

Where a protest, by a prior applicant, is filed against an entry based upon a relocation, and it is alleged by the protestant that the claim was not subject to relocation, a hearing may be had to determine the truth of such allegation, as well as the counter-charge, that the right of the protestant under his application had been finally excluded by adverse proceedings prior to said relocation.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 2, 1890.

This record involves the validity of mineral entry No. 405 made by E. P. Gage September 18, 1886, for the Michigan Central lode claim, lot 179, Tucson, Arizona.

The said entry was based upon a relocation made January 14, 1884, by E. J. Jacklin.

Publication of Gage's application for patent to said Michigan Central claim, (filed March 15, 1886), was begun on March 17, 1886.

On May 15, 1886, Thomas Mitchell attorney for the Continental Gold and Silver Mining Company filed in the local office a protest against the allowance of such "final proof and entry of the said the Michigan Central claim."

This protest set up a prior claim by said company to the Modoc lode lot No. 106, "nearly the whole" of which was included in the Michigan Central survey and asked an opportunity to show that at the date of the said relocation upon which the latter claim is based that "the ground in conflict . . . was not open to relocation."

By letter dated May 18, 1886, to said Mitchell, attorney etc., the register found it "necessary to assert the adverse (Modoc) claim in the form of a regular adverse filing within the period of publication of the Michigan Central notice."

The said entry of Gage for the claim last named having been allowed as stated September 18, 1886, your office on December 22, 1888, examined the evidence relating thereto and required the local office (in effect) to state the exact status of said Modoc claim and also to forward a copy of the said reply (register's letter of May 18, 1886) to the protest hereinbefore referred to.

Upon the receipt of the evidence thus required your office on January 28, 1889, held for cancellation the said entry of Gage for the Michigan Central lode. The appeal of Gage from this action brings the case here.

The said Continental Gold and Silver Mining Company on March 10, 1882, filed its application for patent to the Modoc claim and publication thereof was begun on the 15th of the same month.

During the period of such publication (as shown in addition to the matters stated, by said company's protest against the Michigan Central claim) a claim adverse to the Modoc was filed by parties claiming "a part of the premises as a part of the Grand Trunk Mining claim" and on June 2, 1882, an action in support of said adverse claim was instituted in "the district court of the first judicial district of the Territory of Arizona in and for the county of Cochise."

By the decision appealed from your office found that the said suit was "pending and undetermined" at the date of the Michigan Central application and held that the ground in controversy had been appropriated by the said Modoc application and that the local office erred in requiring the Modoc claimants to adverse the Michigan Central instead of allowing them to show that said Modoc claim was not open to relocation as alleged by them and in "allowing entry upon said Michigan Central lode claim while there was a subsisting prior application for the same ground."

In the notice of location filed by said Jacklin for the Michigan Central claim it is set out that the same "formerly known as the Modoc" became subject to relocation by reason of its abandonment by prior claimants. In support of the appeal the appellants' counsel have filed a number of affidavits which set forth such abandonment and also a certificate by the clerk of said court to the effect, that a default had on May 7, 1883, been entered against the Continental Gold and Silver Mining Company (Modoc claimants) in the suit referred to.

Section 2324 Revised Statutes provides that,

On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the tenth day of May, eighteen hundred and seventy-two, ten dollars' worth of labor shall be performed or improvements made by the tenth day of June, eighteen hundred and seventy-four, and each year thereafter for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location.

Section 2326 provides that

when an adverse claim is filed . . . all proceedings except the publication of notice and making and filing the affidavit thereof shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction or the adverse claim waived.

If, therefore, the Modoc and Grand Trunk claimants had prior to the Michigan Central location, failed to work said claim as required by section 2324, *supra*, and if the said default operated as a final settlement of the suit between the said prior claimants then it would appear by the sections cited that the ground in controversy was properly subject to the Michigan Central location and that the entry in question should stand.

It is, however, expressly asserted in the said protest by the Continental Company (Modoc claimants) against the said entry that the ground involved "was not open to relocation."

I am, therefore, of the opinion that the matters thus in issue should be made the subject of further investigation to the end that the validity of the entry in question may be properly determined.

It is therefore directed that after due notice a hearing be had to determine whether or not the ground in controversy on January 14, 1884 (the date of the Jacklin relocation) was subject to relocation by reason of abandonment or failure by the prior claimants to comply with the stated requirements of section 2324, *supra*, and also whether or not the said default entered May 7, 1883, against the Continental Gold and Silver Mining Company was a "final judgment" (section 2326 *supra*) in the matter of the said adverse proceedings by the Grand Trunk claimants, against said company (Modoc claimants).

Upon the evidence adduced at the hearing thus directed you will readjudicate the case.

The decision appealed from is accordingly modified.

MINERAL LAND—AGRICULTURAL CLAIM.

PEIRANO ET AL. *v.* PENDOLA.

On issue joined between a mineral and agricultural claimant as to the character of land returned as mineral, the question for determination is, whether as a present fact, the land is more valuable for the mineral it contains than for agricultural purposes.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 3, 1890.

I have before me the appeal of Joseph Peirano and others, mineral claimants, from your office decision of July 20, 1888, reversing the local officers' decision of January 12, 1888, which held for cancellation Lorenzo Pendola's pre-emption cash entry, No. 8151, involving the W. $\frac{1}{2}$, NE. $\frac{1}{4}$, NE. $\frac{1}{4}$, Sec. 24, T. 2 N., R. 13 E., M. D. M., Stockton district, California.

The township plat was filed in the local office March 21, 1871, the tract in dispute being returned by the surveyor general as mineral land.

July 22, 1871, Pendola, the agricultural claimant, filed pre-emption declaratory statement, No. 5444, covering, with other land, the twenty acres in question, and alleging settlement June 22, 1868. December 5, 1883, said Pendola made application to offer final proof.

January 26, 1884, final pre-emption proof and payment were made by Pendola, after notice by publication.

March 1, 1884, Joseph Peirano and others, filed a protest against said cash entry, and petitioned for a hearing in which to prove that said W. $\frac{1}{2}$, of the NE. $\frac{1}{4}$, NE. $\frac{1}{4}$, Sec. 24, is mineral and held by them as the Mountain Slide placer mine under location made September 26, 1864.

February 13, 1885, your office ordered a hearing to determine whether said twenty acres were "more valuable for agricultural, mining, or other purposes."

April 23, 1885, such hearing was held, and under date of April 24, 1885, the local officers reported as follows :

After one witness had been examined the respective parties mutually agreed, that by mutual forbearance Peirano *et al*, could and should be allowed to extract the auriferous gravel without disturbing the surface, and that Pendola be permitted to perfect his title and receive patent under his cash entry No. 8151. It appearing from the statements of both parties to this contest that under their agreement each will be secure in the enjoyment of his property, we recommend that patent issue to Pendola upon his cash entry No. 8151.

Under date of May 10, 1887, your predecessor, Commissioner Stockslager, instructed the local officers as follows :

Owing to an apparent misunderstanding upon the part of the contestants and local officers alike, of the bearing upon the question at issue of the withdrawal of the mineral claimants from said contest, the testimony of record is too meagre and uncertain to furnish ground for a definite determination as to the comparative value of the land in question for agricultural or mining purposes.

The re-hearing so ordered was duly held in August, 1887, and on January 12, 1888, the local officers rendered their decision recommending the cancellation of Pendola's cash entry.

Under date of July 20, 1888, by the decision appealed from your office reversed the said decision of the local office, on the ground that, as appears by the testimony at the hearing the tract is, as a *present fact*, worth more for purposes of agriculture than for mining.

In this conclusion I concur, after a very careful consideration of the very voluminous and detailed mass of testimony in the record. Of the very substantial value of the tract in dispute for agricultural purposes, there is practically no real question. Pendola's improvements on this land consist of a dwelling, another house, a wagon shed, barn, corral, fencing, wine cellar, about three thousand grape-vines, about three hundred fruit trees of various kinds, irrigating ditches, a vegetable garden, etc.; the total value of such improvements being probably about \$5,000. Some four or five acres of the tract are in a high state of cultivation, and produce quantities of fruit, grapes for table and wine-making, vegetables of various kinds, and berries; also about twelve

tons of alfalfa hay a year; for all which the pre-emptor has a ready and profitable market at the various towns in the vicinity of the land. It seems clear that he, Pendola, derives from his agricultural operations on this tract, a net annual profit of about \$1,000 after allowing the prevailing wages to himself and three or four hands. On the other hand, as to the present value of the tract for minerals the evidence seems to me to tell against the contestant's claim. Though located as long ago as 1864, and worked on more or less at intervals, even before that, the claim appears not practically worth working, whether judged by the results reported (somewhat vaguely and mostly on hearsay,) or by the conduct in relation thereto of the various persons who have successively held it. Even according to the most flattering reports as to former workings, the profitableness of the mining claim can not be seriously compared with that of Pendola's orchard, vineyard, fields, and garden; and that showing, such as it was, can hardly be trusted as proving the mineral value of the tract "as a *present fact*." One owner or set of owners after another has left the claim unworked or has disposed of his or their interests therein for some \$200 or less, the transfer to the present claimants by Robert Douglass, in 1381,—after a very thorough acquaintance with the property—having been made for \$160. More than one set of prospectors have, after investigating, declined to purchase, even at prices clearly less than the value of Pendola's farm. The present claimants themselves ceased working the mine in June, 1883, and have betaken themselves to laboring for wages, though it seems that it would cost only \$150 to put the claim in working order.

Everything considered I must hold, upon this testimony, that the tract in dispute is not, "as a present fact, more valuable for mineral than for agriculture."

This the Department has held is the question to be determined on issue joined between a mining and an agricultural claimant. Cutting *v. Reininghaus et al*, (7 L. D., 265); Creswell Mining Company *v. Johnson* (8 L. D., 440).

In this connection the language of the United States circuit court for the district of Oregon in the case of the United States *v. Reed*, and another, 28 Federal Reporter, 482, seems peculiarly applicable. In the case cited the court after an exhaustive discussion of a like question, say—(p. 487)

The statute does not reserve any land from entry as a homestead, simply because some one is foolish or visionary enough to claim or work some portion of it as mineral ground, without any reference to the fact of whether there are any paying mines on it or not. Nothing short of *known mines* on the land, capable, under ordinary circumstances, of being worked at a profit, as compared with any gain or benefit that may be derived therefrom when entered under the homestead law, is sufficient to prevent such entry.

In view therefore of the matters herein before set out, the decision appealed from is hereby affirmed.

COAL LAND—SECOND FILING.

ALBERT EISEMANN.

A second coal declaratory statement can not be filed in the absence of a valid reason for abandoning the first.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 3, 1890.

Albert Eisemann appeals from the decision of your office of February 20, 1889, affirming the action of the local officers in rejecting his application made February 5, 1887, to file a coal land declaratory statement for the E.½ of NW.¼ and W.½ of NE.¼, Sec. 4, T. 14 N., R. 19 W., Santa Fe district, New Mexico.

The application was denied by your office and the local officers, on the ground "that the applicant had already made and filed coal declaratory statement No. 184" for another tract of land. It is insisted on appeal, that this ruling was erroneous, and that—

The filing of a coal declaratory statement, unless completed and payment is made for the land embraced therein as provided by law, does not exhaust the right of the applicant, and upon the expiration of such a filing there is nothing in the law or regulations to prohibit the filing of a second coal declaratory statement by the same party.

The statute does not expressly prohibit a second filing of a coal land declaratory statement, but provides that "only one entry" shall be authorized "by the same person or association of persons" (Rev. Stat., 2350). By section 2351, Revised Statutes, however, "the Commissioner of the General Land Office is authorized to issue all needful rules and regulations for carrying into effect the provisions of the law" relating to coal land filings and entries (Rev. Stat., sections 2347-2350). By Rule 9 of "Rules and Regulations" made under this statutory authority, and approved by Secretary Teller, July 31, 1882 (1 L. D., 688), it is provided, "One person can have the benefit of one entry or filing only. He is disqualified by having made such entry or filing, alone, or as a member of an association." By Rule 28, the applicant is required to declare under oath in his declaratory statement, among other things, that he has "never, held or purchased any coal lands" under the statutes relating to the sale of such lands, and at the time of actual purchase Rule 32 provides that he shall "solemnly swear" he has "never had the right of purchase" under said statutes, and has "never held any other lands" thereunder.

These rules, if authorized under the authority given in the statute (Section 2351, Rev. Stat.), have all the force and effect as law of the statute itself. (*Rogers v. Lukens*, 6 L. D., 111). I am of the opinion, they are "needful for carrying into effect the provisions of the law" and are authorized by it. The "provisions of the law" are contained

in sections from 2347 to 2351, inclusive, of the Revised Statutes. By section 2348, "any person or association of persons qualified" as prescribed in section 2347, "who have opened and improved" (or shall open and improve) "any coal mine or mines upon the public lands, and shall be in actual possession of the same," are given "a preference right of entry under said section 2347" of the mines so opened and improved," and, in order to secure this right as against "any other qualified applicant," a declaratory statement must be filed in case of surveyed lands "within sixty days after date of actual possession and the commencement of improvements on the land," or, if the land be unsurveyed, "within sixty days from the receipt of the township plat at the district office," and proof and payment for the land must also be made "within a year from the time prescribed for filing" such declaratory statement. (Sections 2349, 2350.) It is to be observed, in the first place, that, while the statute does not expressly limit a party to one filing of a declaratory statement, it also does not expressly give him the right to more than one, but provides that, on the prescribed conditions, he "shall be entitled to a preference right of entry." The departmental regulation limiting a party to one filing is not, therefore, in conflict with any express provision of the statute, and the question is, in the second place, whether said regulation is "needful for carrying into effect the provisions of the law." In expounding laws, where the intent is doubtful, consequences are to be considered. (Sedg. on Con., 226; J. B. Raymond, 2 L. D., 858). A filing on coal lands does not expire until twelve months after date thereof (Section 2350) and a party, without making proof and payment, may hold the land covered by such filing for said period in addition to that within which he is required to file. (Section 2349.) A construction which would admit a second filing, would allow an indefinite number successively for the same or different tracts. A party might continue to file for the same tract of land until he had exhausted the coal thereon, and, then, without paying the government anything, proceed to file on another tract indefinitely with the same result. He might hold one tract as long as he chose, or change as often as he saw proper, and all the while be paying the government nothing for the privilege and nothing for the coal he was using or selling. An interpretation of the law authorizing such an abuse would be in conflict with its spirit and "in derogation of the general rights of the public." (J. B. Raymond, *supra*.) It would enable a party to evade entirely the express requirements of the law, that proof and payment be made within twelve months after the date of the filing. /

In the case of John McMillan (7 L. D., 181), the first filing of McMillan had been made on a tract of land on which there was a prior claim of one Phelan, and the local officers had advised McMillan that he might either contest the claim of Phelan or make a second filing on another tract. He adopted the latter course, and in due course of time made proof and payment for the land covered by his second filing, and had

expended over \$50,000 in developing and improving it. On this state of facts, it is said in the departmental decision in said case :

The prior claim of Phelan having been in the way, McMillan would have been allowed on application to change his filing to a different tract. His not having applied is explained and excused by his having been advised by the local officers in effect, that the failure of his first filing of itself entitled him to file again for a different tract. No adverse claim to the land covered by his second filing having intervened, and McMillan's good faith not being impeached, and his improvements on the tract actually entered being very valuable, the authorization of the "second filing" may be and is hereby made *nunc pro tunc* and the cash entry, on the basis thereof, confirmed. It is unnecessary to go further in this case, and the question is reserved for further consideration when it shall arise, whether in any case a mere filing will defeat a second entry (meaning, doubtless, second filing).

Eisemann does not present any excuse for not consummating his first filing, but bases his claim to make a second solely upon the ground stated at the outset of this decision, that a coal land filing, "unless completed and payment is made for the land embraced therein, does not exhaust the right of the applicant, and upon the expiration of such filing there is nothing in the law or regulations to prohibit a second filing by the same party."

As we have seen, the regulations limit a party to one filing, and this is not in conflict with the statute, but "needful" for carrying its provisions into effect. This establishes the general rule, and a second coal land filing cannot be allowed in the absence of some valid excuse (such as was shown in the McMillan case, *supra*) for abandoning the first.

The decision of your office is affirmed.

DESERT LAND—DOUBLE MINIMUM.

HUGH REESE.

Within the limits of a railroad grant the price of desert land is properly fixed at double minimum.

An application to make desert entry cannot be allowed while the land is covered by a previous timber culture entry of the applicant.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 9, 1890.

I have considered the appeal of Hugh Reese from the decision of your office of December 29, 1888, affirming the decision of the local officers, which rejected his application to make entry, under the desert land act, of the S $\frac{1}{2}$ NE $\frac{1}{4}$, and the E $\frac{1}{2}$ NW $\frac{1}{4}$ of Sec. 10, T. 10 N., R. 7 W., in the Helena land district of Montana.

On the 27th of November, 1888, the claimant made application to enter the tract above described under the desert land act at one dollar and twenty-five cents per acre, and, at the same time, tendered payment of the cash instalment of twenty-five cents per acre. His application

was rejected on the ground that the land was within the limits of the grant to the Northern Pacific Railroad Company, and double minimum in value. He refused to pay the double minimum rate, and appealed to your office for redress, where the decision of the local officers was affirmed.

He now appeals to this Department, and, in effect, bases his appeal on the ground that the decision of your office is in contravention of the first section of the desert land act of March 3, 1877 (19 Stats., 377), and that the circular of this Department bearing date June 27, 1887, and reported in 5 L. D., p. 708, which fixes the price of desert lands within the limits of a railroad grant at double minimum rates, is also in contravention of the desert land act.

It appears of record that the lands in question constitute subdivisions of an even-numbered section within the forty miles limit of the grant to the Northern Pacific Railroad Company under the act of July 2, 1864 (13 Stats., 365), the sixth section of which provides that the alternate, or even-numbered, sections, within the grant, shall be held for settlement at double minimum rates.

Section 2357 of the Revised Statutes, which embodies the general act of March 3, 1853 (10 Stats., 244), provides that the alternate sections along the lines of railroads, within the limits of congressional grants, shall be two dollars and fifty cents per acre. And it is generally understood that no settlement can be made on such lands at less than the double minimum value. Desert land entries form no exception to this general rule. The rules and regulations of this Department, giving construction and effect to the laws relating to the alternate sections within the limits of railroad grants, allow desert land entries on such lands to be made, but invariably require the double minimum rates to be paid for them, unless otherwise provided and directed by some express act of Congress.

It has been held by this Department that the desert land act of March 3, 1877, does not repeal the provision in grants to railroad companies relating to double minimum lands, nor does it repeal section 2357 of the Revised Statutes, or the acts of Congress covered by its provisions. All these laws have been held to be *in pari materia*, though enacted at different times, and make no reference to each other. They are to be construed together as one system, imparting strength and validity to each other.

These views are fully sustained by the decisions of this Department in the cases of Daniel G. Tilton (8 L. D., 368); Annie Knaggs (9 L. D., 49); Cyrus Wheeler (9 L. D., 271), and by the different authorities referred to in each of said decisions.

It is not obligatory on entrymen to make entries of desert lands on the alternate sections within the limits of railroad grants; but when such entries are made, parties making them must conform to the laws of Congress relating to such lands, and to the rules, regulations and

decisions of this Department which construe and give effect to such laws.

In the decision of your office as rendered in this case, it is said that the records in the Land Department show that the lands in question are covered by a timber culture entry (No. 754), made August 18, 1883, by the same party, and that the lands, therefore, at the time the application was made for entry under the desert land act, were not subject to a desert land entry; and this furnishes another good and sufficient reason why his application should be rejected. But it must also be rejected on the law of the case, and under the decisions of the Department rendered in pursuance of such law.

The decision of your office is, therefore, affirmed.

HOMESTEAD ENTRY—MINOR HEIRS.

INSTRUCTIONS.

On the death of a homesteader, leaving adult and minor heirs, the title, under sections 2291 and 2292 of the Revised Statutes, inures to the minors to the exclusion of the adult heirs.

Secretary Noble to the Commissioner of the General Land Office, May 9, 1890.

Upon the receipt of yours of the 2d ultimo, in regard to sections 2291 and 2292, R. S., I referred the subject to the Assistant Attorney-General assigned to this Department, and herewith transmit a copy of his reply in which he expresses the opinion that the practice which has so long prevailed in the Land Office under the two recited sections, should not be changed. In this conclusion I concur, and you will therefore proceed under these two provisions of the law as heretofore.

OPINION.

Assistant Attorney General Shields to the Secretary of the Interior, May 2, 1890.

I am in receipt, by your reference, of a letter, dated April 2, 1890, from the Commissioner of the General Land Office, which I am requested to examine and give an opinion on the matters involved therein.

The Commissioner invites attention to the first portion of section 2291 and the whole of section 2292 of the Revised Statutes, relating to homesteads, which are as follows :

Sec. 2291. No certificate, however, shall be given, or patent issued therefor, until the expiration of five years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry; or if he be dead, his widow; or in case of her death, his heirs or devisee; or in case of a widow making such entry, her heirs or devisee, in case of her death, proves by two credible witnesses that he, she, or they have resided upon or cultivated the same

for the term of five years immediately succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated, except as provided in section twenty-two hundred and eighty-eight, and that he, she, or they will bear true allegiance to the government of the United States; then, in such case, he, she, or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law.

Sec. 2292. In case of the death of both father and mother, leaving an infant child or children under twenty-one years of age, the right and fee shall inure to the benefit of such infant child or children; and the executor, administrator, or guardian may, at any time within two years after the death of the surviving parent, and in accordance with the laws of the State in which such children, for the time being, have their domicile, sell the land for the benefit of such infants, but for no other purpose; and the purchaser shall acquire the absolute title by the purchase, and be entitled to a patent from the United States on the payment of the office-fees and the sum of money above specified.

The Commissioner observes that the first of these sections as quoted provides a means whereby the heirs of a deceased homestead entryman may acquire title to the entered land, without distinction as to age, and that the second section provides a means by which the homestead may inure to the benefit of the infant child or children, without the issue of patent to such child or children and without requiring continued residence or improvements upon the land.

He states that it has been the practice of his office, in cases where there are both adult and minor heirs, to hold that the title inures to the latter to the exclusion of the former. This practice his law clerks deem to be wrong, and think that section 2292 "was intended to apply in cases where infant heirs only were found." It is not very clear whether the Commissioner means to express his own opinion on the question, or whether he merely recites, in his letter, the views and arguments of his law clerks thereon. He concludes however by saying:

In view of the practice of this office having been of long duration to exclude adult heirs, I would respectfully submit the question for your decision for the future action of this office in such cases, respectfully requesting a reply at your earliest convenience.

I have but little difficulty in forming an opinion upon the question submitted, as the language of the sections referred to is plain and clear to my mind.

Section 2291 declares, in substance, that in case of the death of a homestead entryman before full compliance with the requirements of the law, the final certificate, to be followed by patent, at the designated time, and upon proper compliance with the prescribed conditions, shall be issued to (1) his widow, if he leave one, if not, then, (2) to his heirs or devisee. No distinction is here made as between adult and minor heirs.

Section 2292 qualifies the general provision of the preceding section, and says that in the case of the death of both parents, "leaving infant children the right and fee shall inure to the benefit of such infant child or children."

This language is direct and explicit, leaving in my mind little room for doubt as to its meaning. Under section 2291 the heirs, if of age, are entitled to the land in equal shares. But, if there be an infant child or children, section 2292 gives the entire right and fee to them alone. Against this view, it is urged that it works an injustice to the adult heirs, who, equally with the minors, should share in the estate of the parent. This might have been a forcible argument against the wisdom of enacting such a law, but the law having been enacted, this Department has no right to question its wisdom. When it is remembered that the adult heirs can procure public lands for themselves and in their own names by compliance with the land laws, and that minor heirs can not do so, the reason for the distinction is manifest.

Congress seems to have marked out a different rule for homesteads from that established in regard to pre-emptions. As to the latter, section 2269 of the Revised Statutes provides that in case of the death of a pre-emption claimant, before entry, it shall be made in the name of the heirs, and patent shall issue to them; no distinction on account of age is mentioned. But in the legislation in relation to homesteads, not only has Congress adopted section 2292 as to ordinary homesteads, but by section 2307 it has followed the same policy in regard to soldiers' homesteads, and there conferred the right of a deceased soldier, first upon his widow, if unmarried; and, in case of her marriage or death, then "upon his minor orphan children," and none others. It may be safely assumed from this that Congress was of the opinion that it was not unwise to protect infant orphan children, even to the entire exclusion of the adults.

It is further urged in the Commissioner's letter, that the construction which has heretofore prevailed renders sections 2291 and 2292 "inharmonious and incompatible;" but it is not shown wherein, and I fail to see that they are necessarily so.

These sections were both originally included in section two of the act of June 21, 1866 (14 Stat., 66). Section 2291 of the Revised Statutes was the first proviso of section two of said act, and section 2292 of the Revised Statutes was the second proviso of the same section and act—a proviso upon a proviso, a special exception carved out of the former provisions of the act.

In the construction of statutes it is a well settled rule that general words or provisions are to be restrained by particular words in a subsequent clause in the same statute, even though the particular intention is incompatible with the general intention. Dwarris, 110. A proviso is something engrafted upon a preceding enactment and is legitimately used for the purpose of taking special cases out of the general enactments, and providing specially for them. And, even where the proviso is repugnant to the purview of the act, the proviso will prevail, *ib.*, 118.

And so, where there are, in an act, specific provisions relating to a particular subject, they must govern, as against general provisions in other parts of the statute, although the latter, standing alone, would be broad enough to include the subject to which the more particular provisions relate. Endlich on Statutes, 288.

The intention of Congress as conveyed by the language of the two sections is clearly as indicated. I am therefore of the opinion that the practice, which has so long prevailed in the Land Office, under the two recited sections of the Revised Statutes, should not be changed.

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PRACTICE—APPEAL—NOTICE—SPECIFICATION OF ERRORS.

CONE *v.* BAILEY.

An appeal will not be entertained in the absence of due notice and specification of errors.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 10, 1890.

With letter of April 25, 1889, you transmitted the papers in the case of James W. Cone *v.* George H. Bailey, on appeal by the latter from your office decision of September 15, 1888, holding for cancellation his commuted homestead entry for the NW. $\frac{1}{4}$ Sec. 7, T. 100 N., R. 67 W., Yankton land district, South Dakota.

Bailey made homestead entry for said land April 9, 1883, and commuted same and made final proof January 7, 1884. On November 11, 1885, James W. Cone applied for leave to contest the said entry and on December 11, 1885, a hearing was ordered by your office.

The affidavit of contest alleged that Bailey failed to comply with the law in the matter of residence and that his final proof was false.

A hearing was ordered, and on the day set therefor, both parties appeared and submitted testimony, and on September 17, 1886, the local officers rendered their decision, holding Bailey's entry for cancellation. From this decision Bailey appealed, and your office affirmed the judgment of the local officers. Therefrom, Bailey took an appeal to this Department, in the following language.

George H. Bailey, the contestee in the above entitled cause prays an appeal from the decision in said case to the Hon. Secretary of the Interior and asks that your Honor immediately transmit all the evidence, etc.

This paper was dated December 4, 1888, and was received and filed December 13, 1888. June 21, 1889, contestant filed a motion to dismiss "the so-called appeal," because—

First: said paper was not an appeal.

Second: because said defendant has not filed within the time allowed for giving notice of appeal, a specification of errors of which he complained as required by Rule 88 of Rules of Practice.

Third: because defendant has not served upon contestant a copy of the notice of appeal as required by Rule 93 of the Rules of Practice.

On July 5, 1889, a paper was received at your office from George H. Bailey, in which he states that he has a letter from the attorney of Cone, notifying him of the motion to dismiss the appeal. He asks to be permitted to file proper specifications, and says as an excuse for not filing them within rule, that he is poor and has no attorney, and is ignorant of the law and the rules of practice, and as excuse for not serving notice of appeal, within rule, he says—"that by due inquiry he failed to find the abiding place of said contestant," etc. He accompanies said letter with a list of specifications of error—fourteen in number—to the effect that said decision was against the weight of evidence and against the law.

Affidavits were filed in support of said motion to dismiss, showing that Cone had been during the time from January 1887, to the filing of the motion to dismiss living in the county where the land is situated. The papers filed by Bailey show that he was in Illinois.

In Rudolph Wurlitzer (6 L. D., 315); it is said that the words—"I . . . do hereby appeal," might be regarded as an appeal, but the motion for a writ of certiorari was denied, because

On the showing made by the petitioner his appeal (a copy of which is embodied in his application), would, if before the Department with the record in the case, be dismissed under Rules 88 and 90 of practice for want of specifications of error. See, also, *Hortou v. Wilson* (9 L. D., 560); *Sapp v. Anderson* (9 L. D., 165).

There is no prescribed form of words necessary to be used in an appeal—"The above entitled contestee in the above cause prays an appeal from the decision in the case," would be an appeal, but Rule 88 of Practice prescribes that "within the time allowed for giving notice of appeal the appellant shall also file in the General Land Office a specification of errors, which specifications "shall clearly and concisely designate the errors of which he complains." And by rule 93,—“A copy of notice of appeal, specification of errors, . . . shall be served on the opposite party within the time allowed for filing the same.”

Ignorance of law cannot excuse the appellant, nor can poverty excuse him from complying with the plain rules of practice in the matter of filing specification of errors.

As to the want of service of copy on opposite party, his excuse that he could not find the abiding place of the appellee is not sufficient. It does not set out what efforts were made to find Cone's whereabouts, nor is it alleged that the residence of the attorney was not known, and it is shown by affidavit that Cone lived in the county in which the land lay in Dakota, where the entryman would have naturally expected to find him. Furthermore, the statement that is made is not verified. There was not a substantial compliance in this case with the requirements of the Rules of Practice. The appeal was not perfected. The motion will be sustained and the appeal dismissed.

HOMESTEAD ENTRY—FINAL PROOF—ALIENATION.

EDWARD BOWKER.

An attempted transfer of a homestead claim before final proof gives the transferee no standing before the Department to show that the claimant has complied with the law.

Where notice of a decision holding a homestead entry for cancellation for failure to submit final proof within the statutory period, is not given the claimant, he may be allowed an opportunity to submit such proof, and the entry in such case may go to the board of equitable adjudication if substantial compliance with law is shown.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 12, 1890.

This case comes before the Department upon an appeal taken in the name of Edward Bowker from the decision of your office, rendered February 11, 1889, holding for cancellation the final certificate and original homestead entry made September 15, 1888, for the NW. $\frac{1}{4}$, Sec. 26, T. 139 N., R. 63 W., Fargo, Dakota, by John W. Johnson, as guardian of Edward Bowker, minor child of S. W. Bowker, a deceased soldier.

It appears from the records that John W. Johnson applied for and received from the circuit court of Buchanan county, Iowa, letters of guardianship of the person and property of Edward Bowker, minor heir of S. W. Bowker, deceased, and as such guardian made homestead entry of the tract aforesaid, on September 15, 1881, under the provisions of the act of June 8, 1872, giving homesteads to honorably discharged soldiers and sailors, their widows and orphan children (Section 2307, Revised Statutes).

On December 1, 1883, he appeared with his witnesses before the probate judge of Stutsman county, Dakota, pursuant to notice, and offered final proof, and on January 7, 1884, he made homestead entry and received final certificate therefor.

The testimony as originally written showed that the guardian of Bowker commenced to improve the land some time in the spring of 1882, but it was afterwards changed by writing the figure "1" across the figure "2," so as to show that the improvements were commenced in the spring of 1881.

This case was taken up by your office on November 23, 1884, and it appearing from the record that the said Edward Bowker had reached his majority at the date of final proof, your office required the affidavit of non-alienation to be made by the said Edward Bowker, and that he identify himself with the claim as presented. Pursuant to said instructions, an affidavit, executed by Edward Bowker, March 30, 1885, before E. M. Thompson, a notary public, at Independence, Iowa, was forwarded to your office, in which the affiant stated that he made said entry through his guardian, J. W. Johnson, who made settlement upon and began cultivation of the tract in June, 1882 (afterwards changed to

1881, by marking the figure "1" over the figure "2" as in final proof); that said entry was made for the use and benefit of affiant; that it had not been alienated at date of final proof; that he was the sole *bona fide* owner of said tract, as sole heir at law of S. W. Bowker; that he will bear true faith and allegiance to the government of the United States, and that he makes this affidavit in Iowa, where he was then living, because he could not go to the land office without great expense.

Upon the receipt of this affidavit, your office on May 22, 1885, again rejected the final proof, for the reason that the claimant failed to comply with the provisions of the homestead law. From this decision an appeal was taken to the Department by C. W. Davis, as attorney for Edward Bowker, and, on July 17, 1888, the Department affirmed the decision of your office rejecting the proof offered by the guardian and canceling the final certificate issued thereon, upon the ground that final proof made by the guardian after his ward has reached majority can not be accepted, and the final certificate issued upon such proof must be canceled (Edward Bowker, 7 L. D., 34). But under the ruling of the Department in the case of David Thomas (4 L. D., 331), that the cancellation of the certificate issued upon the proof submitted by the guardian will not bar the right of the beneficiary to submit proof and make final affidavit, your office was instructed to notify Bowker of his right to make final proof within ninety days after notice.

It appears that notice of this decision was mailed to Edward Bowker, claimant, at Ypsilanti, Dakota Territory, W. E. Dodge, attorney for claimant, at Fargo, D. T., and Henry Mulberger, present owner, at Watertown, Wisconsin. On December 1, 1888, the register notified your office that the notice to claimant Edward Bowker was returned to the local office as uncalled for, and that W. E. Dodge, his attorney, and Henry Mulberger, the present owner, were notified of said decision August 15, 1888, and that no action had been taken in response thereto. Whereupon your office, February 11, 1889, held the entry for cancellation, because the time in which the entry should have been perfected (having been made September 15, 1881,) expired by limitation September 15, 1888. Notice of this decision was mailed to Edward Bowker, at Ypsilanti, D. T., W. E. Dodge, attorney, at Fargo, D. T., and Henry Mulberger, at Watertown, Wisconsin.

On April 27, 1889, the register notified your office that the notice to Bowker had been returned to the land office as uncalled for, and that Dodge and Mulberger received said notice February 16, 1889, and at the same time transmitted an appeal filed by H. E. Sox, as attorney for claimant Edward Bowker, said appeal alleging as ground of error the failure to refer said case to the board of equitable adjudication for confirmation. In the meantime, F. M. Heaton, attorney for E. P. Wells purchaser of said land from Edward Bowker, filed an affidavit of Johnson, guardian, with an accompanying letter from N. C. McFarland, Commissioner of the General Land Office, dated October 22, 1881,

addressed to said Johnson informing him that under section 2309 of the Revised Statutes the minor orphan of a deceased soldier may make homestead entry through a duly constituted guardian; also an affidavit by Henry Mulberger, present owner of said land, who states that he was never acquainted with Bowker, but that on March 30, 1886, he purchased the land from Edward P. Wells, the then owner, for \$1600; that the attached paper, marked exhibit A., is an abstract of the title to said land, and that it is impossible to secure Edward Bowker to remedy the defects in the proof, and he asks that "his equitable rights in said land may be preserved and the cash entry approved for patent." The exhibit referred to has not been found amongst the papers.

On July 1, 1889, your office transmitted to the Department a letter from Edward Bowker, dated June 1, 1889, written from Whitney, Dawes county, Nebraska, in which he states that Johnson was making final proof without his leave, and that he (Bowker) had not signed any paper making final proof.

The final proof made by Johnson, guardian, was rejected, and the final certificate issued thereon was canceled by the decision of the Department, July 17, 1888, for the reasons heretofore stated, and no cause is now shown why the ruling thereon made should not be adhered to. As the claimant can not alienate the land before final proof, an attempted transfer of the claim before the making of final proof, in accordance with law, will not give the transferee a standing before the Department for the purpose of showing that the claimant complied with the law, as the law requires, as part of the final proof, that the claimant must make affidavit that he has not at date of final proof alienated the land; nor is there any rule under which this entry may be submitted to the board of equitable adjudication. However, as it is shown by the record that the claimant did not receive notice of the decision of your office, of February 11, 1889, and therefore had no opportunity to appeal therefrom, he should now be allowed to submit proof, within a reasonable time. Besides, the first appeal was taken in the name of claimant by C. W. Davis, as his attorney, and notice of the decision upon that appeal was sent to W. E. Dodge, the attorney of Johnson, guardian. The present appeal is taken in the name of claimant by H. E. Sox, and it nowhere appears from the record that either of them had authority to represent him.

I therefore direct that the claimant be notified that he may yet submit final proof upon said entry, within ninety days from notice of this decision, and if it appears that by reason of ignorance of the law the entry was not made within the period prescribed by the statute, and the law has in all other respects been complied with, the case may be then submitted to the board of equitable adjudication, under Rule 24, and you will also advise Henry Mulberger of this decision.

The decision of your office is modified.

PRE-EMPTION—MINOR HEIRS—FINAL PROOF—RESIDENCE.

ARNOLD *v.* COOLEY.

Final proof on behalf of minors, sole heirs of a deceased pre-emptor, may be submitted by the guardian of said minors, where such guardian, by the laws of the State is charged with the care and management of the minors' estate.

The heirs of a deceased pre-emptor are not prevented from making final proof, and perfecting purchase, by the fact that the pre-emptor died without executing the affidavit required in section 2262, Revised Statutes.

After residence is once established the continuity thereof is not broken by absence from the land caused by judicial restraint.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 12, 1890.

I have considered the appeal of Thomas L. Arnold from your office decision of November 23, 1888, involving the S. $\frac{1}{2}$ SE. $\frac{1}{4}$, section 26, and NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, section 35, T. 18 S., R. 37 E., La Grande land district, Oregon.

It appears that John A. Cooley filed his pre-emption declaratory statement for the S. $\frac{1}{2}$ SE. $\frac{1}{4}$ Sec. 26 and E. $\frac{1}{2}$ NE. $\frac{1}{4}$ Sec. 35 of the said town and range on April 4, 1885, alleging settlement March 28, 1885, and that Thomas L. Arnold filed his pre-emption declaratory statement for the S. $\frac{1}{2}$ SE. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SE. $\frac{1}{4}$ of said section 26, and NE. $\frac{1}{4}$ NE. $\frac{1}{4}$ of said section 35, same town and range, on February 15, 1886.

It further appears that John A. Cooley was burned to death in the jail of Baker City, Oregon, during the month of August, 1885, and that he left surviving him two children of the age of three and five years, respectively. His father, N. G. Cooley, was duly appointed guardian of the said minor children August 14, 1885, and due notice was given October 25, 1886, of his intention as such guardian to make final proof in support of the said pre-emption filing of John A. Cooley, on December 6, 1886.

It further appears that on October 14, 1886, Thomas L. Arnold gave notice of his intention to make final proof in support of his claim November 25, 1886. The published notice did not describe the land covered by his claim correctly. Instead of the NW. $\frac{1}{4}$ SE. $\frac{1}{4}$ Sec. 26, as it should have been, the notice had it the NW. $\frac{1}{4}$ of said section.

On November 25, 1886, Arnold submitted his proof. N. G. Cooley as guardian as aforesaid had filed his protest against its acceptance the day previous and the local officers suspended action on the proof.

On December 6, 1886, N. G. Cooley as guardian as aforesaid, submitted his final proof; against the acceptance of which proof Arnold protested.

The local officers on January 22, 1887, decided that the final proof of N. G. Cooley made as guardian of the minor heirs of John A. Cooley, deceased, should be accepted.

Upon the appeal of Arnold, your office by said decision of November 23, 1886, affirmed the action of the local officers and determined that the contest of Arnold should be dismissed.

Arnold, thereupon, took a further appeal to this Department. He objects to the admission of the proof submitted on behalf of the minor children of the deceased pre-emptor by their guardian, because the law, as he claims, does not authorize a guardian to make final proof in pre-emption cases.

Section 2269 Revised Statutes, provides that such proof shall be made by the executor or administrator of the estate of a deceased pre-emptor or one of his heirs. In the case at bar the pre-emptor died intestate and no administrator of his estate was appointed, indeed since he left no personal estate, there seemed to have been no necessity for such an appointment. By section 3098 of the Code of Oregon the said children were the sole heirs of the said deceased and it was proper for them or either of them, to make the proof.

They, on account of their nonage, could not act for themselves, and it was therefore proper that their guardian, who by the laws of Oregon (see section 2883 of the Code of the said State) has the care and management of their estate, should act for them. When the guardian makes the final proof he does it in his representative capacity and his proof is in fact the proof of the minors. I therefore hold that the guardian of the said minors in this case was duly qualified to make the proof.

A further objection to the admission of the proof is advanced in the argument. It is claimed that because the said pre-emptor before his death had failed to make the pre-emption affidavit required by section 2262 of the Revised Statutes, his heirs never can make the necessary proof and therefore never can succeed to the pre-emptor's right in the matter of his claim.

It is clear that the said affidavit is to be made by the pre-emptor at or about the time of the making of the proof; it can not be made earlier and be of validity. To hold otherwise would enable the pre-emptor long prior to the proof to contract for the sale of his claim without endangering his entry provided he uses the precaution to make his said pre-emption affidavit before entering into the agreement for the sale. The practice always has been to make the affidavit at the time of the final proof and subjoin it to the record of it. If this objection should be held good in this case it would virtually repeal section 2269 of the Revised Statutes, for in no instance can proof be made before consummation of the claim.

I am of the opinion that the said objection should not prevail.

The testimony shows that John A. Cooley was a qualified pre-emptor. He was a married man, his family consisted of a wife and two small children of the ages of three and five years. He commenced his residence on the land early in May, 1885, and continued to reside thereon continuously until July 7, 1885. His wife being insane was an inmate

of a hospital at Salem, Oregon. In May, 1885, he built a dwelling house on the land of the size of eight by twelve feet; also three corals; he also dug a cellar, broke and fenced one acre and planted a number of fruit trees and shrubbery; these improvements valued at one hundred and fifty dollars were made by him within two months from the time he established his residence on the land.

It seems to me that his good faith in the matter of his filing and up to the time of his arrest is fully apparent from the evidence. His absence from the land from that day till his death was the result of judicial restraint and his residence was therefore not interrupted thereby. *Anderson v. Anderson* (5 L. D., 6); *Parsons v. Hughes* (8 L. D., 593).

It is my opinion that the proof made by N. G. Cooley as guardian of the minor heirs of the deceased pre-emptor should be accepted and that, upon further compliance with the requirement of the pre-emption law, patent should issue to the heirs of John A. Cooley, deceased, in accordance with the provisions of the said section 2269 of the Revised Statutes.

Your said office decision is affirmed.

REPAYMENT—FRAUDULENT ENTRY.

MICHAEL LYDON.

Repayment can not be allowed where the entry is canceled for the reason that it was procured on false testimony.

Secretary Noble to the Commissioner of the General Land Office, May 12, 1890.

March 8, 1884, Michael Lydon filed pre-emption declaratory statement, No. 2375, for the W. $\frac{1}{2}$ of NW. $\frac{1}{4}$, Sec. 22, T. 38 N., R. 4 W., Lewiston district, Idaho, alleging settlement the same day. September 20, 1884, he made proof and payment, and received final receipt and certificate.

The proof having been taken on a day other than that named in the published notice, the claimant was "allowed by your office ninety days in which to make new publication (with proper posting of notice) and to make new proof." This new proof, after due publication and posting of notice, was submitted, April 14, 1888.

In the proof originally made, the claimant and his witnesses, in answer to the question, whether his residence had been continuous, answered simply, that it had. On making the new proof, the claimant testified, that he was only on the claim about once a month, at which time he would stay over night, and the balance of the time he lived with his family (four small children) in his house in Lewiston, where he had

lived before initiating his claim. The improvements were valued at \$77.50, and consisted of three acres of breaking and a timber house, twelve by fourteen feet. The local officers disapproved the new proof, on the ground as stated by them "of lack of residence, cultivation and good faith generally." August 30, 1888, the entry was held for cancellation, and, no appeal having been taken from said action, the entry was canceled January 26, 1889, your office not "considering the showing satisfactory as to the good faith of the claimant in the matters of residence and improvements." February 18, 1889, the claimant filed an application for repayment of the purchase money paid on making said entry. By decision of March 2, 1889 (from which the claimant appeals), your office held that this application should not be granted, for the reason, substantially, that the proof originally made upon which the entry was allowed showed on its face compliance with the law and the entry was canceled because that proof was shown by the new proof to have been false.

Section two, act of June 16, 1880, (21 Stat., 287,) provides that "in all cases" where entries of public lands have been "from any cause, erroneously allowed and cannot be confirmed," the amount of purchase money, fees and commissions may be repaid. In construing the words "erroneously allowed" as used in the act this Department in the General Circular of January 1, 1889 (pp. 66, 67), says:

"If the records of the Land Office, or the proofs furnished, should show that the entry ought not to be permitted and yet it were permitted, then it would be 'erroneously allowed.' But, if a tract of land were subject to entry and the proofs showed a compliance with law, and the entry should be canceled because the proofs were shown to be false, it could not be held that the entry was 'erroneously allowed;' and in such case repayment would not be authorized."

Your office decision was based on this interpretation of the words "erroneously allowed." While, however, it may be true that on its face the proof in this case as originally made showed compliance with the law and hence the entry was not "erroneously allowed" because of insufficiency in the proof itself, yet it was "erroneously allowed" for another reason, namely, said proof was not made on the day designated in the published notice. The language of the act is broad, embracing "all cases, where from any cause, the entry has been erroneously allowed," and it is held by this Department (Duthan B. Snody, 1 L. D., 532), that where entry for any cause had been erroneously allowed, no fraud appearing, repayment should be made." The entry having been erroneously allowed for the reason above stated, the question is, whether in making the original proof the claimant intended to perpetrate a fraud on the government.

The fraud, it may be conceded, which will authorize a limitation or denial of the right of repayment so broadly given in the act is inten-

tional fraud, or fraud in fact as distinguished from fraud in law. The new proof shows, that the claimant owned a house in Lewiston, where he lived with his family before initiating his claim, and that he continued to reside there after initiating it, only visiting the claim once a month and these visits ceasing after he made his original proof—that, in fact, he never established, much less maintained for any length of time, residence on the land. In the face of these admitted facts, he swore unqualifiedly in making his original proof, that his residence on the land from the date of his alleged settlement to that of said proof had been “continuous.” No explanation, if there could be any, is attempted. By this original proof, shown to have been false by his new proof, he procured the allowance of his entry, and but for the circumstance that the original proof was submitted on a day other than that named in the notice, would doubtless in due course of time have received a patent from the government. This, I am constrained to hold, is a case of fraud such as under the rule above announced justifies the denial of an application for repayment. The decision of your office is therefore affirmed.

HOMESTEAD ENTRY—COMMUTATION—ABANDONMENT.

SWEETZER v. MOORE.

A homesteader who submits satisfactory commutation proof, accompanied by tender of payment, is thereafter under no obligation to remain on the land or show further compliance with law.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 14, 1890.

I have considered the appeal of W. A. Sweetzer from your office decision of July 9, 1888, dismissing appellant's contest against the entry of Maurice A. Moore, for lot 3, Sec. 30, and lot 1, Sec. 31, T. 34 S., R. 17 E., Gainesville, Florida.

Said Moore made homestead entry of said tract on March 12, 1884; offered commutation proof thereon May 26, 1885, alleging settlement October, 1880, and continuous residence from time of settlement.

The facts are fully set forth in your said office decision, and the only error assigned thereon is in not allowing a contest to proceed, which was instituted by W. A. Sweetzer against said entry, on June 25, 1888.

It appears that about the time the proof was submitted, Special Agent Coffman caused a suspension of the proof. In his letter to your office of June 10, 1885, he charges, among other things, that Moore has never at any time resided on said tract, nor in any way improved the same. Thereupon, your office twice directed Special Agent Dell to investigate

the charges made in Coffman's report. It appears also, that the entryman, Moore, was very solicitous to have said charges investigated. Finally, Agent Connor was instructed to report in the matter, which he did in a report dated May 14, 1888. With Connor's report an affidavit of one A. T. Adams is filed, which states the following: "Claimant and his family lived on the place most of the time from the time he moved in the house (October, 1880,) until he made final proof (May 26, 1885)."

The evidence shows absences from the land, but such absences were clearly excusable and did not break the continuity of the residence from the time of said entry until the proof was submitted. As to the value of the improvements placed on the land by claimant, the evidence is conflicting. But, taking the evidence as a whole, the great preponderance of the same shows the good faith of the claimant, and fails to sustain the charges made by Agent Coffman.

This conclusion was reached by the local office, September, 1886, and claimant called upon for the purchase money, pending which the entry was suspended. Afterwards, on October 23, 1886, Moore's proof was rejected, for the reason that he failed to remit the purchase money. But it appears the letter of rejection was sent to Palma Sola, Florida, in place of Navigation Bureau, Treasury Department, Washington, D. C. Moore offered to pay the money when the proof was first submitted, and claims to have been ready to pay it at any time, and the local officers erroneously addressed him in Florida, when, by previous correspondence with him, they knew his address was Washington, D. C.

Sweetzer's contest affidavit, dated June 25, 1888, merely shows that "said Maurice A. Moore has wholly abandoned said tract; that he has changed his residence therefrom for more than six months since making said entry; that such tract is not settled upon and cultivated by said party as required by law." Said affidavit fails to aver specially that the period of abandonment and want of cultivation was after the entry and before the commutation proof was submitted.

It appearing that claimant tendered the money in payment for the land at the date when he submitted his commutation proof, and that said proof was satisfactory, it having shown compliance with the law, claimant was after its submission under no obligation to show further compliance with the homestead law. He was then at liberty to leave the land, and his doing so did not impeach his good faith, nor impair his rights.

Your said office decision dismissing Sweetzer's contest is affirmed. Moore will be given thirty days in which to make payment for the land.

SECOND HOMESTEAD ENTRY—UNTILLABLE LAND.

SAMUEL P. DURHAM.

A second homestead entry may be allowed, where the tract covered by the first is untillable, and it appears that such entry was made through mistake, though proper diligence was exercised in attempting to determine the location and character of the land intended to be entered.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 14, 1890.

I have considered the appeal of Samuel P. Durham from the decision of your office dated December 27, 1888, rejecting his application to make homestead entry for the NE. $\frac{1}{4}$ Sec. 23, T. 15 S., R. 30 W., Wa Keeney land district, Kansas.

October 23, 1885, said Durham made homestead entry for the NW. $\frac{1}{4}$ Sec. 8, T. 16 S., R. 31 W., in the same land district.

May 14, 1886, Durham appeared at the local office and made application to make homestead entry for said quarter in section 23; he also presented a voluntary relinquishment for the tract covered by his former entry and accompanying his application and relinquishment he filed his own corroborated affidavit in which he alleges—

That prior to making said entry he met one J. J. Jackson, doing business as a land locator at Scott City . . . whom affiant employed to select for him a homestead; that the said Jackson selected the tract above described which he represented as being situated on a large level plain in said township, which representation affiant believed to be true; that the said Jackson was further corroborated by a party of six new settlers who had lately made settlement in said township who stated to affiant that the land he was about to enter was on said level plain and in every way as represented by said locator; that he relied on said representations as he was unacquainted with the section lines and location of any tracts in said vicinity, and after making said entry returned to his family in Republic county, Kansas, and began his preparations to remove to his homestead claim . . . ; that on the 19th day of April 1886, he arrived at what he supposed was the tract embraced in his homestead entry with his wife and children, household furniture and farming utensils, and every thing necessary to begin his residence on said land; that before commencing to build thereon he deemed it prudent to secure the services of a competent surveyor to locate the corners of his land with certainty, and therefore employed one Robert Hickman, a surveyor of experience . . . to make such survey, which to affiant's disappointment and surprise showed the land embraced by said entry to be not on said level plain as had been represented to him, and as he had supposed at the time of making said entry, but to be situated near one mile north therefrom among some rocky bluffs; that the land really embraced by said entry instead of being nice level prairie land . . . is a mass of rocks and blue shale, on which not to exceed five acres is suitable for cultivation while the level south therefrom where affiant supposed his homestead was located, is all tillable and is now all entered by other claimants. Affiant having been misled as above stated now desires to relinquish said entry without prejudice to his right to enter other lands. He further states that he has not assigned, transferred, sold or disposed of nor agreed to sell, assign, transfer or dispose of any right or interest acquired under said erroneous entry . . . and that this application for a change of entry is not made for the purpose of enabling any other person to enter the originally entered tract . . .

He further states that J. J. Jackson who located him on said land, has departed from the State and that he (affiant) does not know the whereabouts or names of the settlers who corroborated Jackson's statement.

The local officers declined to file said relinquishment, and wrote on the back of the homestead application the following viz:—

The within application was presented this 14th day of May 1886, and rejected for the reason that the applicant Samuel P. Durham has heretofore on the 23rd day of October 1885, made homestead entry No. 9874, upon the NW. $\frac{1}{4}$ Sec. 8, T. 16 S., R. 31 W., which entry still remains intact on the records of this office.

(Signed)

W. A. PILKENTON, Receiver.

May 27, 1886, Durham appealed. April 27, 1887, the register and receiver, reported to your office that they had carefully examined this case "which apparently shows good faith; we are of the opinion that his said application (should) be allowed, and he be permitted to make entry for the land described."

December 27, 1888, your office decided that Durham had not "exercised proper diligence in ascertaining the true condition and correct description of the land he sought to enter. By such means he would have learned these facts as readily before as after entry," and affirmed the action of the local office rejecting said second homestead application and refusal to file said relinquishment.

Claimant appealed to this Department.

It appears from the record in this case that the tract covered by Durham's entry is utterly worthless for agricultural purposes, and land upon which no poor man could make a living for his family. It also sufficiently appears that said entry was made by mistake, and that Durham exercised proper care and diligence in attempting to ascertain the true location and condition of the land he sought to enter. Therefore, and in view of his apparent good faith, and as he has already filed a relinquishment of said first entry, and as I find that the case at bar is somewhat similar to the case of Edwin Edwards (8 L. D., 429), his application to make a second homestead entry will be allowed.

Your office decision is accordingly reversed.

DESERT LAND ENTRY—GRAZING LANDS.

KEYS *v.* RUMSEY.

A tract bordering on a stream, and containing living springs, and that includes land that produces a natural growth of grass in paying quantities, and trees of native growth, is not subject to desert entry.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 15, 1890.

I have considered the appeal of Philo Rumsey from the decision of your office of September 11, 1888, holding for cancellation his desert land entry (No. 1223) of the NE $\frac{1}{4}$ NW $\frac{1}{4}$, and NE $\frac{1}{4}$ Sec. 10, T. 13 N., R. 73 W., in the Cheyenne land district of Wyoming Territory.

On the 8th of January, 1884, Rumsey filed a declaration of his intention to reclaim the above-described subdivisions of the public land, containing two hundred acres, under the desert land act of March 3, 1877 (19 Stats., 377).

On the 10th day of April, 1886, William L. Keys filed an affidavit of contest, in which, among other things, he alleged (1) that the tract in question, entered by Rumsey, is not desert land in character; and (2) that the said land was entered in the interest of another party for speculative purposes, based on fraud.

To test the allegations of this affidavit, a hearing was ordered to take place before the local officers on the 24th of May, 1886. At the time and place specified in the order, the contestant and the entryman appeared with their respective attorneys and witnesses, and submitted their testimony. Upon consideration thereof, the local officers found against the contestant and recommended that the entry be allowed to stand. From this judgment he appealed to your office, where you reverse the local office and hold the entry for cancellation; whereupon Rumsey appealed to this Department. In his appeal he specifies numerous errors, all of which, however, duly considered, may be classified under the general head that your decision, as rendered, is contrary to the facts of the case and to the law bearing upon the points at issue.

I have examined the record and find that the evidence introduced at the hearing, though contradictory and irreconcilable, satisfies me that a small stream, known as "Willow Creek," flows through the land in controversy and that the same as located, controls the water front on both sides of the said stream; that a very valuable spring; one of the largest and best on the "Laramie Plains," bursts forth from this tract, moistens and enriches the land and furnishes an abundant supply of water for sheep and cattle, and thus renders the land invaluable for grazing purposes; that large flocks of sheep and cattle have been herded on this land for several years; and a "bog," or marshy piece of ground, containing some four or five acres, produces a vigorous growth of willow trees; that a portion of the land along the stream yields, and has yielded for some time, a remunerative crop of hay, without irrigation. The witnesses differ materially as to the proportion of meadow or low land that is thus hay producing. Those for the contestant claiming that from forty to fifty acres of the land laying along the creek, if not grazed, will produce hay in quantities that will pay; that they have seen the grass growing on this land and believe it will yield, on an average, season after season, from three-quarters of a ton to a ton per acre. On the other hand, the witnesses for the entryman testified that only from five to ten acres of the meadow-land along the creek will produce hay, and that even that is doubtful without irrigation, and that the yield per acre is much less than the estimates furnished by the witnesses for the contestant.

In regard to the uplands of the entry, containing about one hundred and fifty acres, more or less, most of the witnesses agree that it is desert

in character, and some of them testify that a large portion of it is so intensely barren and rocky that it cannot be reclaimed, even by irrigation. Other portions of the upland, some of the witnesses say, will produce a rich and nutritious grass, useful for grazing, without irrigation, but will not produce grass suitable for hay, unless water is introduced by artificial means. All the upland, however, may be regarded as desert. But the land lying along the creek is marshy and can not be considered desert in its character according to the rules, regulations and decisions of this Department and should not be disposed of under the provisions of the desert land act.

The circular of instructions, approved June 27, 1887 (5 L. D., 708), among other things, says: "That land bordering on streams, or through or upon which there is any river, stream, arroyo, lake, pond, body of water, or living spring, are not subject to entry under the desert land act until the clearest proof of their desert character is furnished." It also provides, in effect, that lands producing trees or yielding crops of hay in paying quantity, season after season, can not be regarded as desert land.

In the case of *United States v. George D. Jenks* (14 C. L. O., 61), your office held that land partly desert and partly agricultural could not be entered under the desert land act.

The case of *Riggan v. Riley* (5 L. D., 595), although it involves other legal considerations, holds that land containing several acres of trees is not subject to desert land entry; and the decision of this Department in the case of *Houck v. Bettelyoun* (7 L. D., 425) is corroborative of the views hereinbefore expressed, and, consequently, the land under contest cannot be regarded as desert land.

Such being the views of the Department as to the character of the land, it is unnecessary to consider the second branch of the case, which claims that the entry was made by the contestee in the interest of another party, for speculative purposes.

The decision of your office is therefore affirmed.

PREFERRED RIGHT OF ENTRY--WAIVER.

KELLEM v. LUDLOW.

Though the preference right of a successful contestant is not assignable it may be waived, and after such waiver the land is subject to entry by the first qualified applicant.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 15, 1890.

I have before me your office decision of November 30, 1888, wherein you reject Charles E. Kellem's application to make homestead entry of the N. $\frac{1}{2}$ of NW. $\frac{1}{4}$ and SW $\frac{1}{4}$ of NE $\frac{1}{4}$ of Sec. 4, T. 21 S., R. 25 E., Visalia, California, and allow homestead entry No. 6390, made on March 21, 1888, by Arista R. Ludlow for said lands (including SW. $\frac{1}{4}$ of NW.

$\frac{1}{4}$ of said section) to stand. Your said decision affirms that of the local office, and the case is now before me on Kellem's appeal.

By a stipulation duly entered into and signed by the respective counsel for Kellem and Ludlow (the parties in interest), and filed as a part of the record in this case, it is admitted that Kellem's affidavit, also filed as a part of the record, may be taken as true. Said stipulation also admits that the instrument filed in the record, purporting to be a copy of an assignment or transfer of Kellem's preference right to Ludlow, bearing date of February 24, 1888, was duly acknowledged before a notary public of the State of California, and is a true, full, and correct copy of the original assignment.

It appears from the record that appellant, Kellem, brought a contest against homestead entry made by Martin J. Bobo on said tract, in which a hearing was had June 21, 1887, and on March 12, 1888, Bobo's entry was duly canceled.

On February 24, 1888, the said Kellem, by an instrument duly signed and acknowledged before one Larkins, a notary public, relinquished his right to file on said land, and by the same instrument directed the register and receiver of the land office at Visalia, California, to permit Arista R. Ludlow (appellee) "to file whatever government claim he may deem proper and to him, the said Ludlow, I do hereby transfer and set over and sell all my buildings and improvements upon said land, and to him I relinquish and quit claim all my right, title, or interest in or to said land." This relinquishment was made before the cancellation of Bobo's claim, as instituted by Kellem's contest. But the said writing of relinquishment makes this statement:

I, Charles E. Kellem, filed a contest against Martin J. Bobo for abandoning his homestead (describing said lands). He said Bobo made default after due notice I caused proper proof to be made In consideration of the premises, and knowing that I have the right to file on said land, after its cancellation, do hereby relinquish, etc.

Ludlow's entry was made March 21, 1888, and on same day, but subsequent to Ludlow's entry, Kellem applied to make homestead entry of the land formerly covered by Bobo's entry—claiming a preference right under his contest. His application was denied.

The following are the errors assigned:

1. Under the law Kellem has and had a preference right of entry.
2. Said preference right is not subject to transfer.
3. Kellem had a preference right to enter said land for thirty days after receiving notice of cancellation.
4. It was error for said register and receiver to hold that said Kellem lost his preference right to file on said land under the pretended transfer or relinquishment on file herein.

There can be no objection to receiving an application to enter lands, if the application be accompanied with the waiver of the preference right of a successful contestant. *Cleveland v. Banes*, 4 L. D., 534.

It is not improper to recognize and act upon a waiver of a preference right, though such waiver were made prior to the cancellation, as in this case. *Bachman v. Smith*, 5 L. D., 293.

The right conferred on a successful contestant by section two, act of May 14, 1880 (21 Stat., 140), is a personal right, which can not be transferred to another. *Welch v. Duncan* (7 L. D., 186).

Therefore, by Kellem's transfer herein, Ludlow obtained no rights.

But a preference right may be waived. *Ayers v. Buell*, 2 L. D., 257.

The instrument herein is a waiver of Kellem's preference right as the successful contestant of Bobo's entry, and the land thereby became subject to the first qualified applicant, and Ludlow's entry being the first after Bobo's cancellation, and accompanied as it was with Kellem's waiver, should stand.

Your said office decision is accordingly affirmed.

SIoux INDIAN LANDS--CIRCULAR.*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

Washington, D. C., March 25, 1890.

Registers and Receivers of the United States Land Offices at Bismarck, North Dakota, Huron, Pierre, Chamberlain, and Rapid City, South Dakota, and O'Neill, Nebraska.

GENTLEMEN: Your attention is called to the provisions of an act of Congress, approved March 2, 1889 (25 Stats., 888), entitled "An act to divide a portion of the reservation of the Sioux Nation of Indians in Dakota into separate reservations and to secure the relinquishment of the Indian title to the remainder, and for other purposes," a copy of which is hereto attached.

The first six sections of said act set apart certain tracts for separate reservations, and do not appear to call for further remark in this communication.

The seventh section provides for allotments to certain members of the Santee Sioux tribe of Indians upon the reservation occupied by them in Nebraska; confirms all allotments to said Indians heretofore made upon said reservation, and provides for allotments, or payments in lieu thereof, to the members of the Flandreau band of Sioux Indians, and does not appear to call for further remark.

The eighth, ninth, tenth, eleventh, and twelfth sections provide for the allotment in severalty of the lands embraced in the separate reservations established by the act, and for the purchase and disposal by the United States of lands embraced therein at some future time, and do not appear to call for further remark.

* See instructions of March 20, 1890, 10 L. D., 328.

The thirteenth section provides that any Indian receiving and entitled to rations and annuities at either of the agencies mentioned in the act at the time the same shall take effect, but residing upon any portion of said Great Reservation not included in either of the separate reservations herein established, may, at his option, within a stated time, have the allotment to which he would be otherwise entitled on one of said separate reservations upon the land where such Indian may then reside.

You are therefore directed to exercise every care and precaution to prevent the entry or filing for any lands in said Great Reservation which are in the occupancy of Indians entitled to allotments under the provisions of said act, which occupancy is to be protected to the full extent of the rights granted to the Indians therein. The occupancy and possession of the Indians is regarded as sufficient notice of their rights to all parties concerned. You will advise all parties intending to become settlers, either as agriculturists or under the townsite laws, of the extent of the rights of the Indians and of the impossibility of their acquiring rights in conflict therewith, and impressing on them the wrong and injustice of seeking to interfere with the Indians in their rightful occupancy of the lands, and that they can gain nothing thereby.

To protect the Indians as fully as possible from any wrong or imposition by which they might be deprived of the benefit intended to be secured to them under the law, whether it have the character of open violence or some form of trickery and fraud, in the specious guise of mutual agreement for exchange of values, no purchase by white persons of the settlements or improvements of the Indians will be recognized as having any validity, and their rights to take allotments of the land on which they reside, at their option, will be recognized and enforced whenever claimed by them within the period of one year prescribed in said section 13, notwithstanding any pretended purchase of their improvements that may be set up against them, or any allegation that may be made of their removal from the land and abandonment thereof in favor of white claimants.

No entries or filings, or any settlements, so far as you can prevent them, will be allowed upon that portion of said reservation which is described in the act approved March 28, 1882 (22 Stats., 36), until the Indian title is extinguished as provided by said act, and when the Indian title is so extinguished all lands described in said act not allotted thereunder "shall be open to settlement as provided in this act."

Section fourteen provides for regulations whereby the use of water necessary for agricultural purposes upon the separate reservations provided for by the act may be secured, and does not appear to call for further remark.

Section fifteen ratifies and makes valid all allotments of land taken within or without the limits of any of the separate reservations estab-

lished by this act, in conformity with the provisions of the treaty with the Great Sioux Nation, concluded April 29, 1868 (15 Stats., 635).

Section sixteen provides that the acceptance of the act shall release the Indian title to said Great Reservation, with the exceptions hereinbefore named, and also for certain railroad rights, and does not appear to call for further remark.

Section seventeen provides for schools, stock, and seed for the Indians, punishment for trading with the Indians, and appropriation and expenditure of a permanent fund for the Indians, and does not appear to call for further remark in this communication.

Section eighteen grants to religious societies, with certain limitations, any land in said Great Reservation occupied for religious purposes. Said tracts are therefore reserved from disposal under the provisions of this act.

Section nineteen provides that the provisions of the said treaty concluded April 29, 1868, not in conflict with the provisions of this act are continued in force, and section twenty provides for school houses for the Indians. Neither of these sections appears to call for further remark.

Section twenty-one restores to the public domain the Great Sioux Reservation, with the exception of American Island, which is donated to Chamberlain, South Dakota, Farm Island, which is donated to Pierre, South Dakota, Niobrara Island, which is donated to Niobrara, Nebraska, and the separate reservations described in said act, and provides for the disposal of said restored lands, to actual settlers only, under the provisions of the homestead law, with certain modifications, and under the law relating to townsites. Provision is made that each settler shall pay for the land taken by him, in addition to the fee and commissions on ordinary homesteads, one dollar and twenty-five cents per acre for all lands disposed of within the first three years after the taking effect of the act, and the sum of seventy-five cents per acre for all lands disposed of within the next two years following thereafter, and fifty cents per acre for the residue of the lands then undisposed of. Said additional amount should not be collected when the original entry is made, but is required to be paid when final proof is tendered.

The price which actual settlers are required to pay for said lands becomes fixed at the date of original entry, and any subsequent settler of land so entered and afterwards abandoned will be required to pay the same amount per acre as the settler who made the first entry.

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 act of March 2, 1889 (25 Stats., 854.) See circular of March 8, 1889, 8 L. D., 314.

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 of January 1, 1889,) shall not be abridged," except as to the said additional payment, 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 can not 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, and the additional payment prescribed by this act will be required to be made, before the issue of final certificate.

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 of January 1, 1889.) Therefore, entries made thereon will not be subject to commutation under that section.

In allowing entries under the townsite laws, you will be governed by the laws and regulations as contained in the circular of instructions relative to townsites on public lands of July 9, 1886, 5 L. D., 265.

You are instructed to report filings and entries upon said lands in a separate, distinct, and consecutive series, and on separate abstracts, commencing with R. & R. No. 1, in each series, and report and account for the money received on account thereof in separate monthly and quarterly returns.

Provision is also made in said section twenty-one of this act for the purchase by the government of the lands unsold at the end of ten years from the taking effect of the act, for the reservation of highways around every section of said lands, and for the removal of Indians from the islands named in the section, but these do not appear to call for further remark.

Section twenty-two provides for the disposition of the proceeds of sales of said lands and does not appear to call for further remark.

Section twenty-three provides for entry, under the homestead, pre-emption, or townsite laws, within ninety days after the taking effect of the act, by parties who, between February 27, 1885, and April 17, 1885, entered upon, or made settlements, with intent to enter the same, under said laws, upon certain lands of said Great Reservation therein named, but such settlers are required to comply with the laws regulating such entries, and, as to homesteads, with the special provisions of the act before obtaining title to the lands, and pre-emption claimants are required to reside on their lands the same length of time, before procuring title, as homestead claimants under this act.

You will therefore require each applicant under the provisions of

this section to show by affidavit, corroborated by two witnesses, that he is qualified to make entry under said provisions, giving in full all the facts in connection with his alleged entry or settlement between said dates.

Section twenty-four reserves sections sixteen and thirty-six in every township of said lands for the use and benefit of the public schools. You will therefore allow no entries or filings upon said sections.

Section twenty-five appropriates money for the survey of said lands; section twenty-six provides that all expenses for the survey, platting, and disposal of said lands, shall be borne by the United States; section twenty-seven appropriates money to pay for ponies taken from the Indians; section twenty-eight declares the method by which the act shall become effective; section twenty-nine appropriates money to be used in obtaining the assent of the Indians to the provisions of the act; and section thirty repeals all acts or parts of acts inconsistent with the provisions of the act. None of these sections appear to call for further remark.

It is thought that the foregoing will be found sufficient for your guidance in any cases that may arise, but should cases containing exceptional features arise, you will submit the same for special instructions.

Respectfully,

LEWIS A. GROFF,
Commissioner.

Approved:

JOHN W. NOBLE,
Secretary.

SAPP *v.* ANDERSON.

Motion for review of departmental decision rendered July 5, 1889, 9 L. D., 165, overruled by Secretary Noble, May 16, 1890.

FINAL PROOF PROCEEDINGS—TRANSFEREE.

MANITOBA MORTGAGE AND INVESTMENT CO.

A mortgagee, or transferee, may file in the local office notice of his interest in any entry pending therein; and when such notice has been filed said mortgagee, or transferee, may be heard to sustain the validity of such entry, and should be made a party to any proceeding involving the cancellation thereof.

An entry, however, canceled for bad faith on the part of the entryman, without notice to a transferee who has filed a statement of his interest, will not be reinstated unless reversible or prejudicial error is made to appear in the judgment of cancellation.

To entitle such an applicant to an order of re-instatement the application should set up such a state of facts as will show good faith on the part of the entryman.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 16, 1890.

I have before me the appeal of Eden Maxwell, as agent of the Manitoba Mortgage and Investment Company, from your office decision of

December 3, 1888, denying said Maxwell's application for a re-instatement of cash entry, No. 14,083, based on homestead entry for the SE. $\frac{1}{4}$ Sec. 4, T. 107 N., R. 68 W., Mitchell, Dakota.

This land was entered by Robert M. Huston, on January 14, 1884; commutation proof was made July 10, 1885, and final certificate issued September 12, 1885.

On failure of said Huston to meet the requirements of your office letters of July 31, 1886, and September 3, 1886, respecting said entry, the same was held for cancellation by your office letter of June 16, 1887, and claimant duly notified, on June 26, 1887. Said notice is evidenced by the return registry receipt, signed by R. M. Huston, and made an exhibit by the register in his letter to your office, dated September 23, 1887, and by your office letter of December 10, 1887, you directed the cancellation of said entry upon the records of the local office, "because of bad faith."

This conclusion was reached in your office letter of June 16, 1887. It appears that claimant's commutation proof was not satisfactory, and by your office letter of July 31, 1886, he was called upon to furnish a corroborated affidavit, showing the number and lengths of his absences, the area in crops, and whether or not he had maintained continuous residence since date of his final proof. And by your office letter of September 3, 1886, claimant was called upon to furnish an affidavit stating whether he had ever alienated any portion of the tract. No response was made by him to your letter of September 3, 1886; but, on September 2, 1886, he made an affidavit in response to your said letter of July 31, 1886, in which he states that he established his residence upon the land July 1, 1884, and remained ten days, when he went away to work to obtain money to make a living and further improve the land; that he returned in August, stayed over a week, again left the land and did not return until October, when he stayed four or five days and returned to work again; was on the land part of November, absent again until February, 1885; was on the land in March, left again and returned May 25, when he remained continuously until November 10, 1885, when he left and never returned; that the cause of these absences was that he was not able to make a living on the land. He raised nothing but potatoes in 1884. In 1885 sixteen acres were cultivated; "The balance of the land was not cropped." He further states "he has no other land or property, and is trying to get enough ahead to get a team and farming implements to run the farm with." He is a single man, and he did not reside on the land continuously, and his absence therefrom from the time he alleged he established residence amounts to over nine months, and he only shows a continuous residence of a short time just preceding his making final proof. The not unusual plea of poverty was interposed as an excuse for his absences, yet he had money enough to commute his entry. The absences from the place, and claimant failing to respond to your office requirement, showing he had not alienated the land prior to commutation, and the small value of the

improvements, are certainly not indicative of good faith, and therefore sustains your finding of "bad faith." I think upon the showing made you were justified in canceling the entry. So far as the error complained of in your said decision in your finding that appellant never filed a verified list of all the lands (including lands in controversy) upon which the said company had placed loans in the Mitchell land district, with Ex-Register George B. Everett is concerned, I may say that mortgagees or transferees have a right to file in the local office, under oath, notice of their interest in any entry pending in said office; and when such notice has been filed, such mortgagee or transferee may be heard to sustain the validity of that entry, and should be made a party to any proceeding involving the cancellation thereof. American Investment Company (5 L. D., 603). Conceding in this case that no such notice was given the company and the entry passed upon in its absence, yet it does not necessarily follow that the case should be re-opened unless something is to be accomplished thereby. To justify such action, reversible or prejudicial error must be made to appear. Now so far as this application for the reinstatement of the entry is concerned, it may be conceded that such verified list was filed as alleged, still the application does not disclose any error in cancelling the entry. It does not pretend to set up any facts showing a compliance with the law as to residence or the cultivation of the tract on the part of the entryman. The only statement contained in said petition touching the bona fides of the entryman is the following:

Affiant further states upon information and belief that said entry was made in full compliance with the law, and that he can prove the same should opportunity be offered.

Now the party making this affidavit may believe all this and yet be unable to prove it. It is not the statement of a fact. It is made upon hearsay and belief. To entitle the appellant to a re-instatement of said entry the application should have set up such a state of facts as would have shown good faith on the part of the entryman. Nothing of the kind appears and your said decision denying the appellant's application to re-instate said entry is affirmed.

RAILROAD GRANT—PRE-EMPTION CLAIM ACT OF MARCH 3, 1887.

BOYER *v.* UNION PACIFIC RY. CO.

An unexpired pre-emption filing of record, at the date when the grant becomes effective, is a *prima facie* valid claim that excepts the land covered thereby from the operation of the grant.

Where lands thus excepted from the grant have been patented thereunder proceedings for the recovery of title should be instituted under the act of March 3, 1887.

Secretary Noble to the Commissioner of the General Land Office, May 16, 1890.

By letter of January 27, 1890, you report that, on June 5, 1889, the Union Pacific Railway Company was cited to show cause before your

office why suit should not be instituted to vacate the patent issued to it on November 8, 1881, for the S $\frac{1}{2}$ of the NE $\frac{1}{4}$ of Sec. 5; N. W. $\frac{1}{4}$ NE $\frac{1}{4}$, N $\frac{1}{2}$ NW $\frac{1}{4}$ and SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Sec. 11, T. 3 S., R. 68 W., Denver land district, Colorado; that, although thirty days were allowed for answer to said rule, no response has been made to the same.

It appears from your letter, and the papers accompanying the same, that said tracts are of the odd-numbered sections within the limits of the grant to the said company under the acts of July 1, 1862 (12 Stats., 439), and of July 2, 1864, (13 Stats., 356). From said grants are excepted lands to which a pre-emption claim has "attached" at the date of the definite location of the line of said road, which location was made on August 20, 1869. At that date the lands in question were unoffered, and were covered, as shown by the record, by uncanceled pre-emption filings; notwithstanding which they were patented to the company, as above stated.

It was not until the passage of the Colorado act of July 14, 1870, (16 Stats., 279), that there was any limitation of time fixed within which pre-emption claimants were required to make proof and payment for unoffered land. It is therefore apparent that at the date of the definite location of the company's road, the lands in question, being covered by *prima facie* valid pre-emption claims of record, were excepted from the operation of said grants and ought not to have patented to the company. *Randall v. Sioux City R. R.* (10 L. D., 54-56); *Kansas Pacific R. R. Co., v. Dunmeyer* (113 U. S., 629-640).

This being the law of the case, and the company having failed to show cause to the contrary, you are directed to demand from it a reconveyance of the described tracts; and if it fails or refuses to make such reconveyance within ninety days after demand, you will prepare and transmit to this Department a report of the fact and a record of the case, to be transmitted to the Attorney-General that he may take proper action in the premises in accordance with provisions of the adjustment act of March 3, 1837 (24 Stats., 556).

GRADUATION ENTRY—ERRONEOUS CANCELLATION—ADVERSE CLAIM.

COLLINS' HEIRS *v.* WINSLOW.

A graduation entry, canceled by mistake and without notice to the entryman of his right of appeal, and without his knowledge that said cancellation was erroneous, may be re-instated on the application of the entryman's heirs, made within a reasonable time after learning the facts.

The right to such re-instatement is not defeated by the fact that the entryman, after such cancellation, and in ignorance of his rights, made an entry of the land under the homestead law that was subsequently canceled for failure to submit final proof.

An intervening entry made by one who had full knowledge that said heirs were in possession of, and residing upon said land, will not defeat the right of said heirs to re-instatement.

An unsuccessful contest, by one of said heirs against said intervening entry, alleging a prior settlement right, is no bar to the subsequent re-instatement of said graduation entry for the benefit of the heirs of the deceased entryman.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 17, 1890.

I have considered the case of the heirs of James Collins deceased, *v.* Charles Winslow, on appeal by the latter from your decision of November 12, 1888, affirming the decision of the local officers, and, in effect, canceling the homestead entry of Winslow for the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, and the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 36, T. 8 N., R. 20 E., Montgomery land district, Alabama.

On May 2, 1860, James Collins, ancestor of plaintiffs, made graduation cash entry of the above described land and also of the S. $\frac{1}{2}$ SE. $\frac{1}{4}$ of said Sec. 36, at twenty-five cents per acre, and paid for the same.

One John E. Whitehead protested against said entry as to said S. $\frac{1}{2}$ SE. $\frac{1}{4}$ and on September 20, 1860, the entry of Collins was canceled

December 20th thereafter, Whitehead entered said S. $\frac{1}{2}$ SE. $\frac{1}{4}$, but Collins continued to reside upon and improve the remainder of his claim, and on August 9, 1869, he re-entered the land in controversy, under the homestead act, but failed to make final proof, and said entry was canceled on February 20, 1879.

On September 29, 1879, one James Micheaux entered said land and this entry was contested by said Winslow, but on June 25, 1883, pending said contest, Micheaux relinquished his claim under his entry and on July 7, 1883, Winslow made homestead entry therefor.

Your letter of September 8, 1886, to the register and receiver at Montgomery, Alabama, gives a statement of the case and the origin of this proceeding, as follows :

On the protest of John E. Whitehead, . . . involving the S. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of this entry . . . a cancellation was erroneously noted against the entire entry of Mr. Collins, without notice in the premises as to his right of appeal. The purchase money paid on the Collins entry has, therefore, not been refunded. . . . It appears that Newberry Collins instituted contest against the Winslow entry the 13th of Dec., 1883, on the ground of conflict with the right of a prior settler and this contest is said to have been dismissed at your office on motion of the defense to the effect that the contest should have been brought by the minor heirs. . . . Contestant failed to appeal from that decision. . . . In view of the facts presented, I am of the opinion that the said graduation entry should be re-instated to the extent of the S. $\frac{1}{2}$ NE. $\frac{1}{4}$ SE. $\frac{1}{4}$ NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ in question. You will, however, order a hearing and cite the parties in interest to appear and give testimony as to their rights in the premises, when Mr. Winslow will be required to show why his homestead entry should not be canceled for conflict with the rights of Mr. Collins aforesaid.

The directions in this letter were complied with and the hearing was set for December 20, 1886, at which the parties appeared in person and

by counsel and upon hearing the testimony the local officers decided that the "heirs of James Collins have a prior right to said land and should be permitted to make final proof."

Winslow appealed from this judgment and your office affirmed the same, November 12, 1888, and he appeals to this office.

The testimony shows that James Collins made settlement and established residence upon this land in 1856, and that he lived there continuously, until his death, which occurred in 1881.

The Collins heirs were born and raised there, and two of them were residing on the land at the time of the hearing herein. Their improvements consisted of two houses, cribs, out-houses, about seventy acres cleared and fenced, of estimated value at from \$500 to \$700. Winslow lived near the land before making the entry and knew it had been for years the home of the Collins family, and that it was occupied by them. He went upon the tract, made a "shelter," and "deadened" some timber: He testifies that afterward he moved into a house that was on the land, and cultivated five or six acres of the claim. He did not improve the tract either by buildings, or clearing the ground or fencing any part thereof, and lived on the land only part of the time from 1883 till the hearing. He said that what he did is worth \$25 to \$30. The other witnesses do not value the improvements at anything.

The fact that Collins made a homestead entry, after the cancellation of this graduation entry is evidence that he knew of said cancellation, but it does not follow (as claimed by counsel) that he had notice of his right of appeal, nor does it follow that he knew said entry, as to the land herein involved, was erroneously canceled.

Making the homestead entry by James Collins, under the circumstances, and neglecting to make final proof, does not necessarily estop the heirs from asserting their right to have said graduation entry reinstated on proper application, made within reasonable time after they learned the facts, and there being no evidence showing that the ancestor ever knew that the cancellation was made by mistake, or why the government retained his money, nor any testimony showing when the facts came to the knowledge of the heirs, I conclude, for aught that appears to the contrary, that said application was made within reasonable time and from the facts and circumstances developed upon the trial, said entry appears to have been properly re-instated, and said hearing authorized, following the rule in the case of William Johnson, (4 L. D., 397).

The testimony shows that Winslow is seeking to avail himself of the benefit of the Collins improvements, with a full knowledge of all the circumstances, knowing that the land was being occupied by the Collins heirs. His residence under a "shelter," for a time and afterward in a house built by Collins, and the character of his improvements, do not show him to have, as against the claims of the Collins heirs, any rights in equity that can be considered.

The decision in the contest case of Newberry Collins *v.* Winslow, although involving the same land is not a bar to this proceeding, the parties being different and the issue to be tried, not the same. That contest was not heard upon the merits of the case, but was dismissed on motion of defendant because it should have been brought by the minor heirs, the defendant thereby claiming and the local officers deciding, substantially, that this proceeding would be the proper action.

Considering all the testimony and the circumstances of the case, I conclude that the claim of the heirs of Collins should be sustained, your decision is accordingly affirmed, and the entry of Winslow will be canceled.

APPEAL—CERTIORARI—MINERAL ENTRY—AGRICULTURAL CLAIMANT.

ANDERSON *v.* THE AMADOR AND SACRAMENTO CANAL CO.

The rule that the Commissioner of the General Land Office is without jurisdiction, after appeal filed from his decision, is not applicable in cases where he decides that the right of appeal does not exist.

A homestead applicant who, during the period of publication under a mineral application, asserts no right in himself, is not thereafter entitled to an order for a hearing, and the denial of such order is not the denial of a right.

An appeal will not lie from a decision of the Commissioner refusing to order a hearing, if such refusal does not amount to the denial of a right.

Certiorari will not be granted, if the right of appeal is not wrongfully denied, unless the facts set forth show that the applicant is entitled to relief under the supervisory authority of the Secretary.

Secretary Noble to the Commissioner of the General Land Office, May 19, 1890.

By letter of April 12, 1890, you transmitted a petition for a writ of certiorari, filed by the attorneys for the plaintiff, in the case of Thomas D. Anderson *v.* Amador and Sacramento Canal Company, involving mineral entry No. 1308, Bonanza placer claim, embracing the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, and the W. $\frac{1}{2}$ of the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 5, and the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, and the W. $\frac{1}{2}$ of the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 8, T. 7 N., R. 9 E., M. D. M., Sacramento, California, land district.

This land is the same as was involved in the case of Anderson *et al.* *v.* Byam *et al.*, in which this Department, by decision of April 2, 1889 (8 L. D., 388), affirmed the decision of your office in favor of the defendants. A motion for review was denied August 6, 1889 (9 L. D., 215), and a petition to have that decision recalled was denied August 21, 1889 (9 L. D., 295). The plaintiff in the case now under consideration is a son of George Anderson plaintiff in the former cases and the defendant here is the transferee of the defendants there, Byam *et al.*

On April 23, 1889, the defendant here made mineral entry No. 1308

embracing said land. On February 28, 1890, Thomas D. Anderson, the petitioner here, filed his application to make homestead entry for the same land. With this application he filed a statement duly corroborated setting forth that he was an agricultural claimant of and resident upon said land; that he had improvements thereon consisting of a six-room dwelling house, a barn, wood house, chicken house, blacksmith shop and carriage house combined, pig pen, a well, one hundred acres fenced, twenty acres under cultivation, a reservoir dam, and irrigating ditch, all of the value of \$4,000; that the average annual value of the agricultural products from said land for the last twenty years had been fully \$800; that he had thoroughly prospected every acre of said land and found it had no value for mineral purposes; that there had been no mining improvements on the land since 1875, except some few sluice boxes used for prospecting; that the mineral applicant knew the land had no value for mineral purposes but was solely valuable for agricultural purposes.

The homestead applicant also asked for a hearing to determine the true character of the land. Your office refused to order a hearing, holding that the facts that the applicant was a witness in support of his father's mineral application up to the time of its rejection and that said mineral applicant now appears as a corroborating witness for the homestead applicant indicated "an absence of that good faith which should characterize the acts of a party undertaking to procure the cancellation of the final entry of another;" and that the facts set forth even if determined at a hearing to be true would not warrant the conclusion that the land was more valuable for agricultural than for mining purposes. Anderson filed an appeal from that decision whereupon you decided that he had no right of appeal. The protestant then filed the petition now under consideration.

In the argument submitted in support of this petition it is contended that inasmuch as the filing of an appeal from a decision of your office removes the case from your jurisdiction you had no authority to dismiss this appeal, citing in support thereof Rule 82 of Rules of Practice, and the cases of *St. Paul, Minneapolis and Manitoba Ry. Co. v. Vannest* (5 L. D., 205), and *Rudolph Wurlitzer* (6 L. D., 315). This contention is evidently upon the theory that when this paper had placed upon it the file mark of your office it was thereby received as an appeal. This position cannot be sustained. As soon as this paper filed March 13, 1890, could be considered it was held by you in the decision of March 20, that this party had no right of appeal. The appeal was, therefore, never received as such. The Rule of Practice and the authorities cited by the petitioner are not applicable to this case. You in this case acted under Rule 84 and apparently proceeded in accordance with that rule and the decision in the case of *Stein et al., v. Fisher* (5 L. D., 671), wherein the distinction between this kind of a case and one under Rule 82 is shown.

It is further alleged in support of such motion that "the Commissioner also erred in treating Anderson as a mere protestant without any rights in respect to the land." This is upon the theory that Anderson's application to make homestead entry gave him such a standing as, under the ruling of this Department in the case of Bright *et al.*, v. Elkhorn Mining Co. (8 L. D., 122), entitled him to appeal from a decision adverse to him. Your decision to the effect that Anderson had no right of appeal was upon the theory that inasmuch as his application was not made within the time for publication under the mineral entry he acquired thereby no right in the premises and that therefore the denial of the hearing was not the denial of a right and the same decision in Bright v. Elkhorn Mining Co., is cited in support of that position.

Section 2326 of the Revised Statutes after prescribing the requirements to be complied with by an applicant for a patent for mineral lands provides as follows:

If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter.

The question as to compliance on the part of these mineral claimants with the requirements of the law seems to have been quite thoroughly investigated in the former proceedings before your office and in this Department, such investigation resulting in a decision in their favor. Their compliance with these requirements having been satisfactorily shown no objection from third parties to the issuance of patent can now be heard. This homestead applicant having slept upon his rights if any he had, has by such laches barred himself from asserting further claims to this land. Your action refusing to order a hearing not being therefore a denial of a right no appeal therefrom would lie and the petitioner here is not entitled to the writ of certiorari on the ground of a wrongful denial of his appeal. While this is true yet if the facts set forth showed that he is entitled to relief it might be granted in the exercise of the supervisory authority vested in the head of this Department, Oscar T. Roberts (8 L. D., 423). I, however, concur with you that the facts presented by the record in this case do not entitle this party to the relief asked. That he should strenuously support the mineral application of his father until the defeat of that claim and then immediately claim the land and the improvements thereon as an agricultural settler do not indicate good faith on his part. I do not find that your discretionary authority in this matter has been abused nor do I perceive any sufficient reason for interfering in this matter. For the reasons herein set forth the petition for writ of *certiorari* must be and is hereby denied.

CADY *v.* QUEEN ET AL.

Motion for review of Departmental decision rendered October 4, 1889, 9 L. D., 445, denied by Secretary Noble, May 19, 1890.

RAILROAD GRANT—CERTIFICATION—PRE-EMPTION FILING.

PRINDEVILLE *v.* DUBUQUE AND PACIFIC R. R. CO.

Lands certified to a State under a railroad grant are not thereafter subject to the jurisdiction of the Department, and an application to enter the same must be rejected.

Lands covered by an unexpired pre-emption filing, at the date when the grant becomes effective, are not subject to the operation of a grant from which are excepted lands to which "the right of pre-emption has attached" when the line of road is definitely fixed.

A certification of lands in such status is erroneous, and warrants proceedings for the recovery of title under the act of March 3, 1857.

Secretary Noble to the Commissioner of the General Land Office, May 19, 1890.

This is an appeal by Edward Prindeville from your office decision of August 31, 1886, rejecting his application to make pre-emption cash entry for the SE $\frac{1}{4}$ of Sec. 25, T. 90 N., R. 31 W., Des Moines land district, Iowa.

The records of your office show, that Prindeville filed declaratory statement for said tract on September 22, alleging settlement September 20, 1856; which filing is yet of record uncanceled; that the land is within the six mile limits of the grant to the State of Iowa of May 15, 1856 (11 Stats., 9), in aid of the Dubuque and Pacific Railroad, and that it was certified over to the State on December 27, 1858, as of the granted lands under said act.

In view of the departmental decision in the case of Wisconsin Central Railroad Company *v.* Stinka (4 L. D., 344), and numerous cases following, I affirm your action rejecting the application of Prindeville, at this time, to make entry of the land in question, inasmuch as the title to the same has passed out of the United States.

It appears that prior to and at the time of said certification, it was the practice of the land department, in pursuance of an opinion of Attorney-General Cushing (9 Opinions, 390), to that effect, to recognize the survey in the field as the definite location of a railroad, when its rights under the grant attached to the coterminous designated sections; and, inasmuch as the survey of the line of this road was made opposite to the tract in question on August 6, 1856, your office held that the right of the company to the land attached on that day, which was prior to the settlement and filing of Prindeville, and accordingly certified the land for the use of the company on December 27, 1858.

Subsequently the rule was changed, and in 1875 the Department

held that the right of a land-grant company attached to its granted lands "upon the filing of the map of survey of its road," it having then done all within its power to identify the lands. *Swift v. California and Oregon R. R. Co.*, (2 C. L. L., 733).

In 1882, the supreme court, in the case of *VanWyck v. Knevals* (106 U. S., 360) adopted the view of the Department, with a modification, and held that when a map designating the route is filed with the Secretary of the Interior, "and accepted by that officer," the road is definitely fixed. In the case of the *Dubuque and Pacific Railroad Company*, such map was not approved until October 13, 1856.

The act of Congress, making the grant referred to, excepts therefrom any land to which, at the time the line of the road is definitely fixed, "the right of pre-emption has attached." The records show, in this case, that twenty-one days before the line of the road was definitely fixed "in accordance with the decisions of the supreme court," Prindle placed on record the declaration of his "intention to claim said tract as a pre-emption right under section 2259 of the Revised Statutes of the United States," at which time the records also show the tract was unoffered land.

In the case of the *Kansas Pacific Railway Company v. Dunmeyer* (113 U. S., 629), the supreme court say that the filing of the map of definite location furnished the means of determining to what lands a pre-emption or homestead claim has attached;

for, by examining the plats of this land in the office of the register and receiver, or in the General Land Office, it could readily have been seen if any of the odd sections within ten miles of the line had been sold, or disposed of, or reserved, or a homestead or pre-emption claim had attached to any of them. In regard to all such sections they were not granted.

And, on page 644, the court further says:

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

In the case under consideration, the records showed, at the time when the map was accepted, that the pre-emption claim of Prindle had attached, inasmuch as they disclosed "a proceeding in the proper land office by which the inchoate right to the land was initiated." It results that said tract, being thus excepted from the grant, was improperly certified for the benefit of said company.

Having come to this conclusion, it is the duty of the Secretary, under the act of March 3, 1887 (24 Stats., 556), to take proper steps to restore to the United States the title to said land. *Winona and St. Peter R. R. Co.* (9 L. D., 649). You will therefore, on receipt hereof, call upon the company, as directed in the matter of the *Winona and St. Peter R. R. Co.* (6 L. D., 544), to show cause why proceedings should not be taken, in accordance with the provisions of the last-cited act, to secure the restoration of said land to the government.

SURVEY—DEPOSIT SYSTEM—MAXIMUM RATES.

LEWIS DIEMER *et al.*

A survey under the deposit system may be authorized though portions of the land are heavily timbered, if such lands are more valuable for agricultural purposes than for the timber thereon.

Maximum rates for a survey are allowable if the land is heavily timbered, mountainous, or exceptionally difficult to survey.

Secretary Noble to the Commissioner of the General Land Office, May 19, 1890.

I am in receipt of your office letter of April 19, 1890, transmitting, for departmental action, the application, dated December 30, 1889, of Lewis Diemer and thirty-six other persons, who claim to be *bona fide* settlers upon unsurveyed lands of the United States, supposed to be embraced, except as to three several tracts of one hundred and sixty acres each, in township nineteen north, range seven east, Willamette Meridian, in the State of Washington, asking for the survey of said township under the deposit system, in accordance with the provisions of sections 2401 to 2403, inclusive, of the Revised Statutes.

It is set forth in the application, in substance, that the parties presenting it are "actual and *bona fide* settlers" on the land; that their application is made in good faith, and they intend to make the deposit required by law for the survey; that it is their further intention to perfect title to their respective claims as such settlers, under the homestead or pre-emption laws; that the township is entirely covered with actual settlers, all intending to make entry under the homestead or pre-emption laws, and many of whom have their families with them, their older children going four and five miles to school, while their younger children are deprived of the privilege of school education; that about one third of the land is heavily timbered with fir, hemlock and cedar, and a dense undergrowth; that on a portion of it the timber is scattered, and on the balance there is only a small growth of timber, with undergrowth, having been visited by forest fires; that the northern portion is rough, with a high hill or mountain elevation; that several streams run through it, some of which are quite large, with banks generally abrupt, but with these exceptions the land is generally level, and particularly valuable for agricultural purposes when the timber and brush are removed; that the land is not known to be mineral, and so far as applicants are informed, is not such in fact, and has not been reserved by the government; that the agricultural interests have not kept pace with the growth of towns in that part of the State, chiefly because the surveyed lands have not been equal to the demand of immigrants seeking farming lands; and that it is not believed any portion of the land, however heavily timbered, could be held as a timber claim for the reason that it is regarded as cultivable, and hence valuable for farming purposes when the timber is removed.

Accompanying the application are seventeen individual affidavits of the settlers, substantially corroborating all the statements therein made, and further setting forth the dates of their respective settlements (except in three cases), the uses made of the lands and the character and extent of their improvements, a partial estimate of the value thereof being given only in a few instances. These affidavits show that five of the settlers located on their respective claims in the fall of 1888; seven in the spring of 1889; one in April, 1887, and one in April, 1888, but as to the remaining three settlers no dates are given. With one exception, each affidavit contains a statement to the effect that the lands are more valuable for agricultural purposes than for their timber. Several unsworn statements of persons claiming to be settlers are also filed in support of the application.

The application appears to have been filed in the office of the United States surveyor general for Washington, on the day of its date, and that officer in his report thereon, dated March 29, 1890, states that the lands "are heavily timbered, mountainous, or covered with dense undergrowth, and exceptionally difficult to survey, and the work can not be contracted for at less than the highest rates allowable under the appropriation act of March 2, 1889, viz: eighteen dollars per linear mile for standard and meridian lines, fifteen dollars for township, and twelve dollars for section lines;" and he recommends that authority be given him to contract for the survey applied for at these rates. The act referred to (25 Stat., 939-959,) provides that, if in cases of exceptional difficulties in the surveys, the work can not be contracted for at the usual rates, compensation for such surveys may be made by the Commissioner of the General Land Office, with the approval of the Secretary of the Interior, at rates not exceeding those mentioned in said report.

In your letter of transmittal you state, in effect, that the application and accompanying affidavits appear to be executed in substantial compliance with circular instructions of June 24, 1885 (3 L. D., 599), but the attention of the Department is specially called to section three of said circular which reads as follows:

The deposit system being restricted by law to surveys for pre-emption and homestead settlers is not applicable to the survey of desert lands or desert land claims, nor to swamp lands, nor to lands valuable chiefly for timber, nor to waste or uncultivable lands of any character, nor to lands occupied, inclosed, or controlled for other than settlement purposes, nor to private land claims.

Whereupon you further state, in substance, that except as to the question whether or not the lands to be surveyed are "lands valuable chiefly for timber" and come within the interdiction of the circular in respect to such lands, you have no hesitation in recommending that authority be given your office to cause the township to be surveyed under the deposit system at the augmented rates named in said act.

Although the record shows that portions of the lands are heavily tim-

bered, they are nevertheless clearly shown to be more valuable for agricultural purposes than for the timber, and the township appears to be covered with settlers who are seeking to obtain title to their claims for farming purposes. I think it sufficiently shown, therefore, that the lands do not belong to that class described in the circular referred to, as "lands valuable chiefly for timber," and I see no good reason why they may not be regarded as subject to survey under the deposit act.

The application, upon the whole, appears to be a meritorious one, and in my judgment the survey should be made. You are accordingly authorized to cause the same to be made, in accordance with existing rules and regulations, at the maximum rates mentioned in the act of March 2, 1889, *supra*, if it shall be found after the required notice, and invitation of proposals for the survey, are had, that it cannot be made at less cost.

Your attention is called to the fact that the lands sought to be surveyed appear to be within the primary limits of the grant to the Northern Pacific Railroad Company—branch line. If they are found, upon survey, to be so situated, said company will, under the act of July 31, 1876 (19 Stats., 102-121), ultimately have to pay the cost of the survey of such sections as fall within its grant.

JEFFERSON D. MASKE.

Motion for review of Departmental decision rendered August 1, 1890, 9 L. D., 203, denied by Secretary Noble, May 19, 1890.

HOMESTEAD—ADJOINING FARM ENTRY—RESIDENCE.

MCHARRY *v.* STEWART. (ON REVIEW).

Residence on the contiguous tract, claimed as the original farm, is an essential prerequisite to the right of making an adjoining farm entry under section 2289 of the Revised Statutes.

Secretary Noble to the Commissioner of the General Land Office, May 19, 1890.

On December 10, 1883, James Stewart made homestead entry (adjoining farm) No. 5734, for lots 2 and 3 Sec. 22, and lot 1 Sec. 27, T. 2 N., R. 3 W., Mount Diabolo meridian, San Francisco land district, California. On December 13, 1883, Daniel S. C. McHarry filed declaratory statement No. 17,834, for the same tracts, and certain others not in dispute, claiming settlement thereon January 19, 1878. The plat of survey of said township was filed December 10, 1883. Subsequently, McHarry gave notice of his intention to make proof in support of his pre-emption

claim. Against this proof Stewart protested as to the described lots, and a hearing was had May 9, 1884, at which both parties were represented and testimony submitted. The judgment of the local officers was adverse to Stewart, who appealed. On September 1, 1886, your office reversed said judgment, and McHarry appealed. On September 16, 1889, the judgment of your office was reversed, and that of the local officers affirmed. (See 9 L. D., 344).

The case is again before me on a motion on behalf of Stewart to review and reverse the departmental decision.

The facts of the case are fully and fairly stated, and the law applicable thereto discussed at length, in the reported decision, so that it is sufficient, for the purposes of considering this motion, to briefly restate the principal facts.

One James McClellan was the owner, before his marriage, of one hundred and seventy-five acres of land purchased from the owners of the Pinole Rancho. He died in 1871, leaving a widow and two minor children. On February 18, 1876, said tract of land was set apart by the probate judge of Contra Costa county as a homestead "for the use of the family" in accordance with the provisions of the laws of California. (See Code and Statutes, sections 6260 and 11,465.) This homestead adjoins the lands in controversy in this case. Shortly afterwards the widow of McClellan married James Stewart, the contestant here, and on October 2, 1882, she executed a deed purporting to convey to Stewart the "SE $\frac{1}{4}$ of the SW $\frac{1}{4}$ and fraction in the SW $\frac{1}{4}$ of the SE $\frac{1}{4}$ " of sec. 22, T. 2 N., R. 3 W, being about sixty acres of said homestead which lie contiguous to the lots in question.

It is the alleged ownership of and residence upon this tract of sixty acres which is the basis of Stewart's claim to make an adjoining farm entry under section 2289, Revised Statutes.

On this state of facts and the testimony submitted at the hearing, it was held by the Department, substantially, that the deed from his wife to Stewart did not convey to him such an estate in the land embraced therein as will sustain an adjoining farm entry, and that, independently of the defect in the title, the evidence showed that Stewart did not reside upon the land he claimed to own during the period covered by his adjoining farm entry.

It is urged that said decision should be reviewed and reversed because (1) the laws of California relating to probate homesteads are misconstrued therein; (2) because the ruling that an undivided interest in land does not afford a legal basis for an adjoining farm entry is erroneous, harsh and new; (3) being new, the point should be fully argued; (4) said decision is based on facts not passed on by the local officers, and is contrary to the finding of the Commissioner of the General Land Office on the same facts; and (5) if said decision is right in regard to probate homesteads, then the case ought to be sent back in order that the minor children of McClellan should be represented in the case. In

conclusion, sufficient time is asked for filing a brief in support of the points presented, of which the substance only is given.

Though the motion for review was filed on October 19, 1889, no argument has been presented in relation thereto up to the present time.

In disposing of this motion, it is not necessary to answer the specifications of errors as given above.

A number of witnesses were examined at the hearing and a large amount of testimony was taken at that time, much of which is conflicting, unsatisfactory and evasive. It has all been gone over patiently, and from that submitted in behalf of Stewart, including the testimony of himself and wife, it is quite clear that he has not resided on the land, which he claims to own, since 1879, when he removed therefrom to the town of Martinez, some miles away, where he has, with his family, lived, and where he has carried on a grocery-store and keeps a saloon. The claim, on his part, of residence upon the homestead, is a mere pretense, and is only evidenced by occasional excursions or visits by himself and wife to the said land, which has been all the time in the occupation of and cultivated by a tenant. The town residence has never been for a moment abandoned, and is not claimed to have been abandoned at any time. But whilst retaining and occupying it, carrying on business in connection therewith for years, the bold claim is made that his residence has been and is upon the homestead tract. This claim has only assertion to support it, while all the facts contradict it.

The excuse set up by Stewart that he was deterred from maintaining an actual residence upon the probate homestead because of threats and fear of violence on the part of the McHarry's, is not supported by the evidence, is in conflict with his claim of and attempt to show actual residence thereon, and is contradicted by his own testimony and that of his wife, wherein it is asserted they were in the habit of going upon the land and staying as long as they pleased or found it convenient.

I therefore hold that the claim of residence, as well as the inconsistent excuse for failure to maintain the same, are without foundation in law or fact.

Having come to this conclusion, it is not necessary to pass upon the other questions in the case, for, as section 2289 of the Revised Statutes only allows an adjoining entry to a person "owning and residing on" contiguous land, even if all the other questions were decided favorably to Stewart, this want of residence would be fatal to his right to enter the lots in question as an adjoining entry.

Entertaining these views, the motion is denied.

HOMESTEAD ENTRY—SETTLEMENT RIGHTS.

FRANKLIN *v.* MURCH.

One who occupies public land as the tenant of another does not thereby acquire a settlement right under the homestead law.

The act of settlement is complete from the instant the settler goes upon the land with the intention of making it his home, and performs some act indicative of such intent.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 20, 1890.

I have considered the case of Benjamin Franklin *v.* Horace G. Murch, on appeal by the latter from your decision of December 29, 1888, cancelling his homestead entry No. 3519 for the W. $\frac{1}{2}$ SE. $\frac{1}{4}$ and W. $\frac{1}{2}$ NE. $\frac{1}{4}$ of Sec. 23 T. 9 N., R. 39 E., Walla Walla land district, Washington.

On September 5, 1885, Horace G. Murch made application to enter said land and afterward, on the same day, Benjamin Franklin made application to enter said W. $\frac{1}{2}$ SE. $\frac{1}{4}$ together with the E. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of same section, alleging in his affidavit that he had made settlement in May 1883. Each of said applications were rejected because said land "is within limits Northern Pacific R. R."

On September 12, 1885, Franklin filed with the local officers his affidavit, setting forth his settlement and residence on said land, and his application to enter the same and also setting forth the claim of Murch to the W. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of said section, which conflicted with his claim, and asked that a hearing be ordered to determine the rights of the parties to said tract.

This application was allowed and the hearing was fixed for October 30, 1885, of which Murch had due notice.

On the day of hearing both parties appeared in person and by attorney and the testimony having been heard, the local officers decided that Franklin had the prior right to said land, from which decision Murch appealed to your office.

Pending these proceedings one Charles Robertson attempted to purchase said land, and his application being rejected he appealed to your office, but he has no appeal filed in this Department, and his connection with the case has ceased to be of any importance.

Murch and Franklin each made subsequent applications to enter said tract, but their rights are dependent upon their original applications to enter, and their subsequent applications will not be considered in the case.

On December 29, 1888, your office decision affirmed the decision of the local officers and held Murch's entry for cancellation. From this decision Murch appealed to this Department.

The testimony shows that Franklin made settlement upon this land in May 1883, and established his residence thereon, living with his wife in

a tent, until June of same year, when he had a house erected, into which he moved, and in which he has since continuously resided.

This tract adjoined land owned by Robertson, and in building a fence around his field, they followed the contour of the ground, rather than straight lines, and in so doing enclosed in Robertson's field from one to three acres of the south part of the tract in controversy.

In 1883, Murch, who is Robertson's son-in law, lived on Robertson's farm and rented of him his farming land, and in cultivating the same, plowed the parcel of the controverted tract so enclosed.

In the latter part of May 1883, soon after Franklin moved onto the tract, a mob consisting of about twenty men was organized at Robertson's mill, on the adjoining land, and went to Franklin's tent to move him off the tract. His tent was on the south part of the land near the parcel enclosed with Robertson's field. Franklin not being at home, Robertson who was along with the mob, prevented violence, but Murch, who was very active in this enterprise, notified Mrs. Franklin that if they did not move from where they lived, they would be moved by force. Franklin, the next day, upon his return, moved his tent to the north part of the W. $\frac{1}{2}$ of SE. $\frac{1}{4}$ and again pitched it, and built his house, above mentioned, near it. In addition to his house he has built a barn and fenced, cleared and cultivated twelve to fifteen acres of the land.

In 1883, Murch built a little fence on the tract in connection with Robertson's field, and 1884, erected a house on the south part of the tract and moved into it and has cleared some eight or ten acres and fenced in forty or fifty acres of the land. Both men were claiming possession at the date of the hearing. Murch claims prior settlement, because of the cultivation of the parcel of tract included in Robertson's field, he further claims that Franklin abandoned his claim to the tract when he moved his tent.

It is very clear that his occupancy of the parcel included in Robertson's field was merely incident to his tenancy, and while he testifies to prior entry, settlement and cultivation, it is in law no entry or settlement upon the land. His family resided on Robertson's farm. "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." *Lytle v. Arkansas* (22 How., 193), cited and followed in *United States et al v. Atterbery et al.* (8 L. D., 173).

Being a tenant of Robertson, Murch could establish no claim in his own right. *Call v. Swain* (3 L. D., 46).

Franklin became an "actual settler" the instant he pitched his tent upon the land with the intention of making it his home, and if the mob had driven him off within the next hour his settlement would have been complete. Besides he did not move off of the tract, but only to another part of it.

I concur in the conclusion that Franklin has the better right to the

said W. $\frac{1}{2}$ SE. $\frac{1}{4}$ in dispute and his entry should be allowed to stand. This necessarily involves the cancellation of Murch's entry as to this tract, but inasmuch as Murch's claim to the W. $\frac{1}{2}$ of NE. $\frac{1}{4}$ of said section is not involved in this controversy, I see no reason for cancelling his entry as to that tract, and it will be allowed to stand.

Your decision is accordingly modified.

CONTEST—PREFERENCE RIGHT—FAILURE TO APPEAL.

BOOS *v.* WHITCOMB.

A contestant who fails to appeal from a decision of the local office dismissing his contest, is not thereafter entitled to assert the preference right of a successful contestant in the event that the entry under contest is canceled on the evidence submitted therein.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 20, 1890.

In the matter of the appeal by Ferdinand Boos from your decision of September 2, 1887, cancelling his timber culture entry for the SE. $\frac{1}{4}$ Sec. 7, T. 111 N., R. 63 W., Huron land district South Dakota, I have examined the record in the case and find the following facts:

On August 12, 1882, Boos made homestead entry for the land, and on January 22, 1884, Whitcomb filed affidavit of contest against the same.

On September 8, 1884, the local officers decided against Whitcomb, and dismissed the contest. It appears that Whitcomb failed to appeal in time, and his appeal filed on October 23, 1884, was rejected by the local office, but it was sent to your office with the papers in the case. Your office affirmed the action of the local officers in rejecting Whitcomb's appeal, but reviewed the case under rule of the Department, and canceled Boos' homestead entry. This decision was affirmed by this Department, in May, 1887 (5 L. D., 448).

On May 23, 1887, the parties were notified of the cancellation and on May 26, 1887, Boos made timber culture entry for the land. On June 11, 1887, Whitcomb made timber culture entry for same tract.

In his affidavit filed for entry he says he is the identical Leslie C. Whitcomb who was the contestant in the case of Whitcomb *v.* Boos, involving the SE. $\frac{1}{4}$ Sec. 7, T. 111, R. 63.

The local officers reported Boos' entry in their May (1887) report and that of Whitcomb in their June report.

In your letter September 2, 1887, you say to the local officers that—

Under the rulings of this office Whitcomb was clearly entitled to his preference right, and as he availed himself of said right in time, the entry by Boos is illegal and is held for cancellation. Notify Boos hereof and of his right of appeal.

Boos was notified of this action March 23, 1888, and on May 22, 1888, he appealed from said decision.

Whitcomb, having failed to appeal from the decision of the local office of September 8, 1884, dismissing his contest, is out of court, and is not in position to claim the preference right of a contestant. A preference right is only given to a successful contestant, Sec. 2, act May 14, 1880, 21 Stats., 140. Whitcomb does not bear that relation to this case. When the register and receiver decided against him and he acquiesced therein by failing to appeal, he had no greater right to the tract than any other qualified entryman, and upon the cancellation of Boos homestead entry, there is nothing in the record to show that he was not qualified to enter the same tract under the timber culture act, and having made such entry prior to the time Whitcomb made his timber culture entry, I can see no valid reason why the same should not be upheld. There is certainly nothing in the record that will justify the Department in canceling the entry.

Believing your decision to be wrong, the same is hereby reversed.

TIMBER CULTURE CONTEST—BREAKING—MISTAKE.

VAUGHN *v.* BRECHEISEN.

The contestant cannot be heard to complain of the entryman's failure to comply with the law, if such failure is the result of the wrongful act of the contestant. That part of the breaking, through mistake, is not on the land entered, does not call for cancellation.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 20, 1890.

I have considered the case of Elsworth Vaughn *v.* Phillip Brecheisen, on appeal by the former from your decision of December 5, 1888, dismissing his contest against the timber culture entry of Brecheisen for the SE. $\frac{1}{4}$ Sec. 20, T. 26, R. 49 W., Chadron land district, Nebraska.

Brecheisen made timber culture entry for said tract March 16, 1885, and on March 17, 1886, Vaughn filed affidavit of contest against the same, alleging "that claimant has failed to break or cause to be broken five acres upon said tract during the first year after date of entry, and has failed to comply with the timber culture law upon said tract" etc., at the same time he made application to make a timber culture entry for said tract. A hearing was had upon said affidavit, but the same being without any sufficient notice to the entryman, the proceedings were set aside on May 25, 1888, by your office, and the case was remanded for further proceedings according to law.

On June 15, 1888, the contestant filed an amended and supplemental affidavit alleging—

That claimant has failed to break or cause to be broken five acres upon said tract during the first year after date of entry, and has failed to comply with the timber culture law upon said tract during the second and third years after date of entry and has failed to cure his defects up to date of contest.

Notice of contest, was thereupon served upon defendant, the hearing being set for August 13, 1888, and C. A. Burlew, clerk of the district court, Box Butte county, Nebraska, was appointed to take testimony at Nonpariel, Nebraska, on August 6, 1888.

The hearing was continued till September 20, 1888, and the deposition of Brecheisen was taken on interrogatories before a notary public at Battle Creek in Madison county, Nebraska on September 10, 1888.

The contestant with counsel appeared at the time of hearing and the contestee appeared by counsel. Upon consideration of the evidence the local officers found that claimant had complied with the law and were of opinion that said timber culture entry should not be canceled. From this decision Vaughn appealed to your office and your decision of December 5, 1888, affirmed the same and dismissed said contest. From this decision Vaughn appealed to this Department.

The testimony shows that the entryman had about ten acres of ground broken the first year, but a part of it, some five and a half acres, by mistake, was broken on an adjoining quarter section. The entryman lives some two hundred miles from the land, and Vaughn went upon it and broke several acres in 1887. In 1888 he cultivated the land broken by him together with land broken by the entryman. In June 1888, Brecheisen furnished tree seeds and employed three men to plant five acres of the tract, but Vaughn ordered them to stop planting, and claimed that more planting would interfere with his potato ground. He admits that he ordered the men to stop planting seeds; they informed him that they were planting for Brecheisen. He says he had prepared the ground and they were interfering with his potato patch; that he did not use any threats or harsh language, but they quit when he told them to. This was after he had notice of the Commissioner's decision, and just before he filed his second affidavit of contest. He admits that he knew Brecheisen's men had made a mistake and broke land on the wrong tract; but he says he does not know how much was so broken. It is not shown whether the potato patch was on the land broken by Brecheisen or Vaughn. The entryman was at considerable expense in preparing the ground for trees and tree seeds, and the breaking done "over the line" was paid for by him. He paid \$30 for plowing and paid \$25 to a man for cultivating and caring for the land. He also paid for re-surveying the tract and paid \$10 for planting tree seeds in 1888.

Vaughn was merely a trespasser when he went upon the land and did the breaking and cultivating and can not be heard to complain of the lack of planting when his own wrongful act prevented it.

The testimony in this case is rather unsatisfactory and appears to have been carelessly taken on both sides, but as the local officers and your office concur as to the rights of the parties, I do not feel authorized, on the case made, to disturb your decision, and the same is therefore affirmed.

HOMESTEAD ENTRY—APPROXIMATION—FINAL PROOF.

FRANK ALDRICH.

A homestead entry for parts of different quarter sections should approximate one hundred and sixty acres, but exceptions to this rule are recognized when valuable improvements would be disturbed, or other like injury follow the relinquishment of a sub-division.

Republication is required where the published notice does not definitely indicate the officer before whom the final proof is to be taken.

First Assistant Secretary. Chandler to the Commissioner of the General Land Office, May 21, 1890.

I have considered the appeal of Frank Aldrich from your office decision of December 2, 1887, suspending his commuted cash entry on account of excess of acreage and requiring him to relinquish one subdivision thereof so that the remaining contiguous tracts will approximate one hundred and sixty acres, and further requiring him to make new publication of notice.

The entry embraces lot 4, Sec. 17, containing 35.60 acres, SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 16, 40.00 acres, W. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 21, 80.00 acres, and lot 1, Sec. 20, 21.10 acres, T. 11, 8 N., R. 78 W., Huron, Dakota, making in all 176.70 acres.

Aldrich made homestead entry for said tracts January 15, 1883, and offered proof before the clerk of the district court of Hughes county, on June 18, 1883. Cash certificate issued the following day. The proof shows that residence had been continuous from June 3, 1882, and that he had substantial improvements, valued at \$1,000. In his proof he advertised his intention to make proof "before the judge or clerk of the court of record in and for Hughes county." The excess of acreage was paid for in cash.

In an affidavit on appeal Aldrich says that he made settlement before survey, and that the plat showed his improvements to be on lot 4, Sec. 17, lot 1, Sec. 20, and the NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 21; that prior to making said homestead entry he did not desire to enter said lots 1 and 4, but wanted other land adjoining them, but was informed by the register that he would have to include said lots, and that he could enter said land embracing 176.70 acres; that some time after cash entry Potter county was organized, "and as affiant's said land was the only land in Potter county that was proved up and available for a county seat of said county, affiant sold all the land embraced in his said cash entry for the purpose of said county seat, and all of said land was shortly afterwards platted and laid out into lots and the town of Forest City, was located thereon, which was then the county seat of said county; that as soon as said land was platted and laid out into lots, said lots or the greater number of them, were sold and disposed of to third parties, who in many instances have improved said lots and placed buildings

thereon." Two other residents of the town corroborate this affidavit and state that "if any portion of the land embraced in said cash entry is canceled" the buildings of the town will have to be removed, "and it will change to a certain extent the business streets and business buildings of said town."

It is well settled that homestead entries for parts of different quarter sections must approximate one hundred and sixty acres. Wm. C. Elson (6 L. D., 797). However, certain exceptions to this rule have been recognized when valuable improvements would be disturbed or other like injury follow the relinquishment of a subdivision. Lafayette Council 5 L. D., 631; Alexander Bouret (ib., 298). See also Joseph H. McComb (5 L. D., 295). In this case the excess is not great and the other facts clearly bring it within the exception indicated in the cases cited.

The notice published was insufficient. It failed to indicate the officer before whom proof was to be taken. Claimant will be required to give new notice of his intention to submit final proof, and if upon the day advertised for such proof no protest is filed, the proof heretofore made may be accepted. William M. Kemp (9 L. D., 439).

The decision appealed from is accordingly modified.

HOMESTEAD ENTRY—ACT OF JUNE 15, 1880.

COLE *v.* REED.

The relinquishment of a homestead entry defeats the right of the entryman to purchase under section 2, act of June 15, 1880.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 22, 1890.

I have considered the appeal of Francis W. Cole from the decision of your office dated May 8, 1889, holding for cancellation his timber culture entry for lot 1 and the SE. $\frac{1}{4}$ NE. $\frac{1}{4}$ and E. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of Sec. 4, T. 21 S., R. 24 W., Larned land district, Kansas, and rejecting his application for a hearing.

March 18, 1878, Loved W. Reed made homestead entry for said described tract.

April 29, 1882, Reed executed a relinquishment of said entry, and on September 13, 1883, the same was filed in the local office and the entry canceled, and the tract was thereupon covered by the pre-emption filing of Joseph L. Malosh.

June 27, 1884, Reed made application to have his homestead entry re-instated and that he be allowed to purchase said land under the provisions of the act of June 15, 1880, alleging among other things in his said application that his improvements on said tract consisted of a stone house seventeen by twenty feet; it had two doors and three windows;

a cut stone milk-house twelve by fourteen feet; a dug-out stable fourteen by sixteen feet; and forty acres broke and cultivated. Value of his improvements \$250. Reed also alleged that he resided with his family upon said homestead until April, 1880, when owing to the severe drouth and failure of crops during the years 1879 and '80, he was unable to earn a livelihood upon the land for his wife and four children, and moved to Andover county, Kansas, and not being aware of his privileges under the second section of the act of June 15, 1880, he executed a voluntary relinquishment to the United States of his interest in said land and delivered his receipt to one Dooley "who as he (Reed) has been informed, delivered it to one Malosh who filed it in the U. S. Land Office at Larned, Kansas." Reed's original entry was canceled September 13, 1883, and Malosh made a pre-emption filing for said tract.

June 28, 1884, the register transmitted Reeds application to your office stating that "we received a letter from Malosh, in which he claims to be actually residing on the said tract . . . under the circumstances, there being adverse rights, we can not recommend the reinstatement asked."

September 27, 1884, your office directed the local office to reject Reed's application because of Malosh's adverse right, and said application was accordingly rejected.

March 13, 1885, Reed appealed.

November 2, 1885, Francis W. Cole made timber culture entry for said land. November 4, 1885, Malosh's relinquishment (dated September 4, 1885) of his pre-emption declaratory statement was filed in the local office, and said declaratory statement was canceled.

November 19, 1885, your office informed the local office that as a pre-emption filing was not regarded as an absolute appropriation of the land, that Reed's application to make cash entry "may be granted subject to the rights of said pre-emptor."

December 17, 1885, Reed made cash entry for said tract.

March 6, 1886, Cole filed a protest against the allowance of said cash entry, alleging among other things that he had just that day learned of the action of the local officers allowing said entry; that the same was to his (Cole's) injury and prejudice and should be canceled because of its illegality.

June 8, 1887, your office notified the local office that Cole's timber culture entry was held for cancellation because of its conflict with Reed's cash entry.

June 27, 1887, Cole filed an application for a reconsideration of the decision of June 8th, based upon several affidavits alleging that he (Cole) had obtained evidence showing that Reed relinquished his homestead entry for a valuable consideration; that his cash entry was made on false and fraudulent proof and for speculative purposes, and that a hearing should be ordered in the premises.

January 22, 1889, your office rejected Cole's application, and adhered to its former decision holding his entry for cancellation.

March 26, 1889, Cole appealed to this Department alleging substantially the following grounds of error :

1st. In holding that the pre-emptor who purchased Reed's interest in said land for \$5, is a stranger to the record.

2nd. In holding that there is no evidence of the transfer of the land and that the relinquishment did not carry with it the settler's equities to the same.

3rd. In holding that the relinquishment executed by Reed for the benefit of Malosh could not be construed to imply that the surrender of the duplicate receipt by Reed was equivalent to a transfer by bona fide instrument in writing or equal to a deed of conveyance.

4th. In holding there was no fraud practiced by Reed, but on the contrary a clear legal right exercised by him.

5th. In holding appellant's entry for cancellation because of conflict with Reed's entry, and in not cancelling Reed's entry because made after he had transferred to a subsequent claimant for a valuable consideration all his right, title and interest to said tract as shown by his endorsement upon the back of his duplicate receipt.

Upon review of the record in this case, it is apparent that it should be governed by the rule laid down in the case of *Rice v. Bissell* (8 L. D., 606), wherein it is held that

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 will 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 re-instatement of the original entry.

I am of the opinion that as there is no evidence in the case at bar that the relinquishment of the original entry was obtained by fraud, or executed by mistake, and Reed having voluntarily relinquished his original entry, more than six weeks before the passage of the act of June 15, 1880, he can not now plead that he acted in ignorance of an act which was not then in existence, nor has he, as I view it, a basis for an entry thereunder in the presence of the adverse claim of Mr. Cole.

For the reasons herein stated, the decision of your office is reversed. Reed's cash entry will be canceled and Cole's timber culture entry be re-instated.

TIMBER CULTURE CONTEST—CULTIVATION.

TRIPP *v.* DIEHL.

Failure to secure a growth of trees does not call for cancellation if said failure is not due to the negligence of the entryman.

A contest must fail if the default charged is cured prior to the initiation of the contest.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 22, 1890.

I have considered the appeal of Charles E. Diehl from the decision of your office dated October 16, 1888, in the case of Benjamin Tripp *v.* said Diehl, holding for cancellation the latter's timber culture entry for the SW. $\frac{1}{4}$ of Sec. 6, T. 30, R. 8 W., Niobrara, land district, Nebraska.

On December 7, 1878, Diehl made timber culture entry for said land, and on December 31, 1885, Tripp, initiated a contest against said entry alleging that the—

Said section is not prairie land naturally devoid of timber but contains a natural growth of from forty to fifty acres of oak, ash, cottonwood, elm, and box elder; that about one hundred and fifty cords of natural wood have been cut from said section, some trees being two feet in diameter, and if said timber had been properly protected there would be more wood than necessary for the families that may have resided, or may reside there; that defendant failed to plant or cause to be planted five acres of said tract to trees, seeds or cuttings since October 22, 1884, the date of his extension, and there are not now growing on said tract fifty planted trees, and said failure exists at the present time; that the defendant failed to break five acres of said tract the second year after entry.

Hearing was ordered and had. The local officers found that the tract was subject to entry under the timber culture law, but that claimant failed to break ten acres within the time required, and also failed in planting, cultivating and protecting "the requisite acreage of trees, seeds and cuttings as required by law," and recommended the entry for cancellation. The claimant appealed, and on October 16, 1888, your office affirmed the findings of the local office and held the entry for cancellation, whereupon he further prosecuted his appeal to this department.

The local officers decided that the tract was subject to entry under the timber culture law. The contestant did not appeal from that part of their decision and it therefore became final on that point. The only question presented to and passed upon by your office was as to the entryman's compliance with the requirements of the law. That question is therefore the only one to be now considered by this Department.

The contestant was sworn and testified at the hearing, but he could not swear that claimant had failed to plant five acres of said tract to trees, seeds or cuttings since October 22, 1884; he could not tell how many acres the entryman had broken on the tract the second year after entry; he testified that he measured the breaking the day before the

hearing (March 12, 1886) with a rope and found it to contain only seven acres, and only three living planted trees growing thereon. He admitted on his cross examination that at the time he measured the breaking there were seven or eight inches of snow on the ground, and that the measuring was done with a rope which was wet; that the breaking was two rods wide at each end, and about half a mile long; he did not measure the length of the breaking, he only judged of its length from the fire breaks near to it.

Three other persons testified on the part of contéstant, but their testimony is of a negative character and does not materially strengthen the testimony given by him.

Samuel S. Haines testified that he had been claimant's agent since February, 1885; that he employed W. R. Drake to plant ten acres of said tract to cottonwood cuttings four feet apart each way, and that they were planted in May, 1885; he afterwards measured the part planted and found it contained but $9\frac{1}{4}$ acres. On his cross examination he swore that he saw Diehl break about five acres in 1879, and about five acres in 1880, and supposed both together contained ten acres until after he had measured the planting done by Drake. He paid Mr. Drake twenty-five dollars for planting ten acres, and Drake furnishing the cuttings.

A. McCloud testified that he had known the tract in question since April, 1880; and saw Mr. Drake working there in the spring of 1885, also saw some cottonwood trees growing on the land.

W. R. Drake was sworn and his evidence fully corroborates that given by Haines; he also testified that he cultivated said cuttings with a two horse cultivator during the summer of 1885, but that the same were killed by drouth during that season.

The claimant offered in evidence a corroborated affidavit for extension, which was executed before the register and filed in the local office October 22, 1884, marked exhibit "G".

It appears from the record in the case at bar that the tract covered by claimant's entry contains 152.64 acres, and at the time of the initiation of this contest very few planted trees were growing upon said land, but contéstant failed to show that such failure was owing to any neglect or bad faith on the part of claimant; or that the $9\frac{1}{4}$ acres were not properly replowed and planted to cottonwood cuttings and cultivated during the year 1885, and during the period covered by said extension.

Upon review of the record of this cause, I think it should be governed by the decision in the case of *Hartman v. Lea* (3 L. D., 584), wherein it was held that where the requisite breaking and planting were done within the proper time, but the seeds so planted failed to grow, that the entry should not be forfeited. This same ruling was followed in the case of *Sanford v. Burbank* (6 L. D., 773), and *Conrad v. Emick* (7 L. D., 331). Therefore, as the weight of affirmative evidence shows that claimant in good faith had cured his default, if any existed, prior to the

initiation of this contest, and that the cuttings planted and cultivated in 1885, were killed by drouth, this contest should be dismissed. *Stan-ton v. Howell* (9 L. D., 644),

The decision appealed from is accordingly reversed.

— — —
PRACTICE—NOTICE OF CONTEST—INFORMATION.

MILLER *v.* KNUTTSON.

A notice that does not set forth the grounds of contest is defective, and does not war-rant proceedings thereunder.

An affidavit of contest should charge the continuance of the default alleged.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 22, 1890.

I have considered the case of William Miller *v.* Knutt Knuttson on appeal by the latter from your decision of November 19, 1888, cancel-ling his timber culture entry for E. $\frac{1}{2}$ of NE. $\frac{1}{4}$ and N. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of Sec. 32, T. 115 N., R. 45 W., 5th P. M., Redwood Falls land district, Minne-sota.

On June 5, 1877, Knuttson made timber culture entry for said tract, and on April 24, 1884, Miller filed affidavit of contest against the same, alleging that Knuttson, "has not complied with the timber culture law in the matter of planting five acres of trees, seeds, nuts or cuttings the third year after said entry, or of planting five acres of trees, seeds, nuts or cuttings the fourth year after said entry and has not cultivated said tract."

Affidavit was also made, to authorize service of notice by publica-tion, which was made and said contest heard, but objection having been made to the service of notice such proceedings were had that the case came before this Department on appeal, and on May 24, 1886, Act-ing Secretary Muldrow held that the objection to the service was well taken, and without considering the testimony or passing upon any other matter in the case, the service was set aside, "with leave to con-testant to proceed with his contest by a new notice, provided he applies to do so within a reasonable time, say thirty days, from receipt of this decision." 4 L. D., 536.

Notice of this decision was duly given and within thirty days there-after, to wit on July 8, 1886, Miller elected to proceed with his contest and a notice was issued and served personally upon Knuttson on August 11 thereafter; the hearing being set for September 23rd, of same year. Said notice was on a printed form and was as follows:—

U. S. LAND OFFICE, REDWOOD FALLS,

Minn. July 8, 1886.

Complaint having been entered at this office by William Miller against Knutt Knuttson for failure to comply with law as to timber culture entry No. 467, dated June 5, 1877, upon the . . . , with a view to the cancellation of said entry, and

as per a commissioner's letter of May 24, 1886 a new hearing was ordered by the Commissioner of the General Land Office—the said parties are hereby summoned to appear at this office on the 23rd day of September 1886, at 10 o'clock A. M., to respond and furnish testimony concerning said alleged failure.

Signed by the register and receiver.

July 8, 1886, the register wrote your office, that the contestant had applied for new hearing; that notice had been issued in the matter and said: "Please return the affidavit of contest for us to go by on the trial."

By stipulation of attorneys the hearing was continued until October 22, 1886, at which time the parties appeared, and the attorney for contestee filed a motion to dismiss the contest on the grounds:—

1st. That no charges of failure to comply with the timber culture law are set forth in the notice of contest.

2nd. That no failure is alleged to exist at the date of notice of contest or filing the affidavit of contest on which re-hearing is ordered.

3rd. That the defendant in this case has not been charged with any failure to comply with the law, and therefore cannot be prepared to defend.

This motion was "denied" and exceptions were taken and noted of record. Contestant then offered his evidence; objection was made to any testimony subsequent to the filing of the original affidavit. Contestee also offered testimony and the same having been concluded the local officers decided against the claimant and recommended the entry for cancellation. From this decision Knuttson appealed and on November 19, 1886, your office decided that:—

The said charges, as alleged having been proven, your decision is sustained and the entry held for cancellation.

From this decision Knuttson again appealed, and thus the case is a second time before this Department for consideration.

The purport and extent of the former decision of this Department seems to have been misapprehended both by the local officers and in your office. By that decision this Department did not order a new hearing nor did it pass upon the sufficiency of the charges in the contest affidavit as held in the decision of your office now under consideration. It was there simply held that there had been no legal notice in the case and it was returned to afford the contestant an opportunity to give such notice as would confer jurisdiction upon the local officers.

The notice herein is defective in that it does not state the grounds of the contest as required by the rules of practice and the decisions of this Department and the objection thereto must be sustained. Inasmuch however as this error seems to be that of the local officers rather than of the contestant he should be afforded an opportunity to cure it. All proceedings had under said notice are therefore set aside and the case will be returned with leave to the contestant to proceed anew within thirty days from notice hereof by proper notice duly served in accordance with the regulations governing such cases.

While the case might be disposed of on this point yet, I have con-

sidered it advisable to the end that this litigation may be terminated as speedily as possible to consider the objection made to the contest affidavit. Said affidavit is clearly defective in that it does not allege a continuance of the default charged to the date of its execution and before a hearing can be properly proceeded with thereunder or testimony submitted in support thereof, it must be amended in the particular designated.

If the contestant shall not within the time specified signify his intention to further prosecute his contest the same will be dismissed.

PRACTICE—NOTICE OF APPEAL—RULE 82.

BUNDY *v.* FREMONT TOWNSITE (ON REVIEW).

An appeal will not be entertained if notice thereof is not served on the opposite party within the time accorded therefor under the rules of practice.

The fact that appellant is not notified, under rule 82, of his default in omitting proof of service, until too late to make the service under the rules of practice, can not affect his status or the rights of the appellee.

Secretary Noble to the Commissioner of the General Land Office, May 23, 1890.

I have considered the motion filed on behalf of Hiram Bundy for review of the decision in the case of said Bundy against the Townsite of Fremont dated August 16, 1889, (9 L. D., 276), involving the NE. $\frac{1}{4}$ Sec. 23 and the SE. $\frac{1}{4}$ Sec. 14, T. 8 S., R. 25 W., Oberlin, Kansas.

It appears that on March 29, 1888, your office rendered a decision adverse to Bundy. He was notified on April 12, 1888, and filed an appeal which, on May 25, was returned by your office in order that proof of service in accordance with the rules of practice might be furnished. On July 17, following, the appeal was again filed accompanied by proof that notice thereof, including a copy of the specifications of errors and argument, was served on the attorneys for the appellees by registered letter July 13, 1888.

The case was then forwarded to the Department with a motion by the attorneys for the Townsite claimants for the dismissal of the appeal, for the reason that the same had not been filed in accordance with the rules of practice.

The case was dismissed because no proper service had been had within seventy days from notice as required by the rules.

The motion states:

Now there is but one point to be considered in the disposition of the within motion, and by it we stand or fall. Does the time allowed by rule 82 of the rules of practice run against an appellant in determining whether his appeal is in time or not?

Rule 82 is :

When the Commissioner considers an appeal defective he will notify the party of the defect, and if not amended within fifteen days from the date of the service of such notice the appeal may be dismissed by the Secretary of the Interior and the case closed.

No notice under the rules was given the adverse parties until July 13, 1888, more than ninety days after notice of the decision.

This was in violation of the rules of practice and fully authorized the dismissal of the case. *Groom v. Missouri, Kansas and Texas R'y Co.* (9 L. D., 264).

The point made by the motion therefore does not properly arise in this case. The defect found in the appeal by your office was that the *proof* of service was not furnished. But when the case reached the Department it was discovered for the first time that the service itself had not been made as the rules require.

The fact that appellant was not notified of his default in omitting proof of service, until too late to make the service under the rules, can not affect his case or the rights of appellees. They were entitled to proper notice within seventy days after Bundy was notified of your office decision, and he was charged with knowledge of the rule. In this he failed and his case was thereafter subject to dismissal.

I find no reason for disturbing said decision, and the motion is accordingly denied.

 FINAL PROOF—EQUITABLE ADJUDICATION.

ELIAS ROSENTHAL.

In the absence of evidence showing that the case is within the confirmatory provisions of the act of March 2, 1889, a defect in final proof, caused by failure to submit the same on the day fixed therefor, must be cured through equitable action.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 23, 1890.

Elias Rosenthal advertised his intention to submit pre-emption proof before the local officers on April 27, 1883, for NE. $\frac{1}{4}$ Sec. 25, T. 101 N., R. 63 W., Mitchell, Dakota.

The proof was taken the following day and showed that claimant made settlement and established residence on July 29, 1882, built a house ten by twelve feet, and broke six acres, and that his residence had been continuous. The improvements were valued at \$65. Final certificate thereupon issued.

By letter of April 2, 1888, your office rejected the proof on account of the small amount and value of improvements and because proof had not been made on the day advertised. Notice of this action was mailed to claimant's address on May 21st following, but was returned unclaimed.

By letter of January 28, 1889, your office accordingly held the entry for cancellation.

From this action Claudius Horst appeals and alleges on oath that on June 11, 1884, he purchased the tract from Herman Rosenthal, a brother of claimant, that he has resided on the claim since April 1, 1885, and now occupies it as a farm and home, and that at the time notice was sent to Rosenthal the latter was residing at Spencer, Dakota, over fifty miles from the land. Leopold Jacobs, a witness on final proof, says in an affidavit that he has known the pre-emptor from boyhood; that on July 29, 1882, Rosenthal made settlement by digging a well, and on or about August 1, 1882, he built a house of ship-lap lumber with shingled roof, walls battened on the outside, ceiled floor, one door, and two windows; that the house was habitable and comfortable during all seasons of the year, and well furnished; that he maintained residence therein until sometime in the fall of 1883, that he raised no crop during the first year as his settlement was too late, but that in 1883, he broke twenty-four acres more making thirty acres "all of which he cropped to corn that year," and that in the summer of 1888, he moved to New York. This affidavit is corroborated.

These allegations seem fully to meet any objections to the merits of the case.

As no protest appears in the record on the ground that the proof was not taken as advertised, it will be presumed that none was filed. Caroline Bruner (9 L. D., 339).

The cause of the delay in this case does not appear. If it had been made to appear that the pre-emptor was prevented by "accident or unavoidable delays" from making proof as advertised, the entry might be passed to patent by virtue of the provision of the act of March 2, 1889 (25 Stats., 854). In the absence of such proof however, although the delay was but of one day, the defect must be cured by reference to the board of equitable adjudication, under section nine of final proof rules, dated July 17, 1889 (9 L. D., 123), which provides,—

Where final proof has been accepted by the local office prior to the promulgation of said circular of February 19, 1887, if in all other respects satisfactory, except that it was not taken as advertised, the case may be submitted to the board of equitable adjudication for its consideration.

It is so ordered.

The decision is accordingly modified.

DESERT LAND ENTRY—FINAL PROOF—EQUITABLE ADJUDICATION.

EDWIN J. EATON.

The testimony on final proof should show that the witnesses have personal knowledge that each sub-division of the land is irrigated.

The claimant's affidavit and the testimony of the final proof witnesses must be taken at the same time and place.

A desert land entry may be equitably confirmed when the failure to effect reclamation within the statutory period is due to obstacles that could not be overcome.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 23, 1890.

With your letter of April 5, 1889, you transmit the appeal of Edwin J. Eaton from your office decision of November 28, 1888, wherein you hold for cancellation appellant's desert land entry No. 2344, made February 11, 1885, for Sec. 21, T. 48 N., R. 92 W., Buffalo, Wyoming, consisting of six hundred and forty acres.

On June 6, 1888, claimant made an affidavit, in response to a notice to show cause why his entry should not be canceled for failure to make proof within the time required by law. He stated in said affidavit, that unavoidable delays had been suffered in constructing a ditch, but that the same would be completed and water running through the same during July, 1888, and that the lands embraced in said entry would be thoroughly irrigated in August, of that year; that the sum of \$18,000 had been expended in the construction of said ditch, of which sum he had paid the sum of \$608.

This showing having been made, your office, by its letter of July 20, 1888, allowed him sixty days to make final proof, and also advised him that the law did not authorize an extension of time for the reclamation of land.

On October 17, 1888, he made a second affidavit, asking a further extension of time to reclaim the land and make final proof. In this affidavit he testifies, that about the time of making said entry twenty-seven other desert land entries of contiguous lands were made by residents of the city of Colorado Springs, Colorado; that the said entrymen, including claimant, formed a corporation under the corporate name of the Big Horn Ditch Company, for the sole object of constructing and maintaining a ditch for the irrigation of the lands embraced in said entries—the capital stock of said company being \$17,020, divided into seventeen hundred and two shares of ten dollars each; that the whole of said capital stock was subscribed for and is now held by said entrymen—each entryman subscribing for and now owning one share of said stock for each and every ten acres of land embraced in his entry; that in June, 1885, said company commenced the work of constructing a ditch from the Big Horn river for the irrigation of said lands, and diligently continued such work until the latter part of July, 1888,

when the same was fully completed; that said company were delayed in the construction of the ditch by the fact that along its course were several depressions in the surface of the ground, which rendered it necessary to construct several long and high flumes, and owing to the isolated locality in which the work was being done, and to the scarcity of saw mills in that region, it was almost impossible for the company to get the lumber for the construction of the flumes; that the company, after great difficulty, succeeded in procuring the necessary lumber in the fall of the year 1887, and as soon as possible thereafter the flumes were erected. The ditch was fully completed during the month of July, 1888, and water turned into it from said Big Horn river, for the purpose of irrigating said lands, through said ditch; but within a very few days thereafter the water in said river fell to such a low stage that it could not be gotten into the ditch; that such stage of water was occasioned by long continued drought, and by the very small quantity of snow which fell during the winter of 1887-8 in the mountains in which said river heads; that the water in the river was lower in July, 1888 (and has so remained ever since), than it had been during any other season for a great many years; that, while the lands lying under said ditch and embraced in the aforesaid desert land entries were irrigated to some extent in July, 1888, none were irrigated in such manner or to such extent that the company could have fully and properly stated that they had reclaimed their respective entries in the manner required by law or by the regulations of the General Land Office, and for this reason he did not attempt to make final proof upon said land; that said ditch is about twenty miles long, at its head it is twenty feet wide on the bottom and gradually lessens in width until it is about five feet wide on the bottom at its lower end; it is seven feet deep at its head and its grade is about four or five feet per mile, and will carry abundant supply of water for the complete and thorough irrigation of all the lands lying under it, being claimed by the stockholders of said ditch company; that he is the owner of sixty-four shares of the capital stock of said company, fully paid up, which entitles him to the use of $\frac{64}{170}$ of all the water carried in said ditch; that he has no interest in any of the land entered by other entrymen; that he has paid out towards the reclamation of said lands embraced in his said entry the sum of \$640; that it will be impossible for reasons above stated to irrigate the said lands before the spring of 1889, and asks that for reasons above given that his said entry be not canceled, but that he may be permitted to make final proof during the summer of the year 1889.

On the above showing and by your said office letter, you held said entry for cancellation.

By your office letter of August 28, 1889, you enclose claimant's proof on his said desert land entry.

There is no adverse claimant. It is shown that failure to reclaim

this land within the three years allowed by law was the result of obstacles which could not be controlled.

It is shown that the entryman was qualified, the land properly subject to entry under the statute, and the final proof submitted shows that the legal requirements as to reclamation have been complied with, except that it is not shown—

1. That the proof witnesses have personal knowledge that the water is conveyed from the ditch over all the legal subdivisions of the land. Charles H. Schick (5 L. D., 151).

2. That the claimant's affidavit was taken at the time and place of his proof witnesses. (Rule 7, circular, June 27, 1887, 5 L. D., 708).

In this case there must be a new advertisement and new proof to show a full compliance with the law; and should there be no adverse claim, and the proof is satisfactory, it may be submitted to the board of equitable adjudication for relief from the limitation of the law as to time of proving. Rule 30, circular April 28, 1888 (6 L. D., 799); also George F. Stearns (8 L. D., 573); Alexander Douglas (6 L. D., 548). Geo. W. Mapes (9 L. D., 631). I therefore direct that you allow ninety days in which to submit new proof.

Your said decision is accordingly modified.

PRACTICE-REVIEW-ORDER FOR HEARING.

REEVES *v.* EMBLEN (ON REVIEW).

A motion for the review of a decision that approves the action of the Commissioner in ordering a hearing will not be sustained except on the presentation of the most cogent and conclusive reasons.

Secretary Noble to the Commissioner of the General Land Office, May 23, 1890.

In the case of David W. Reeves *v.* George F. Emblen the attorney for Emblen has filed a motion for review of departmental decision of November 27, 1889 (9 L. D., 584) refusing to interfere with your order directing a hearing on Reeves' contest against Emblen's commuted homestead entry for the NW $\frac{1}{4}$ of Sec. 23, T. 2 N., R. 48 W., Denver, Colorado land district.

As a basis for this motion it is alleged:—

First: The question in issue was over-looked.

Second: That, as is admitted in your said decision, at the time you considered the record, you had not before you Reeves' sworn application to contest this entry and you could not have had an accurate knowledge of its contents. (Nor had you any copy of said contest affidavit).

It is unnecessary to recite the history of this case as it is fully set out in the former decisions. (8 L. D., 444, and 9 L. D., 584).

It is urged that the question in issue was over-looked in the decision of November 27th, because the conclusion there reached is entirely inconsistent with the opinion expressed in the former decision. In the first decision it was said in substance that while as a rule an entryman should not be called upon to defend a second time against the same charges, yet the ordering of a hearing in any case is a matter resting largely in the discretion of the Commissioner, and his action therein will not be disturbed unless there is a clear and satisfactory showing of an abuse of such discretion. The conclusion reached in the decision complained of here is not inconsistent with the rule thus announced in the former decision. A careful comparison of the two decisions in this case shows that the question as to the charges in these two contests being the same, which is evidently what the attorneys refer to by the expression "the point in issue," was not over-looked, but was carefully considered in connection however with the other proposition as to the discretion of Commissioner in the matter of ordering hearings.

While it is true as stated in the second allegation in support of this motion, Reeves' sworn application to contest this entry was not among the papers, yet the contents of that paper were substantially set forth in the decision of April 27, 1889. (8 L. D., 444). The allegations contained in Reeves' contest affidavit were also before this Department at the date of the decision complained of, and are correctly stated therein in the quotation from the decision of your office. The absence of these papers could not under these circumstances work any injury to this party, and his motion for review cannot be sustained on that ground.

A careful consideration of this case in the light of the allegations contained in the motion for review, and the argument in support thereof, discloses no good reason for setting aside the decision complained of. It was said in the case of George H. Smith *et al.*, on review (10 L. D., 184)—

It would require the presentation of most cogent and conclusive reasons to justify this Department in granting a motion for review of a decision that did not finally pass upon the rights of the parties, but simply ordered a hearing in order that the facts might be more fully and clearly presented.

This rule seems equally applicable to a case like the one under consideration, where the action of your office ordering a hearing has been approved.

For the reasons herein stated the motion for review must be, and is hereby denied.

OSAGE LANDS—ABANDONED MILITARY RESERVATION.

HIRAM WING.

The Department is authorized to withhold from Osage filing lands within an abandoned military reservation upon which are situated government buildings, pending the disposition of said buildings under the act of July 5, 1884.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 23, 1890.

I have considered the appeal of Hiram Wing from your office decision of October 18, 1888, rejecting his Osage declaratory statement for lots 3, 5, 6 and 7, Sec. 3, T. 27 S., R. 24 W., Garden City, Kansas.

The tracts are part of the Osage Indian trust lands under the treaty of September 29, 1865 (14 Stats., 687), and were formerly included within the Fort Dodge military reservation established by executive order of June 22, 1868.

It appears that said reservation was made up partly of Osage Indian lands and partly of public lands, and that by executive order of January 12, 1885, said reservation was placed under the control of the Secretary of the Interior for disposition under the act of July 5, 1884 (23 Stats., 103).

It was ascertained that only about twelve hundred acres of said reservation extended over the public lands, all the remainder being Osage trust lands under said treaty. Your office held that only said twelve hundred acres could be disposed of under said act of 1884, and by letter of July 9, 1886, directed the local officers to allow entries of said Osage Indian trust lands as provided by act of May 28, 1880 (21 Stats., 143), "with the exception, however, of tracts upon which buildings erected by the government for military purposes are located," which tracts were declared to be still reserved from disposal until such buildings should be appraised and sold.

Wing offered his declaratory statement on June 12, 1888, and the local officers rejected the same for the reason that the government buildings stood upon said tracts. Your office by the decision complained of affirmed the action of the local officers.

Appellant urges that your office had no power to reserve these tracts from the operation of the land law.

Without entering into a discussion of the general control of this Department over the public lands, a sufficient answer is found in said act of July 5, 1884. Section three thereof directs the Secretary of the Interior to cause such buildings to be appraised and sold to the highest bidder, for cash. This authority necessarily carries the duty to protect and preserve such buildings pending the sale and as a consequence the right to the control of the public lands upon which they are situated. Such protection and preservation could not be maintained if the lands were disposed of.

The authority of the Department in the premises is ample. The decision appealed from is accordingly affirmed.

RES JUDICATA—COMMISSIONER OF THE GENERAL LAND OFFICE.

JOSEPH EVANS.

With certain exceptions, the Commissioner of the General Land Office has no authority to review or modify a final decision of his predecessor.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 24, 1890.

I have considered the case of Joseph Evans on his appeal from your office decision of February 21, 1889, in which you revoke and reverse your office decision of June 5, 1883, in so far as the same restores his pre-emption right, and refuse to revoke or modify said decision as to the cancellation of his pre-emption cash entry for the NE. $\frac{1}{4}$ of NE. $\frac{1}{4}$, Sec. 26, T. 5 S., R. 1 W., Bozeman, Montana, land district.

The record shows that your office, on February 6, 1883, directed the local officers to require of the claimant a corroborated affidavit, setting forth the facts relative to the ownership of a certain tract of land which his final proof showed was bought by the claimant from his brother, and which he left to settle upon the land in question. Said affidavit was duly transmitted, and your office on April 18, 1883, decided that the claimant was disqualified from making said entry, and accordingly held the same for cancellation, subject to the usual right of appeal. From this decision no appeal was taken by the claimant, but, subsequently, upon his application to have his pre-emptive right restored and the purchase money refunded, your office, on June 5, 1883, canceled said entry and allowed claimant, "upon proper application at the local office, to make another filing," and held the question of the return of the purchase money for further consideration. No appeal was taken by claimant from said decision of your office canceling his said entry.

On January 2, 1889, claimant filed in the local office his petition, accompanied by affidavits, praying that said decision of your office canceling his said entry be reconsidered, and that the entry be passed to patent. The allegations in said petition are that claimant did not move from land of his own to settle upon his pre-emption claim, and that he meant to have said in his final and supplemental proof that "he 'expected' to buy said land, instead of saying that 'he had bought it.'"

Your office on February 21, 1889, after reciting the facts as aforesaid, states that, "In view of the fact that no claim to said land appears to have been asserted since the cancellation of said entry, I have concluded to review the former action taken in the case, without passing upon claimant's right to have the matter re-opened at this late day," and your office held that under the decision of the Department in the case of Frank H. Sellmeyer (6 L. D., 792), and also in the case of Ole K. Bergan (7 L. D., 472), the inhibition of the statute applied to those persons removing from land held under an equitable title, or under a

contract to purchase, although payment has not been made by the purchasers at the time of their removal to settle upon pre-emption claims. Your office accordingly decided "that the cancellation of said entry was proper," but revoked "that part of office decision of June 5, 1883, that allowed claimant to make a second filing," on the ground that he had exhausted his pre-emption right, citing the case of Clayton M. Reed (5 L. D., 413). The claimant appeals from the decision of your office revoking so much of the former decision of your office which allowed him to make another filing, for the reason that he acted in good faith, and that it would be unjust and inequitable in the absence of any evidence of bad faith to disturb said decision of your office which restored to him his pre-emption right.

It is quite evident that your office had no jurisdiction upon the record as presented to change the decision of your office, made in 1883, which had become final, and the petition of the claimant should have been refused for that reason. There was no allegation of any newly discovered evidence, and the decision of your office revoking that part of said decision allowing claimant to file another declaratory statement shows that it was made "without passing upon claimant's right to have the matter re-opened at this late day."

That one Commissioner of the General Land Office has no jurisdiction to review or modify a decision of his predecessor—except in certain cases which are well defined and which do not include the case at bar—is well settled. *United States v. Stone* (2 Wall., 535); *Heirs of Joseph Mainville* (3 L. D., 177); *Eben Owen et al.* (9 C. L. O., 111); *Pike's Peak Lode* (10 L. D., 200); *Rules of Practice Nos. 76 and 77, 86 and 100* (4 L. D., 46-48).

The decision of your office modifying said decision of June 5, 1883, must be and it is hereby vacated, and said petition of the claimant is hereby dismissed.

TOWNSITES IN OKLAHOMA—CIRCULAR.

*Secretary Noble to Registers and Receivers of the United States Land Offices,
in the Territory of Oklahoma, May 24, 1890.*

I transmit herewith copies of an act "to provide for townsite entries of lands in what is known as 'Oklahoma' and for other purposes," approved May 14, 1890.

This act provides:

That so much of the public lands situate in the Territory of Oklahoma, now open to settlement, as may be necessary to embrace all the legal subdivisions covered by actual occupancy for purposes of trade and business, not exceeding twelve hundred and eighty acres in each case, may be entered as townsites, for the several use and benefit of the occupants thereof, by three trustees to be appointed by the Secretary of the Interior for that purpose, such entry to be made under the provisions of section twenty-three hundred and eighty-seven of the Revised Statutes as near as may be.

Upon comparison of this act with the 22nd section of the act "To provide a temporary government for the Territory of Oklahoma, to enlarge the jurisdiction of the United States court in the Indian Territory, and for other purposes," approved May 2, 1890, a copy whereof is also herewith transmitted, I have determined that the act of May 14, applies as well to the Public Land Strip as to that portion of the Territory opened to settlement by proclamation of the President on the 22nd day of April, 1889, and you will so construe the same.

By force of the act of May 14, the entries for townsites in the Territory aforesaid must be made by the trustees to be appointed by the Secretary of the Interior, instead of by any judge of a county court or the corporate authorities of any town.

Preliminary to a more extended series of instructions, which will be promulgated in time to regulate the action of the trustees when their employment begins, I have now to instruct and direct, that parties interested in any town-site shall prepare, and you shall receive and preserve without filing until the trustees appointed shall be prepared to act, the requests for the entry of the lands included in any particular town-site, with proof as prescribed in town-site circular of July 9, 1886 (5 L. D., 265), subdivision III, so far as applicable under section twenty-three hundred and eighty-seven of the Revised Statutes, above mentioned, with a duly authenticated plat of survey of the land into streets, alleys, squares, blocks, and lots, if any, already made by the inhabitants thereof, and if not, that fact to be stated.

If proof and plat of survey have already been made and forwarded, the application now called for may refer to the fact, and date of transmission, without renewing the papers so previously forwarded. Upon the receipt of the application and the other papers that may be submitted, you will forward them to this office, for further action, with your opinion thereon.

By the first section of the act of May 14, you will perceive that the trustees when appointed may approve the survey already made by the inhabitants and thus save much time, or under the instructions of the Secretary of the Interior the trustees may make the survey of the land into streets, alleys, squares, blocks, and lots when necessary.

The purpose of these instructions is to save time, and enable the appointment of the trustees to take effect at as early a day as possible and the business then to proceed without interruption. Before the time when the trustees shall enter upon the discharge of their duties, the preliminary work above described having been perfected, further rules and regulations will be promulgated, under the act, whereby their duties and yours in regard to all the matters to be affected by the town-site act may be carried into effect.

You will give publication to this letter in complete form in at least one newspaper in your land district and send notice to the proper parties in each town-site within your district. The publication for that

part of the Territory contained in the Public Land Strip will be made in like manner upon the establishment of the land offices therein.

This business must be made special and receive immediate and continuous attention.

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INDIAN LANDS—CONVEYANCE—SECRETARY'S APPROVAL.

MARY FISH.

In the absence of the Secretary's approval, a deed executed by a Shawnee Indian, holding under a patent issued in pursuance of the act of March 3, 1859, conveys no legal right, title, or interest, and if the grantor in such case dies, leaving heirs, the subsequent approval of the deed must be denied, as such action would not operate to divest the title of the heirs.

Secretary Noble to the Commissioner of Indian Affairs, May 26, 1890.

I acknowledge the receipt of your communication of 18th instant, submitting for approval a certified copy of a deed dated February 21, 1865, from Mary Fish, widow of Charles Fish, a Shawnee reservee, conveying to Sarah Cohen the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 9, and the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 10, T. 13, R. 21 E., in Kansas, containing one hundred and sixty acres, consideration \$640.

I return herewith said certified copy of deed without my approval, in accordance with the opinion of the Hon. George H. Shields, Assistant Attorney-General for the Department of the Interior, to whom the question as to the approval of said certified copy of deed was referred.

Said opinion is herewith transmitted to you.

* * * * *

OPINION.

Assistant Attorney-General Shields to the Secretary of the Interior, May 24, 1890.

I have the honor to acknowledge the receipt of a communication from the Commissioner of Indian Affairs, submitting for approval a certified copy of a deed from Mary Fish, widow of Charles Fish, a Shawnee reservee, conveying to Sarah Cohen a certain tract of land therein described, which you have referred to me for an opinion as to whether the rules requiring the acknowledgment of such deeds to be made before an Indian agent may be waived in this case, and whether the certified copy of the deed referred to may be approved by the Secretary as a sufficient conveyance of the right, title and interest of the said Mary Fish in the land therein described.

The facts in this case are substantially as follows :

On the 28th of December, 1859, the government patented to Charles Fish, a Shawnee reservee, a quantity of land in the State of Kansas, aggregating 1,110.58 acres.

On February 20, 1865, the said Charles Fish conveyed to Mary Fish, his wife, in consideration of love and affection, the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 10, the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 9, and the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 4, T. 13, R. 21, containing in all two hundred acres, being part of the 1,110.58 acres above referred to. This deed was approved by the Secretary July 13, 1869. On the 21st February, 1865, Mary Fish, in consideration of \$640, paid to her, conveyed to Sarah Cohen all of the land last described, except the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 4. This deed was not submitted for the approval of the Secretary, for the reason, as appears from the letter of the Commissioner, that it was supposed that where a conveyance of Shawnee land had been once approved by the Secretary, his approval was not required in any subsequent conveyance. The Department has, however, held that until the Indian title is extinguished, every conveyance by Indians must be approved.

It will be further noted, as appears from the Commissioner's letter, that the deed from Mary Fish to Sarah Cohen was made February 21, 1865, the day after the land had been conveyed to her by Charles Fish, and both said deed and that from Cohen to Lothholz were made before the original deed from Charles to Mary Fish had been approved by the Secretary.

On April 11, 1868, Charles Lothholz purchased said land from Sarah Cohen, and has been in possession of the tract for over twenty-one years. Being informed that the approval of the Secretary was essential to the validity of the deed from Mary Fish to Sarah Cohen, and the original deed being lost, Lothholz concluded to purchase from the heirs of Mary Fish, rather than contest their title in the courts. On March 18, 1890, the heirs of Mary Fish executed a deed for two hundred acres of land to Lothholz (doubtless intended to be the same land conveyed to Mary Fish, but different in description), the consideration being \$500. This agreement to purchase was made upon the condition that said deed would be approved by the Secretary. But Lothholz would rather have the certified copy of the deed from Mary Fish approved, if that will perfect his title, in which event he would be able to require a return to him of the \$500 paid to the heirs of Mary Fish.

In view of the fact that Mary Fish received from Sarah Cohen full compensation for said land in 1865, being two dollars per acre more than Charles Fish received for the adjacent lands, the Commissioner of Indian Affairs is of the opinion that Lothholz should not be required to pay further compensation to the heirs of Mary Fish, and he recommends that the rules requiring the acknowledgment of deeds to be made before an Indian agent be waived in this case, and that the certified copy of the deed from Mary Fish to Sarah Cohen be approved as sufficient conveyance of her right, title, and interest in the land described.

By the ninth article of the treaty of May 10, 1854 (10 Stat., 1053),

it was stipulated that "Congress may hereafter provide for the issuing to such of the Shawnees as may make separate selections patents for the same, with such guards and restrictions as may seem advisable for their protection thereon," and the 11th section of the act of March 3, 1859 (11 Stat., 425), making appropriations for sundry civil expenses of the government, authorized the Secretary of the Interior to cause patents to issue to such Indians, or their heirs, "upon such conditions and limitation, and under such guards or restrictions as may be prescribed by said Secretary." Under the provisions of this act, this land was patented to Charles Fish, with the condition in the patent that "said tract shall never be sold or conveyed by the grantee or his heirs without the consent of the Secretary of the Interior for the time being."

Rules and regulations were subsequently adopted by the Secretary, under which said patentees might obtain the approval of the Secretary for the sale of the land patented to them by the government. These rules provide that the deed shall be executed in the presence of two witnesses and acknowledged before the Indian agent, and accompanied by a certificate signed by two of the chiefs of the tribe to which the reservee belongs that the grantor is the identical person to whom the land was granted, or in case the original reservee be dead, that the grantor or grantors are the only heirs surviving, that they are of full age and competent to manage their property, and that it is advisable that the land be sold. A certificate from the agent is also required, showing that the contents of the deed were known and understood by the grantor; that the consideration specified is a fair price for the land and was actually paid to the grantor in money, and that the conveyance is in every respect free from fraud or deception. The object of the rules was to protect the grantor and to satisfy the Secretary that the Indian, or his heirs, was receiving the full benefit of the allotment. With such approval the Indian could convey his right, title or interest in the land, but without such approval he had no power to sell or convey, and a deed executed by him without the approval of the Secretary could convey no legal right, title or interest to the grantee in such conveyance.

The Commissioner refers to the approval by President Jackson in 1835 of an Indian deed, dated, September 26, 1832, and to the approval by President Grant in 1871 of a deed, dated August 3, 1858, as precedents for the action recommended herein. I have not the facts in those cases before me, but I apprehend that the only question involved therein was, whether a deed could be approved, so as to relate back and take effect from the date of the conveyance where there was no change of interest or title since the execution of the deed. Where land has been sold by an Indian reservee, and a deed executed for a full and fair consideration, and where the purchase is in all respects free from fraud or deception, but where the deed fails to convey the title solely by reason of not having the approval of the Secretary, and the

title is still in the grantor, I can see no reason why the Secretary may not, by the approval of the deed, affirm or approve such conveyance, and thus confirm and perfect the title.

But a different question is presented in this case, and that is, whether the deed of Mary Fish can now be approved by the Secretary so as to give validity thereto and cause it to operate as a conveyance of the land, in view of the fact that since the execution of said deed Mary Fish has died, leaving heirs surviving her.

If there is no power in the Indian owner to convey without the approval of the Secretary, then the deed from Mary Fish to Sarah Cohen conveyed no legal title, and the title remaining in her at the time of her death was by operation of law immediately cast upon her heirs. The subsequent approval of the Secretary could not operate to divest that title. I have not had the deed from Charles Fish to Mary Fish exhibited to me, nor do I know whether it contains a restriction against the power of alienation, unless approved by the Secretary of the Interior, but, as stated by the Commissioner "in the case of the conveyance from Charles Fish to his wife Mary Fish, it was simply a transfer from one Indian of the tribe to another Indian of the same tribe, of two hundred acres of land, which the said Charles Fish recognized as clearly due to his wife, Mary, under the treaty of 1854," the restriction, therefore, that said land shall not be sold or conveyed by the grantee without the consent of the Secretary was operative whether in the deed or not.

For the reasons above stated, I am of the opinion that the certified copy of the deed from Mary Fish to Sarah Cohen should not be approved by the Secretary.

RAILROAD GRANT—ACT OF JUNE 22, 1874.

UNITED STATES *v.* ST. PAUL AND SIOUX CITY R. R. CO.

Lands within the indemnity limits of a grant are not of the class contemplated by the act of June 22, 1874, as bases for relinquishment and selection.

A certification on such basis is erroneous and warrants proceedings for the recovery of title under the act of March 3, 1857.

Secretary Noble to the Commissioner of the General Land Office, May 28, 1890.

By letter of May 24, 1890, you transmit a list of lands, aggregating 11,954.90 acres, which, in your opinion, were erroneously certified for the benefit of, what is now known as, the St. Paul and Sioux City Railroad, under the grant made to the then Territory of Minnesota by the act of March 3, 1857 (11 Stat., 195), and amendments.

It appears that the lands in question are of the even numbered sections along the line of said road, were selected and certified under the act of June 22, 1874 (18 Stat., 194), in lieu of other lands relinquished by the company because of alleged settlements thereon, and it is stated by

you that the relinquished lands "are outside of the primary and within the indemnity limits of said grant."

This being so, the matter is clearly covered by my decision, in relation to other similarly situated lands certified to this same company, reported in 10 L. D., 50, 52, where it is held that lands within the indemnity limits of a railroad are not of that class, which, were contemplated by the act of 1874, *supra*, as bases for selection and relinquishment. It is therefore apparent that the certification in the present instance was erroneous, and that proceedings should be instituted to restore the title of said lands to the United States, in accordance with the provisions of the adjustment act of March 3, 1887 (24 Stat., 556), the grant to said company being unadjusted.

Inasmuch as the fact, that the relinquished tracts are within the indemnity limits of said road, is authoritatively shown by the records of your office, and the law, applicable to such a state of fact, was determined by my decision in 10 L. D., *supra*, and the company has already been heard in regard to other similarly situated land, no good reason exists for incurring the delay consequent upon laying a rule upon the company to show cause why a demand should not be made upon it for reconveyance of said tracts, as directed in the matter of the Winona and St. Paul R. R., 6 L. D., 544. But in this instance you will at once demand from said company a reconveyance of the tracts in question, and if it fail or refuse to make such reconveyance within ninety days after demand, you will report the fact to this Department, accompanied by such a record of the case as will enable the Attorney General to institute proper proceedings in accordance with the provisions of the adjustment act of March 3, 1887, *supra*, to restore said lands to the United States.

RAILROAD GRANT—ADJUSTMENT—ACT OF MARCH 3, 1887.

HANNIBAL AND ST. JOSEPH R. R. CO.

Proceedings under the act of March 3, 1887, for the recovery of title to lands erroneously certified are not authorized where, long prior to the passage of said act, the grant had been declared, by competent authority, to be adjusted.

A formal declaration of adjustment is not necessarily nullified by the subsequent approval of tracts found to be within the grant.

Secretary Noble to the Commissioner of the General Land Office, May 28, 1890.

By letter of February 28, 1890, you transmitted a statement showing the adjustment of the grant to the Hannibal and Saint Joseph Railroad Company, made by the act of June 10, 1852 (10 Stats., 8). Said statement shows that the company has not received the full amount of land to which it was entitled by 176,528.64 acres.

You state that an examination of the adjustment shows a number of

tracts within the granted limits to have been erroneously certified for the benefit of the road, which, under present rulings of the Department, would have been excepted from the grant; and also that other tracts were certified over as indemnity land, which are in fact outside of the indemnity limits of the grant.

Two lists are forwarded. List A describes twenty-six tracts within the primary limits, each of which is covered by an uncanceled pre-emption declaratory statement, the earliest of which was filed December 17, 1841, and the latest June 18, 1852. These being offered lands, the filings on all the tracts, except two, had expired at the time of the definite location of said road, which was on June 10, 1853. Nearly all said tracts were certified for the benefit of the road in 1854, and the remainder in 1856.

List B is of sixteen tracts, aggregating 2,279.76 acres, certified for the benefit of the company in 1854, as indemnity lands, and which you state it now appears are beyond the indemnity limits fixed by the grant.

It is stated further that said grant "was adjusted in the year 1854, and by public notice number 541, dated July 14, 1855, the lands without the granted limits were restored." But, it is added, in February, 1856, lists aggregating 511.97 acres, and on October 7, 1865, a list for 120 acres, were approved for the benefit of said company, most of which lands are within the indemnity limits.

Under these circumstances, you express the opinion that this grant can not be considered as coming within that class of grants described in the first section of the act of March 3, 1887 (24 Stats., 556), as "heretofore unadjusted"; but submit the question for my direction.

I concur in the opinion expressed by you. The grant was formally declared in 1854, by competent authority, to be adjusted, and the lands theretofore withdrawn for its benefit were restored to the public domain. The subsequent certifications in 1856 and 1865, it is learned, on inquiry at the Railroad Division of your office, were not made on the application of the company nor upon lists or selections filed by it; but by your office, of its own accord, as was then the practice, upon discovery that said lands were then in a condition to be certified for the benefit of the unsatisfied grant.

I do not think that this supplementary approval on the part of your office should have the effect of nullifying the previous formal closing of the adjustment by public notice. But even were it so, the long time which has elapsed since the last certification in 1865, would seem to put this grant outside of the class upon which the adjustment act of 1887, *supra*, was intended to operate. No one is setting up claim to any of the lands now discovered to have been erroneously certified, and no injustice seems to have been done to the government by that certification. And, whilst there is no statute of limitations which can be pleaded as a bar to the right of the government to recover lands patented or certified without authority of law, I think this is a case where

the repose of so many years should not be disturbed to assert a mere legal title. Besides, it should be remembered that when the United States enters the court as a litigant, they waive exemption from legal proceedings and stand on the same footing as private individuals. If in a court of equity, they must present a case by allegation and proof entitling them to relief. If in the case presented it would be inequitable to grant relief to a private individual, because his equities were stale, relief would be denied to the United States. See *United States v. Flint* (4 Sawyer, 43-48), afterwards affirmed in 98 U. S., 61, as the case of *United States v. Throckmorton*.

Entertaining these views, I decline to direct any further proceedings in the matter, and herewith return the papers in the case.

PRE-EMPTION—UNOFFERED LAND—ADVERSE CLAIM.

BLAKE *v.* MARSH.

The intervention of an adverse claim does not defeat the right of a pre-emptor who fails to make proof and payment for unoffered land within the statutory period, unless said claim is made in good faith by one who has complied with the law and regulations of the Department.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 29, 1890.

I have considered the case of Catherine Blake *v.* Henry J. Marsh, as presented by the appeal of the latter from the decision of your office, dated June 28, 1888, holding for cancellation his homestead entry, No. 1375, of the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 28, T. 2 N.; R. 4 W., made April 1, 1880, at Helena, Montana, as to the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said section.

The record shows that the township plat of survey was filed in the local office on July 1, 1870; that John Blake, the husband of said Catherine Blake, on August 27, 1872, filed his pre-emption declaratory statement, No. 2756, for the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of said section and range, alleging settlement thereon the same day.

It appears that Mrs. Blake, on April 1, 1880, started for the local office to enter the lands filed for by her husband, in his lifetime, and upon her arrival the next day found that the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said section was covered by said entry of Marsh made the day before, and she was told by the local land officers that she could do nothing about said tract, because it was covered by Marsh's entry.

On April 4, 1885, Marsh offered his final proof in support of his homestead claim, which was protested by Mrs. Blake, who cross-examined the witnesses in support of the entry, and also submitted testimony in her own behalf.

The examination of witnesses was concluded on May 4, 1885, on which day Mrs. Blake offered her application to make homestead entry of the and covered by said pre-emption filing alleging, among other things, that her husband, John Blake, died on March 4, 1878, and that April 2, 1880, she offered to change said filing to a homestead, and was refused by the local office. The local officers rejected said offer of Mrs. Blake, because the SE. $\frac{1}{4}$ of the N. $\frac{1}{4}$ was covered by Marsh's said entry, dismissed her contest, and allowed Marsh to make new proof and publication, because of imperfect description of the land in the published notice.

On appeal by Mrs. Blake, your office found that the testimony showed that she had a dwelling house, stables, sheds root cellar, and fences on said SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, and had resided on said tract continuously since 1872, with her four children; that Marsh had never claimed or in any manner exercised control over said tract, but had always recognized the right of Mrs. Blake to the land upon which she had continuously resided and improved since 1872; that prior to April 2, 1880, Mrs. Blake did not know that Marsh had any claim to the tract upon which she lived, and which Marsh well knew she claimed as her home; that the testimony tended to show that Marsh would not have made entry of said tract as he did, if he had not learned that Mrs. Blake had gone to the local land-office, when he at once started for the same place and arrived before Mrs. Blake; that, although Mrs. Blake was in laches in not asserting her rights, yet the Department will not aid one to acquire title to the home and improvements of another, who knows that he has no right thereto; that at the date of Mrs. Blake's application to enter said land, the circular of your office, dated July 1, 1879 (6 C. L. O., 92), was in force, which holds that an entry of land in the possession of a *bona fide* settler is invalid and liable to contest. Your office accordingly held said homestead entry for cancellation as to the tract in question, and allowed Mrs. Blake to contest the right of a timber-culture claimant to the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of said section.

Marsh appealed, and alleges the following grounds of error:

- (1) In that said decision is not in accordance with the testimony given in said case.
- (2) In that said decision is clearly erroneous in law.

These specifications of error are clearly insufficient, but, inasmuch as counsel, in his argument accompanying said appeal, alleges that the testimony shows that Mrs. Blake was at the time of said homestead entry of Marsh "nothing more nor less than a squatter upon said SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$," and had lost her rights by failing to make due proof and payment for the land embraced in her husband's filing, I have concluded to consider the case upon its merits.

It is not denied, but was freely admitted at the hearing, that the husband of Mrs. Blake filed and settled as alleged in his declaratory statement; that said statement was duly filed, and that up to the time of

his death in 1878 said Blake, with his family, continuously resided upon and improved said land, and that since the death of her husband, Mrs. Blake and her children have continued to reside upon said tract and cultivate the same up to the time of hearing.

The testimony shows that said Marsh was a single man; that at the date of his entry he was residing upon the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said section, adjoining the tract in question. In his final homestead affidavit, dated April 4, 1885, Marsh swears:

I have made actual settlement upon and have cultivated said land, having resided thereon since the fall of 1865, except for seven or eight months prior to July, 1874, when I lived on my pre-emption claim, to the present time.

In his testimony in support of his final homestead proof, Marsh swears in answer to question three:—

My house was built in the year of 1865, and I established my residence on the land in said house in the fall of 1865, and lived there all the time, except for seven or eight months prior to July, 1874, when I lived on my pre-emption claim.

The testimony in the contest shows, that Marsh did not have a dollar's worth of improvements upon the tract in question, except, perhaps, a little fence, which enclosed a small portion of the land which Mrs. Black swears her husband and herself allowed said Marsh to cultivate at his request. Marsh also swears, in answer to the question: "Between the years 1865 and the present date, how long have you resided off from this land in controversy, and for what purpose. Answer fully.

Answer. Before I could prove up on my pre-emption, I had to live on that, and I lived on the ranch from six to eight months, this prior to 1874, before I proved up. It was part of the time in 1873 and 1874.

In his proof, dated June 5, 1873, relative to the mineral character of the land covered by his pre-emption claim covering the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 17, and the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 20, and the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 21, in said township and range, said Marsh swears that he "had a residence upon said land from 1865 until the present time," and his two witnesses both swear that Marsh had made his exclusive residence upon his pre-emption claim "from 1865 until the present time," and this statement is repeated by the witness to the final proof dated, July 18, 1874.

It is very clear that the final proof offered by Marsh in support of his homestead claim can not be true, if the statements made in the proof in support of his pre-emption claim are correct. He could not have two legal residences upon different tracts of land at one and the same time.

The land in question is unoffered, and the pre-emption law prescribes no forfeiture for a failure of the pre-emptor to make proof and payment within the time prescribed by the statute (Sec. 2267, U. S. Revised Statutes).

It is true that under the rulings of the Department the failure of the pre-emptor to make proof and payment within the prescribed time renders his claim subject to contest, or any valid intervening right. But

such claim in order to defeat a prior *bona fide* settler must be made in good faith, and it must appear that the claimant has complied with the requirements of the law and the regulations of the Department.

In the case at bar the evidence shows that Marsh knew that Mrs. Blake claimed said tract, that she had resided thereon continuously since her husband's death, and he had fully recognized her superior right by asking permission, from both her husband and Mrs. Blake, to cultivate a portion of the land. It appears that Marsh seeks to claim residence on said tract from 1865 to the date of final proof, except for the seven or eight months when he alleges that he resided on his pre-emption claim, prior to 1874, but this is flatly contradicted by his proof in support of his pre-emption claim.

In *Dayton v. Hause et al.* (4 L. D., 263), Secretary Lamar said:—

It should be kept in mind always that in every contest the United States is a party in interest, and will take care, so far as possible, that every applicant for public land shall show good faith in his every act. *Johnson v. Johnson* (*ibid.*, 158).

The fact that Marsh, after living on his homestead claim, as he alleges, for six years without any claim of record, succeeded in placing his entry of record one day prior to the date when Mrs. Blake appeared at the local office to perfect the claim filed by her husband, will not defeat the superior equity of Mrs. Blake for the tract upon which she had her home, and which Marsh knew she claimed and had reason to believe she was about to enter.

The Department will exercise its supervisory authority to see that the home of the widow and the orphans shall not be taken away by one who, "by a seeming compliance with the forms of law," seeks to obtain title thereto under the homestead law. *Lee v. Johnson* (116 U. S., 52); *Widdicombe v. Childers* (124 U. S., 404).

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

PUBLIC SALE—ISOLATED TRACT.

LIZZIE STEFFEN.

The Commissioner of the General Land Office is authorized by section 2455 of the Revised Statutes to order into market isolated tracts of unoffered land.

Secretary Noble to the Commissioner of the General Land Office, May 29, 1890.

I have considered the appeal of Lizzie Steffen from the decision of your office of November 16, 1887, rejecting her application to have the lands of the NE $\frac{1}{4}$ of the NE $\frac{1}{4}$ of Sec. 34, T. 3, R. 27 W., 6th principal meridian, in the Oberlin land district of Kansas, ordered into market under section 2455 of the Revised Statutes of the United States.

The petition asking for this order was filed May 25, 1885, and substantially represents, that the petitioner is desirous of purchasing the

lands above described at public sale; that the said land is isolated and surrounded by other tracts already patented to other parties. On this petition the local officers recommended that the said lands be offered at public sale, after being properly advertised; but your office reversed this ruling, and refused to order the sale, holding that the said lands were held for settlement. The petitioner appealed from your office decision, and the case is now before this Department.

In the appeal papers the lands in question are described as better suited for grazing purposes than for cultivation; they are shown to be isolated by a statement to that effect made by the local officers in rendering their decision. Section 2455 of the Revised Statutes, which is a compilation of Sec. 5 of the act of August 3, 1864 (9 Stats., 51), authorizes the Commissioner of the General Land Office, after due notice of thirty days, to order into market, without the formality and expense of a proclamation by the President, such isolated lands, although heretofore unproclaimed and unoffered.

Under this provision of the Revised Statutes, your office has the undoubted right to order the sale, and the question becomes one of mere policy. In this case, the record evidence shows the isolation of the tract, which contains only forty acres. It has remained for many years subject to entry under the settlement laws. Being surrounded by patented lands, the adjoining proprietors may be disposed to purchase, and the government will have the benefit of the competition.

In the recent case of T. L. Chamberlin (8 L. D., 421) isolated lands were ordered into market.

You will, therefore, order the sale of the land in question, after giving the required notice. The decision of your office is reversed.

SCRIP LOCATION—PRE-EMPTION FILING—ABANDONMENT.

CYR ET AL. v. FOGARTY.

Odd numbered sections within the six mile common limits of the grant to the Marquette and State Line, and Ontonagon and State Line Railroads, surrendered by the State are not subject, prior to re-offering, to location by scrip issued under the act of June 22, 1860.

An application to file a pre-emption declaratory statement does not segregate the land covered thereby, but the subsequent application of another to file upon or enter said land is subject to the right of the first applicant.

A charge of abandonment will not lie against a pre-emption claimant on the ground of failure to establish and maintain residence prior to the allowance of his application to file declaratory statement.

Secretary Noble to the Commissioner of the General Land Office, May 29, 1890.

The land involved in this case is the SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ of SE. $\frac{1}{4}$, Sec. 1, T. 42 N., R. 35 W., Marquette district, Michigan.

June 22, 1878, the local officers allowed L. D. Cyr to locate said land under certificate of location, No. "O" 37 (issued under acts of June 22, 1860, March 2, 1867, and June 10, 1872).

November 17, 1884, Patrick Fogarty made application to file a pre-emption declaratory statement for a part of said tract, to wit, the said SE. $\frac{1}{4}$ of SE. $\frac{1}{4}$, which was denied by the local officers, because of the prior location thereof by Cyr.

October 18, 1887, Eliza Blake (by her attorney in fact, Dan. H. Ball,) applied to locate said SE. $\frac{1}{4}$ of SE. $\frac{1}{4}$ with Sioux half breed scrip (No. 416 A.), and her application was also denied by the local officers.

By decision of December 12, 1888 (from which Cyr and Blake appeal), your office found:

The tracts covered by Cyr's location are (in an *odd* numbered section) within the six mile common limits of the grant by act of June 3, 1856 (11 Stat., 21), for the Marquette and State Line and the Ontonagon and State Line Railroads. Under date of January 6th last, the Secretary of the Interior held in the case of Wakefield v. Cutter *et al.* (6 L. D., 451), that the *odd* numbered sections in said limits are not subject to private cash entry. As the certificate of Cyr is only locatable upon land which is *subject to private entry*" (see Sec. 6, of act of June 22, 1860, 12 Stat., p. 87), "and as the *odd* sections in said limits have been held *not* to be subject to private entry, Cyr's location is held for cancellation.

The grant referred to by your office was made to the State of Michigan to aid in the construction of the roads named and embraced the "alternate sections of land designated by *odd* numbers" within the granted limits. (11 Stat., 21). After said *odd* numbered sections had been selected by and certified to the State under the grant, Congress by joint resolution of July 5, 1862 (12 Stat., 620), authorized a change of route of the Marquette and State Line Railroad, and provided that, upon surrender by the State of all claim to said lands so selected along the old route, it should "be 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 surrendered lands aforesaid." It is held in said case of Wakefield v. Cutter *et al.*, that the re-offering at public sale as required by the resolution "was a condition precedent to the right of entry of said *odd* numbered sections." The lands involved in this case being in the category of lands so required to be re-offered and not having been re-offered, were not open to private cash entry, and your office correctly held that they were not subject to location under the certificate of Cyr, which was locatable only on lands open to such entry (Sec. 6, act of June 22, 1860, 12 Stat., 87).

Your office then holds, that Blake's application to locate Sioux half breed scrip must be rejected, "because of the prior application of Fogarty to make pre-emption filing," and that Fogarty should be "permitted to complete his filing."

An application to file a pre-emption declaratory statement does not segregate the land covered by it, and a subsequent application to file upon or enter said land should be received and held subject to the first

application to file. On the cancellation of Cyr's location, this course should be pursued with Blake's application to locate "Sioux half breed scrip"—said scrip being locatable on any "unoccupied land subject to pre-emption" (10 Stat., 304).

In her appeal Blake alleges (and files affidavits in support of the allegation), that Fogarty "did not establish his residence on the land between November, 1884, when his settlement was made, and October 18, 1887, when her application was filed." She contends that this failure "worked an abandonment and forfeiture of his pre-emption right, particularly in the presence of an adverse claim," and, on this ground, asks that Fogarty's application to file be rejected, "or a hearing be ordered to ascertain the facts with respect to his abandonment of the land prior to the filing of her application."

The declaratory statement which Fogarty applied to file was dated November 17, 1884, and alleged settlement on the 7th of that month. On its rejection, November 20, 1884, by the local officers, he duly appealed, and your office decision in his favor was not rendered until December 12, 1888, over four years after the date of rejection. At the time Blake's application was filed, October 18, 1887, and during the period prior thereto, when she claims Fogarty forfeited his pre-emption right as against her by not establishing residence on the land, his appeal was pending from the rejection of his application. He had neither filing nor entry on the land, and the government, through its officers having jurisdiction of the matter, had denied him the right to institute a claim thereto. It would appear inconsistent to reject an application to institute a claim and at the same time require the performance of the requirements of the law as though the application had been granted. To require a party to expend time, money and labor for an indefinite period of time on an uncertainty and while denying his right to reap the benefit of such expenditure, would be an unreasonable, if not harsh, exaction. Cyr's location of his certificate on the land had segregated it from the public domain and Fogarty's application to file on it could not be allowed until Cyr's location had been finally declared invalid. The question of the validity of Cyr's location is now before this Department in this case on his appeal from your office decision—about five years and a half after the rejection of Fogarty's application. It is true, that after an entry has been allowed, the entryman is required to comply with the law pending a contest of such entry (*Byrne v. Dorward*, 5 L. D., 104; *Swain v. Call*, 9 ib., 22), but as is held by this Department in the case of *Griffin v. Pettigrew*, decided April 29, 1890 (10 L. D., 510), that class of cases is "broadly distinguished" from a case where an application to make homestead entry is rejected. In that case Griffin's application to make homestead entry had been rejected because of a railroad claim, which was on appeal by Griffin declared invalid. In the meantime, Pettigrew had also applied to enter the land under the homestead law, and insisted that his application, although subsequent to that of Griffin,

should be allowed, because Griffin did not establish residence until seventeen months after the date of his application, after Pettigrew had made application. In the departmental decision in said case, it is said:

These cases (referring to *Byrne v. Dorward* and *Swain v. Call*, *supra*,) are broadly distinguished from the one at bar, in this, that the application of Griffin was rejected, and the claim of the railroad was not finally declared invalid until July 15, 1886. Until that date the entry of Griffin could not have been allowed. Before that time at least he had no entry and the charge of abandonment would not lie.

It is true, the pre-emptive right is based on prior settlement, while the homestead claimant may settle on the land, either before or after entry, and is not required to establish residence until six months thereafter. Both classes of claims are, however, settlement claims—the distinction being that, as to pre-emption claims, settlement is, strictly speaking, a condition precedent, while, as to homestead claims, it is a condition subsequent. It is not denied that Fogarty settled on the land prior to his application and to the date of his rejected declaratory statement as alleged therein. By departmental regulation, a pre-emptor is required to show six months continuous residence preceding his proof, as an evidence of good faith, but, while his settlement must be prior to the filing of his declaratory statement, he need not establish actual residence until after such filing. The requirement of residence, therefore, is as to pre-emption as well as homestead claims a condition subsequent—subsequent, in the one case, to the allowance of the filing, and, in the other, to the allowance of the entry. I can perceive no ground for making a distinction between the cases of a rejected application to file a declaratory statement and a rejected application to make homestead entry, in respect to residence prior to the final allowance of such applications, and hold, in analogy to the doctrine laid down in *Griffin v. Pettigrew*, *supra*, that a charge of abandonment will not lie against a pre-emption claimant on the ground of his failure to establish and maintain residence prior to the allowance of his application to file a declaratory statement.

The filing, or application to file, a pre-emption declaratory statement, does not segregate the land covered by it, but a subsequent claim by another party is nevertheless subject thereto. Blake's claim is not based on settlement, but is simply an application to locate the land with Sioux half breed scrip. When she made said application, the record gave her notice of Fogarty's application and of the pendency of his appeal from the denial thereof. Even if her application could have been received pending said appeal, yet at the date of the applications of both Fogarty and Blake, the land was segregated from the public domain by the location of Cyr, and therefore not subject to either. But the location of Cyr, having been improperly allowed, must be canceled. On this being done, there is presented the question of priority of right as between Fogarty and Blake. Fogarty, being prior in point of time and having never abandoned his claim, must be held to be prior in point of right.

Accordingly, the decision of your office, in so far as it holds Cyr's location for cancellation and allows Fogarty to proceed with his filing, is affirmed; but, it is modified to the extent, that Blake's application to locate may be received and held subject to the prior pre-emption claim of Fogarty.

PRACTICE—NOTICE BY PUBLICATION.

RYCKMAN v. LASELL.

In service of notice by publication, the day of the first insertion of the notice in the newspaper may be computed as forming a part of the required period.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 29, 1890.

I have considered the appeal of Josiah C. Ryckman from the decision of your office of December 19, 1888, in relation to his contest against the desert land entry, No. 277, made by William D. Lasell, and involving title to the N. $\frac{1}{2}$ of Sec. 34, T. 18 N., R. 118 W., in the Evanston land district of Wyoming Territory.

The record shows that Lasell made a desert land entry of the above described tract, June 5, 1885; and that Ryckman, on the 10th day of November, 1887, filed an affidavit of contest against the same, in which he alleged that the said tract was not desert land in character.

On this affidavit a hearing was ordered, and notice issued to both parties to appear before the local officers on the 8th of January, 1888, and submit their testimony.

On the 3rd of January in the same year, Ryckman again appeared before the local officers, and made further affidavit, to the effect, that he had been unable, after diligent effort, to serve a personal notice of the hearing on Lasell; that the said Lasell resided in Colorado, and being a non resident of Wyoming Territory, that it was impossible to serve such a notice; he, therefore, asked for a notice of the hearing by publication, which was granted, and the day previously fixed for the hearing was changed from the 8th of January to the 4th of February, 1888.

At the time and place designated in the last-named order, Ryckman appeared with his witnesses and presented his evidence, but Lasell failed to appear either in person or by attorney.

After the hearing, the local officers sustained the contest, and recommended the cancellation of the entry. An effort was then made to notify Lasell of this decision by registered letter, but, the effort was of no avail; the letter was returned to the local officers.

No appeal was taken from this ruling of the local officers, but, after the time for such appeal had expired, the record and papers in the case were transmitted to your office, where, the decision rendered by the local officers was reversed, and the cause remanded with leave to the

contestant to apply for a new notice by publication, within thirty days after being notified of said decision.

This decision of your office was based upon the assumption that the notices, by advertisement and by registered letter, were insufficient in point of time under the rules of practice then in force in the Department, and, being thus insufficient, failed to confer jurisdiction of the Department over the non-resident entryman.

Ryckman appealed from your decision, and claims that it was rendered in error of both law and fact, in holding that the aforesaid notices were insufficient under the rules of practice, and further claims that the said notices were given in strict conformity with the said rules.

Rules thirteen and fourteen of the series approved August 13, 1885, in substance, require :

1. That the notice by publication shall be made by advertising the same at least once a week for four successive weeks, in some newspaper published in the county where the land lies, and that the first insertion of said notice shall be at least thirty days prior to the day fixed for the hearing.

2. Where notice is given by publication, a copy thereof shall be mailed by registered letter to the last known address of each person to be notified, thirty days prior to the day of hearing.

3. That a like copy of such notice shall be posted in the register's office during the period of publication, and in a conspicuous place upon the land for at least two weeks prior to the day set for hearing.

These notices have been held to be concurrent, and each and all of them must be complied with to constitute a legal notice. See the cases of *Parker v. Castle* (4 L. D., 84); *Kelly v. Grameng* (5 L. D., 611); *Stayton v. Carroll* (7 L. D., 198) *William W. Waterhouse* (9 L. D., 131); *Watson v. Morgan, et al.* (9 L. D., 75); *Van Brunt v. Hammon, et al.* (9 L. D., 561); and *Nanney v. Weasa* (9 L. D., 606).

In the pending case all the requirements of the said rules of practice have been strictly complied with. The evidence of record shows, that a copy of the notice as published was posted on the land and in the register's office as required; that another copy of the same notice was sent per mail by registered letter to the last known address of the entryman, on the 5th of January, 1888, and that the said notice by publication first appeared in the "Uinta Chieftain," a newspaper published in the county where the land lies, on the 5th of January 1888, the day of hearing being, as above mentioned, the 4th of February, in the same year.

Including the day of first insertion of this notice in the county paper, gives the thirty days required prior to the day of hearing.

In the case of *Griffith v. Bogert* (18 Howard 158), the supreme court of the United States, in effect, says :

There is no settled rule as to whether the first or the last day of two periods shall be included in computing the required time; that every

case must depend upon its own circumstances, and that no rule can be laid down applicable to all cases. In this case of *Griffeth v. Bogert*, the supreme court allowed the first day, that is the day on which certain letters of administration issued, to be estimated in the computation. By pursuing the same course in the case under consideration, the full notice of thirty days was given prior to the day fixed for the hearing, and being of the opinion that the rules of practice have been complied with, the decision of your office is reversed.

SOLDIERS' HOMESTEAD ENTRY—RESIDENCE.

JAMES G. THOMPSON.

The right of an entryman under a soldier's homestead entry date from the time when he files declaratory statement.

Under a soldier's homestead entry the claimant is entitled to credit for the full period of his enlistment where his resignation as an officer in the military service is accepted on a surgeon's certificate of disability.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 29, 1890.

I have considered the case of James G. Thompson on appeal from your decision rejecting his final proof in support of homestead entry for the E. $\frac{1}{2}$ NE. $\frac{1}{4}$ of Sec. 21 and W. $\frac{1}{2}$ NW. $\frac{1}{4}$ Sec. 22, T. 162 N., R. 75 W., Devils Lake land district North Dakota.

Thompson filed homestead declaratory statement under section 2304 Revised Statutes for said tract on December 21, 1885. On April 19, 1886, he made his entry and moved into a house already on the land on July 10, 1886, and on September 20, 1887, made final proof which was accepted by the local officers.

On February 25, 1888, your office found that his service in the army added to the time from July 10, 1886, to September 20, 1887, lacked seven months and twenty days of making five years, and you required him to furnish "an affidavit duly corroborated that he continued to reside upon and cultivate the tract since date of proof, for the length of time last mentioned." Thereupon on April 13, 1888, he filed a supplemental statement from the War Department, of his military service, showing that his resignation was based on surgeon's certificate of disability, and was accepted by reason of such certificate.

It having appeared from the evidence that claimant was deputy collector of customs, your letter of May 11, 1888, called upon him for an affidavit, duly corroborated, of the exact date when he was appointed to said office, which being furnished, showed that he was appointed "deputy collector and mounted inspector of customs January 4, 1886, for the district of Minnesota, with his office at Bottineau, D. T."

On November 8, 1888, your office considered the case and referring to said affidavit, you say in your letter of that date :—

His entry was made April 19, 1886, and residence established July 10, 1886, both dates subsequent to the time of his official appointment. He was well aware in making his entry that he could not comply with the law. The proof is rejected and the final certificate and original entry are held for cancellation.

From this decision he appealed to this Department, and assigns as error:

First: In holding that Thompson's rights to said land commenced at date of entry April 19, 1886.

Second: In deciding that he knew at the time of entry that he could not comply with the law.

Third: In rejecting said final proof and holding said certificate and original entry for cancellation.

The testimony shows that James G. Thompson served from August 19, 1862, until July 1, 1864 in Company E, 9th Minnesota Infantry, and was discharged by reason of promotion to Captain in 68th U. S. C. Infantry, in which he served from July 1, 1864 until July 20, 1865, when he was honorably discharged, his "resignation based on surgeon's certificate of disability."

The records of your office show that he filed homestead declaratory statement for this land on December 21, 1885.

In January 1886, he purchased the improvements on the land, placed there by a former occupant. On July 10, 1886, he moved onto the tract with his family, consisting of his wife and three children. The improvements on the land consisted of a house built of hewed poles and mortar; sod roof; plank floor; two rooms, two doors, two windows, and a cellar under the house. The house was plastered with lime mortar and was habitable at all seasons. There was a frame stable built of boards with board roof and two windows; a well six feet deep of good water, and there were ten acres of land broken. When he moved onto the tract he took all of his household furniture and all his chattel property, and bought farming utensils. He cultivated the broken land in 1886, and in 1887 broke ten acres additional and cultivated the twenty acres.

The land was four miles from Bottineau, at which place he kept an office and he attended there when his official duties required, but lived on his land with his family. In October 1886, while in discharge of his duty he arrested some men for violating the revenue laws and took possession of their teams, wagons, harness etc., and took them to Bottineau. He stated in his affidavit of September 20, 1887, that it became necessary for him to remain at Bottineau until the matter was settled, which was not until the latter part of June 1887, when he returned to his homestead; but he went to his home frequently during this time; he had not moved his property or household goods from the land. His family went to Minnesota about the last of November 1886, and stayed there all winter, returning in June 1887. He states that this was for

the purpose of educating the children, there being no school within twenty miles of his residence.

While it is true that the entryman did not commence settlement and improvement on the tract until after receiving his official appointment; it is also true that under the law and the rulings of this Department prior to the act of Congress approved March 2, 1889, the filing of his homestead declaratory statement exhausted his homestead right. See *Maria C. Arter* (7 L. D. 136). Besides it appears from the testimony that the discharge of the duties of this office was not inconsistent with his compliance with the homestead law.

The fact that he had made homestead declaratory statement does not appear in the record of the case sent to this Department from your office, nor is it mentioned in any of your office letters or referred to in your decision. It was evidently overlooked by your office, which may account for the charge of bad faith in the entryman when you accuse him of making an entry when he was well aware he could not comply with the law.

The first assignment of error is well taken. The entryman's rights, dated from December 21, 1885. The second assignment refers to a mere statement which, while erroneous is not a ground for reversal. The third is general and refers to the entire decision.

I am of opinion that the entryman made his entry, settlement and residence in good faith, and his temporary absence as shown by the testimony does not affect his residence, which was commenced July 10, 1886, and which on September 20, 1887, had been maintained more than one year. Inasmuch as his resignation was based on a "surgeon's certificate of disability," and was accepted by reason of such certificate, he is entitled to credit for his full term of enlistment—three years. This and his service in Company C 9th Minnesota Infantry Volunteers, aggregate over four years of military service, and having resided on the land one year as required by law, he is entitled to a patent which will accordingly issue.

Your decision is reversed.

OSAGE LAND—FINAL PROOF—TRANSFeree—COSTS—NATURALIZATION

MILUM *v.* JOHNSON.

Where an applicant for Osage land applies to amend his filing, the time within which he is required to submit final proof begins to run from the date when such amendment is allowed.

The death of the entryman prior to the day fixed for the hearing is no ground for the dismissal or suspension of proceedings against the entry, where said entryman has disposed of his interest in the land, and the transferee is made a party defendant and is present in court.

In contest cases, under rule 55 of practice, each party must pay the cost of taking the testimony of his own witnesses, both on direct and cross-examination of said, witnesses.

The certification of naturalization papers should be received only when made under the hand and seal of the clerk of the court in which such papers appear of record, unless the record is lost or destroyed, when, upon proof of that fact, secondary evidence may be received.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 29, 1890.

I have considered the appeal of Amelia Milum from your office decision of October 29, 1888, wherein you dismiss the contest instituted by said Milum against defendant, John J. Johnson, involving the SE. $\frac{1}{4}$ of Sec. 25, T. 30 S., R. 8 W., Wichita, Kansas.

Plaintiff, Milum, filed Osage declaratory statement, No. 28,025, on May 8, 1884, claiming settlement April 23, 1884, on the W. $\frac{1}{2}$ SW. $\frac{1}{4}$ of Sec. 30, and E. $\frac{1}{2}$ SE. $\frac{1}{4}$ of Sec. 25, T. 30 S., R. 9 W. Finding that her filing did not conform to her settlement, your office, on November 13, 1884, on her request amended said filing to the W. $\frac{1}{2}$ SE. $\frac{1}{4}$ and E. $\frac{1}{2}$ SW. $\frac{1}{4}$ of Sec. 25, T. 30 S., R. 8 W.

The defendant, Johnson, filed Osage declaratory statement No. 29,295, October 10, 1884, alleging settlement July 8, 1884, on the SE. $\frac{1}{4}$ of Sec. 25, T. 30 S., R. 8 W. This filing was in conflict with that of plaintiff, as to the W. $\frac{1}{2}$ SE. $\frac{1}{4}$ of said section. On December 4, 1884, a little more than two months after his filing, Johnson gave notice of his intention to make final proof before I. P. Campbell, or William M. Glenn, notaries public, at Harper, Kansas, on January 17, 1885. Johnson's proof was accordingly taken before Notary Glenn on the day set, and on February 3, 1885, his final affidavit was made before the register, and receipt for first instalment of \$50 was given.

On March 2, 1885, the plaintiff filed a corroborated affidavit in the local land office, alleging that she had improved and continuously resided upon the land embraced in her said amended filing of November 13, 1884; that upon July 8, 1884, defendant Johnson settled upon the E. $\frac{1}{2}$ SE. $\frac{1}{4}$ of said section, but, when he came to file, he filed upon the entire SE. $\frac{1}{4}$ of said section, the west half of which Milum had already settled upon and improved; that being unable to read or write, she knew nothing of said Johnson's notice to make final proof; that prior to his submitting the same he made no improvements of any kind or nature upon the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ —the land in dispute—but that she had plowed a part of the same and raised upon it crops of corn and millet, and built a stable; that said Johnson told her that he was proving up his eighty for Hugh Garrett, of Harper, Kansas, and that soon after submitting his proof, he did convey said land to said Garrett.

Upon this affidavit being filed in your office, you, on November 5, 1885, authorized a hearing to determine the rights of the parties. In pursuance of said order, a hearing was duly had. Personal service was

made on defendant, and also upon Hugh Garrett, to whom said Johnson had, on February 9, 1885, conveyed by general warranty all right, title and interest in and to the said SE. $\frac{1}{4}$ of said section. On this hearing, the register and receiver found in favor of the plaintiff upon the testimony submitted, and recommended the cancellation of defendant's entry. Upon his appeal, you reversed said finding and dismissed Milum's contest, without passing directly upon the charges affecting Johnson's entry, for the reason that both filings were made under the provisions of section 2260 of the Revised Statutes and the act of May 28, 1880 (*infra*), and that plaintiff had no legal standing under the claim of a superior right, she failing to make proof within six months after filing, and that her filing became subject to defendant's, by the operation of said statute.

On March 4, 1885, two days after Milum filed protest against Johnson's entry, she gave notice of her intention to make final proof before Bert Venable, clerk of district court, at Kingman, Kansas, on April 18, 1885.

In pursuance of said notice, the proof was duly taken. It showed continuous residence and improvements valued at \$250. This proof appears to have remained in the local office and endorsed thereon is the following:—

U. S. LAND OFFICE, *Wichita, Kans.*

I hereby certify that this proof was on the 9th day of November, 1888, discovered in the receiver's office among old papers, and that I never had any knowledge that such proof was in existence.

December 6, 1888.

SAM. L. GILBERT,

Receiver.

Before Johnson made his Osage declaratory statement Milum had (exact date not of record) filed a petition to be allowed to amend her filing to embrace the land on which she had settled, and Johnson's filing was made with notice of this application, as shown by the record.

On Milum's request, your office, on November 13, 1884, amended her filing. It follows, therefore, that the proof submitted by her on April 18, 1885, was within six months of her filing, and meets the rule in the case of *Hessong v. Burgan*, 9 L. D., 353.

On the hearing before the register, April 5, 1886, Garrett filed a motion to continue the case by reason of the severe sickness of his co-defendant, Johnson. This motion was granted, but plaintiff was permitted to introduce her testimony, to which ruling defendant excepted. The plaintiff's testimony was taken and case continued until May 12, 1886. Defendant Hugh Garrett, with his attorney, was present.

On May 12, the parties again appeared, when Hugh Garrett, by his attorney, moved the abatement and dismissal of the case and the following grounds were assigned:

1. That the defendant and entryman John J. Johnson died on April 4, 1886, the day next preceding the taking of the testimony of plaintiff before the register.

2. That there was no such person in existence as the defendant Johnson, and no suit could be pending against him.

3. Because said Johnson was the material and indispensable defendant to the complaint of the plaintiff and no proceedings could be maintained against a dead person.

4. Because no administrator or executor of the estate of said Johnson had been appointed, and no one authorized to represent said estate.

5. Because of the death of said Johnson, on April 4, 1886, this action abated, and there was no proceeding pending against either of the defendants on April 5, 1886.

Proof of Johnson's death was filed in support of the motion. The register overruled this motion, and also another motion to continue said cause until an administrator of the estate of Johnson be appointed. Thereupon, defendant, Hugh Garrett, moved to strike out from plaintiff's testimony, taken April 5, and 6, all that part of the same relating to the personal transactions or statements made by Johnson, claimed to have been made by him during his lifetime—subject to which motion defendant introduced his testimony.

It is to be observed that, on April 5, 1886, the day fixed for the hearing, it was not known that Johnson was dead. Moreover, defendant Johnson was only a nominal defendant. He had, on February 9, 1885, six days after obtaining his receipt for the first installment, conveyed all his interests in said lands to Hugh Garrett. Both Johnson and Garrett were served with notice, and Garrett appeared. At the hearing, therefore, Garrett was the only party defendant, who had any interest in the proceeding ordered by your office on November 5, 1885. It was a proceeding to inquire as to which of the parties, Milum or Johnson, had the superior right to the land. The investigation was also made to inquire into Milum's averment that Johnson's entry was made for Garrett's benefit. Johnson having conveyed to Garrett, the latter was the only party in interest, and the register did not err in overruling defendant's motion to abate, because of Johnson's death; nor did he err in refusing to continue the case until an administrator of Johnson's estate was appointed, for the manifest reason that such administrator could exercise no jurisdiction over property belonging to Garrett. Had Johnson been living, he might have been a witness for Garrett, but his death for this reason could neither abate nor continue the suit.

Defendant also complains of the action of the register in refusing defendant the alleged right of cross-examining plaintiff's witnesses, without advancing the register's fees therefor. While the register was perhaps justified in this ruling, under the practice of your office, yet I have deemed this a proper occasion to correct a practice which often entails great hardships, and which is contrary to all ordinary rules of procedure in obtaining evidence. Rule 55 of the Rules of Practice is as follows:

In other contested cases, each party must pay the cost of taking testimony upon his own direct and cross examination.

I construe this to mean that each party must pay the cost of taking the testimony of his own witnesses, both in the direct and the cross examination of such witnesses. The cross examination of a witness is

part of his testimony, and he is to be treated as the witness of the party calling him.

Rule 41 gives officers the right to summarily put a stop to obviously irrelevant questioning; still rule 56 makes it discretionary with the officer to allow such irrelevant questioning to proceed at the sole cost of the party making such examination. And while rule 56 refers specially to rule 54, which is confined to contests under the act of May 14, 1880, the reason on which rule 56 rests is equally applicable to cross-examinations in contests covered by the provisions of rule 55, and an amendment of rule 56 to such effect seems called for by the construction herein given to rule 55. You will accordingly please prepare and submit at an early day, for the approval of the Department, an amendment of rule 56, so as to make it conform to the views above expressed.

Section 2259 of the Revised Statutes of the United States provides as follows:—

Every person being the head of a family or a widow, or a single person over the age of twenty-one years and a citizen of the United States, or having filed a declaration of intention to become such is authorized to enter one hundred and sixty, or a quarter section of land upon paying the minimum price of such land.

It is not clear from the evidence in this case that Milum is a qualified pre-emptor. The evidence should show whether she is "the head of a family" or a widow, or a single person over twenty-one years of age, or whether she is the wife of Thomas Shea.

The evidence of the naturalization of John J. Johnson is defective. The certified copy by the notary, Glenn, of a copy purporting to be a transcript from the Court of Common Pleas, Buchanan county, Missouri, can not be received. The certification of naturalization papers should be received only when made under the hand and seal of the clerk of the court in which such papers appear of record, unless such record is lost or destroyed, when, upon proof of that fact, secondary evidence may be received.

For the reasons above given, I direct that this case be remanded for a new hearing. Notify all parties in interest.

FRANK BURNS.

Motion for review of departmental decision rendered March 27, 1890, 10 L. D., 365, denied by Secretary Noble, June 4, 1890.

PRE-EMPTION ENTRY MARRIED WOMAN—EQUITABLE ADJUDICATION.

EMMA McCLURG.

In the absence of an adverse claim, a pre-emption entry, made in good faith by a married woman, may be referred to the board of equitable adjudication, where it appears that she had fully complied with the law as to settlement, residence, and improvements prior to marriage, and the local office, with full knowledge of the facts, accepted proof and payment for the land and issued final certificate therefor.

The case of Margaret Forgeot, 7 L. D., 280, overruled.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, June 4, 1890.

April 18, 1884, Emma Roberts filed her declaratory statement for the NE. $\frac{1}{4}$ of Sec. 32, T. 34, R. 15 W., Niobrara land district, Nebraska. December 29, 1884, she married William A. McClurg. April 18, 1885, Mrs. McClurg made pre-emption proof, and on the 29th of the same month paid for said tract of land, and obtained her final certificate.

By decision of your office, dated January 9, 1888, her entry was held for cancellation, on the ground that being a married woman at the date of making final proof she was not a qualified pre-emptor, and that therefore said entry is illegal. From this decision Mrs. McClurg appeals.

The final proof shows that appellant settled on the described tract of land April 10, 1884, and resided on it continuously up to the date of making proof, April 18, 1885, and that from the time of settlement up to the date of her marriage, December 29, 1884, she was unquestionably a duly qualified pre-emptor.

Her improvements at the time she made proof—and by fair inference at the time she was married—consisted of a frame dwelling house, twelve by fourteen feet, and a story and a half high; a root house; pig-pens; eight acres of land broken, on which she had raised one hundred and twenty-five bushels of corn and twenty bushels of potatoes, and a vegetable garden. She had also set out two hundred forest trees on her claim. The total value of these improvements is estimated at three hundred dollars. That applicant could have made proof and pre-emption cash entry of the described tract of land any time between October 18, and December 29, 1884, there is no reasonable grounds to doubt. The only question to be determined then is, did appellant by her marriage forfeit her right to said tract? Has she by this act lost all benefit under her pre-emption cash entry and turned herself out of house and home?

The evidence in this case satisfactorily shows that appellant, on October 18, 1884, had complied with the requirements of the pre-emption law and the regulations of this Department thereunder, relative to filing her declaratory statement, settlement, residence and improvement of the land covered by her said certificate, and was at that time authorized by law to make pre-emption cash entry of said land. Had she made her final proof at any time prior to her marriage, there can be no ques-

tion but that she would have been entitled to a patent for said land. It must be observed that the pre-emption law does not declare a forfeiture for failure to make final proof and payment for unoffered land (such as this was) within the time prescribed by law. (Sec. 2267, U. S. Revised Statutes.)

In this case, the pre-emptor made her proof after her marriage, but since the same showed that she had fully complied with the requirements of the law as to settlement, residence and improvements prior to her marriage, that there is no adverse claim, and the entry was founded upon a *bona fide* right of pre-emption, that the land was public land and subject to entry, and the local officers, with a full knowledge of all the facts, accepted the proof and payment for the land and issued certificate therefor, I am clearly of the opinion that the entry ought not to be forfeited, but should be submitted to the board of equitable adjudication for consideration under the appropriate rule.

The Department has held for a long time that the entry of a married woman, where all the necessary acts, including publication of notice of intention to make proof, have been performed prior to marriage, should be submitted to the board of equitable adjudication for its consideration. Lydia Steele (1 L. D., 460). See also Melissa J. Cunningham (8 L. D., 433); Mary E. Funk (9 L. D., 215); Susan Herre (10 L. D., 166).

I am unable to perceive that the fact that the pre-emptor has given notice of intention to make final proof can materially alter the case. If the applicant had in good faith, prior to her marriage, complied with the requirements of the pre-emption law and the departmental rulings thereunder relative to settlement, improvement and residence, and subsequently the local officers accepted payment for the land, there being no adverse claim, the entry should be submitted to said board for its consideration. I am not unmindful of the ruling of the Department in the case of Margaret Forgeot (7 L. D., 280), holding a different doctrine, but that case seems to me not to be in harmony with the other departmental decisions cited herein, and it is hereby overruled.

The decision of your office is accordingly modified.

RAILROAD GRANT—PRIVATE CLAIM—SURVEY.

CHILDS *v.* SOUTHERN PACIFIC R. R. Co. (ON REVIEW).

An allegation that certain lands were embraced within a survey of a private claim made under section 8, act of July 23, 1866, at the date when the company's right attached, and were thus excepted from the grant, must fail, if it does not appear that a copy of the plat of the township thus surveyed was filed in the local office prior to said date.

Secretary Noble to the Commissioner of the General Land Office, June 7, 1890.

The attorneys of Samuel R. Childs have filed a motion for review of departmental decision of October 8, 1889 (9 L. D., 471), in the case of said Childs *v.* Southern Pacific R. R. Company, rejecting Childs' application

to make homestead entry for the NW. $\frac{1}{4}$ of Sec. 31, T. 4 S., R. 3 W., S. B. M., Los Angeles California land district.

In support of such motion the following errors are assigned :

1st. Error in neglecting to consider and give proper effect to the segregation and location upon the ground of the San Jacinto grants in October, 1867, by the United States surveyor general for California under and pursuant to the act of Congress July 23, 1866, authorizing and directing such location in such a case as this.

2nd. Error in refusing to hold that such location and segregation (which stood unreversed and valid on April 3, 1871, when the grant to Southern Pacific R. R. Co. attached) operated to except the land embraced therein from such railroad grant.

3rd. Error in holding that the land embraced in such segregation and location was public land on April 3, 1871.

4th. Error in affirming the rejection of this application.

Thus it is seen that the only question presented by this motion is as to the effect of a certain survey or surveys claimed to have been made in 1867. This survey was referred to in the decision complained of as follows : "There appears to have been some sort of survey of these two grants made in the year 1867, but such survey was never accepted or approved by your office or the Department." It is now urged that this survey was made under and in accordance with the provisions of the eighth section of the act of July 23, 1866 (14 Stat., 218), and did not need the approval of your office or of this Department to render it effective, the approval of the surveyor general being all that was necessary to that end.

The particular tract of land involved in this case, is within the boundaries of the survey claimed to have been made in 1867 of the San Jacinto Nuevo, and hence all questions relating to the other two San Jacinto grants might be properly disregarded. There are however a large number of similar cases pending in this Department and in your office involving tracts of land claimed to have been within the boundaries of one or the other of those two grants as surveyed at the time the grant to the railroad company took effect, and it was for that reason that in the consideration of this case on appeal each of these grants was considered. The questions presented by this motion for review, as will be seen from a statement of the facts, can relate to one only of said grants, and the other two may be disposed of with a statement of the facts.

The grant of the Sobrante de San Jacinto Viejo Nuevo was finally confirmed by the judgment of the United States supreme court, at the December term 1863, affirming the decree of the district court (1 Wall., 311) and patent was issued therefor on October 26, 1867. This patent designated definitely the land conveyed by said grant and having been issued prior to the date the grant to the railroad company took effect, no land other than that described in the patent was at said date reserved or affected by said Sobrante grant. All question as to land claimed to have been excepted from the grant to the railroad company by the Sobrante grant is therefore eliminated from the case, and need not be further considered.

The only claim made in connection with the San Jacinto Viejo grant is that there was a survey of said grant in 1867 under the provisions of the eighth section of the act of July 23, 1866 (14 Stat., 218), which included within the boundaries of said grant land afterwards excluded therefrom and which survey still remained in force at the date the grant to the railroad company took effect. Section eight of said act provides :

That in all cases where a claim to land by virtue of a right or title derived from the Spanish or Mexican authorities has been finally confirmed, and a survey and plat thereof, shall not have been requested within ten months from the passage of this act, as provided by section six and seven of the act of July 1st, eighteen hundred and sixty-four, "To expedite the settlement of titles to lands in the State of California," and in all cases where a like claim shall hereafter be finally confirmed, and a survey and plat thereof shall not be requested, as provided by said sections within ten months after the passage of this act, or any final confirmation hereafter made, it shall be the duty of the surveyor-general of the United States for California, as soon as practicable after the expiration of ten months from the passage of this act, or such final confirmation hereafter made, to cause the lines of the public surveys to be extended over such land, and he shall set off, in full satisfaction of such grant, and according to the lines of the public surveys, the quantity of land confirmed in such final decree, and as nearly as can be done in accordance with such decree; and all the land not included in such grant as so set off shall be subject to the general land laws of the United States: *Provided*, That nothing in this act shall be construed so as in any manner to interfere with the right of *bona fide* pre-emption claimants.

Under the provisions of this section no survey could have been made until after the expiration of ten months from the date of the final confirmation of the grant. The grant of San Jacinto Viejo was not finally confirmed until November 2, 1875. The motion for review must then in so far as it relates to the lands within the claimed limits of the San Jacinto Viejo be denied.

The grant San Jacinto Nuevo was confirmed by the district court February 14, 1856, which decree of confirmation became final upon the dismissal by the supreme court of the appeal February 23, 1857, and patent was issued therefor January 9, 1883. A survey under the provisions of the eighth section of the act of July 23, 1866, might properly have been made at any time after the expiration of ten months from the date of said act, and prior to the date of patent.

In support of the allegations that surveys of the different townships into which the grant of San Jacinto Nuevo extends were made in 1867, and lands set off for said grant by and with the approval of Surveyor General Upson, there is filed a plat entitled "Plat of Rancho San Jacinto Nuevo as located by the U. S. Surveyor General during the months of September and December 1867, compiled from the maps of the several townships Nos. 1 of the official records of the office. Boundaries shown by lines colored blue. Scale 100 chains 1 inch.

Located under the provisions of the act of Congress approved July 23, 1866."

To this plat the following certificate is appended :

"I hereby certify this plat to be correctly compiled from the original maps on file in this office."

Then comes a list of townships, viz :

| | |
|---|---------------------|
| T. No. 3 S., R. No. 2 W. S. B. M., approved | September 26, 1867. |
| " " 4 " " " 2 " " " " " | " " 25, 1867. |
| " " 4 " " " 3 " " " " " | December 21, 1867. |
| " " 4 " " " 4 " " " " " | " " 21, 1867. |
| " " 5 " " " 3 " " " " " | " " 21, 1867. |

This certificate is dated November 7, 1889, and signed by R. P. Hammond Jr., U. S. Surveyor General for California. In addition to this plat there is on file a copy of a map of township 4 south, range 3 west, San Bernardino meridian, in which the tract involved in this case is situated, certified by the surveyor-general in 1876 and by the register of the Los Angeles land office October 30, 1889, as a true copy of plats of said township on file in their respective offices. This plat has marked on it "Lot No. 37 Part of Rancho San Jacinto Nuevo" within the boundaries of which the land here in question is located. Among other statements appearing thereon is the following:—"Lot No. 37, located by Surv. Gen'l., under act of Congress approved July 23, 1866-Dec. 1867," and the following certificate :

The above plat of township No. 4 south range No. 3 west San Bernardino meridian has been made out in conformity to the field notes of the undermentioned surveys thereof returned to and filed in this office which have been examined and approved.

(Signed)

L. UPSON,
Surv. Gen'l. Cal.

SURVEYOR GENERAL'S OFFICE,
San Francisco, Cal. Dec. 21, 1867.

This is the evidence relied upon in support of this motion and to show that a survey was made and approved by the surveyor general in accordance with the provision of said act. I do not think it is sufficient for that purpose. The certificate on the copy of the plat of T. 4 S., R. 3 W., does not refer to any survey except those made in 1855. Furthermore it is not shown that this plat was filed in the local office prior to the date the rights of the railroad company attached. The supreme court in discussing the effect of a survey under this act in the case of *Frasher v. O'Connor* (115 U. S., 102-114), said :

The survey of the land confirmed is withdrawn, therefore, from that special supervision and control which are vested in the Commissioner of the General Land Office over surveys of private land claims made under the act of 1864. The laws and practice of the Land Department, with respect to the surveys of the public lands generally, only apply, and must govern the case. Had it been the intention of Congress to retain the special supervision of the Commissioner, it is reasonable to suppose that the intention would, in some way, have been expressed. But there is nothing of the kind, and the survey is therefore to be treated as an ordinary official survey of the public lands, and, as such, is operative until changed or set aside by the Land Department.

“An ordinary official survey of the public lands” does not however become effective until a copy of the plat of the township so surveyed has been filed in the local office. Applying the same rule to the survey here claimed to have been made we must hold it was not effective for any purpose until plats of the townships in question had been filed in the local office. It is not shown that such plats were filed prior to the date the rights of the railroad company attached, but on the contrary the certified copy filed here indicates that a copy of that plat was not filed in the local office until after May 12, 1876, the date of the certificate of the surveyor general, heretofore referred to.

The facts presented are not sufficient to warrant a revocation of the decision complained of and said motion for review must be, and is hereby denied.

PRE-EMPTION—TRANSMUTATION—ACT OF MARCH 2, 1889.

JAMES W. BARRY.

A pre-emption settler whose claim was initiated prior to the act of March 2, 1889, is authorized by section 2, of said act to transmute his filing into a homestead entry, although he has already perfected title to another tract under the homestead law.

Secretary Noble to the Commissioner of the General Land Office, June 6, 1890.

October 18, 1888, James W. Barry filed pre-emption declaratory statement for the SE. $\frac{1}{4}$ of Sec. 20, T. 133 N., R. 55 W., Fargo district, North Dakota, alleging settlement the 14th of that month, and May 16, 1889, he applied to transmute said filing into a homestead entry. It appears that, on September 22, 1881, Barry had made homestead entry of another tract, and, having commuted the same, March 21, 1883, had received patent thereunder for the land embraced therein. Because of this prior commuted homestead entry, under which he had “perfected title to a tract of land,” the local officers rejected his application to transmute his pre-emption filing into a homestead entry, and, on appeal, your office, by decision of January 3, 1890, sustained the action of the local officers, and he now appeals to this Department.

This case involves the construction of section two, act of March 2, 1889 (25 Stat., 854), which is as follows :

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.

The right of transmutation of a pre-emption filing into a homestead entry in general, being created by and a part of the homestead law (Revised Statutes, 2289) and one mode provided therein of exercising the homestead right, could not be claimed by a party who had already exhausted his homestead right by a former homestead entry. Congress recognizes this in the proviso to the above section, which virtually confers the right of second homestead entry upon pre-emption claimants whose claims were pending at the date of the act, by giving them the privilege of transmutation, notwithstanding they had before the act had the "benefit" of the homestead law. Barry's application is under this proviso, and the question to be determined is, whether it authorizes transmutation of a pre-emption filing into a homestead entry in a case (like Barry's) where title to a tract of land has been perfected under a prior (commuted) homestead entry, or only in cases where such title has not been so perfected. The evident intention of Congress in that part of the section preceding the proviso was, to remedy as to the claimants mentioned therein the hardship arising from the departmental ruling, that a party exhausted his right under the homestead law, if he made entry thereunder, and failed to consummate the same for any reasons, except those beyond his control. But provisos are generally in the nature of exceptions to or qualifications of that which precedes, and the language of the proviso under consideration is:—

That all pre-emption settlers upon the public lands whose claims have been initiated prior to the passage of this act may change such entries to homestead entries and proceed to perfect their titles to their respective claims under the homestead law, notwithstanding they may have heretofore *had the benefit of such law.*

The decision of the question involved herein depends upon the meaning of or construction to be given the words italicized above, "had the benefit of such law" (homestead). Section 2262 (Revised Statutes), a part of the pre-emption law, requires the pre-emption claimant to make oath "that he has never had the benefit of any right of pre-emption under" said law. The pre-emptive right being defined to be "a right to purchase at a fixed price, in a limited time, in preference to others," it is held by this Department that said oath could not "be consistently taken after one declaratory statement had been filed and the thirty-three months had elapsed, simply because the pre-emptor for some reason did not buy the land during such period" (J. B. Raymond, 2 L. D., 857). Such being the nature of the pre-emptive right, this ruling is manifestly correct. It is to be observed, the language of the pre-emption law (Sec. 2262, *supra*) is not benefit of the pre-emption law, but of "any right of pre-emption." Neither the phrase, "benefit of the homestead right," nor, "benefit of the homestead law," are to be found

in the homestead law, but the inhibition in said law is against "acquiring title to more than one quarter-section under the provisions" thereof (Revised Statutes, 2298), and while (as before stated) this Department holds, that a party may exhaust his homestead right, by an entry under which he fails to perfect title to a tract of land, yet it has never been held that he has thereby "had the benefit of the homestead law." It is clear, therefore, that the words used in the proviso to section two of the act of 1889, "had the benefit of such law" (homestead), have never been construed by this Department and have acquired no technical meaning, different from their natural and ordinary acceptation. This being so, they are to be "read according to their natural and most obvious import, without resorting to subtle and forced constructions for the purpose of either limiting or extending their operation." (Sedg. on Con., p. 220). These words would seem to be plain and unambiguous, and where this is the case, "the legislature should be intended to mean what they have plainly expressed and consequently no room is left for construction" (ib., p. 195). Reading the words under consideration, "had the benefit of the homestead law," according to their natural and most obvious import, they must be held to apply to a party, who had made an entry and acquired title to a tract of land under said law.

Under the legislation with respect to homestead and pre-emption rights as it stood prior to the passage of the act of March 2, 1889, a settler was entitled to take a claim of one hundred and sixty acres under each law and thus acquire title to three hundred and twenty acres of land. Under the law as it now stands pre-emptors within the proviso under discussion are entitled to transmute their claims into homestead entries although they may have already perfected one entry under the homestead law. In other words the new legislation gives to this class of pre-emptors, if they so elect, the privilege of making two homestead entries instead of the former right to make one entry under the homestead law, and one under the pre-emption law. In both cases the amount of land that can be thus obtained is the same, the change is only in the method by which the title is secured.

This interpretation does not, as held by your office, operate (strictly speaking) a repeal of section 2298, Revised Statutes, but only excepts from the general rule laid down therein the particular class of pre-emption settlers mentioned in the proviso. This, Congress had the power to do, and, in my opinion, has done by plain and unambiguous language. As before stated, *provisos* generally engraft upon the main provision of a law exceptions to, or qualifications of, such provisions, and the fact, that the claimants provided for in that portion of the law preceding the proviso, are only allowed the right of second homestead entry in case they have *not* acquired title to a tract of land under a prior entry, does not authorize a departure from the plain import of the language of the proviso and warrant the construction placed thereon by your office.

I am of the opinion, therefore, that Barry is entitled to the right of transmutation given in said proviso, notwithstanding he had perfected title to a tract of land under his prior entry.

The decision of your office is reversed.

RAILROAD GRANT—SETTLEMENT CLAIM—ACT OF FEBRUARY 8, 1887.

VICTORIEN *v.* NEW ORLEANS PACIFIC RY. CO. (ON REVIEW).

The Blanchard-Robertson agreement is recognized in section 4, act of February 8, 1887, only so far as to provide protection to persons who on December 1, 1884, were in the actual occupancy of lands to which the company were entitled under said act.

Under section 2 of said act lands occupied by actual settlers at the date of the definite location of the road, and still remaining in their possession are excepted from the grant; and therefore not subject to the provisions of section 4.

The forfeiture of the grant of June 3, 1856, by the act of July 14, 1870, rendered the lands so forfeited at once subject to settlement.

The failure of a bona fide settler to apply, within the statutory period, for the land covered by his settlement will not subject his claim to forfeiture in favor of a railroad grant.

Long continued occupancy of land as a home, and the cultivation and improvement thereof, are acts that indicate an intention to claim the land under the settlement laws.

Secretary Noble to the Commissioner of the General Land Office, June 7, 1890.

This is a motion by the New Orleans Pacific Railway Company for review of the departmental decision of March 30, 1889 (8 L. D., 377), in the case of J. B. Victorien against said company, and involves the SE. $\frac{1}{4}$ of Sec. 7, T. 4 S., R. 1 E., New Orleans district, Louisiana.

The ground of the motion, as stated therein, is, that said decision was erroneous in "holding that the settler acquired a right to the land by reason of the forfeiting act of July 14, 1870; whereas the tract in controversy was covered by the Blanchard-Robertson agreement, founded upon the Blanchard-Robertson protest, which is incorporated into the act of February 8, 1887 (24 Stat., 391)." That part of the act of 1887, in which it is alleged, in the motion, the "Blanchard-Robertson agreement," is "incorporated" is section four, so much of which as is material to the present inquiry is as follows :

That it shall be the duty of the Secretary of the Interior, in issuing patents for the lands conveyed herein, to establish such rules and regulations as to enable all persons who, on the first day of December, 1884, were in the actual occupancy of any of the lands to which the New Orleans Pacific Rail Road Company is entitled under the provisions of this act to secure titles to the lands so held by them on payment to said company at the rate of \$2.00 per acre, for the land so occupied ; it being the intention of this section to protect the settlers upon said lands and to give binding force and effect to the Blanchard-Robertson agreement made with the New Orleans Pacific Company, on the 4th day of January, 1882, and filed in the Office of the Secretary of the Interior.

It is not claimed in the motion, that the "Blanchard-Robertson" agreement is literally and as an entirety made part of section four by reference thereto, but that it is "incorporated" therein. As said section and the agreement differ materially, it would seem that force and effect are intended to be given to said agreement only in so far as it is incorporated in said section four. The language of said section is plain and unambiguous, and it is unnecessary, in order to arrive at its meaning, to go behind the act and examine the protest and letter of Robertson and Blanchard or the agreement itself, as is done at length by counsel for the railroad company. At any rate, it is clear from the language italicized in the above quotation from said section, that it embraces in its provisions only "persons who on the first day of December, 1884, were in the actual occupancy of any lands to which the New Orleans Pacific Railway Company is entitled under the provisions of the act." To what lands is the company entitled under said provisions? This question is answered by section two of the act, which after granting and confirming the title to certain lands therein designated to the New Orleans Pacific Railway Company, as assignee of the New Orleans, Baton Rouge and Vicksburg Railroad Company, expressly provides, "That all said lands occupied by actual settlers at the date of the definite location of said road" (New Orleans Pacific R. R.) "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."

If Victoriën was in the occupancy of the land in controversy as an "actual settler" at the date of the definite location of the road, and he or his heirs or assigns were still in possession thereof at the date of the act, then said land was excepted from the grant and the company was not "entitled thereto under the provisions of the act," and said land would not be "covered by the Blanchard-Robertson agreement" as incorporated in said section *four*, but by said proviso to section *two*, as is held in the departmental decision now under consideration.

It is proven and not denied by the company, that Victorien, who was qualified to take the benefit of the homestead and pre-emption laws, went upon the land with his family in 1863 and has since continuously occupied it as a home for himself and family, being so in possession both at the date of the definite location of the road and of the passage of the act of 1887, and that he has cultivated and fenced said land and built thereon a dwelling and made other improvements necessary for its occupancy as a home.

At the time Victorien took possession of the land, it was covered by an executive withdrawal made in 1856 under the grant of June 3d of that year (11 Stat., 18), for the benefit of the New Orleans, Opelousas, and Great Western Railroad Company, which grant was forfeited by act of July 14, 1870 (16 Stat., 277). The land was again withdrawn, November 29, 1871, under section twenty-two of the act of March 3, 1871 (16

Stat., 573, 579), for the New Orleans, Baton Rouge and Vicksburg Railroad Company, and, October 15, 1883, it was withdrawn for the appellant (New Orleans Pacific Railway Company), as assignee of the New Orleans, Baton Rouge and Vicksburg Railroad Company, upon the filing by the appellant of its map of definite location in 1882. The land is within the granted limits of appellant's road, and appears on its list of selections of December, 1883. Victorien did not file a homestead application until March, 1886.

It is in substance held in said departmental decision in this case, that, the land being situated in that part of the grant of June 3, 1856, which was forfeited by the act of July 14, 1870, and being in the occupancy of Victorien and family as a home during the period from the date of said forfeiture until it was again withdrawn, November 29, 1871, he thereby became an "actual settler" thereon at a time when it had been restored to the public domain and was open to such settlement, and that his occupancy having continued until the definite location of the road in 1882 and up to the passage of the act of 1887, he came within the purview of and was protected by the proviso to the second section of said act. In reply to this, it is contended in the first place, on the part of the company, that the forfeiture of the grant of 1856 by the act of July 14, 1870, did not operate a revocation of the withdrawal claimed to be then in force under the former act, and, hence, did not restore said land to the public domain and render it subject to settlement.

The language of the act of July 14, 1870, is, that the lands "are hereby declared forfeited to the United States and these lands shall hereafter be disposed of as other public lands of the United States." The forfeiture of certain lands theretofore granted to the Atlantic and Pacific Railroad Company is declared by the act of July 6, 1886, in substantially the same terms—namely, that said lands "be and are hereby declared forfeited and restored to the public domain"—and this Department in construing the latter act held, that it "rendered" the lands so forfeited "subject to settlement immediately upon its passage." (*Atlantic and Pacific R. R. Co.*, 5 L. D., 269). I am of the opinion that the same construction must be put upon the act of July 14, 1870.

It is further insisted by the counsel for the company, that Victorien is barred by his laches in not making homestead application until 1886, and that his settlement was not with the intent to appropriate the land under the settlement laws. As to the first of these points, it is well settled by the decisions of this Department, that the statutory limitations as to the time of filing formal application, are intended for the protection of the settler against intervening adverse claims, and in cases between the government and the citizen, will not be enforced by the government when the citizen has acted in good faith. The railroad company being a mere grantee of the government, a forfeiture on account of laches of a claimant will not be declared in favor of the railroad, where it would not be claimed by the government, and

the former can not be heard to complain of defaults which the latter sees fit to waive. The filing of a homestead application or a pre-emption declaratory statement within the statutory periods, is not necessary to constitute an "actual settler," according to any definition of those words heretofore promulgated and certainly is not under the proviso to section two of the act of 1887, which accords to "actual settlers" the right thereafter to make formal entry of the lands settled on.

As to the contention, that Victorien did not intend to appropriate the land under the settlement laws, it may be said in this case as was said in the case of *Prestina B. Howard* (8 L. D., 286), "that" Victorien "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." Victorien had been occupying the land with his family as a home and improving and cultivating it for about nineteen years at the date of the definite location of the road in 1882 and about twenty-four years at the date of the act of 1887. The facts set forth in the *Blanchard-Robertson* protest, as quoted in the argument of counsel for the company, that a large part of these lands up to 1871 were unsurveyed and from that time on were covered by withdrawals, may account for Victorien's delay in making application. In the case of *United States v. Atterberry* (8 L. D., 173), an "actual settler" is defined to be "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." It can not be doubted that Victorien went upon the land with the intention of making it a home, and he gave the public notice of this intention by fencing and cultivating it and building a dwelling, stable, etc., and by the establishment of residence thereon, with his family. He never at any time acknowledged the claim of any of the railroads in whose favor withdrawals were, from time to time, made, and at least from July 14, 1870, the date of forfeiture of the grant of 1856, he can not be held (in the absence of proof to the contrary) to have intended to appropriate the land otherwise than under the settlement laws. Those laws were enacted for a two-fold purpose—namely, to provide a home for the citizen (and his family, if he have one) and to promote the development of the public domain by securing permanent settlement or inhabitancy thereof. Both these ends are attained in this case—the law in spirit and substance has been fulfilled; for, that Victorien in good faith cultivated and improved the land and established and maintained residence thereon as a permanent home for himself and family to the exclusion of one elsewhere, is manifest.

I am of the opinion, that he was an "actual settler" within the meaning of the proviso to the second section of the act of 1887, and being such at the date of the definite location of the road and at the date of said act, that he is protected by said proviso.

The motion for review is denied.

MINING CLAIM—ALIEN—TRUSTEE.

CAPRICORN PLACER.

The right to purchase mineral land is restricted to citizens of the United States, or those who have declared their intention to become such.

A citizen of the United States, acting as the trustee of an alien corporation, can not make a mineral entry for the benefit of such corporation.

Proof of citizenship is required from the beneficiaries where the applicant for a mineral entry is a trustee.

Secretary Noble to the Commissioner of the General Land Office, June 7, 1890.

I have before me the appeal of Theodore F. Van Wagenen, trustee, from the decision of your office dated May 4, 1889, holding for cancellation mineral entry No. 2802, for the Capricorn Placer claim, Leadville, Colorado.

It appears from the record that on February 1, 1884, the Twin Lakes Hydraulic Gold Mining Syndicate conveyed said claim by mining deed to said Van Wagenen as trustee for the syndicate. On the same day an agreement was entered into between Van Wagenen and said syndicate wherein it was recited that the latter was a corporation organized under the laws of Great Britain, and not a citizen actual or constructive of the United States or any of them, but being desirous of obtaining title to said claim from the government, had conveyed said claim to Van Wagenen in trust, to the sole end that he might obtain patent therefor as such trustee. Van Wagenen agreed that upon securing the receiver's receipt he would at once reconvey said claim to the syndicate and declared that he was the simple holder of the naked legal title and had no further interest whatever therein. Accordingly Van Wagenen, who is a citizen of the United States, as such trustee made application for patent for said claim, and made entry on December 6, 1886. The "Memorandum of Association, etc.," executed in England and filed by the syndicate with the Secretary of State of Colorado, shows that it was organized for the purpose of acquiring and working tracts of gold bearing gravel near Leadville, Colorado, in the United States.

Section 2319, R. S., provides :

All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

Section 2321, provides :

Proof of citizenship, under this chapter, may consist, in the case of an individual, of his own affidavit thereof; in the case of an association of persons unincorporated, of the affidavit of their authorized agent; made on his own knowledge, or upon information and belief; and in the case of a corporation organized under the laws of the United States, or of any State or Territory thereof, by the filing of a certified copy of their charter or certificate of incorporation.

These enactments restrict the right of purchasing mineral lands of the United States to citizens of the United States and those who have declared their intention to become such, and by consequence exclude aliens from the enjoyment of that privilege. The trustee in this case as disclosed by the record is merely the agent, for a special purpose, of an alien corporation. It needs no argument to show that this syndicate, incompetent to secure title by proceedings under the statute, can not accomplish that end by indirection, through means of an agent.

Furthermore the instructions issued July 6, 1883, (2 L. D., 725; C. L. O., 191), require proof of citizenship from the beneficiaries, where the applicant for entry is a trustee.

For these reasons the decision holding for cancellation said entry is affirmed.

SOLDIERS' HOMESTEAD DECLARATORY STATEMENT—PRE-EMPTION.
JOSEPH M. ADAIR (ON REVIEW).

A soldier's homestead declaratory statement filed by one who is at the same time residing upon and claiming another tract under the pre-emption law, which he subsequently secures under said law, does not operate to reserve the land covered thereby, during the subsequent period of residence on the pre-emption claim, as against the right of an intervening *bona fide* settler.

Secretary Noble to the Commissioner of the General Land Office, June 7, 1890.

This is a motion by Joseph M. Adair for review of the departmental decision in the case of said Adair, rendered February 14, 1889 (8 L. D., 200).

Adair, May 16, 1886, filed a [pre-emption] declaratory statement for a certain tract of land, under which he made final proof, December 10, 1886, which proof was the same day approved and cash entry certificate issued. July 16, 1886, two months after the said filing and about five months before he made said proof, Adair filed a soldier's declaratory statement for another tract of land, the SE.¼ of Sec. 4, T. 7 N., R. 44 W., Denver district, Colorado, on which he made homestead entry (based on said declaratory statement) December 20, 1886, ten days after he had made final proof and received certificate on his pre-emption claim. It further appears that on October 20 1886, one Abraham L. Jones made homestead entry on said land for which Adair had filed his soldier's declaratory statement.

In the departmental decision under consideration it is held, that the well established principle that a party can not lawfully prosecute claims under the settlement laws to two tracts of public land at the same time, applies as well to soldiers' homesteads as to ordinary homesteads and settlement claims in general, and that the filing, by Adair of a soldier's declaratory statement for said land, "while residing upon and claiming a different tract, upon which he afterwards made proof and secured title under the pre-emption law," did not authorize his holding "during the time of his residence on such pre-emption claim, as against an intervening *bona fide* settler, the land covered by" his soldier's declaratory statement.

The rule that claims to two different tracts of public land can not be prosecuted at the same time—the one under the pre-emption and the other under the general homestead law, is based upon the fact that both of said laws require residence, and a party can not simultaneously maintain two residences. This, as to actual residence, is analogous to, and as obviously true as the axiom in physics that one body can not occupy two spaces at the same time. By a regulation of this department, however, an ordinary homestead entryman is allowed six months after entry within which to establish actual residence on the land entered. This regulation is in harmony with the spirit, if not a logical sequence of that provision of the homestead law, making it a ground of contest of an entry thereunder, that the entryman "has actually changed his residence, or abandoned the land for more than six months at any time." (Revised Statutes, Sec. 2297.) If the entryman establish residence within said period of six months, "the law regards his residence as commencing from the date of entry." (Krichbaum *v.* Perry, 5 L. D., 403.) The soldiers' homestead law allows claimants thereunder to file a declaratory statement for a tract of land and within six months thereafter "make actual entry and commence settlements and improvements on the same." (Revised Statutes, Sec. 2309, 2304.) By this provision of said law, the soldier claimant is expressly granted the same privilege as to settlement for the period of six months after filing his declaratory statement that the entryman under the general homestead law is given by departmental regulation for six months after entry, and it is, also, held (in analogy to the rule in cases of settlement within six months after entry under the general homestead law), that on settlement by a soldier under the soldiers' homestead law within six months after filing the declaratory statement, his right as against intervening claims relates to the date of such filing. (Stephens *v.* Ray, 5 L. D., 133.)

It is contended by counsel for the motion, in substance, that, while actual residence can not of course be maintained on different tracts of land at the same time, yet "the law forbids the application of the rule of theoretical residence during the first six months to soldiers and sailors," so as to defeat a claim of a soldier or sailor to a tract of land initiated by filing a declaratory statement under the soldiers' and sailors'

homestead law, while prosecuting a claim to another tract under the pre-emption law. The difficulty, however, does not lie so much, if at all, in the application of the doctrine of such "theoretical" or constructive residence to soldiers' homestead claims, but in the actual *bona fide* residence exacted of the pre-emptor in prosecuting a claim under the pre-emption law. To constitute residence under the pre-emption or any settlement law, the act and intent must concur—the act of inhabitation and the intent to make the claim a home, *for at least an indefinite period*, to the exclusion of one elsewhere. The pre-emptor, it is true, may sell his claim or change his residence at any time after making proof, but if this be done pursuant to an intent formed before he makes settlement his claim is invalid and subject to cancellation. No principle of the settlement laws is more firmly established than that a party can not acquire title thereunder by occupying a claim for a stated period of time solely with a view of acquiring such title and not with the intent of making such claim a home to the exclusion of one elsewhere. If Adair intended, as announced in his soldiers' declaratory statement five months before he made proof on his pre-emption claim to quit his inhabitation of said claim at a fixed time and establish residence on another tract of land, he was not qualified to further in good faith prosecute such pre-emption claim, and, if he intended to prosecute such claim in good faith, he was, during the period of such prosecution, disqualified to file a truthful soldiers' declaratory statement. If good faith as to his pre-emption claim would disqualify (as it clearly would) a party from filing a truthful soldiers' declaratory statement, did Congress intend that by bad faith as to such claim, he should be placed in a more favorable position as to such declaratory statement? Did Congress intend to give the right of filing a soldier's declaratory statement to one who is disqualified to truthfully make such statement by reason of his prosecution in good faith of a pending pre-emption claim; or, on the other hand, to one who, if his declaratory statement is true, was fraudulently or in bad faith prosecuting his pre-emption claim? Obviously, neither of these intents can be imputed to Congress, and yet this must be done in order to sustain a soldier's declaratory statement for one tract of land filed pending the prosecution of a pre-emption claim to another tract, unless it be shown that soldiers filing such declaratory statements are exempt from the requirements of the law as to pre-emption claims. It is to be observed that there is no soldiers' and sailors' pre-emption law, and nothing in the soldiers' and sailors' homestead law, giving them exemption in prosecuting pre-emption claims from the requirement of the pre-emption law.

As we have shown before, the claimant under the soldiers' and sailors' homestead law occupies the same position as the claimant under the general homestead law as to the period within which settlement shall commence after the initial acts required by those laws respectively—namely, the filing a declaratory statement in the one case and regular

entry in the other. While, however, the law confers on the soldier and sailor no advantage in this particular over ordinary homestead claimants, yet, they are justly granted many advantages and privileges in other important respects. They are allowed, (1) to hold land for six months by merely filing a declaratory statement, (2) to file such statement by an agent as well as in person, (3) to enter one hundred and sixty acres or a quarter section of public land, "including the alternate reserved sections along the line of any railroad or other public work, not otherwise reserved or appropriated," and (4) credit is given them (not exceeding four years) on the time of residence required under the general law for the period of service, or, if honorably discharged on account of wounds or disability incurred in the line of duty, for the term of enlistment. In case of death, their widows and minor children are also authorized to make homestead entries with like privileges. (Revised Statutes, Secs. 2304-2309). By giving soldiers and sailors in the late war these important privileges and advantages, Congress has evinced a laudable desire to discharge to some extent the debt of gratitude due them from the country, but no such right as that claimed for Adair in this case, involving a radical departure from the well-settled principles of the law on the subject, is granted either expressly or by implication.

The motion for review is denied.

RAILROAD GRANT—PRE-EMPTION FILING—PRESUMPTION.

NORTHERN PACIFIC R. R. CO. *v.* STOVENOUR.

A prima facie valid unexpired pre-emption filing of record at the date of the statutory withdrawal on general route, serves to except the land covered thereby from the operation of said withdrawal.

Such a filing raises a presumption of settlement as alleged, and of the actual existence of the pre-emption claim, that is conclusive as against the grant, especially in the absence of an allegation which, if proven, would render said filing absolutely void in its inception.

Whether the pre-emptor under such a filing inhabited and improved the land, and performed other duties imposed by the pre-emption law, are questions that can not be raised by the company in aid of the grant.

On the expiration of the statutory period fixed for making proof and payment under a pre-emption filing, without such proof and payment having been made, the presumption arises that any claim that had attached under said filing has been abandoned, and no longer exists. This presumption, however, is not conclusive, but is open to rebuttal by any one claiming an interest in, or right to the land who may allege the contrary.

Secretary Noble to the Commissioner of the General Land Office, June 7, 1890.

The case of the Northern Pacific Railroad Company *v.* John Stovenour involves the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, and the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, Sec. 15, T. 2 N., R. 2 E., Bozeman, Montana.

The land in question lies within the primary, or granted, limits of the grant to said railroad company, under the act of July 2, 1864 (13 Stat., 365), as shown by the map of general route of the company's road, filed February 21, 1872, and by the map of definite location thereof, filed July 6, 1882.

The record shows that, on March 28, 1870, one Joseph Pare filed his pre-emption delaratory statement for the land, alleging settlement March 1, 1870; that on February 22, 1871, one Harvey M. Yeaman filed on his behalf a like statement, alleging settlement February 20, 1871; that on April 19, 1872, one John England filed on his behalf a like statement, alleging settlement April 5, 1872; and that on April 21, 1883, one James W. McElvaine was allowed to make timber-culture entry for the tract.

On July 23, 1883, Stovenour initiated contest proceedings against the entry of McElvaine, charging that the land was not devoid of timber, and, therefore, not subject to entry under the timber-culture law. Upon a hearing of the contest, the local officers found in favor of McElvaine, and recommended that his entry be allowed to stand. From this finding Stovenour appealed.

On September 22, 1885, your office, considering first the effect of the several pre-emption declaratory statements above described, relative to the rights of the railroad company under its grant, held that "the filings in question, existing and of record, at, and prior to, the dates of withdrawal on general route, and of filing of map of definite location, excepted the land from the withdrawal and the grant," and then proceeding to dispose of the contest, on Stovenour's appeal, reversed the finding of the local officers, held McElvaine's entry for cancellation, and directed that Stovenour be allowed to make homestead entry for the land in accordance with his application filed with the contest.

The case is now here on the company's appeal from this decision of your office. McElvaine did not appeal, and said decision, as between him and Stovenour, has, therefore, become final.

The sole question raised by the appeal is, whether the land in controversy was excepted from the grant to the company by reason of the pre-emption filings of Pare and Yeaman, the record existence of which covered the dates of both the filing of map of general route by the company and the definite location of its road. The claim of England was not asserted in any form until after the map of general route was filed, and his filing can not, therefore, upon the present record, cut any figure in the case.

The tract is of the series of "unoffered" lands, and, aside from the filings of Pare and Yeaman, there is nothing in the record which tends to establish the status thereof, as bearing upon the question involved, either at the date of designated general route, or at the date of the definite location of the company's road. Neither of the parties named has ever made final proof under his filing, nor is there any proof, or allegation, that either is now a settler, or resident on the land.

By the pre-emption law it is required that every claimant thereunder, for unoffered land, shall "make known his claim in writing to the register of the proper land office within three months from the time of the settlement, giving the designation of the tract and the time of settlement; otherwise his claim shall be forfeited and the tract awarded to the next settler, in the order of time, on the same tract of land, who has given such notice and otherwise complied with the law;" and that every such claimant shall "make the proper proof and payment for the land claimed within thirty months after the date prescribed" for filing his declaratory notice, has expired. (Sections 2265 and 2267 Revised Statutes.)

It will be observed that Pare and Yeaman each filed his declaratory statement for the land within three months from the date of his alleged settlement thereon, and that at the date when the general route of the company's road was fixed, the time within which proof and payment were required to be made under such filings had not elapsed. These filings were, therefore, at that date, in point of time, unexpired. They had expired, however, at the date when the company's road was definitely located, in the sense that the statutory period allowed for making proof and payment in such cases had elapsed.

The grant to the company, by the third section of said act of July 2, 1864, was of

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.

The sixth section of the act provided for the survey of the lands for forty miles in width on both sides of the road, after the general route should be fixed, and as fast as might be required for the construction of the road, and that the odd sections of land thereby granted should not be liable to sale, entry, or pre-emption, before or after the survey, except by the company. This section operated, *proprio vigore*, to withdraw from sale, entry, or pre-emption, the odd sections subject to the grant, to the extent of forty miles on each side of the road, from and after the date of filing of the map of general route, which, in this case, as we have seen, was the 21st of February, 1872. *Buttz v. Northern Pacific Railroad* (119 U. S. 55).

Under the facts stated, it is first to be considered whether the land in dispute was free from pre-emption or other claims or rights at the date of the statutory withdrawal on general route? If so, it was subject to that withdrawal, and under the authority of the *Buttz* case, *supra*, no claims or rights could thereafter attach thereto, and, hence, it must be held to have passed to the company under its grant, upon the definite

location of the road. But if not free from such claims or rights at the date of said statutory withdrawal, the land was excepted from the operation thereof by the terms of the grant, and in that event it is further to be considered, whether it was free from such claims or rights at the date of the definite location of the company's road.

I am of the opinion that the pre-emption filings of Pare and Yeaman constituted pre-emption claims, within the meaning of the excepting clause of the grant, such as served to except and did except the land in dispute from the operation of the statutory withdrawal on general route. These filings were in all respects *prima facie* valid, when made, and at the date of such withdrawal they had not expired by lapse of time, but were still in full force and vigor. They operated, therefore, to raise a presumption on the face of the record, of settlement as therein alleged, and of the actual existence of pre-emption claims to the land; and this presumption is conclusive against the company, especially in the absence of any allegation in reference to said filings, such as, if proven, would render them absolutely void in their inception, and, for that reason, not amounting, at any time, to claims of any character whatsoever. This was substantially the holding of the Department in the case of *Malone v. Union Pacific Railway Company* (7 L. D., 13), and it has since been followed in the case of *Millican v. Northern Pacific Railroad Company* (7 L. D., 85); *Sioux City and Pacific Railroad Company v. Lewis et al.* (8 L. D., 292); *Northern Pacific R. R. Co. v. Gjuve* (8 L. D., 380); *Payne v. Atlantic and Pacific Railroad Company* (7 L. D., 405); *Union Pacific Railway Company v. Haines* (9 L. D., 595); and other similar cases.

The question as to whether these pre-emptors, or either of them, inhabited and improved the land, and performed other duties required by the pre-emption law, is not a matter that concerns the company. With the performance of these conditions, the company has nothing to do, and it is not competent for it to inquire into them. *Kansas Pacific Railway Company v. Dunmeyer* (113 U. S., 629-641); *Northern Pacific Railroad Company v. Wiley* (7 L. D., 354). It is sufficient that there was, at the date of the withdrawal, a claim to the land in dispute, of such a nature and character as the act defines, and any question as to the lawfulness of such claim at that date, or as to the performance by the claimant of certain prescribed conditions, is immaterial. *Dunmeyer case, supra*; *Newhall v. Sanger* (92 U. S., 761).

This conclusion renders it necessary further to consider whether the land was "free from pre-emption, or other claims or rights," at the date when the line of the company's road was definitely located, to wit: July 6, 1882. At that date, it will be observed, the time prescribed by statute, within which proof and payment were required to be made under the declaratory statements of Pare and Yeaman, had elapsed, without proof and payment having been made. These declaratory statements were, therefore, at the date when the company's rights attached under its grant, what are usually denominated "expired filings;" and

there is no evidence, or allegation even, that the parties named were then settlers, or residents, on the land.

Were these filings, nevertheless, "pre-emption claims," such as served to except the land from the grant? I am of the opinion that they were not. Upon the expiration of the time limited by statute for the making of proof and payment, without such proof and payment having been made, the presumption arose that whatever claim, or claims, had previously attached to the land, under or by reason of such filings, had been abandoned, and no longer in fact existed. This presumption, however, was not conclusive, but was open to rebuttal by any one claiming an interest in or right to the land, who might allege the contrary. The claimant, Stovenour, has made no such allegation in this case. So far as the record shows, the land in dispute was *prima facie* subject to the grant to the company at the date of the definite location of its road, and must be held, therefore, in the absence of any allegation or showing to the contrary, to have passed under the grant. *Caldwell v. Missouri, Kansas and Texas Railway Company et al.* (8 L. D., 570).

Your office decision is accordingly reversed, and the application of Stovenour to make homestead entry for the land is rejected.

HOMESTEAD ENTRY—"TRADE AND BUSINESS."

FOUTS *v.* THOMPSON (ON REVIEW).

A homestead entry of land occupied by the entryman at the time of entry for purposes of trade and business is illegal, and such illegality is not limited to the land actually covered by the buildings and improvements under such occupancy but extends to the entire entry.

Residence, cultivation, and improvements will not legalize a homestead entry of land that is declared by law to be not subject thereto.

Secretary Noble to the Commissioner of the General Land Office, June 9, 1890.

John F. Fouts, in the former decision erroneously named Fouts, has filed a motion for review of the decision of my predecessor of November 22, 1887 (6 L. D., 332) affirming the decision of the Commissioner of the General Land Office, holding for cancellation Fout's homestead entry for the S. $\frac{1}{2}$ SW. $\frac{1}{4}$, SW. $\frac{1}{4}$ SE. $\frac{1}{4}$ of section 5, and the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, of section 8, T. 17 N., R. 7 W., M. D. M., San Francisco land district, California.

The former attorney of James C. Thompson signs an admission of service of the notice as follows: "I accept service of a copy of the above motion and decline to reply as the death of James C. Thompson ended my employment as attorney."

The motion will, therefore be considered.

The grounds upon which the motion is based are:

- I. The death of the adverse claimant and the withdrawal by his attorney of all objections to the awarding of the land to Fouts.
- II. The changed conditions of Fouts' use and occupation of the land.

Attached to the motion is the affidavit of Fouts bearing date August 9, 1889, from which it appears

that the contestant Thompson has died, leaving no known heirs, and the attorneys have informed me that they do not longer intend to contest or claim the land; that since the evidence was taken deponent has used the land for agricultural purposes, having cleared and grubbed ten acres, having two acres in alfalfa, three acres of grapevines, two acres in vegetables, fifty-seven fruit trees and the balance plowed; that deponent and his family have resided continuously on the land since the date of hearing and have had no other home or stopping place; that the land not cultivated is used by deponent for grazing purposes, and no other person has had any use, possession or occupation of the land.

The homestead entry of Fouts was canceled because the land covered thereby was at the date of entry "actually settled and occupied for the purpose of trade and business" and therefore according to sections 2258 and 2289 of the Revised Statutes not subject to such entry.

The death of Thompson or his withdrawal from the contest cannot affect this case nor can the residence of Fouts on the land and his cultivation and improvements of the same legalize an entry for lands that is declared by the law not to be subject thereto. See the recent case of *Douđ et al v. Slocomb* (9 L. D., 532).

In the course of the argument Fouts' attorney requests that the motion be granted "for the reason that the evidence does not clearly show which legal subdivision was used for trade and business and the inhibition of entry of land so used cannot apply to more than the legal subdivision so used."

If any part of the land covered by the entry was not properly subject to the said objection, Fouts had the opportunity to show such fact at the hearing. If he neglected it then it is now too late to re-open the case for such a purpose, when he fails to point out what parts of the land he claims not to fall under such objection.

Besides it appears from the departmental decision in this case, that Fouts began in May, 1874, to improve the tract, putting up in that year a hotel and other buildings and continuing until at the time of hearing May, 1883, he had twenty cottages, hotel, bath house, store etc.; that he since 1874, made use of the land for the purpose of maintaining a health resort thereon.

When the land was settled upon with the object of establishing thereon a health resort as shown in this case, and when the land was used and occupied for such a purpose, it seems, that the illegality of the subsequent entry must affect the whole of it. The illegality is not limited to the parts of the land actually covered by the buildings and other improvements erected and made in pursuance of the general purpose.

For the reasons stated the motion must be denied.

GONZALES *v.* TOWNSITE OF FLAGSTAFF.

Motion for review of departmental decision rendered March 24, 1890, 10 L. D., 348, overruled by Secretary Noble, June 9, 1890.

REVIEW—FINAL PROOF PROCEEDINGS—NEW PROOF.

WILLIAM H. KEIGAN.

Where the claimant or transferee is afforded a further opportunity to support an entry, a motion for review will not be granted unless there is a palpable abuse of discretion, as shown by the record, in directing the hearing or requiring new proof

Secretary Noble to the Commissioner of the General Land Office, June 9, 1890.

R. H. McClellan, transferee, has filed a motion for review of departmental decision of March 7, 1890, affirming your office decisions of May 17, and December 26, 1888, requiring new proof upon the pre-emption cash entry of William H. Keigan for the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 23, and the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 22, T. 105, R. 54, Mitchell land district, South Dakota.

The grounds of said motion for review are the following :

- (1) Said decision is clearly contrary to law, and is not sustained by the present rulings of the Department;
- (2) Error in holding that it was necessary to make an attempt to crop the land prior to final proof;
- (3) Error in holding that a sale of the land made four months after final proof tended to impeach the integrity of the entry;
- (4) Error in holding that the entry should not be passed to patent as it stands;
- (5) Error in holding that in default of further proof the entry should stand canceled.

The decision complained of does not hold "that it was necessary to make an attempt to crop the land prior to final proof." The fact that "it does not appear that entryman made any attempt to crop the tract in question" is incidentally mentioned as a part of the statement of the facts in the case, but it is not held that it was "necessary" to crop the land. The sale of the land four months after final proof is "considered in connection with the unsatisfactory character of his pre-emption proof." The conclusion reached by the Department was based, not upon any single item in the evidence but upon the weakness of the final proof taken as a whole.

All the questions raised by the motion for review are the same as those adjudicated in the decision, and no additional evidence is offered (Charles W. McKallor, 9 L. D., 580). "There is no denial that the facts are correctly stated, nor is there any allegation of newly discovered evidence, or of any material fact not considered in the original decision ;

it is earnestly contended by counsel, however, that the facts do not justify the conclusion reached" (*Atterberry et al.*, 10 L. D., 37). This is a case wherein "fair minds may reasonably differ as to the conclusion to be drawn" from the evidence, hence the decision should not be disturbed (*Mulligan v. Hanson*, 10 L. D., 311). Where the Department has afforded the claimant or the transferee an opportunity to support an entry if he can do so, a motion for review will not be granted unless there is a palpable abuse of discretion, as shown by the record in directing a hearing or requiring new proof.

The motion is denied.

OFFERED LANDS IN NEW MEXICO—RES JUDICATA.

J. C. LEA.

There is no general statutory authority for the disposition of public lands at auction or private entry, but authority for such action is specially given by statute in each case, and the limits within which such disposal may be made are defined by the statute.

The only statutory authority for the proclamation issued by the President May 3, 1870, for the offering of certain lands in New Mexico, must be found, if at all, in the last clause of section 13, act of July 22, 1854, and as said clause is open to such construction, it must be presumed that the President acted thereunder.

In view of the lapse of time and the presumption that the President found authority in said clause for such offering, and that on the faith of that action large sums of money have been invested in these lands, and expended in their improvement, the question as to the legality of said offering must be held *res judicata*.

Secretary Noble to the Commissioner of the General Land Office, June 9, 1890.

By letter of December 6, 1889, you represented that on May 3, 1870, the President issued a proclamation for the offering of certain public lands in New Mexico for sale at public auction, that thereupon in August following said lands were so offered, and that those of them remaining undisposed of were subsequently treated as subject to private entry under the act of April 24, 1820 (3 Stats., 566),—sections 2357 and 2264 Revised Statutes, that on July 10, 1886, Commissioner Sparks directed the local officers at Las Cruces to allow no further private cash entries "until the question of the legality of the alleged public offering of lands August 19, 1870, is determined by this Department," that all proceedings with reference to such entries were suspended in your office and so continued, that you have caused an examination of the subject to be made, and have reached the conclusion that the offering so made was not authorized by law.

You state the point involved to be, "whether the statutes enacted by Congress from time to time empowering the President to offer and sell public lands, or any of them, at public sale, and thereafter at private entry, extended so far as to include the particular lands embraced in

the offering mentioned, there being no general enactment giving such power."

You further state that Congress has provided for the survey of said lands and their disposal by donation, pre-emption, homestead, and in other ways, "but it has made no provision by statute for the offering of them at public sale, or their subsequent disposal at private entry, as contemplated with regard to offered lands by the act of April 24, 1820, now substantially embodied in the Revised Statutes of the United States."

You suggest in case the Department concurs in your conclusion, that Congress be called on to confirm titles based on entries under said proclamation, of which you state a considerable number are now suspended in your office.

The lands embraced within the present Territory of New Mexico were obtained, partly from the State of Texas by cession of 1850, and the remainder from Mexico, under the treaty of Guadalupe Hidalgo in 1848, and by the Gadsden purchase of 1853.

On July 22, 1854, an act was passed entitled "An act to establish the offices of Surveyor General of New Mexico, Kansas, and Nebraska, to grant donations to actual settlers therein, and for other purposes." (10 Stats., 308). This act provides for a surveyor-general and made donations of land to certain classes of settlers in New Mexico, and provided for surveys of the public land, and that any lands not otherwise taken under the provisions thereof should be subject to the operation of the pre-emption law, and for the ascertainment of Spanish-Mexican grants, and excepted all lands covered thereby "from sale or other disposal by the government," etc. The first eight sections relate exclusively to New Mexico. The ninth section authorizes the Secretary of the Interior to issue all rules necessary to carry into effect the "several provisions of this act." The last four sections provide for the appointment of a surveyor-general for the Territories of Nebraska and Kansas, and prescribe his duties, and for a survey of the public lands therein, and declares that certain lands therein shall be subject to the pre-emption laws. Section thirteen, the concluding section, is as follows:

And be it further enacted, That the public lands in the Territory of Nebraska, to which the Indian title shall have been extinguished, shall constitute a new land district to be called the Omaha district; and the public lands in the Territory of Kansas, to which the Indian title shall have been extinguished, shall constitute a new land district, to be called the Pawnee District; the officers for each of which districts shall be established at such points as the President may deem expedient; and he is hereby authorized to appoint, by and with the advice and consent of the Senate, a register and receiver of public moneys for each of said districts, who shall each be required to reside at the site of their respective offices, and they shall have the same powers, perform the same duties, and be entitled to the same compensation as are or may be prescribed by law in relation to other land-offices of the United States. *And*

the President is hereby authorized to cause the surveyed lands to be exposed for sale from time to time, in the same manner and upon the same terms and conditions as the other public lands of the United States.

If there is authority of law for the disposition of public lands in New Mexico at auction or private sale, it must be found in the concluding sentence of this section; for there is no general statute authorizing the President to so dispose of any public lands of the United States he may desire to sell. The authority is specially given by statute in each case, and the limits within which such disposal may be made are defined by the statute. In the absence of any proof to the contrary, therefore, it must be presumed that the President authorized said sales by virtue of the provision of said section. Read by itself the provision is open to the construction that it refers to the lands in New Mexico as well as to those in Nebraska and Kansas, for it gives authority to sell "the surveyed lands." Now, the purpose of the act was to authorize surveys in New Mexico as well as in the other two Territories. Section five explicitly declares that "when the lands in said Territory (New Mexico) shall be surveyed . . . preparatory to bringing the same into market", sections sixteen and thirty-six shall be reserved, etc. The last clause of section thirteen does not in terms limit the disposition of such lands, by sale, to the Territories of Nebraska and Kansas. While there may be some doubt whether this provision applies to New Mexico, owing to its relation to a section that otherwise refers to Nebraska and Kansas, yet it relates to the "surveyed lands" which were provided for by the act in the three territories, and it appears from the foregoing that the doubt was solved by President Grant in favor of the other construction. In this he was evidently sustained by your office where the proclamation was prepared and by the Secretary who transmitted it. The practical construction given to a statute by the public officers of State charged with its execution, and acted upon by the people thereof is to be considered, "and perhaps should be regarded as decisive in a case of doubt, or where the error is not plain." *Union Ins. Co. v. Hoge* (21 How., 35); *Matthews v. Shores* (24 Ill., 27).

It does not appear how many entries were allowed under the proclamation, but J. C. Lea has filed an affidavit in which he states that he made various entries thereunder in good faith, and that his improvements on the land have cost not less than \$20,000.

It must be presumed that the action of the President and of his advisers was taken after full consideration of all the legal questions involved, and after such consideration they found authority in the law for their action. There is nothing to rebut the presumption that they acted under the provision cited above.

Meanwhile, on the faith of that action parties have invested money in the lands and expended large sums in their improvement. While these conditions continued twenty years have elapsed. Under these circumstances I can find no authority either in the ruling of the courts

or in the practice of the Department, for re-opening this question with a view to disturbing the rights thus vested. In the case of *United States v. Flint* (4 Sawyer, 58, affirmed in 98 U. S., 61), the court said:

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. See also *The Atlantic and Pacific R. R. Co.* (8 L. D., 165) and *St. Paul, Minneapolis and Manitoba Ry. Co.* (*Ibid*, 255).

In the light of these authorities I conclude the question presented has become *res judicata*,—and for the purposes of this case must be accepted as finally and legally determined. This will render it unnecessary to further consider the recommendation of your office.

You will cause this opinion to be made known to the parties in interest by sufficient publication.

MINING CLAIM—APPLICATION—PUBLICATION.

ERIE LODGE *v.* CAMERON LODGE.

The register may exercise his official judgment in the selection of a newspaper nearest to the mining claim, for the publication of an application for patent.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, June 10, 1890.

On June 2, 1885, George Yule, N. N. Farris and Robert Harper made mineral entry (based upon a location filed August 18, 1879) for the Cameron Lodge claim, lot No. 3863, T. 12 S., R. 87 W., Gunnison, Colorado.

The Centennial Prospecting and Mining Company claimants of the Erie lode, a claim in conflict with the Cameron, claiming a better right to the ground embraced in such conflict, filed in your office an application for the cancellation of said entry and alleged that since the "Erie" location (filed August 28, 1879) it had kept up the annual assessment work thereon and also that the notice of the Cameron application "was not published in a newspaper published nearest to the said Cameron lode mining claim" and that had such notice been so published the said company "would have obtained notice on such application for patent and would have been in condition to and would have asserted their rights . . . as provided by law."

Thereupon a hearing ordered by your office letter of March 10, 1887, was had at the local office on June 13, 1887, when the said company appeared by its attorneys and the claimants made default.

"From the testimony offered and from the failure of the defendant to appear" the local officers found that the said company should be

permitted to adverse the said "Cameron" claim. Upon affidavits subsequently filed by Farris and Harper to the effect that they had had no notice of said hearing, your office by letter of December 23, 1887, directed a rehearing.

The evidence at such rehearing was, by stipulation of the parties, submitted by affidavits filed in the case.

The local officers found in effect that the notice of the "Cameron" application had been properly published and the said "Centennial" company appealed.

Thereupon this ruling was affirmed by your office decision of January 12, 1889.

The said company again appeals.

For some time prior to January 25, 1885, a newspaper called the "Silver Record," was published at Gothic, some seven or eight miles from the claim in controversy. Subsequently to that date, and until after May 30, 1885, when it was republished at Gothic, said paper was printed at Crested Butte some fifteen or sixteen miles from the said claim, "on the press and with the type of the Crested Butte Gazette," a newspaper published at the latter place.

The "Cameron" application for patent was filed in the local office on February 28, 1885, and notice thereof was published from March 5, to May 7, 1885, in each successive issue of the "Elk Mountain Pilot," a weekly paper also printed at Crested Butte.

It appears that the vice president of the said company who, with its other officers, lived at Colorado Springs over two hundred miles from said claim, supposing that the Cameron application would appear in the Silver Record, subscribed during 1884 and 1885 for that paper for the "express purpose of watching and protecting" its interests; that the said company was without knowledge of the Cameron application during the period of the said publication in the Elk Mountain Pilot, that while the Silver Record was being printed at Crested Butte its plant remained at Gothic; that during a part of such period, said paper was "dated as of Gothic," and during the remainder thereof "as of Crested Butte," and that of the three papers named the Elk Mountain Pilot was alone in existence at the time (March, 1888) of rehearing.

The affidavit of the editor and proprietor of the Silver Record sets out that the "printing and distribution" of that paper at Crested Butte was "made necessary by deep snows rendering it impracticable to get supplies into the town of Gothic" and that the same was "at all times temporary and not permanent."

The then register swears that when the Cameron publication was made the office of the Silver Record at Gothic was "closed and not used;" that no paper was then published nearer to said claim than at Crested Butte, that he deemed the existence of the Silver Record precarious, and that he considered "the notice of the said application for patent would be safer and more sure of being published

through the term of sixty days by being published in the Elk Mountain Pilot."

Section 2325 Revised Statutes provides that when an application for mineral patent is duly filed in the local office, the register "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."

The Department has held that the register may exercise his official judgment as to whether or not a certain publication is such newspaper within the meaning of the law. *Tomay et al. v. Stewart* (1 L. D., 570).

In the case at bar the register exercised his official judgment and selected the newspaper which he believed to be best fitted for the proper publication of the Cameron notice.

That such selection was warranted by the attendant circumstances is to my mind too plain for discussion. The decision appealed from is accordingly affirmed.

DESERT LAND CONTEST ORDER OF SUSPENSION.

CANNING *v.* FAIL.

No rights are acquired under an affidavit of contest filed during the pendency of proceedings against the entry by the government, or while all adverse proceedings against such entries are suspended by a general order of the Department. A contest must fail where a default is cured prior to notice of contest, and such action is not induced by knowledge of the impending suit, but is the result of a previous *bona fide* intent.

Secretary Noble to the Commissioner of the General Land Office, June 11, 1890.

This record presents the case of *George Canning v. Frederick W. Fail*, involving the SW. $\frac{1}{4}$, S. $\frac{1}{2}$, of NW. $\frac{1}{4}$, Sec. 1, and the SE. $\frac{1}{4}$, S. $\frac{1}{2}$ of NE. $\frac{1}{4}$, NW. $\frac{1}{4}$, of NE. $\frac{1}{4}$, E. $\frac{1}{2}$, of NW. $\frac{1}{4}$, NE. $\frac{1}{4}$, of SW. $\frac{1}{4}$, Sec. 2, T. 1 S., R. 2 W., Salt Lake City, Utah.

On June 2, 1877, Fail filed a declaration of intention to reclaim under the desert land act (March 3, 1877, 19 Stat., 377) the tracts described.

On September 25, 1880, the local office in pursuance of your office instructions notified Fail that the statutory period following his said declaration had expired "without the requisite proof and payment," and required him within ninety days to show cause why his entry should not be cancelled for non-compliance with the requirements of the law.

Fail made within the time limited no reply to said rule and no action was taken thereon.

On February 7, 1882, Secretary Kirkwood, being advised of the pendency in Congress of certain bills for the relief of desert land entrymen, directed your office to instruct the various local officers to suspend proceedings adverse to persons who have made desert land entries "and

who have made *bona fide* efforts to comply with the law but have been as yet unable to do so." By the same order Secretary Kirkwood directed "such suspension until the action of Congress in the matter shall be known."

On about November 16, 1882, Canning filed in the local office a corroborated affidavit of contest against the entry of Fail and the same was transmitted December 7, following. Said affidavit set out that Fail had not replied to the rule referred to, that he had neither reclaimed nor attempted to reclaim the land and that he had abandoned the same. By the same affidavit Canning asked that your office cancel Fail's entry to the end that he (Canning) "may acquire title to the same or part thereof."

On September 8, 1883, the local office transmitted Fail's affidavit (not corroborated) made before the register on July 25, preceding, wherein he set out that his entry had been made in good faith, that from surveys which he had made about six weeks before he is of the opinion that water can be brought on the land from a recently constructed canal, in which he was negotiating for water rights and that he had made arrangements for the sinking of artesian wells.

The Department, being advised by your office letter of March 14, 1883, that Congress had taken no action with regard to desert land entries, on September 6, 1883, upon recommendations made by your office issued further instructions in relation thereto.

Thereupon on September 19, 1883, your office issued the following instructions to registers and receivers in the desert land entries of Frederick W. Fail and others, where the parties had failed to make proof within the statutory period, or to respond to the notice given in accordance with the Circular of instructions of August 8, 1880:

In pursuance of instructions from the Hon. Secretary of the Interior of date September 6, 1883, you will again notify the entrymen in the case above named to show cause within sixty days why their entries should not be canceled.

At the expiration of the sixty days you will report the result to this office. In cases where no response is made to your notice the entries will at once be canceled by this office, and where the parties claim to have made *bona fide* efforts to comply with the law in regard to the reclamation of the land, their statements must be made under oath and duly corroborated, setting forth the nature and extent of the same.

On December 8, 1883, the local office transmitted Fail's corroborated affidavit made the day before, in response to the instructions last referred to, wherein he sets out that he found after making the entry that great expense would be involved in bringing water upon the land from the West Jordan Canal; that in consequence the work of reclamation was unavoidably delayed; that during the past summer he found after an outlay of thirty dollars for a survey that water could be conducted upon each legal subdivision of the tract from the North Jordan Canal; that until within the last few months he has had no opportunity of buying water rights from the North Jordan Canal Company; that he has purchased sixty-four shares in the said company at "more than

\$800," for the sole purpose of irrigating this land. He further avers that boring of artesian wells has, on account of quick-sand at a depth of sixty or eighty feet, been attended with great difficulty; that it was only of recent date that he had knowledge of an available well boring machine, and that he now has an interest therein.

On February 13, 1884, the local office transmitted a further affidavit (not corroborated) by Fail made the 11th inst. wherein he avers that he has completed such well to the depth of one hundred and fifty seven feet at a cost of over \$300, and that he has thereby obtained through a two and half inch pipe a good flow of water.

February 18, 1884, the local office transmitted Canning's corroborated affidavit made the same day wherein he averred that nothing had been done by Fail to reclaim the land, up to the filing of his affidavit of contest in November, 1882; that not a single act of reclamation had been done, or caused to be done by Fail from November 16, 1882, when he filed his charge of abandonment, up to date; that the only act done by Fail was since December 4, 1883, when he bored for a well where he struck water, which comes to the surface in a three-quarter inch pipe and runs from there about sixty feet; that the amount of water thus obtained if run to its fullest capacity would not irrigate half an acre, so as to produce an agricultural crop; that the only act of cultivation done on said land was done by affiant on a choice spot of the tract, where he cultivated and broke about fifteen acres of land and raised a crop of barley and lucern without irrigation. He further stated that the North Jordan Irrigation Canal is five and a half miles from the tract, and that there is no ditch leading from the canal to the land.

On June 28, 1884, Fail made proof and payment for the land at the local office.

From the allowance of said proof Canning (alleging no jurisdiction) appealed to your office.

Canning's corroborated affidavit attached to said appeal set out that on or about June 23, 1884, Fail completed small ditches or plow furrows on the land and conveyed water thereon for the purpose of making proof and not for reclamation, that such ditches will not convey water enough to irrigate more than forty acres and that the land was still in a desert condition.

Your office made no ruling with reference to said appeal but on December 17, 1884, ordered a hearing to determine the questions raised by the final proof and the affidavits filed by Canning herein. Said hearing at which the parties appeared with counsel was had at the local office in February, 1885. Upon the evidence adduced the local office found in effect that Fail had complied with the law in the matter of reclamation. They, however, held that his entry could not "be confirmed prior to the disposal of Canning's application to contest."

From the foregoing Canning took no appeal while Fail appealed from so much thereof as is adverse to him.

On July 16, 1886, your office found Fail's proof to be satisfactory except as to cultivation and held that in the absence of appeal he should be permitted to submit supplemental proof, and dismissed Canning's contest.

Canning appeals.

Fail's proof set out that he had made no cultivation of the land, that sufficient water to irrigate the whole tract had been conducted thereon at the south-east corner through a main canal six feet wide, eighteen inches deep and one hundred and ninety-one rods long, running north-westerly from which two principal ditches, three feet wide and one foot deep extended almost across the land and that side ditches diverge therefrom.

The record of the hearing shows that Fail's first work on the land was in December, 1883, when he began boring a well, which he finished in January following, at a cost of over three hundred dollars; that in September following he bought, for a thousand dollars, a half interest in a canal, whence, in June, 1884, he had conducted water through the system of ditches described, and that he has expended \$3,165.50 in the purchase of two hundred and fifty seven shares in the North Jordan Canal Company, for the express purpose of irrigating this land.

When Canning in November, 1882, filed his affidavit charging that Fail had not reclaimed and that he had abandoned the land, the entry in question was the subject of an inquiry by the government and furthermore all proceedings adverse to desert land entries were in the manner stated then suspended. Consequently Fail's entry at that time was not properly subject to contest and Canning could acquire no rights under the affidavit just mentioned. The said suspension ended with the failure of Congress to act in the premises and Fail's entry having been allowed to remain intact, it is obvious that the said proceeding by the government did not disclose to your office a sufficient reason for disturbing it. On the contrary Fail was allowed sixty days within which to show cause why his entry should not be canceled and to submit proof of his *bona fide* efforts to comply with the law in regard to reclamation.

Such proceeding having subsequently terminated when Fail filed his affidavit in response to the said second rule to show cause and it appearing by Canning's affidavit of February 18, 1884, that Fail prior to the expiration of time named in such rule and up to the date of said affidavit had not reclaimed the land or complied with the law, his entry was subject to contest.

Whatever rights Canning may have, must therefore, result from his affidavit filed on February 18, 1884, charging a continued default by Fail. No notice of contest however was issued or served on Fail on this affidavit until after the final proof and affidavit of protest against the same when a hearing was ordered as above stated. Fail having been subsequently permitted to make proof and payment for the land, a material question arises as to whether or not the reclamation was

made as alleged and if so whether it was induced by his knowledge of the affidavit filed by Canning in February, 1884, or made in pursuance of a previous *bona fide* intent. If it should be ascertained that prior to such reclamation Fail had knowledge of such affidavit and that the reclamation was induced thereby, then the rights of Canning should prevail; but if it should appear that Fail had reclaimed the land in good faith and not on account of Canning's affidavit, then his entry should remain intact. *Scott v. King* (9 L. D., 299).

I find with the record before me a report by a special agent of your office of an examination of the land made by him (at Canning's request) on July 29, 1889, together with Canning's corroborated affidavit of even date. Said report is to the effect that Fail had not reclaimed the land, and taken in connection with the matters noted herein, furnishes an additional reason for a further hearing.

You will, accordingly, direct that a hearing be duly had within a reasonable time to determine if Fail in good faith complied with the law in the matter of reclamation, as herein stated.

The decision appealed from is accordingly modified.

SECOND HOMESTEAD ENTRY—PRIVATE ENTRY.

JACOB FARLEY.

A homesteader, who has secured title to one tract under the homestead law, can not make a second entry of a legal sub-division containing a quantity of land which added to the first will make more than one hundred and sixty acres.

An application to make private entry of the lands embraced within the second homestead entry may be filed by the entryman, as said lands being in Missouri, and "offered" are subject to such disposition.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, June 12, 1890.

This is an appeal by Jacob Farley from your office decision of January 26, 1889, holding for cancellation his homestead entry made December 17, 1881, for N. $\frac{1}{2}$ of lot 2, SW. $\frac{1}{4}$, Sec. 31, T. 31 N., R. 9 W., Ironton, Missouri, and rejecting his final proof made December 24, 1888, showing continuous residence thereon with his family from December, 1881, and improvements valued at \$345.

The facts are sufficiently stated in the said decision and I concur in the conclusion reached by your office to the effect that Farley having previously perfected title to other land under the homestead law cannot be permitted to make in like manner a second entry for a legal subdivision containing a quantity of land which added to his first entry would make more than one hundred and sixty acres.* Act March 2, 1889 (25 Stats., 854), section six.

*From the Commissioner's decision it appears that the entryman secured title, through his first entry, to one hundred and thirty-six acres, and that the second entry was for fifty-six acres.

I am, however, advised by your office that the public lands in Missouri have all been offered at public sale, and such lands in that State being excepted from the operation of the act of March 2, 1889 (*supra*) withdrawing "public lands from private entry," I can see no reason why Farley's request (made with his appeal) to enter the land in question "at government price" should not be considered.

You are, therefore, directed that Farley will be allowed within sixty days from notice hereof to file an application to make private entry for the tract involved.

The decision appealed from is modified accordingly.

RAILROAD GRANT—PRE-EMPTION FILING—WITHDRAWAL.

* NORTHERN PACIFIC R. R. CO. *v.* BROWN.

A pre-emption filing of record, fraudulent *ab initio*, because there is in fact no such person as the alleged pre-emptor, is a nullity, and does not except the land covered thereby from subsequent withdrawal on general route; but when the alleged pre-emptor in fact exists at date of the filing, and such filing is unexpired, it is effective as against the grant, and the company will not be heard to allege that the settler has not complied with the law as to settlement, residence, and cultivation.

Lands covered by withdrawal on general route are not subject to entry under the settlement laws until duly restored to the public domain.

Secretary Noble to the Commissioner of the General Land Office, June 12, 1890.

I have considered the appeal of the Northern Pacific Railroad Company from the decision of your office rejecting its claim to the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, and lots 1, 2, 3 and 4, Sec. 3, T. 1 S., R. 2 E., W. M., Oregon City land district, in the State of Oregon.

The record shows that on December 30, 1883, said Brown made application to enter said tracts under the homestead laws, alleging that the land applied for was excepted from the withdrawal for the benefit of said company, of August 13, 1870, by reason of the pre-emption declaratory statement, No. 616, filed for said tracts, on April 8, 1859, by John J. McCreedy, alleging settlement thereon April 1, same year. Thereupon a hearing was ordered, at which both parties were present, the company offered testimony tending to show that said filing was fraudulent, that no settlement whatever was made upon said land between 1858 or 1859 and 1870, and that no one during those years had ever resided on said land. Brown declined to offer any testimony, and upon the evidence submitted the local land officers rendered their joint opinion that said filing was not valid or subsisting at the date of the withdrawal for said company, nor at any other time; that said homestead application must be rejected and said filing canceled.

From the decision of the local land officers no appeal was taken, and the papers were duly transmitted.

On February 5, 1886, your office considered said case and affirmed said decision of the local land officers, in so far as it determined the rights of Brown. But your office went further and rejected the claims of the railroad companies, and decided that the land in question must be held subject to entry by the first legal applicant. From this decision only the Northern Pacific Company appealed.

Your office rejected the claim of the appellant company for the reason that the land was excepted from the grant by act of Congress approved July 2, 1864 (13 Stat., 365), and the withdrawal of September 20, 1870, by reason of said filing, which remained intact upon the records of your office and the local land office; and that it is not necessary, in order to except the land from the railroad grants, that a claim "should have been valid and subsisting" at the dates when the rights of the companies attach, and that "whether it was valid or not could exercise no influence upon the result of the case."

The only question of moment in the present case is, whether said land is subject to entry by the first legal applicant. Said withdrawal was made by virtue of the provision of section six of said act, and it is held by this Department, and the courts, to have taken effect upon the odd sections granted on August 13, 1870, the date of the acceptance of the map of general route by this Department.

The local officers found from the evidence——

That the witnesses have known the land since 1858 to the present time; that they all live or have lived in the vicinity of the land, and are in a condition to testify knowingly of the claim, if any, of John McCready; that none of them has ever heard of such a man as John J. McCready in the neighborhood, and no improvements of any kind had been made on the land between 1858 or 1859 and 1870, and that no one had resided on the land between those years.

The local officers, therefore, held——

That John J. McCready's pre-emption declaratory statement, No. 616, was not subsisting at the time of withdrawals for said railroads, nor at any other time, that Brown's application to make a homestead entry of said land must therefore be rejected.

From this decision Brown did not appeal, and your office decided that said decision of the local officers must be held to be final as to him.

If it be true that said filing was fraudulent, that no such person as John J. McCready was in existence at the date of said filing, then, unquestionably, the filing must be held to be a "nullity," and of no force and effect. It is simply a notice of an intention to claim land under the pre-emption laws by nobody, and is of no force and effect. *Lansdale v. Daniels* (10 Otto, 113); *Moffat v. United States* (112 U. S., 24).

If, however, John J. McCready filed said declaratory statement in the local office, the fact that he had made no settlement at the date of said withdrawal could not be questioned by the company. That could be cured by the settlement and residence prior to final proof and payment.

The land in question is unoffered, and the limitation placed upon the time for making final proof had not expired at the date of said withdrawal. If there was a filing of record by a person *in esse* at the time of the filing, then such filing served to except the land from the withdrawal for the benefit of the appellant company, and the question whether the settler has complied with the requirements of the law as to settlement, residence and cultivation cannot be raised by the railroad company. But when the allegation is made by the company that the filing was fraudulent *ab initio*, because there was no such pre-emptor, and the allegation is duly proven by the company, then it would be going too far to hold, as your office does, that "whether it was valid or not, could exercise no influence upon the result of the case."

The record in this case shows that the filing purported to have been made by McCready did not except said land from said withdrawal, and that the application of Brown was properly rejected by the local officers. *Buttz v. Northern Pacific Railroad* (119 U. S., 55).

Although the company has not yet definitely located its line of road opposite the land in question, yet until the land is duly restored to the public domain it will not be subject to entry under the settlement laws of the United States. *Schulenberg v. Harriman* (21 Wall., 44).

The decision of your office must be and it is hereby modified, in so far as it holds that the "claim" of the Northern Pacific Railroad Company must be rejected and the land "held to be subject to entry by the first legal applicant."

NOTICE—SERVICE BY PUBLICATION.

QUAM *v.* BROWN.

In service of notice by publication a copy of the notice must be mailed by registered letter to the last known address of the defendant, and failure so to do constitutes a fatal defect in the service.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, June 14, 1890.

I have considered the appeal of Mathias Quam from the decision of your office dated January 16, 1889, in the case of said Quam *v.* Charles Brown, involving the latter's homestead entry for the NW. $\frac{1}{4}$, Sec. 26, T. 150 N., R. 60 W., Grand Forks land district, North Dakota.

April 18, 1883, Brown made homestead entry for said land. November 27, 1886, Quam initiated contest against the same, alleging the usual charge of abandonment.

A hearing was ordered before the local office for April 6, 1887, the testimony to be taken April 1, 1887, before H. D. Fruit, notary public at Lakota, D. T. On the day set for the taking of testimony, contest-

ant appeared in person, but the claimant made default. Contestant and one other person were sworn as witnesses and testified against the entry.

Upon consideration of the evidence, the local office found in favor of contestant and recommended the entry for cancellation.

Your office, upon examining the record in this case, discovered that the notice of contest mailed to claimant was directed to the post office nearest the land, instead of to his last known post office address; thereupon you directed the local office to advise contestant that thirty days would be allowed in which to show that Rule 14 of practice had been complied with.

The local office reported that contestant's attorney had been duly notified to furnish the evidence required and that although more than thirty days had elapsed since said notice, no action had been taken in the premises.

Your office thereupon set aside the action of the local office, and remanded the case with leave for contestant to apply for new notice of publication, and proceed with his contest within thirty days after notice of said decision, and that in case of failure to so proceed, said contest would be dismissed.

February 17, 1889, contestant appealed and accompanying the same he filed his own affidavit corroborated by the oath of one person, in which he states substantially:

That at the time he made affidavit asking for publication of notice of contest he did not know claimant's address, but that his (affiant's) attorney said he thought it was at Grand Forks, D. T., and that he (affiant) swore that such was his address. It was only on information and belief so received. That he (affiant) never did know said claimant's post office. That he (affiant) did not understand the English language well, being a foreigner; that said claimant had not been heard of since the initiation of this contest.

February 8, 1887, contestant made the usual affidavit for an order of publication of notice of contest, alleging therein, among other things, that "I have made diligent search and inquiry for the said Charles Brown, including inquiry of the postmaster at Bue, the post office nearest to the land contested, and of the postmaster at Lakota, the last known post office address of the said Charles Brown, and as a result of said investigation, I find that I am unable to make personal service of notice of contest on the said Charles Brown as I can not ascertain his whereabouts."

Upon the filing of said affidavit in the local office it was ordered that notice of contest be served on claimant by publication.

The notice was printed for a period of thirty days in a newspaper published in the vicinity of said land, and a copy thereof was posted on said tract in a conspicuous place for a period of at least fourteen

days preceding the day set for the hearing, and on February 25, 1887, a copy of said notice was sent by registered mail addressed to Charles Brown, Bue, D. T.

Counsel in his argument filed herein contends that his client by mistake swore that he knew the post office address of claimant, and "that if the contestant does not know the post office address of defendant, no registered letter is required," and cited the case of *Emmert v. Kilpatrick* (2 L. D., 230), as a precedent.

Rule 14 of the Rules of Practice prescribes that "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, and a like copy shall be posted in the register's office during the period of publication, and also in a conspicuous place on the land, for at least two weeks prior to the day set for hearing."

An allegation that contestant "never knew the post office address" of the defendant furnishes no reason for failure to comply with the imperative requirement of the rule, and such failure constitutes a fatal defect in the service. *Wallace v. Schooley* (3 L. D., 326); *Parker v. Castle* (on review, 4 L. D., 84); *Deakins v. Matheson* (6 L. D., 269); *Watson v. Morgan et al.* (9 L. D., 75); *Nanrey v. Weasa* (*ib.*, 606).

In addition to the above, attention is directed to the fact that there is no evidence that a copy of the notice was posted in the register's office during the period of publication.

For the reasons herein stated the decision appealed from is accordingly affirmed.

OKLAHOMA TOWN SITES.

REGULATIONS PROVIDED BY THE SECRETARY OF THE INTERIOR FOR
THE GUIDANCE OF TRUSTEES IN THE EXECUTION OF THEIR TRUST.

DEPARTMENT OF THE INTERIOR,

Washington, D. C., June 18, 1890.

To the Trustees of Town Sites in the U. S. Land Districts, Oklahoma Territory.

By virtue of the authority vested in me by an act of Congress approved May 14, 1890, entitled "An act to provide for town site entries of lands in what is known as 'Oklahoma,' and for other purposes," I have prepared the following rules and regulations for your observance and direction in the execution of the trust thereby created.

1. In the performance of your duties you will bear in mind the provisions of sections 12 and 13 of the act of Congress approved March 2, 1889 (25 Stats., 1004), by virtue of which the Indian title to said "Oklahoma" was extinguished and the lands therein made a part of the public domain, and special attention is directed to that part of the Presi-

dent's Proclamation of March 23, following, opening a portion of the Territory of Oklahoma to settlement, which reads—

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.

No person, who went into said Territory in violation of said Proclamation, will be allotted any portion of a townsite, and you will recognize no claim filed by such person in making your allotments.

2. As soon as you are officially advised by the Secretary of the Interior of the town site, or town sites, which you are to enter as trustees, and have qualified before an officer having a seal, and duly authorized to administer oaths, by taking and subscribing the following oath, or affirmation :

I do solemnly swear (or affirm) that I have no interest either directly or indirectly in the town site of——, or any part or parcel thereof; that I will faithfully discharge the duties of my office, and execute the trust imposed upon me with fidelity; that I will impartially hear, try, and determine all controversies submitted to me fairly and justly, according to the law and the evidence free from bias, favoritism, prejudice, or personal influence of any kind or character whatever. So help me God. (Or, if by affirmation, "under the pains and penalties of perjury.")

you will proceed to discharge the duties imposed on you by law and these rules and regulations. Your several boards are, as required by the statute, composed of three trustees. Your several commissions have designated your respective boards, and each board will act as a separate body as to the particular town site to which it is assigned.

3. All applications heretofore filed in the proper land office will be prosecuted to final issue in your names as provided in section 6 of act under which you are appointed. In case you find a contest or controversy pending between a homestead entryman and the occupants of the town site to which you are assigned, involving the title to any portion of the land occupied for town site purposes, you will at once, as a board, and before taking any other step or proceeding, make application at the local office in the district where the town site is situate to intervene and be made parties to the proceeding, and thereupon the case will be made *special* and disposed of as expeditiously as the transaction of public business will permit, as no entry can be completed until after the contests are disposed of. Publication of intention to make proof must be for five days, and the proof of publication may be as in ordinary cases. The proof shall relate to actual occupancy of the land for the purposes of trade and business, number of inhabitants, and extent and value of town improvements.

4. The entry is to be made by you as trustees as near as may be conformably to section 2387 of the Revised Statutes and in trust for the use and benefit of the occupants of the town site according to

their respective interests and at the minimum price, \$1.25 per acre. No provision is made in the act for the payment of the entry fees and the price of the land, and as the entry must be made before the town site can be allotted, you may call upon the occupants thereof to furnish the requisite amount to pay the government for said land, keeping an accurate account thereof, and giving your receipt therefor, and when realized from assessment and allotment, you will refund the same, taking evidence thereof, to be filed with your report in the manner hereinafter directed.

5. Section one of said act of May 14, requires me to provide rules and regulations for the survey of the land occupied for town site purposes into streets, alleys, squares, blocks, and lots, or to approve such survey as may already have been made by the inhabitants thereof, and section five of said act makes the provisions of sections four, five, six, and seven of the act of the legislature of the State of Kansas entitled "An act relating to town sites," approved March 2, 1868, so far as applicable a part thereof.

Section four of the Kansas act adopted requires you to cause an actual survey of the town site to be made, conforming as near as may be to the original survey of such town, designating on such plat the lots or squares on which improvements are standing, together with the value of the same and the name of the owner, or owners thereof, hence, if you deem it advisable to survey the town site assigned you, you will observe this rule in connection with the first proviso of section twenty-two of Oklahoma Territorial bill, approved May 2, 1890; but if the town site has already been surveyed by the inhabitants thereof and you are satisfied that the same is correct and in harmony with the spirit of the act under which you are appointed, you may approve and adopt such survey, making the designation on the plat thereof as required by said section four so far as the same is applicable under said act of May 14.

6. In any event, you will, as soon as you definitely fix the survey, cause to be designated on each of said plats, the lots and blocks occupied, together with the value of the same, with the name of the owner, or owners, thereof; you will also designate all squares, parks, and tracts reserved for public use, or sites for public buildings, and all lots occupied by any religious organization which are subject to disposal under the provisions of said act. The designation of an owner on such map shall be temporary until final decision of record in relation thereto, and shall in no case be taken or held as in any sense or to any degree a conclusion or judgment by the Board as to the true ownership in any contested case coming before it.

7. You will observe that no town site can embrace any greater number of legal sub-divisions than are "covered by actual occupancy for the purposes of trade and business," and in no case can it exceed twelve hundred and eighty acres, hence, in making your survey of the land "into streets, alleys, squares, blocks, and lots," or the approval of such

survey as may have been made by the inhabitants of the town site, when you deem the same sufficient, you will determine the area thereof by legal sub-divisions so occupied for such purposes.

8. As soon as the survey and plat are completed as aforesaid, you will cause to be published in some newspaper printed in the county in which said town is situated, a notice that such survey has been completed, notifying all persons concerned or interested in such town site that on the designated day you will proceed to set off to persons entitled to the same according to their respective interests, the lots, blocks, or grounds to which each occupant thereof shall be entitled, under the provisions of said act. Such publication shall be made at least fifteen days prior to the day set apart by you to make such division and allotment. Proof of such publication shall be evidenced by the affidavit of the publisher of the newspaper in which such notice is printed, accompanied by a printed copy of such notice.

10. After such publication shall have been duly made, you will proceed on the day designated in the notice, except in contest cases which shall be disposed of in the manner hereinafter provided, to set apart to the persons entitled to receive the same, the lots, blocks, and grounds to which each party or company shall be entitled according to their respective interests, including in the portion or portions set apart to each person or company of persons the improvements belonging thereto, and in so doing you will observe that section 2 of said act of May 14, 1890, provides that any certificate or other paper evidence of claim duly issued by the authority recognized for such purpose by the people residing upon any town site subject to entry, shall be taken as evidence of the occupancy by the holder thereof of the lot or lots therein described, except where there is an adverse claim to said property such certificate shall only be prima facie evidence of the claim of occupancy of the holder. But any person holding any such certificate who went into said Territory prior to the hour of twelve o'clock, noon, on the 22d day of April, 1889, in violation of said proclamation, shall not be held to have acquired any rights thereunder.

11. When the survey is finally completed it will be certified to by you in quadruplicate as follows :

We, the undersigned, trustees of the town site of _____, Oklahoma Territory, hereby certify that we have examined the survey of said town site and approve the foregoing plat thereof as strictly conformable to said survey in accordance with the act of Congress approved May 14, 1890, and our official instructions.

One of said plats shall be filed in the land office in the district where the town site is located, one in the office of the register of deeds in the county in which the town site is situate, one in the office of the Commissioner of the General Land Office, and one retained in your custody for your own use.

12. Whenever you find two or more inhabitants claiming the same lot, block, or parcel of land, you will proceed to hear and determine the

controversy, fixing a time and place for the hearing of the respective claims of the interested parties, giving each ten days' notice thereof, and a fair opportunity to present their interests in accordance with the principles of law and equity applicable to the case, observing as far as practicable the rules prescribed for contest before registers and receivers of the local offices; you will administer oaths to the witnesses, observe the rules of evidence as near as may be in making your investigations, and at the close of the case, or as soon thereafter as your duties will permit, render your decision in writing.

If the notice herein provided for can not be personally served upon the party herein named within three days from its date, such service may be made by a printed notice published for ten days in a newspaper in the town or city in which the lot to be affected thereby is situated; or, if there is none published in such town, then said notice may be printed in any newspaper in the county, or if there is none published in the county, then in one printed in the Territory. The proof of such notice to be filed with the record, and may be made as provided in these rules and regulations in other cases. The proceedings in these contests should be abbreviated in time and words or your work may not be completed within the limits of any reasonable period of time or expense.

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

14. All costs in such proceedings will be governed by the rules now applicable to contests before the local land offices.

15. After setting apart such lots, blocks, squares, or grounds, and upon a valuation of the same, as hereinbefore provided for, you will proceed to determine and assess upon such lots and blocks according to their value, such rate and sum as will be necessary to pay for the lands embraced in such town site, costs of survey, conveyance of lots, and other necessary expenses, including compensation of trustees as provided for in said act, and in so doing you will take into consideration:

First. The ten thousand dollars (\$10,000) appropriated by said act of May 14, 1890, and such further sum as may be appropriated by Congress, before said assessment is made, for the purpose of carrying into

effect the terms of said act, which is to be refunded to the Treasury of the United States; but, of course, only so much thereof as it will be necessary to use.

Second. The money expended for entering the land.

Third. The costs of survey and platting the town site.

Fourth. The expenses incident to making the conveyances.

Fifth. The compensation of yourselves as trustees.

Sixth. The compensation of your clerk.

Seventh. The necessary traveling expenses of yourselves and clerk.

Eighth. All necessary expenses incident to the expeditious execution of your trust.

More than one assessment may be made, if necessary, to effect the purposes of the act of Congress.

16. From each board the Secretary of the Interior will designate a chairman and a secretary. The secretary shall keep the minutes and a record of your proceedings, and an accurate account of all money received and paid out, taking and filing proper vouchers therefor in the manner hereinafter provided; he shall also be the disbursing officer of the board, shall receive and pay out all moneys provided for in said act, subject to the supervision of the Secretary of the Interior; and he shall, before entering upon duty, take the official oath, and also enter into a bond to the United States in the penal sum of ten thousand dollars for the faithful discharge of his duties, both as now prescribed and furnished from the Department of the Interior. The money in the hands of the disbursing officer shall at all times be subject to the control and order of the Secretary of the Interior, and the sum appropriated by Congress which is to be refunded to the Treasury of the United States shall be paid over to the Treasurer thereof at such times in such sums and in such manner as the Secretary of the Interior may direct.

17. There shall be a clerk for each board, who shall also be a stenographer, if available, to be appointed by the Secretary of the Interior, who shall do all the clerical and stenographic work of the board and secretary thereto, and, under its control and direction, subject to the general supervision of the Secretary of the Interior.

18. The minutes of each day's proceedings shall be completed and written out in ordinary handwriting, or type-written, and duly signed by the chairman and secretary before the next day's business shall be begun, and shall not thereafter be changed, except by a further record, stating accurately the changes intended and ordered, and the reasons therefor. This is not intended to include the testimony or other than actual decisions, orders, and proceedings of the Board.

19. All payments of money by the inhabitants of the town site for lots and blocks shall be in cash and made only to the disbursing officer, who shall receipt therefor in duplicate, one to be given the party making the payment, and the other to be forwarded to the Commissioner of the General Land Office, and said officer shall charge himself with each

payment on his books of account, and he shall deposit all sums received by him at least once a week, and, when practicable, daily, in some bank designated by the Board, and he shall pay the same out only on his checks countersigned by the Chairman of the Board of which he is Secretary, which checks, after they are honored, shall be filed with his accounts as vouchers.

20. Upon the payment to the disbursing officer of all sums assessed by you upon any lot, block, or parcel of land by the person entitled thereto, and not before, you will proceed to execute him a deed therefor pursuant to the terms of said act. All conveyances made by you shall be acknowledged before an officer duly authorized in said Territory to take acknowledgments of deeds. The form of deed and acknowledgment will be forwarded you.

21. All lots occupied by any religious organization will, upon the payment of the assessments thereon, be conveyed by you to it directly, or in trust for the use and benefit of the same at its option.

22. You will ascertain and submit to the Secretary of the Interior a statement showing separately,

First. All lots not disposed of under the provisions of said act which are subject to be sold under the direction of the Secretary of the Interior for the benefit of the municipal government of the town or city controlling the town site which you are directed to allot.

Second. Such part thereof as may be reserved for public use as sites for public buildings.

Third. For the purpose of public parks.

23. You will be allowed ten dollars per day for each day's service when you are actually engaged and employed in the performance of your duties as such trustee; your necessary traveling expenses; and three dollars per day for your subsistence. But these sums may be reduced in either board at the will of the Secretary of the Interior if he deems it for any cause necessary.

24. The Clerk of the Board, when not a clerk already in government employment and assigned to the Board for duty, will be allowed as compensation for his services at the rate of one hundred dollars a month; he will also be allowed his actual necessary traveling expenses. All expenses of members of the board and the clerk shall be reported to and adjusted by the Commissioner of the General Land Office at the end of each week after you commence executing conveyances for the lots and blocks on the town site; before that, monthly on the first day of the month.

25. The account of all your expenses and expenditures, together with a record of your proceedings, which, with your oath of office, and all papers filed with you, the records in each case, and all evidence of your official acts, except conveyances, you will file in the office of the Commissioner of the General Land Office to become a part of the records therein.

26. Where any one occupying and filing for a homestead obtains a patent for a town site under section 22 of the Oklahoma Territorial act, approved May 2, 1890, such town site will not be affected by the provisions under which you are appointed, and you can not act in any such case.

27. You will correspond with the Commissioner of the General Land Office, and only through him with the Secretary, so that a complete record thereby may be kept in the Land Office.

It is believed that the foregoing regulations, together with copies of the laws referred to therein, and copies of the rules and regulations furnished registers and receivers in contested cases and appeals will be found sufficient for the proper determination of all cases which may arise, but should unforeseen difficulties present themselves, you will submit the same for special instructions.

In view of the fact that the expenses incident to the allotment of town sites by the provisions of this act are necessarily burdensome to those interested therein, you will be expected to proceed as expeditiously as is consistent with a due regard to the proper performance of your duties in disposing of the trust herein imposed upon you. It is hoped that you will, from a sense of duty, relieve as much as possible the inhabitants of the town sites under your control from unnecessary delays, fees, and expenses.

Very respectfully,

JOHN W. NOBLE,
Secretary.

DESERT LAND ENTRY—RELINQUISHMENT.

YATES *v.* GLAFCKE.

A desert land entry should be canceled at once, when a relinquishment thereof is filed in the local office, and the land held open to the first legal applicant. The failure of the local office to promptly cancel a desert entry, after due relinquishment thereof has been filed, will not prejudice the rights of a subsequent applicant for the land involved therein.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, June 19, 1890.

I have considered the appeal of Elmer Yates from your decision of February 25, 1889, rejecting his application to file a declaratory statement for the NE. $\frac{1}{4}$ of Sec. 34, T. 14 N., R. 66 W., Cheyenne, Wyoming.

The facts in this case are as follows: The tract in question was embraced in desert land entry No. 697, made July 9, 1883, by Malinda Butler, which entry also embraced the S. $\frac{1}{2}$ of the same section. On July 9, 1886, Butler executed a relinquishment of the said NE. $\frac{1}{4}$ and on October 14, 1886, made final proof for the said S. $\frac{1}{2}$ of the section.

In your letter of February 7, 1889, addressed to the local officers at Cheyenne, you state that there is nothing on the relinquishment to show

when it was filed in said local office, but the presumption is, that it was received with the final proof papers for the S. $\frac{1}{2}$ of the section on which final certificate issued October 14, 1886.

This relinquishment was not noted on the records of the local office, neither was said entry canceled by your office until May 10, 1887, when such action was taken.

On April 27, 1887, Herman Glafcke made application to enter said tract under the timber culture law, but his application was rejected by the local officers for the reason that the tract was embraced in the desert land entry of Butler which at that time was intact on their records. Glafcke filed an appeal which was transmitted to your office June 4, 1887.

On May 18, Elmer Yates made application to file a declaratory statement for said tract alleging settlement thereon May 6, 1887. This was rejected by the local officers for the reason that the timber culture application of Glafcke was pending for said tract. Appeal was taken which was also transmitted to your office on June 4, 1887.

By letter of February 7, 1889, your office allowed the timber culture entry of Glafcke, and by letter of February 25, 1889, rejected the application of Yates for said tract.

The reason for allowing the former was that under the decision of the Department in the case of *Fraser v. Ringgold* (3 L. D., 69), and in the case of *Sears v. Almy* (6 L. D., 1), the relinquishment of Butler for said tract should have been received and noted on the records of the local office when filed, which was assumed to be October 14, 1886, when final proof was made by Butler, and that the tract should have been considered vacant public land at the date of his [Glafcke's] application, and his entry should have been allowed. It, of course, followed that the application of Yates must be rejected, as the land was appropriated by the entry of Glafcke.

In the case of *Fraser v. Ringgold* decided by the Department August 13, 1884, it was held that desert land entries were included within the act of May 14, 1880, and should be held subject to the rules of practice in the matter of hearings and contests. Under this decision it was the practice of your office, while recognizing the rights of contestants of desert land entries to be the same as contestants of homestead and pre-emption entries, to require the relinquishment of a desert land entry to be sent to your office to be canceled; in other words, the local officers were not permitted to cancel a desert land entry upon the filing of a relinquishment of the same in their office, as provided by said act of May 14, 1880, and this practice continued until June 3, 1887, when the decision of the Department was rendered in the case of *Sears v. Almy*, which held that when the relinquishment of a desert land entry is filed in the local office, the entry should at once be canceled, and the land thereafter held open to settlement and entry without further action.

We are met with these facts in the case at bar: Glafcke made his application for the land after the relinquishment was filed, but the entry not canceled, while Yates waited until the order of cancellation before he made application to file his declaratory statement, although he made settlement a few days prior, and the question to be determined is, does the prior application of Glafcke give him the better right to the land?

It must be so held unless he was disqualified, or the land was not subject to appropriation under said application. He appears to have been a legally qualified applicant, and I am unable to conclude that, under the rulings of the Department, the land was not properly subject to entry.

The decision in the case of *Sears v. Almy* is clearly a statement by the head of the Land Department that the practice of your office requiring relinquishments to be transmitted for cancellation subsequent to the decision in the case of *Fraser v. Ringgold* was erroneous, and contrary to the ruling in said case. Had the decision of the Department been followed, as it should have been, the entry of Butler would have been canceled on the records of the local office at the date of Glafcke's application. In making his application Glafcke simply did what he had a legal right to do, viz., to make application for land which, under the ruling of the Department, was properly subject to entry, and the action of the local officers in rejecting the same, even though such action was taken under the erroneous instructions from your office, can not defeat his right.

Counsel for Yates contends that at the time Glafcke made his application, April 27, 1887, the land was segregated by the desert land entry of Butler, and that said reservation continued until the entry was canceled, May 10, 1887, and that the subsequent change in the rule made by the decision in the case of *Sears v. Almy*, June 3, 1887, should not be permitted to operate in such a manner as to defeat the right of Yates, who refrained from presenting his application until the letter of cancellation was received at the local office; or, in other words, that the change of rule by said decision should not have a retroactive effect, but that the rights of both applicants should be adjudged under the rule in force at the date of their applications, and that the application of Glafcke should be rejected, and the rights of Yates recognized, as a settler on the land when the same became subject to appropriation, viz., at the date of the cancellation of the entry upon the relinquishment of Butler, May 10, 1887.

It is true that Glafcke made his application at a time when the land was regarded as segregated; but Yates is in the same condition, for he made his settlement, upon which he bases his right to file, at a time when the land was considered segregated, so that both are on an equal footing, neither was governed by the rule in force, but both attempted to gain a right by some act prior to the restoration of the land to market, and if we take this view it would seem that the proper disposition of

the case would be to regard the application of Glafcke (who took an appeal from the action of the local officers) as pending the instant the cancellation was made, and if so, his right was certainly equal to that of Yates, who could claim no right as a settler prior to said date of cancellation.

In my opinion, however, the only correct rule that can be applied in this case is the one recognizing the principle laid down in the case of *Fraser v. Ringgold*, that desert land entries are included in the provisions of the act of May 14, 1880, and that the entry of Butler should have been canceled on the filing of the relinquishment, and the land rendered subject to entry by the first legal applicant.

The erroneous interpretation by your office of the principle announced in said decision can not be allowed to defeat the rights of an applicant for the public lands.

Glafcke was the prior applicant for the tract in question, and his right must be recognized.

Your decisions are therefore affirmed.

RAILROAD GRANT—ADJUSTMENT—INDEMNITY.

GRAND RAPIDS AND INDIANA R. R. Co.

The grant for the benefit of this road, as amended by the act of June 7, 1864, provides for a continuous line of road from Fort Wayne, on the south, to Traverse Bay, the northern terminus of the road, and for one grant of land along the line of said road, with the right to take indemnity, for lands lost in place, from other lands anywhere along the line of said continuous road, within a lateral limit of twenty miles.

Secretary Noble to the Commissioner of the General Land Office, June 20, 1890.

I have considered, and herewith send my conclusions, in the matter, submitted by your letter of February 28, 1890, relating to the adjustment of the grant made to the State of Michigan by acts of June 3, 1856 (11 Stat., 21), and June 7, 1864 (13 Stat., 119), to aid in the construction of certain railroads.

The act of 1856, *supra*, granted to the State of Michigan, "to aid in the construction of railroads" therein described, including one "from Grand Rapids to some point on or near Traverse Bay," "every alternate section of land designated by odd numbers; for six sections in width on each side of said roads;" and provided further, that if, when the lines of said roads "are definitely fixed," the United States have sold any of the granted lands, or "the right of pre-emption has attached to the same," then indemnity lands therefor shall be selected, subject to the approval of the Secretary of the Interior, "from lands of the United States nearest to the tiers" of the granted sections, and within fifteen miles of the line of the road.

By the act of June 7, 1864, *supra*, the former act was amended so as to substitute for the railroad hereinbefore described one

from Fort Wayne, in the State of Indiana, to a point on the southern boundary line of the State of Michigan, in the township of Sturgis, thence, by way of Grand Rapids, to some point on or near Traverse Bay,

and the indemnity limits were increased to twenty miles from the line of the road.

This grant was conferred by the State upon the Grand Rapids and Indiana Railroad Company, which built the entire road from Fort Wayne, Indiana, to Petowskey, on Traverse Bay, Michigan, a distance of three hundred and thirty-three miles, within the time limited by law.

Whilst stating that you think there can be no question but that "under the amendment made by the act of 1864, the grant must be adjusted as one continuous grant, and that losses from the state line to Grand Rapids could be made up from the indemnity limits above the last mentioned point," you transmit for my information two plans for the adjustment of the same, as far as the road is located in the State of Michigan. The first divides the grant into two parts, the one being for that part of the road which lies between the State line and Grand Rapids, and the other for that part between Grand Rapids and the northern terminus at Traverse Bay. By this method there is shown a deficiency in the grant, on the first division, of 324,649.08 acres; whilst on the second division the certifications exceed the amount due the road, for that division, by 224,749.36. You do not suggest, nor do I see any reason why this plan of adjustment should be adopted.

The act of 1856, by which the grant was made, it is true, provided only for a road "from Grand Rapids to some point on or near Traverse Bay;" but the act of 1864 did not make a supplementary grant for the other portion of the road authorized by it. On the contrary, this last act directed that the former be so amended as to substitute for the words "and from Grand Rapids to some point," etc., these words: "and from Fort Wayne, in the State of Indiana, to a point on the southern boundary of the State of Michigan, thence by way of Grand Rapids," etc.; so that the original act is to be read as though these last provisions were therein, and not the former. This plainly, to my mind, provides for one continuous line of road from Fort Wayne, the southern, to Traverse Bay, the northern terminus of the road, and for one grant of land along the line of said road, with a right to take indemnity, for lands lost in place to the grant, from other lands anywhere along the line of said continuous road, within a lateral limit of twenty miles, provided they are of "the lands of the United States nearest to the tiers of" the granted sections.

For these and other reasons which might be suggested, I agree with you in conclusion as above quoted.

The second plan presented adjusts the grant as an entirety, and is approved, for the reasons stated.

By this last method of adjustment there are found to be yet due the company 99,899.72 acres as indemnity for losses, and it is stated that selections are pending for only 81.66 acres, which, being within the granted limits, will not reduce said deficiency.

This last account as stated by you seems to be correct. From it the net area of the grant appears to be 954,573.83 acres. There have been approved within the primary limits 377,400.33 acres, and within the indemnity limits 475,349 acres, and there are vacant and subject to the grant, within the primary limits 1,724.78 acres, which are yet to be certified over for the benefit of the company, when the aggregate receipts on account of the grant will be 854,474.11 acres, leaving a deficiency as stated before.

I note in your letter it is stated that said company has been called upon to show cause why proceedings should not be instituted against it in relation to certain lands said to have been improperly approved for its benefit. Your action in this respect seems to be in accordance with instructions, and is approved.

HOMESTEAD CONTEST—ACT OF JUNE 15, 1880—PRACTICE.

PEARCE *v.* WOLLSCHIED.

The initiation of a contest against a homestead entry suspends the right of purchase under section 2, act of June 15, 1880, until the final disposition of the contest; and this rule is applicable to all cases not finally adjudicated when said rule was first announced (June 21, 1886).

After decision in a case the local officers are without jurisdiction to enter an order of dismissal on their own motion, and failure to appeal from such order will not affect the rights of a contestant.

Notice of a decision will not be presumed, it must affirmatively appear of record.

Secretary Noble to the Commissioner of the General Land Office, June 20, 1890.

On July 5, 1878, John Wollscheid made homestead entry for lots 3 and 4, Sec. 6, T. 26 S., R. 16 W., Larned, Kansas.

On August 25, 1884, William N. Pearce filed an affidavit of contest alleging that Wollscheid had abandoned said land for "over four years last past."

After notice by publication a hearing was had upon said contest at the local office on October 15, 1884, when Pearce appeared and submitted testimony and Wollscheid made default. On the same day the local officers sustained the contest and found that the said homestead entry should be canceled. On October 20, 1884, Wollscheid was allowed to purchase the land under the second section of the act of June 15, 1880, and on the same day the contest of Pearce was dismissed by the local officers.

By letter of March 16, 1887, after acknowledging the receipt of a letter dated December 30, 1886, from a special agent of your office report-

ing the docket entries in the case and forwarding certain affidavits made in December, 1886, by Pearce and another, your office directed the local officers "to transmit the record of the hearing in order that proper action may be had in the case by this office." The record of said hearing being duly transmitted, your office on April 1, 1887, held the homestead entry of Wollscheid for cancellation and suspended his cash entry "to await the final disposition of the homestead entry."

From this action D. H. Scott, the grantee of Wollscheid appealed and on January 24, 1889, the Department modified the decision of your office by directing the said cash entry to be suspended pending the exercise by Pearce of his preference right to enter the land.

A motion to review the said departmental decision has been filed by the said Scott.

The six assignments contained in the motion set out substantially that the said departmental decision should be reconsidered for the reason that the allowance of Wollscheid's purchase under the act of June 15, 1880, was proper under the then rulings of the Department and that the rights of Pearce were concluded by his failure to appeal from the dismissal of his contest.

In the case of *Freise v. Hobson* (4 L. D., 580), it was held that the initiation of a contest against an entry suspended the right of purchase under the second section of the act of June 15, 1880, until the final disposition of such contest. The only limitation of this rule of law was that it would not affect cases then (June 21, 1886) finally adjudicated. In the case of *Roberts v. Mahl* (6 L. D., 446), it was urged that your office erred in applying the rule announced in *Freise v. Hobson* to a purchase made prior to said last mentioned decision; but the Department said: "This contention cannot be maintained. It is the precise claim urged by Hobson in support of his entry," and concluded that your office properly applied the rule to a case not finally adjudicated at the date of the decision in the *Freise* case. This ruling has been consistently followed.

The point that Pearce's rights are lost by his failure to appeal from the action of the local office in dismissing his contest after they had rendered a decision, is not well taken. Under rules 51, 52, and 53, the local officers were required, after rendering their decision to promptly transmit the record and were thereafter debarred from taking any action affecting the disposal of the land until instructed by your office. *Wade v. Sweeney* (6 L. D., 234); *Iddings v. Burns* (8 L. D., 359). Whether they might review their judgment on motion of one of the parties, or to correct the record need not here be discussed, for no such action was taken. They were without jurisdiction to dismiss the case on their own motion, and the question of jurisdiction may be raised at any time. Being without jurisdiction their action was void. Although a court may have jurisdiction over the parties and the subject matter, yet if it make a decree which is not within the powers granted, it is void.

United States v. Walker (109 U. S., 258). It was the duty of the local officers to transmit the record of the contest whether appeal was taken or not. The fact that they retained possession of the record until 1887, when it was discovered and reported by a special agent, can in no manner deprive your office of its ordinary jurisdiction. They violated the instructions of the Department in so doing.

When the case came before your office you had full authority to reverse the action taken. By rule 48, in case of a failure to appeal from the local officer, your office is authorized to reverse their decision where it is "contrary to existing laws or regulations." Their action was clearly contrary to the rules as shown above. It was also contrary to existing law. The law of the case is found in *Freise v. Hobson*, and as there announced, applied to all cases not finally adjudicated. The final adjudication of this case is only now reached.

Furthermore, it does not affirmatively appear that Pearce was notified of the dismissal of his contest. He says he "got notice from his attorney at Larned that said claimant (Wollscheid) had made final proof upon said land and his (Pearce's) said contest was dismissed." The letter from the attorney is attached and recites, "Wollscheid's final proof was made of record yesterday and that *will* consequently dismiss your case." No notice appears that the case *had* been dismissed, and that Pearce was entitled to appeal as required by the rules. Notice cannot be presumed, but the record must show it affirmatively.

For the reasons herein stated the motion is denied.

AMENDED RULE OF PRACTICE—RULE 56.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, June 19, 1890.

Rule 56 of Practice is hereby amended to read as follows, viz :

RULE 56. The accumulation of excessive costs under rule 54 will not be permitted ; but when the officer taking testimony shall rule that a course of examination is irrelevant, and checks the same, under Rule 41, he may, nevertheless in his discretion, allow the same to proceed at the sole cost of the party making such examination. This rule will apply also to cross-examinations in contests covered by the provisions of Rule 55.

LEWIS A. GROFF,
Commissioner.

Approved,
JOHN W. NOBLE,
Secretary.

TIMBER CULTURE ENTRY—FRACTIONAL SECTION.

ANDREW JOHNSON.

Not more than one quarter of any section can be appropriated under the timber culture law.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, June 21, 1890.

I have considered the case of Andrew Johnson on appeal from your decision of November 19, 1888, rejecting his application to make timber-culture entry for lot No. 4, Sec. 20, T. 114, R. 53 W., Watertown land district, South Dakota.

On August 1, 1888, he made application to enter said lot and said application was "rejected for the reason that there is already of record a timber-culture entry for eighty acres upon the W. $\frac{1}{2}$ of NW. $\frac{1}{4}$ same section and the area of land in said section No. 20, T. 114, R. 53 W., as shown by the plate is 380.60 acres and the lot No. 4 sought to be entered would make more than one fourth of the area of said section."

From this decision Johnson appealed to your office and your said decision affirmed that below, from which decision he appealed to this Department.

The record shows that said lot No. 4, contains twenty-seven acres; this added to the eighty acres already entered, would exceed one-fourth of the section. The act of Congress approved June 14, 1878 (20 Stat., 113), amending an act entitled "An act to encourage the growth of timber on the western prairies" provides, "That not more than one quarter of any section shall be thus granted," etc.

Your decision is affirmed.

 ADDITIONAL HOMESTEAD ENTRY—ACT OF MARCH 2, 1889.

THOMAS B. HARTZELL.

Under section 5, act of March 2, 1889, an additional homestead entry of contiguous land may be made by a homestead settler who, prior to said act, made entry of less than one hundred and sixty acres, and who at the date of his application owns and occupies the land originally entered; and patent for such additional entry may issue without further proof, if, under the original entry, final proof has been made.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, June 21, 1890.

The record in the case of Thomas B. Hartzell, asking to be allowed to amend his homestead entry No. 1425, shows that November 9, 1883, applicant made homestead entry, embracing N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, Sec. 18, Tp. 14 S., R. 1 W., Los Angeles, California; final certificate No. 612

issued December 21, 1883, upon which he received a patent for the above described tract August 9, 1884.

On April 13, 1885, Hartzell made application to be allowed to make an adjoining farm entry of the SW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of Sec. 7, and the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 17, same town and range, which last application was refused by the local officers, and, on appeal, their ruling was affirmed by your office, and on appeal to this Department the decision of your office was affirmed, on the ground that, in order to make an adjoining farm entry, it must appear that land owned by applicant was obtained otherwise than by homestead entry. (See said case, reported in 5 L. D., 124.)

July 28, 1888, the said Hartzell made application at the local office, asking that the patent issued to him under his first entry as above be canceled, and that he be allowed to amend his entry to embrace, in addition to the land covered by his patent, the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ Sec. 7, and the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ Sec. 17, same township and range, which application was denied by the local office, and on appeal to your office the rejection by the local officers was affirmed. From this decision of your office Hartzell now appeals to this Department.

Your decision rejecting appellant's application was made January 15, 1889. Since the rendition of this decision of your office, Congress by an act, entitled "An act to withdraw certain public lands from private entry, and for other purposes," approved March 2, 1889, declared,

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. (Sec. 5, Chap. 381, 25 Stat., page 854.)

Applicant satisfactorily shows by his affidavit, corroborated by the affidavit of two other witnesses, that at the date of making his application he owned and occupied the land covered by his original entry, and has in all respects fully complied with all the provisions of the act of March 2, 1889.

It is true, appellant's application is not made under this act, but inasmuch as he has shown himself entitled to the benefits thereof, and there being no adverse claims to the land in question, you are directed, without further proof, to issue to him a patent for the land embraced in his application, to wit: the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 7 and the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 17, Tp. 14 S., R. 1 W., S. B. M., upon compliance with the circular of instructions issued from the General Land Office March 8, 1889. (See 8. L. D., 314.)

The decision of your office is therefore reversed.

RAILROAD GRANT—INDEMNITY SELECTION—SETTLEMENT CLAIM.

NORTHERN PACIFIC R. R. CO. v. HURD.

A settlement claim cannot be recognized for land embraced within a prior indemnity selection until it is shown that the tract was not subject to selection; and the failure of the company to appear at a hearing, ordered to determine the status of the tract, does not relieve the settler from the necessity of submitting such proof.

Secretary Noble to the Commissioner of the General Land Office, June 21, 1890.

This case comes before the Department upon the appeal of the Northern Pacific Railroad Company from the decision of your office rejecting the company's application to select the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and lots 5 and 6 Sec. 13, T. 134 N., R. 43 W., 5th P. M., Fergus Falls, Minnesota, and allowing the declaratory statement of Charles E. Hurd for said tract to remain intact, subject to further action by your office upon his pre-emption final proof, should said decision rejecting the claim of the company be affirmed.

The tract is within the indemnity limits of the grant to said road, but was excepted from the withdrawal for the benefit of said road by the pre-emption filing of S. B. Mills existing at date of said withdrawal. This filing was however canceled in 1881, and the company selected the tract December 19, 1883.

On September 18, 1885, Charles E. Hurd filed pre-emption declaratory statement for said tract, and on March 26, 1886, filed in the local office a paper, which your office treated as an application for a hearing between the company and Hurd to ascertain the status of the tract at the date of the company's application to select. Said paper was supported by the affidavit of Hurd, stating that at the date the Northern Pacific Company applied to select the land, it was occupied and being improved by one A. B. Hurd, who resided thereon from the spring of the year 1882, until the fall of the year 1885. He therefore asked that a hearing be ordered to prove the allegations made in said affidavit, and a hearing was thereupon ordered to be had January 17, 1887, of which hearing the Northern Pacific Railroad Company was notified and served with a copy of the decision of your office ordering said hearing, which recited the grounds alleged in the application of Hurd. At said hearing the company failed to appear, and upon motion of counsel for Hurd the case was dismissed, no testimony being offered.

While the record of this hearing was pending before your office for consideration, Hurd submitted final proof, to wit: March 4, 1887. Action upon this proof was suspended by the local officers "waiting the determination of case of hearing now pending."

The company filed in your office a protest against the allowance of Hurd's entry, upon the ground that it was not incumbent upon the company to appear, if it were willing to let the case stand on what Hurd could prove *ex parte*, and they further insisted that Hurd had failed to sustain his allegations that the land was occupied when the company applied to select.

Your office held, "that when the company failed to appear at the hearing to deny the allegations contained in Hurd's corroborated affidavit, it tacitly admitted the truth of the same, and waived the right to dispute them afterward." The company appealed, alleging said ruling as error.

This land being within the indemnity limits of the grant and having been selected by the company prior to the initiation of the claim of Hurd, and there being no claim of record at the date of selection, it was incumbent upon Hurd to show that the land was not subject to selection, by reason of being occupied and improved by a settler at that date. This he failed to do, not only at the hearing, but in his final proof thereafter submitted, in which it is shown that he first made settlement in August, 1885, having purchased the improvements of David Wood, but there is no testimony that there was any earlier settlement on the tract.

The hearing was ordered for the express purpose of allowing Hurd to prove his allegation that the land was occupied and improved by a settler at the date of selection, and the failure of the company to appear did not relieve him from the burden of submitting such proof.

This case differs from the case of *Brady v. Southern Pacific R. R. Co.*, 5 L. D., 407 (on review, 658), and cases therein cited, in this, that in those cases no selection had been made by the company, whereas in the present case the company had made application to select the tract, being within its indemnity, and for which no other claim of record appeared.

But, inasmuch as Hurd was present with his witnesses and the local officers made the mistake in dismissing the case without any evidence, and allowed Hurd to make final proof, I direct that the local officers be instructed to continue said hearing, after notice to all parties, for the purpose of affording Hurd the opportunity to offer evidence in support of his allegations. Action upon his final proof will remain suspended until the determination of said hearing.

RAILROAD GRANT—PRE-EMPTION FILING—PRACTICE.

CHICAGO, MILWAUKEE AND ST. PAUL RY. CO. *v.* MELLBRATH.

Land covered by an unexpired pre-emption filing at the date when the grant becomes effective, is not subject to the operation of a grant from which are excepted lands to which the "right of pre-emption" has attached.

In case of conflict as to the right to lands within either the primary or secondary limits of a grant, the beneficiary thereunder should be notified, with due opportunity to be heard.

In the transmission of an appeal to the Department the record should show whether the land involved is "offered" or "unoffered."

Secretary Noble to the Commissioner of the General Land Office, June 23, 1890.

I have considered and herewith send my conclusions in the case of the Chicago, Milwaukee and St. Paul Railway Company, successor to

the Southern Minnesota Railroad Company, *v.* Karl Mellbrath, on appeal by the company from your office decision of December 30, 1886, involving the right to the W. $\frac{1}{2}$ SE. $\frac{1}{4}$ of Sec. 12, T. 102 N., R. 27 W., 5th P. M., now in the Worthington land district, Minnesota.

It appears from the record before me that on November 11, 1864, one Samuel Landis filed pre-emption declaratory statement for said tract, claiming settlement thereon the day before.

On July 4, 1866 (14 Stat., 87), Congress made a grant of land to the State of Minnesota to aid in the construction of a railroad from Houston in the southeastern part of the State to the western boundary thereof; and, on the definite location of the line of this road, on February 27, 1867, the described tracts fell within the primary limits thereof. Subsequently, on June 22, 1876, the company included it in a list of its granted lands, filed in your office, which has not yet been approved.

On April 18, 1881, Karl Mellbrath applied to make homestead entry of the tract in question; but his application was rejected, because of conflict with the railroad selection. On appeal the ruling of the register and receiver was affirmed, on June 23, 1881. No appeal having been filed in your office, on July 7, 1883, the case was declared to be closed.

On October 19, 1885, Mellbrath presented a second application to make homestead entry of the tract, which was also rejected by the local officers, and he appealed. On consideration of this appeal, your office became satisfied that Mellbrath was not notified of the former decision, and that he had been led to believe that no action had been taken therein; that the closing of said case was premature and unauthorized, and the proceedings therein should not be a bar to the consideration of the second application to enter. Thereupon it was held that the filing of Landis excepted the land in question from the railroad grant; that the listing or selection of the same by the company should be canceled, and that Mellbrath be permitted to enter the land.

On appeal here three principal objections to said judgment are made by the company, viz: (1) as the claim of Mellbrath was in conflict with that of the company, it should have been notified thereof, and been heard in relation thereto prior to judgment; (2) the first judgment, rendered June 23, 1881, by a former Commissioner, is *res judicata*, and can not be re-opened by his successor in office; and (3) that a pre-emption filing, unless actual settlement and occupation be shown, will not except the land covered by it from a railroad grant.

The last specification of error will be disposed of first.

The granting act, in this case, gave to the State five odd numbered sections per mile on each side of the proposed road, and provided that

in case it shall appear that the United States have, when the lines or routes of said roads are definitely located, sold any section, or part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same

then indemnity lands may be selected under the direction of the Secretary of the Interior.

It does not appear from anything in the record sent me, whether the tract in controversy is "offered" or "unoffered" land. An inspection of the records of your office fails to show that it was ever offered for sale, and therefore the presumption is that it is unoffered land and must be treated as such. On March 7, 1857, the register and receiver, of the district in which the land was situated, were instructed by telegraph to withhold *all* the lands within that district from "sale or location;" and by letter two days thereafter they were informed that said telegram was only intended to protect from sale and location the "offered" lands within the probable lines of the railroad grant, made to the Territory of Minnesota by the act of March 3, 1857 (11 Stat., 195); that as said act recognized the right of parties to assert pre-emption claims to said lands up to the date of definite location of the proposed road, the said order of withdrawal was not intended to inhibit or interfere with the assertion of claims under the pre-emption law. It does not appear when this withdrawal was revoked, but it is apparent that it was not applicable to the tract in controversy here, because it is not "offered" land, and also because said withdrawal was only from "sale and location," and not from pre-emption rights or claims.

The tract in controversy then, being open public land on July 11, 1864, when Landis filed his declaratory statement therefor, his pre-emption claim attached to the same; being unoffered land, his preferred right to purchase under the pre-emption law had not expired at the date of the definite location of the appellant's road, on February 27, 1867, and served to except the land from the grant. *Kansas Pacific Ry. Co. v. Dunmeyer*, 113 U. S., 629-640; *Randall v. St. Paul and Sioux City R. R.*, 10 L. D., 54-56; *Prindeville v. Dubuque and Pacific R. R.*, *ib.*, 575; *Northern Pacific R. R. Co. v. Stovenour*, 10 L. D., 645.

Having come to the conclusion that the land in question was excepted from the railroad grant, the claim of the company in connection therewith may be eliminated from further consideration in this case, and therefore it is not necessary to pass upon the other specifications of errors presented by it.

It is proper to say, however, that, as matter of practice, wherever there is a conflict as to the right to lands within either the primary or secondary limits of a Congressional land grant, the beneficiary thereunder should always be notified, and have an opportunity afforded it to be heard. In the case under consideration, your predecessor erred in rendering judgment prior to giving the company its day in court. But, as this error has not worked injury to the company, the case will not be remanded because of it.

The land being excepted from the railroad grant, I can see no reason why as between the United States and Mellbrath he may not be permitted to enter the same, if he is otherwise properly qualified, even if his first application was properly rejected. I therefore affirm your judgment, and return the papers in the case.

Your attention is called to the fact that it nowhere appears in the record sent up on appeal whether the tract in controversy was offered or unoffered land. This omission occurs in many cases transmitted on appeal. The status of the land in this respect often has an important bearing upon the judgment to be formed. When its condition is a material one, and no statement, as to it, is found in the appeal record, it necessitates a personal inspection of the records of your office, or an official call, in order to obtain the required information, thereby causing inconvenience and delay. You are directed to give such instructions as will prevent this omission hereafter.

APPLICATION TO MAKE ENTRY—FINAL PROOF.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, June 25, 1890.

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 amend section twenty-two hundred and ninety-four of the Revised Statutes of the United States, and for other purposes," approved May 26, 1890, a copy of which is hereto attached.

The second paragraph refers to the preliminary affidavits,—no affidavit, however, being required when a pre-emption declaratory statement is filed.

Under its provisions, said affidavits, when the applicant is prevented by reason of distance, bodily infirmity, or other good cause, from personal attendance at the local land office, whether he is residing on the land or not, may be made before the clerk of a court of record for the county in which the land is situated, or any commissioner of the United States circuit court having jurisdiction over the county in which the land is situated.

The third paragraph refers to final proofs, and affidavits required to be made under the homestead, pre-emption, timber-culture and desert land laws, and provides that said proofs and affidavits may be made before any commissioner of the United States circuit court having jurisdiction over the county in which the lands are situated, or before the judge or clerk (not necessarily the clerk in the absence of the judge) of any court of record of the county or parish in which the lands are situated.

The remaining paragraphs relate to the fees which may be charged

by officers other than the local officers before whom proofs may be made, but do not affect the laws governing the fees which may be charged by the local officers.

Very respectfully,

LEWIS A. GROFF,
Commissioner.

Approved.

JOHN W. NOBLE,
Secretary.

AN ACT to amend section twenty-two hundred and ninety-four of the Revised Statutes of the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that section twenty-two hundred and ninety-four of the Revised Statutes be, and the same is hereby amended so that it will read as follows:

SEC. 2294. In any case in which the applicant for the benefit of the homestead, pre-emption, timber-culture, or desert land law is prevented, by reason of distance, bodily infirmity, or other good cause, from personal attendance at the district land office, he or she may make the affidavit required by law before any commissioner of the United States circuit court or the clerk of a court of record for the county in which the land is situated, and transmit the same, with the fee and commissions to the register and receiver.

That the proof of settlement, residence, occupation, cultivation, irrigation, or reclamation, the affidavit of non-alienation, the oath of allegiance, and all other affidavits required to be made under the homestead, pre-emption, timber culture and desert land laws, may be made before any commissioner of the United States circuit court, or before the judge or clerk of any court of record of the county or parish in which the lands are situated; and the proof, affidavit, and oath, when so made and duly subscribed, shall have the same force and effect as if made before the register and receiver, when transmitted to them, and with the fee and commissions allowed and required by law. That if any witness making such proof, or any applicant making any such affidavit or oath, shall knowingly, wilfully, and corruptly swear falsely to any material matter contained in said proofs, affidavits, or oaths, he shall be deemed guilty of perjury, and shall be liable to the same pains and penalty as if he had sworn falsely before the register. That the fees for entries and for final proofs, when made before any other officer than the register and receiver, shall be as follows:

For each affidavit, twenty-five cents.

For each deposition of claim or witness, when not prepared by the officer, twenty-five cents.

For each deposition of claimant or witness prepared by the officer, one dollar.

Any officer demanding or receiving a greater sum for such service shall be guilty of a misdemeanor, and, upon conviction, shall be punished for each offence by a fine not exceeding one hundred dollars.

Approved, May 26, 1890.

CERTIORARI—LOCAL OFFICE—PRACTICE.

WOOD v. GOODWIN.

While the rules of practice provide for certiorari only in cases where the General Land Office denies the right of appeal, yet the Secretary has the power and authority to issue the writ to the local officers in a case that calls for such action. Certiorari will not lie to review an interlocutory order of the local office where the ordinary methods of procedure afford relief.

Secretary Noble to the Commissioner of the General Land Office, June 25, 1890.

By letter of June 14, 1890, you forwarded the petition of Hettie Wood for an order directing the local officers at Garden City, Kansas, to certify to this Department certain proceedings now pending in that office.

She alleges that on April 30, 1889, she filed in said office an affidavit of contest against the homestead entry of Gilbert H. Goodwin, made December 12, 1885, alleging that said Goodwin—

Has wholly abandoned said tract, that on or about December 24, 1888, he removed with his entire family from the State taking his household goods and his entire belongings from the land; and affiant has heard and believes that the said Gilbert H. Goodwin declared his intention of never returning to said land; and that he does intend to sell and relinquish the same. Affiant further asks that the contest be heard not sooner than July 1, 1889, so it need not impair his rights should he return within the six months.

It is further alleged that the hearing was set for August 23, 1889, and service was had on the entryman at Harrison, Arkansas, on August 3, 1889, but twenty days prior to the date set for the hearing; that on August 17, contestant filed her motion asking that the latter clause of said affidavit, to wit, "affiant further asks that said contest be heard not sooner than July 1, 1889, so it need not impair his rights should he return within the six months," be stricken out, and that the same be amended to read, "that Gilbert H. Goodwin has wholly abandoned said tract, that he has changed his residence therefrom for more than six months since making said entry, that said tract is not cultivated by said party as required by law at this time."

It further appears that the original notice was returned under rule of practice No. 12, the case continued on August 17, to October 11, and an alias notice containing said amendment issued, which was served at Harrison, on August 22, 1889; that on August 23, an attorney acting for the entryman moved to dismiss the action "for want of jurisdiction," which motion was overruled "because of the amended complaint and the continuance previously taken;" that thereupon said attorney entered a general appearance in the case and moved that the same be dismissed because the complaint did not state a cause of action, which motion was not considered "because it was prematurely filed before the trial day."

On October 11, the day to which the case had been continued, con-

testant appeared and announced that she was ready for trial, whereupon the attorney for the entryman filed the following motion.

Comes now the defendant in the above entitled cause and moves the register and receiver to reject and strike out the amended complaint of plaintiff in the above entitled cause, for the following reasons to wit:

First: Because said amended complaint states a cause of action which did not exist at the time her original complaint was filed.

Second:—Because said amended complaint shows that as amended no cause of action had accrued or existed at the date of filing the original complaint, therefore there was no complaint to amend; wherefore the defendant moves to reject said amended complaint and that said contest be dismissed.

On the argument of this motion the point was made that on June 26, 1889, Thomas G. Goodwin, brother of the entryman, had filed a contest against said entry, also alleging abandonment and it was urged that pending such contest, the original contestant could not be allowed to amend her complaint.

The local officers sustained the motion in the following words: "Motion to strike out on first count, sustained. *Hawkins v. Lamm* (9 L. D., 18); *Farmer v. Moreland* (8 L. D., 446)."

The attorney for contestant took an exception, and thereupon filed this petition alleging that no appeal lies from said action of the local officers, it being interlocutory, and that she has no other adequate remedy.

While the rules of practice provide a remedy by "certiorari" only in cases where your office formally decides that a party has no right of appeal (Rules 83, 84 and 85), yet it cannot be doubted that the Secretary has the power and the right to issue the writ to the local officers in a proper case made. By section 441 R. S., he is charged with the supervision of public business relating to the public lands, and rule of practice No. 114 provides that—

None of the foregoing rules shall be construed to deprive the Secretary of the Interior of the exercise of the directory and supervisory powers conferred upon him by law.

However, the cases in which this power will be exercised must be extremely rare, as the local officers are required to transmit to your office the record of every contest (Rule 52), and even in the absence of appeal your office may correct any error of law therein (Rule 48).

In the case at bar there is no ground for resort to this extraordinary remedy.

The motion to dismiss "for want of jurisdiction" was overruled; the second motion to a similar effect was not considered. The motion that was sustained was a motion to strike the amendment from the affidavit of contest, and it was sustained on the ground that it stated a cause of action which did not exist at the time the original complaint was filed, viz., that the abandonment had continued for six months.

This action of the local officers left the case resting on the allegations in Wood's original affidavit. The regular course of procedure there-

fore would be to go forward to trial on these allegations, the contest of Thomas G. Goodwin awaiting the result. If the local officers erred in their ruling the exception taken will preserve contestant's rights in that respect. It is clear from the language of the local officers and the cases cited by them, that they intended merely to reject the amendment. In the Hawkins-Lamm case, *supra*, it was held that a contestant who had "slept upon his contest," (for fifteen months) would not be allowed in the face of a second and intervening contest, to so amend his complaint as to incorporate the charge made by the second contestant, but that the case should go to trial on the original complaint, the second contest meanwhile awaiting the result. The local officers apparently concluded that this ruling governed the case at bar.

As the local officers made no final decision in this case, but merely an interlocutory order, there is no ground for the issuance of the writ. The ordinary methods of procedure afforded full relief. While I do not intend at this stage of the proceeding to pass on the merits of the action of the local office, I call attention to section 2997, R. S., which authorizes a contest against a homestead settler who "has actually changed his residence, or abandoned the land for more than six months at any time."

The petition is denied.

SOLDIERS' ADDITIONAL HOMESTEAD—"TRADE AND BUSINESS."

FRANCEWAY ET AL. v. GRIFFITHS.

A soldier's additional homestead entry of land occupied for purposes of trade and business is illegal *ab initio*, and the subsequent withdrawal of the protest, filed on behalf of such occupancy, will not legalize said entry.

Secretary Noble to the Commissioner of the General Land Office, June 27, 1890.

By decision dated December 17, 1886, your office *inter alia* held for cancellation the additional homestead entry made by Richard Griffiths March 15, 1884, for lot 3, Sec. 19, T. 2 N., R. 4 W., M. D. M., San Francisco, California, for the reason that a part of said lot "was in the possession of The Granite Powder Company prior to the soldiers' additional entry of Griffiths, and that said company had placed improvements thereon to the extent of some \$25,000 for the purpose of carrying on their business and trade and that it is still in their possession as a place of business and trade."

On appeal by Griffiths the Department on March 1, 1889, formally affirmed the said decision of your office. Thereupon separate motions to review the said departmental decision in so far as it rejected the entry of Griffiths were filed by M. D. Hyde as attorney for Griffiths and The Granite Powder Company, on May 16 and June 6, 1889, respectively.

It appears that the lot mentioned was formerly within the claimed limits of the San Pablo Rancho, that one Ellen Franceway (a grant claimant) and the said company claiming by purchase from Franceway, applied (as stated by the local office) on March 7th and June 12th, 1884, respectively to purchase portions of said lot 3, under the act of July 23, 1866 (14 Stat., 218), entitled "An Act to quiet Land Titles in California" and that a hearing on the protest of Franceway and The Granite Powder Company against the said entry of Griffiths was had at the local office December 9, 1884. Upon the evidence thus adduced the local officers rejected the said applications to purchase and also found that said lot was not properly subject to the entry of Griffiths. They suggested, however, a division of the said lot by special survey to protect the respective claims of Griffiths and of the said company.

It further appears that Griffiths has stipulated to convey to the said company the particular land in its possession. The object of the motion by the said company is therefore to enable it to make, under the entry of Griffiths, title to the land just referred to.

Affidavits made in August, 1889, by a surveyor and by the President of the said company are filed with the argument of counsel in behalf of the last mentioned motion. These affidavits are to the effect that the larger part of said company's works is on the swamp land adjoining said lot 3, and that said works have been "shut down for the past three years." But as a part of said lot 3, the legal subdivision in question, was occupied by the said company at the date of Griffiths' entry for business purposes, the allegations just outlined are not material.

It is alleged in the pending motions that the Griffiths' entry is in the nature of a scrip location and not subject to the statutory provision which prohibits entry under the settlement laws upon lands "actually settled upon and occupied for purposes of trade and business and not for agriculture."

In this connection it is urged that in section 2306 Revised Statutes, under which Griffiths' entry was made there "is no restriction as to the kind or condition of the land he may enter and the act granting this right (8 June, 1872) is subsequent to the act (4 September, 1841) which prohibits the entry of land used for business purposes and consequently the former act does not restrict the rights conferred by the latter."

The act of 1872, *supra*, 17 Stat., 333, provides for soldiers' additional homestead entries "on compliance with the provisions of an act entitled "An Act to secure homesteads on the public domain." Entries under the latter, to wit, the homestead act, cannot be made for lands occupied for business purposes. *Fonts v. Thompson* (6 L. D., 332).

But it is further alleged in behalf of the motion by the said company that there being no conflict of interest between it and Griffiths, the presence of its improvements upon said lot 3, is not an occupation adverse to the entry in question, and that consequently the same should

not be thereby defeated. Counsel for the company insist that the precise question that is thus presented is involved in the case of *Myrick v. Thompson* (99 U. S., 285). In that case where an occupant sought to locate upon land occupied by himself Sioux half-breed scrip which Congress had provided should be located on "unoccupied" land, the supreme court held

that the provision authorizing the scrip to be located upon unoccupied land was evidently framed for the benefit and protection of the occupants of the land and that if the occupant saw fit to locate the scrip upon land occupied by himself there could be no objection to the location as the occupant might waive his right to object and abandon his occupancy and that if he did, the effect would be to restore the premises to the condition of unoccupied land:

If the entry under which the said company now seeks to make title to the land in its possession had been made for its benefit and protection, the case cited might possibly control the one at bar. But such entry is not shown to have been originally made for the use of said company. The record on the contrary, indicates that when said entry was made the company's interest was adverse to that of the entryman (Griffiths).

The attendant circumstances existing at the date of such entry should in my opinion be considered in determining its validity.

At the date of said entry the said company was occupying the legal subdivision in question for the purpose of trade and business.

It would therefore seem that the said entry of Griffiths was made in direct contravention of the statute and that consequently it is void *ab initio*.

At all events this view is in accord with the existing rulings of the Department as shown in the case of *Fonts v. Thompson supra*, where it was held that one who occupies and is making use of public land for business purposes prior to entry thereof is precluded from appropriating such land under the homestead law.

The entry of Griffiths having been allowed at a time when the land was excepted therefrom it follows under the authority last cited that such entry is illegal. I must therefore find that the withdrawal by The Granite Powder Company of its protest against the entry of Griffiths can not cure the illegality of such entry nor avoid the provisions of the statute.

The motions are accordingly denied.

PRACTICE—CONTEST—HEARING—PATENT.

RAVEZZA v. BINUM.

The local officers have no authority to order a hearing involving an entry on which final certificate has issued; and no rights can be secured under proceedings based on such order.

The issuance of a patent terminates the jurisdiction of the Department over the land covered thereby.

Secretary Noble to the Commissioner of the General Land Office, June 28, 1890.

I have considered the appeal of Louis Ravezza from your office decision of March 1st 1889, denying his petition for recall and cancellation of patent issued to Edward L. Binum.

The record shows that said Binum made homestead entry September 23, 1882, at the land office at Sacramento, California, for lot No. 1, or fractional NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 34, and the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 27, T. 4 N., R. 12 E., M. D. M.,

Final proof was made on January 16, 1886. The proof was accepted by the local officers and final certificate issued thereon, and on July 3, 1888, a patent was issued to him for the land.

On the 21st of August, 1888, appellant herein filed in your office a written statement entitled a "Petition for recall and cancellation of patent," in which "the immediate recall and cancellation" of the patent issued to Edward L. Binum, dated July 3, 1888, is asked. The ground he states for such request to be:

That said paper called a "patent," was unintentionally prepared and sent to the local office, or, in other words, such action was a mere error and inadvertence, or mistake on the part of your office, committed while a certain proceeding and question involving the determination of the character of twenty acres of the land embraced in said homestead entry was actually pending and undetermined as fully shown by the inclosed affidavits of Louis Ravezza and Judge Ira Hill Reed and exhibits thereto attached.

Then follows an argument referring to the case of *The United States v. Schurz* (102 U. S., 378), as an authority in support of the claim made by petitioner, which case when examined in the light of the record of the case at bar is conclusively against the appellant.

From Ravezza's affidavit it appears that he is a miner working a placer mining claim adjoining the homestead of Binum; "that said homestead involves twenty acres claimed and occupied by him and his mining partner, for mining purposes." That on the first publication of Binum's notice of final proof Ravezza employed some attorneys for the purpose of protecting his right to the twenty acre tract. That he was advised by his attorneys not to oppose Binum's final proof. That acting under their advice he did not oppose said proof but instead procured a lease from Binum of the ground claimed for ninety-nine years. A

copy of the lease is attached to said affidavit which shows it was executed and acknowledged December 7, 1885. It further appears from said affidavit that on the 16th of January, 1886, Binum made his final proof on the land. That thereafter on the 5th of January, 1887, Ravezza filed in the local land office his affidavit, duly corroborated, alleging twenty acres of said homestead tract, to-wit, "The S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of NW, $\frac{1}{4}$ of said section 34 (being the same described in said lease) to be mineral in character and more valuable for mining than for agricultural purposes."

Thereupon the register ordered a hearing between the parties on the 27th of February, 1887, at the local office to establish the character of the twenty acre tract.

The parties mutually desiring to avoid the expense of taking witnesses to the land office agreed to take their testimony at another place than the local office with the understanding that said hearing should be continued till consent should be obtained from the local office ratifying such agreement. The register denied such application and ruled that the testimony should be taken before his office. "Both parties appealed to the Hon. Commissioner from such ruling." That patent has lately issued to Binum on his homestead entry and is now in the local land office; that said appeal is undetermined and the case before said local land office set for hearing September 7, 1888, and asks that the patent may be recalled, that the appeal be determined and further proceedings had to determine the mineral character of the land.

Reed's affidavit corroborates Ravezza's. The reports of the register of the local office show that the hearing was ordered, the ruling made, and alleged appeal taken substantially as stated in Ravezza's affidavit.

The papers in the alleged appeal case are found among the papers in this case.

I find no evidence of the patent having been issued unintentionally or by any mistake or inadvertence on the part of your office.

On the 1st of March, 1889, your office found that the issue of the patent was regular; that the title has passed from these United States and denied the petition of recall, from which decision Ravezza appeals.

October 3, 1889, Binum, through his counsel, filed in this Department a motion to dismiss the appeal on the grounds that as a patent has been regularly issued to Binum that this Department has no jurisdiction over the title to the land or any question connected with the title.

It is claimed in argument by appellant that as the protest of Ravezza was filed in the local office and that action had been taken thereon and both parties had appealed from the decision prior to the preparation of the patent, that it was error to make out and issue the patent to Binum.

A sufficient answer to this is: that the local officers had no right or authority to order a hearing in this case.

Under the rule of practice No. 5, such hearing will be ordered only

by direction of the Commissioner of the General Land Office. No such order having been made the proceedings were void and the appeal (in case an appeal would lie from the order complained of) would not cure the want of authority in the local officers to order it and it follows that the hearing ordered, the proceedings had, and the appeal to your office, were void *ab initio* and could confer no right upon any one.

If the hearing before the local officers had been ordered by your office, the order appealed from was simply an interlocutory order from which an appeal would not lie. See Rule 43. *Jones v. Campbell* (7 L. D., 404).

I have considered the appeal fully upon the record presented and fail to find any merit in it.

In *Moore v. Robbins* (96 U. S., 530), it is held "that when a patent has been issued, delivered, and accepted, all right to control the title or decide on the right to the title has passed from the general land office. Not only has it passed from the land office, but it has passed from the executive department of the government."

In *United States v. Schurz* (102 U. S., 378), it is held that "title by patent from the United States, is title by record, and the delivery of the instrument to the patentee is not, as in a conveyance by a private person, essential to pass title." See also *Steel v. Smelting Company* (106 U. S., 447).

It has been uniformly, as well as very frequently held by this Department that when a patent has issued for a tract of land, the Land Department has no further jurisdiction over it, and cannot allow another to enter it. *Garrigues v. Atchison, Topeka and Santa Fe R. R. Co.* (6 L. D., 543); *Schweitzer v. Ross et al.* (8 L. D., 70); *Iowa Railroad Land Co. v. Sloan* (9 L. D., 597).

Your said office decision is accordingly affirmed and the appeal of Ravezza is dismissed.

INDEX.

| | Page. | | Page. |
|--|-------|--|----------|
| Abandonment. | | To enter must show the present status of the land and qualifications of the applicant. | 384 |
| See <i>Contest</i> (sub-title <i>Homestead</i>), <i>Residence</i> . | | To make homestead entry reserves the land covered thereby..... | 192, 510 |
| Account. | | To make homestead entry can not be allowed for land covered by a school selection..... | 263 |
| See <i>Fees, Repayment</i> . | | Accompanied by a relinquishment is at once effective on the filing of the relinquishment..... | 139 |
| Of deputy surveyors may be adjusted without an examination in the field..... | 199 | To enter, filed by a second contestant with his affidavit of contest, against a timber-culture entry, reserves the land, subject only to the rights of the first contestant..... | 532 |
| Alabama. | | To enter may be allowed during the period accorded for the exercise of the preference right of a successful contestant, subject to such right..... | 221 |
| See <i>Mineral Land</i> . | | To enter may be received during the time allowed for appeal from a judgment of cancellation, subject to such appeal, but should not be made of record until the rights of the former entryman are finally determined... .. | 221 |
| Alien. | | To enter should not be allowed during the pendency of a charge affecting the good faith of the entryman..... | 402 |
| See <i>Naturalization</i> . | | To enter lands certified to a State under a railroad grant will not be entertained... .. | 575 |
| Can acquire no right to public land before declaration of intention to become a citizen, and his subsequent qualification will not relate back to the exclusion of an intervening adverse right..... | 463 | To enter lands covered by unapproved railroad selection, procedure in case of..... | 504 |
| Alienation. | | To make desert entry cannot be allowed while the land is covered by a previous timber-culture entry of the applicant..... | 541 |
| See <i>Practice</i> (sub-title <i>Notice</i>). | | To make timber-culture entry must be presented within a reasonable time after the execution of the preliminary affidavit... .. | 325 |
| After due compliance with law by the homesteader, payment of fees, and submission of final proof, but prior to the issuance of final certificate, does not defeat the right to a patent..... | 142 | To file should not be allowed for lands covered by a pending railroad selection until after disposition of such selection..... | 454 |
| Purchaser of land held under final certificate (timber land) takes an equity only, and is charged with notice of all defects in the title..... | 415 | To file a declaratory statement does not segregate the land, but the subsequent application of another is subject thereto..... | 616 |
| One who purchases land during the pendency of an appeal, involving the validity of the title thereto, is charged with notice of the appeal..... | 415 | Arkansas. | |
| The attempted transfer of a homestead claim before final proof gives the transferee no standing before the Department..... | 548 | See <i>States and Territories</i> , | |
| Amendment. | | California. | |
| See <i>Entry</i> (sub-title <i>Pre-emption</i>), <i>Contest</i> (sub-title <i>Timber Culture</i>). See <i>Filing, Practice</i> . | | See <i>States and Territories</i> . | |
| Appeal. | | Certification. | |
| See <i>Practice</i> . | | See <i>Patent</i> . | |
| Application. | | | |
| See <i>Contest</i> . | | | |
| To make entry under section 2294, R. S., as amended, circular of June 25, 1890..... | 687 | | |

Certiorari.

Page.

| | |
|--|----------|
| A copy of the Commissioner's decision should accompany the application | 159 |
| Applicant for, should make it affirmatively appear that substantial justice has not been done | 159 |
| To review an order of the Commissioner directing a hearing will not be granted unless a clear abuse of discretion shown | 250, 491 |
| Will not be granted unless the right of appeal has been denied and such denial results in serious injury to the applicant | 491 |
| Will not be granted if the right of appeal is not wrongfully denied, unless the facts set forth show that the applicant is entitled to relief under the supervisory authority of the Secretary | 572 |
| The Secretary may issue the writ to the local office in a case that calls for such action | 689 |
| Will not lie to review an interlocutory order of the local office where the ordinary methods of procedure afford relief | 689 |

Circulars and Instructions.

See table of, page XVIII, and circulars cited and construed, page XIX.

Citizenship.

See *Alien, Natu: alization.*

Coal Lands.

| | |
|---|-----|
| Entry must be made in good faith and not for the benefit of another | 160 |
| Status of, at date of proof and payment, with respect to distance from a completed railroad determines the price | 422 |
| Failure to file declaratory statement within sixty days after date of actual possession, and make payment within one year from the expiration of the time for filing renders the land subject to the entry of another who has complied with the law | 160 |
| A second declaratory statement cannot be filed in the absence of a valid reason for abandoning the first | 539 |
| Second filing for same tract not allowed to one who has failed to make proof and payment within the statutory period | 508 |
| Failure to make proof and payment within the statutory period does not forfeit the right of purchase in the absence of an adverse right | 508 |
| On failure to make proof and payment within the statutory period the filing should be canceled, if, after due notice, the claimant does not comply with the law | 508 |

Colorado.

See *States and Territories.*

Commutation.

See *Entry, Final Proof* (sub-title *Homestead*) and *Homestead.*

Contest.

Page.

See *Application, Contestant, Entry* (sub-title *Homestead*), *Practice.*

GENERALLY.

| | |
|---|--------------------|
| The government a party in interest | 19 |
| No rights acquired through a speculative | 250, 404 |
| No rights secured under a hearing ordered by the local office without authority | 694 |
| Second, not allowed on issues tried and determined in the first | 232, 253, 318, 451 |
| If the good faith of, is attacked, a hearing may be ordered on that issue | 114 |
| Invalid on its face, and abandoned by the contestant, is no bar to new proceedings by said contestant | 268 |
| Objection to an affidavit of, is not waived by going to trial after such objection is overruled | 181 |
| Failure to serve notice of, and the initiation of new proceedings is an abandonment of the first, and warrants the dismissal thereof | 268 |
| In case of conflicting applications for the right of, the only person that can object to the award made is the unsuccessful applicant | 459 |
| Not initiated until issuance of notice, but the contestant on filing affidavit of, acquires a right to proceed against the entry that cannot be defeated by a subsequent relinquishment | 302 |
| Begun during the pendency of government proceedings against the entry, or while all adverse proceedings against such entries are suspended by general order, confers no rights | 657 |
| Death of the entryman prior to the day fixed for hearing is not ground of dismissal, or suspension of proceedings, when the entryman has sold the land and the transferee is in court | 624 |
| Based on a charge of non-compliance with law may be defended by an intervening entryman claiming under a relinquishment | 302 |
| Intervening entryman is entitled to notice of any action that necessitates cancellation of his entry | 302 |
| Is discontinued by agreement of counsel to indefinite postponement of hearing | 459 |
| On the withdrawal of a contestant the case is left as between the government and the entryman | 133 |
| Failing on the issue joined, the contestant will not be heard to say that the entryman cannot show compliance with the law in the statutory period | 232 |
| Acts performed after the initiation of, will not relieve the entryman of the consequence of non-compliance with law prior thereto | 133 |
| Failure of local officers to enter of record a, and issue notice thereon, will not render such contest subject to the intervening right of a second contestant | 210 |

| | Page. |
|--|----------|
| DESERT LAND | |
| Must fail if the default is cured prior to notice, and such action is not induced by knowledge of the impending suit, but is the result of a previous <i>bona fide</i> intent | 657 |
| On the ground of non-compliance with law, filed during the pendency of the general order of February 7, 1882, suspending such proceedings, confers no right | 657 |
| HOMESTEAD. | |
| May be entertained, though not begun until after the expiration of five years from date of entry | 111 |
| Charging the incompetency of the entryman, under the law to perfect his entry, is a good ground for | 274 |
| Local office may order a hearing to determine the right of a homestead applicant as against a railroad grant | 281 |
| Based on a charge of non-compliance with law in the matter of residence and improvements should not be entertained where the entry is suspended on account of a defective survey | 297 |
| On the ground of non-compliance against an entry made for the minor heirs of a deceased soldier or seamen, must fail if the land is cultivated and improved for five years succeeding date of entry | 482, 528 |
| Against a final entry on the ground that the entryman is not a citizen must fail, if the defect is cured prior to notice, and such action is not induced by the initiation of .. | 474 |
| On the ground of abandonment should show that the alleged abandonment was prior to final entry | 555 |
| To sustain the charge of abandonment, it must be shown that such abandonment has continued for six months, and the complaint must so allege | 105 |
| A charge of abandonment, change of residence, and failure to settle, is not an admission that residence has been established, and does not estop the contestant from proving failure to establish residence as required by law | 346 |
| Where abandonment and change of residence are charged, and the notice cites the entryman to respond to the charge of abandonment, the variance is not such as to prejudice the rights of the entryman | 294 |
| A charge of abandonment will not lie against a homestead claimant prior to the allowance of his application to enter | 510 |
| Initiation of, prior to the expiration of the six months allowed for establishment of residence, will not prevent cancellation, if the proof, submitted after such period, shows permanent abandonment | 211 |
| PRE-EMPTION. | |
| Charge of abandonment will not lie on the ground of failure to establish and maintain residence prior to the allowance of application to file declaratory statement | 616 |

| | Page. |
|---|-------|
| TIMBER CULTURE. | |
| Affidavit of, should charge the continuance of the default alleged | 593 |
| Affidavit of, must show the continuance of the default alleged; but leave to amend may be given where the complaint is defective in this particular | 181 |
| Right of amendment, on suggestion of the entryman's death, not defeated by an intervening | 261 |
| Death of the entryman, before initiation of, being shown, the contestant should by amendment and due notice make the heirs parties, and a continuance for such purpose should be allowed | 261 |
| Against the entry of a deceased entryman, where the decedent is made the sole party, defendant is a nullity and must be dismissed | 152 |
| May be entertained, though the contestant files no application to enter therewith | 398 |
| May be initiated during the period of extension provided for in section 2 of the timber-culture act | 302 |
| Proof of sale, and removal from the land, of a small quantity of stone, will not warrant cancellation | 20 |
| On the ground that the land is not "devoid of timber," must fail, if it appears that the entry was allowed in accordance with the rulings then in force | 190 |
| Will not lie against an entry not of record in the local office, and under which no right was ever asserted where the land was subsequently in good faith entered by another ... | 59 |
| Must fail, if the entryman prior to the initiation thereof commences in good faith to cure the default | 232 |
| Must fail, where prior to the initiation thereof the entryman has begun to cure the default, and made due provision for subsequent compliance with law | 373 |
| Must fail, if the default charged is cured prior to the initiation of the suit | 591 |
| Proof of an offer to sell does not in itself justify a conclusion that the entry was not made in good faith | 20 |
| Charging failure to plant the requisite acreage within the statutory period must fail, if such default is solely due to the unusual inclemency of the weather | 470 |
| Cancellation not insisted upon by the government if the failure to comply with the law is not in consequence of bad faith and the rights of third parties are not involved | 107 |
| Failure to break the requisite acreage within the statutory period may be excused where it is not the result of negligence, and the default is in good faith cured as soon as possible, though not till after the initiation of | 153 |
| That part of the breaking, through mistake, is not on the land entered, does not call for cancellation | 585 |

| | Page. |
|---|----------|
| Failure to secure a growth of trees does not call for cancellation, if such failure is not due to negligence | 591 |
| A stranger to the record can not be heard to allege that a contest is premature | 108 |
| A charge of non-compliance with law made prior to the expiration of the first year after entry is premature, and does not authorize proceedings against the entry | 268 |
| Charge of non-compliance with law must fail if it is shown that the alleged failure was due to the illegal and adverse possession of another | 57 |
| Charging non-compliance with law must fail if it appears that the default is due to the wrongful possession of the land by the contestant | 318 |
| The contestant can not be heard to complain of the entryman's failure to comply with the law, if such failure is the result of the wrongful act of the contestant | 585 |
| Not a good defense that the default was the result of the negligence of entryman's agent | 341 |
| Plea of sickness not a good defense against a charge of non-compliance with law, if the claimant was in default at the time he was disabled for further compliance | 352 |
| Contestant. | |
| <i>See Mineral Land.</i> | |
| Preference right of, not assignable | 560 |
| Preference right may be waived, and after such waiver the land is subject to entry by the first qualified applicant | 560 |
| Preference right not acquired through a speculative contest | 250 |
| If the preference right of, is not exercised the land is subject to entry by another | 297 |
| Right of, not defeated by a relinquishment, filed pending contest | 105, 302 |
| Right of, to proceed against an entry not impaired by a relinquishment accompanied by an application to enter filed after initiation of contest | 256 |
| Should not be allowed to exercise preference right without due notice to an intervening entryman | 18, 41 |
| Right of, not defeated by an intervening entry based upon a relinquishment filed pending contest | 398 |
| On a general order to an intervening entryman to show cause why his entry should not be canceled and the preferred right of the, allowed, he may set up any charge involving the invalidity of said right | 250 |
| Who fails to appeal from a decision of the local office dismissing his contest is not entitled to a preference right in the event the entry under contest is canceled on the evidence submitted | 584 |
| Of timber culture entry may acquire a preference right under the act of May 14, 1880, though no application to enter is filed with the contest | 398 |

| | Page. |
|---|-------|
| If successful, is entitled to thirty days from the receipt of notice of cancellation within which to exercise the preference right of entry | 41 |

Continuance.*See Practice.***Costs.***See Practice.***Cultivation.***See Final Proof (sub-titles, Homestead and Pre-emption).***Decision.***See Judgment, Res Judicata.***Declaratory Statement.***See Filing.***Dedication.**

Of land for municipal uses under statutory proceedings divests the government of title

375

Of land may be made by the United States

375

By the proceedings under the act of September 25, 1850, title was passed to the village of Sault Ste. Marie of the land set apart for cemetery purposes, and on the incorporation of the village said title vested in the municipal authorities

375

Deposition.*See Evidence.***Desert Land.***See Entry, Final Proof.*

Land that without irrigation will produce grass in paying quantities is not subject to desert entry

169

That the land was at one time included within a hay reservation raises a presumption against its non-desert character, but such presumption is not conclusive

313

The non-irrigable character of a portion of the land entered will not defeat the right to a patent if the land susceptible of irrigation is reclaimed and the remainder is of no value to the government.

495

A tract bordering on a stream and containing living springs, and that includes land that produces a natural growth of grass in paying quantities and trees of native growth, is not subject to desert entry

558

Price of, fixed at double minimum within the limits of a railroad grant

541

Entry.*See Alienation, Application, Equitable Adjudication, Final Proof, Relinquishment.*

| Page. | Page. |
|--|--------|
| GENERALLY. | |
| Of public land cannot be made by employé of the General Land Office..... | 97 |
| Two for the same tract should not be allowed of record at the same time..... | 18, 43 |
| Secured through fraudulent and speculative contest is invalid..... | 402 |
| Pending appeal from the rejection of a railroad indemnity selection excludes land from..... | 15 |
| The disqualification to enter, provided in section 452, Revised Statutes, extends to officers, clerks, and employés in any of the branches of the public service under the control of the Commissioner..... | 97 |
| Made subject to the preference right of a successful contestant should not be canceled without due notice to the entryman..... | 18, 41 |
| Allowed while the land is covered by the entry of another may be suspended, pending determination of conflict..... | 19 |
| After the expiration of the period accorded a successful contestant, an entry by another is <i>prima facie</i> valid, and should not be canceled without due notice to the entryman..... | 41 |
| Canceled for bad faith will not be reinstated on the application of a transferee except on a statement of facts showing the good faith of the entryman..... | 506 |
| Re-instatement of, for the benefit of heirs not defeated by the intervening entry of another, made with full knowledge that the heirs were in possession of, and residing upon, the land..... | 570 |
| Under the graduation act, erroneously canceled, may be re-instated for the benefit of the heirs, though the entryman, in ignorance of his rights, made a homestead entry of the land which was afterwards canceled for failure to submit final proof..... | 569 |
| Canceled by mistake, and without notice to the entryman of his right of appeal, and without his knowledge that such action was erroneous, may be re-instated on the application of the entryman's heirs, made within a reasonable time after learning the facts..... | 569 |
| Re-instatement of, for the benefit of heirs not barred by the unsuccessful contest of one of the heirs against an intervening entry alleging priority of settlement..... | 570 |
| DESERT LAND. | |
| Right of married woman to make, recognized..... | 48 |
| May be equitably confirmed when the failure to effect reclamation within the statutory period is due to obstacles that could not be overcome..... | 598 |
| Made in good faith, in ignorance of the fact that the land was included within a hay reservation, may stand, where such reservation is subsequently abandoned and the land restored to the public domain..... | 313 |

| | |
|--|----------|
| HOMESTEAD. | |
| Failure of the entryman to establish the pre-requisite residence, where the preliminary affidavit is executed before a clerk of court, may be cured by the establishment of residence prior to the intervention of an adverse right, and a subsequent contest does not cut off the right of amendment..... | 61 |
| Married woman, the head of a family, qualified to make..... | 527 |
| Not allowed for swamp land..... | 39 |
| For lands not in a technical quarter section must approximate 160 acres, in cases of excess..... | 524, 587 |
| Exceptions to the rule requiring approximation recognized where valuable improvements would be disturbed, or other like injury follow the relinquishment of a subdivision..... | 587 |
| Second, may be allowed where the first, through mistake, was for untillable land..... | 557 |
| The right to make second, accorded when the first, through no fault of the entryman, was made for land covered by a prior <i>bona fide</i> pre-emption claim..... | 9 |
| Application to make second, pending on motion for review, at the passage of the act of March 2, 1889, secures to the applicant the benefit of said act to the exclusion of intervening adverse claims..... | 192 |
| *Right to make additional, under the act of March 2, 1889, accorded upon a pending application may be treated as a preferred right..... | 78 |
| Second, under act of March 2, 1889, not allowed for a quantity that, added to the first, will exceed 160 acres..... | 661 |
| Joint, may be allowed, in case of conflicting settlements prior to survey..... | 234 |
| Conflicting rights, acquired through settlement prior to survey, adjusted by either party making entry, on condition that he tenders to the other an agreement to convey to him that portion of the land covered by his occupancy..... | 234 |
| May be equitably confirmed where through ignorance the entryman submits final proof prior to becoming a citizen..... | 475 |
| Of land not subject thereto, not legalized by subsequent residence, cultivation, and improvements..... | 649 |
| Made on land covered by the prior timber-culture entry of another, not of record and under which no rights were asserted, is good as against every one except the timber-culture entryman..... | 59 |
| Commuted, may be referred to the board of equitable adjudication, in the absence of protest, where residence is not commenced within six months..... | 88 |
| PRE-EMPTION. | |
| When allowed relates back to final proof to the exclusion of intervening adverse claims..... | 258 |

| | |
|---|-----|
| A pre-emptor is entitled to enter a quarter section, platted as such, regardless of the actual area thereof..... | 116 |
| Embracing lands in different sections must approximate 160 acres in cases of excess.... | 62 |
| Can not be amended to include a tract that was not embraced in the original claim for the reason that the land was then supposed to be excluded from such appropriation.... | 419 |
| Made in good faith by a married woman who, prior to marriage, had fully complied with the law as to settlement, residence, and improvement, may be equitably confirmed.... | 629 |
| May be confirmed by equitable action, in the absence of an adverse claim, where a single woman after settlement, filing, due inhabitancy and improvement, marries prior to final proof, but after published notice of intention to submit the same..... | 166 |

TIMBER CULTURE.

| | |
|--|-----|
| Not more than one-quarter of a fractional-section can be taken under the timber culture law..... | 681 |
| A natural growth of timber excludes land from, though such growth may require protection from fire to render it valuable..... | 13 |
| Made in good faith for land subject to such appropriation under the rulings then in force should be protected..... | 190 |
| The present construction of the act as to lands subject to entry thereunder should not be enlarged to protect entries not allowed under the former construction..... | 190 |

Equitable Adjudication.

See *Entry, Final Proof.*

| | |
|---|-----|
| Entries submitted for, should be placed under the rule appropriate thereto, or submitted as "special"..... | 299 |
| In submitting an entry for, under authority of a departmental decision, the authority may be noted, but the appropriate rule should be stated, or the entry placed under the special provision..... | 299 |
| Additional rules of, 31, 32, and 33..... | 502 |

Estoppel.

See *Relinquishment.*

Evidence.

See *Patent.*

| | |
|---|-----|
| Irregularity in the submission of, can not be urged on appeal by one who, after such objection proceeds with the trial and submits testimony on his own behalf..... | 169 |
| Ex parte not accepted to defeat the records of the local office..... | 256 |
| An objection to the manner in which depositions are transmitted comes too late where raised for the first time on appeal to the Department..... | 339 |
| May be secured through depositions taken on commission issued after hearing under rule 35 of practice..... | 480 |

Fees.

| | |
|--|-----|
| In proceedings by the government against an entry a witness who is summoned by the claimant and testifies in his behalf is not entitled to any fees from the United States.... | 385 |
| On allowance of second homestead entry the claimant is not entitled to credit for fee and commissions paid on first, but should apply for the repayment thereof..... | 469 |

Filing.

See *Application.*

| | |
|---|-----|
| Can not be made until the land has been surveyed, and the plat filed in the local office..... | 195 |
| Prima facie valid raises a presumption as to the fact of the claim and its validity.... | 645 |
| That has expired without proof and payment gives rise to the presumption that the claim has been abandoned..... | 645 |
| Second, not permissible, though the first was for unoffered land, and made prior to the adoption of the Revised Statutes..... | 188 |
| Second, not permissible though the first may have been allowed prior to the adoption of the Revised Statutes..... | 336 |
| Right to make second, recognized, if through no fault of the pre-emptor consummation of title was not practicable under the first..... | 338 |
| The right to make second, may be accorded where failure to perfect title under the first was due to the ill health of the pre-emptor..... | 17 |
| Second, may stand when made in good faith, and allowed in accordance with existing rulings, where the first was made through mistake and subsequently relinquished..... | 229 |
| Default in, for offered land, does not defeat the right of purchase, if cured prior to the intervention of an adverse right..... | 387 |
| Failure to make, within statutory period defeats the right of purchase in the presence of an intervening adverse claim..... | 435 |
| For land included within a former indemnity withdrawal, and covered by a pending selection, should not be allowed without due notice to the railroad company..... | 454 |
| Time under amended Osage, begins to run from the date when the amendment is allowed..... | 624 |
| Second Osage, permissible where the first is in good faith abandoned on account of the intervening adverse claim of another.. | 150 |

Final Proof.

See *Alienation.*

GENERALLY.

| | |
|--|-----|
| Under section 2294, R. S., as amended, circular of June 25, 1890..... | 637 |
| Misdescription of land in the published notice, calls for republication..... | 468 |

| | |
|--|----------------|
| Submitted on indefinite notice, may be accepted after republication, in the absence of protest..... | Page. 372, 587 |
| Republication required, where not submitted at the time fixed and the proceedings are continued but not to a day certain . | 418 |
| When taken before an officer not authorized to act in such proceedings the entry may be equitably confirmed, if otherwise regular | 183 |
| Defect in, caused by failure to submit on the day advertised, must be cured by equitable action, in the absence of evidence showing that the case is within the confirmatory provisions of the act of March 2, 1889 | 596 |
| Section 7, act of March 2, 1889, is retroactive, and legalizes proof taken within ten days following the date advertised, in pending cases, where unavoidable delay prevents compliance with the notice..... | 301, 597 |
| Where the testimony of the witnesses was taken on a day, and before an officer not named in the notice, but was submitted, with the testimony of the claimant, at the proper time and before the officer designated, the entry may be equitably confirmed. | 296 |
| Preparation of part of the testimony, on the day before that fixed for taking, does not affect regularity of, where it is completed at the time and place, and before the officer designated | 119 |
| On offer of, an adverse claimant can not set up a claim that has been held invalid in a decision, final as between the parties.... | 451 |
| Supplemental, should be required where the testimony is evasive and incomplete.... | 1 |
| On submission of supplemental proof a special agent may be present and cross-examine the witnesses | 30 |
| If found insufficient, and bad faith is not apparent, supplemental evidence may be submitted, in the absence of protest or adverse claim | 183 |
| Supplemental, showing due compliance with law prior to the submission of the original, may be submitted in lieu of new proof, where the entry was allowed, payment made, and the new proof not called for until four years thereafter..... | 213 |
| DESERT LAND. | |
| The claimant's affidavit and the testimony of the witnesses must be taken at the same time and place | 59 |
| The testimony should show that the witnesses have personal knowledge that each subdivision of the land is irrigated | 598 |
| If not made within the statutory period the entry may be equitably confirmed, where the failure is due to obstacles that could not be overcome..... | 313 |
| HOMESTEAD. | |
| Should be explicit in all details necessary to establish the fact of residence in good faith | 30 |

| | |
|--|-----------|
| The Department has no authority to extend the statutory period within which to submit | Page. 400 |
| Where notice of a decision holding an entry for cancellation for failure to submit within the statutory period is not given, an opportunity for the submission of such proof may be allowed, and the entry equitably confirmed if within the rule..... | 548 |
| If made on original entry, no further proof is required by the act of March 2, 1889, under an additional entry of contiguous land..... | 681 |
| New, may be made, where that submitted is found insufficient, but good faith is apparent | 400 |
| In the absence of fraud or concealment, supplemental may be submitted in case of a commuted entry allowed on insufficient proof..... | 492 |
| Breaking may be accepted as proof of cultivation under a commuted entry where settlement is made too late in the season for a crop..... | 526 |
| PRE-EMPTION. | |
| Failure to submit, and make payment within thirty months after the expiration of the period fixed for filing declaratory statement, subjects the claim to the intervening right of another..... | 216 |
| Submission of, within the shortest period possible, not in itself sufficient to impeach the good faith of the pre-emptor | 119 |
| Submission of, a few days prior to the expiration of the six months requisite residence does not in itself call for cancellation, if good faith is otherwise apparent..... | 260 |
| For lands within former indemnity withdrawal may be accepted, though offered within less than six months after revocation of the withdrawal, where the claimant has improved and resided upon the land prior to such revocation..... | 454 |
| That the improvements are inconsiderable in value does not warrant rejection of, if otherwise satisfactory | 340, 468 |
| Should not be rejected for failure to show cultivation if the inhabitancy and improvements are sufficient | 337 |
| Delay in the execution of the final affidavit and making payment excused, where caused by the advice of the local office.... | 421 |
| On behalf of minors, sole heirs of a deceased pre-emptor, may be submitted by the guardian, if by the laws of the State he is charged with the care of the minor's estate | 551 |
| Heirs may submit though the pre-emptor died without executing the affidavit required in section 2262, R. S..... | 551 |
| Must be submitted under amended Osaage filing within six months from the allowance of the amendment | 624 |

| | Page. | | Page. |
|--|---------------|--|-------|
| TIMBER CULTURE. | | | |
| Departmental instructions of July 16, 1889, with respect to the rule to be observed in computing the period of cultivation did not affect cases already adjudicated..... | 93 | That the purchase was made during the pendency of a contest, is an objection that can only be raised on behalf of the contestant..... | 392 |
| Under entries made prior to the regulations of June 27, 1887, the time occupied in preparing the ground and planting the trees may be computed as part of the statutory period of cultivation..... | 409, 501 | The rule in <i>Freise v. Hobson</i> applicable to all unadjudicated cases..... | 678 |
| Publication of notice of intention to submit not required if the entry was made prior to September 15, 1887..... | 501 | A purchase allowed by final decision prior to the ruling in <i>Freise v. Hobson</i> is not affected thereby, nor can the validity of such purchase be questioned collaterally by another applicant for the land..... | 129 |
| Graduation. | | | |
| See <i>Entry</i> . | | A cash entry made subject to the right of a successful contestant, who makes pre-emption entry, may be suspended, or relinquished with the right to apply for repayment..... | 410 |
| Hearing. | | | |
| See <i>Practice</i> . | | A contract of sale made before purchase under the act, will not defeat a subsequent purchase thereunder..... | 392 |
| Homestead. | | | |
| See <i>Entry, Final Proof, Residence</i> . | | An entry under said act is not invalid though the entryman may have contracted to sell the land before making the entry.... | 129 |
| GENERALLY. | | | |
| Right to make entry does not extend to lands reserved by competent authority.... | 513 | Right of purchase not defeated by the prior execution of a power of attorney, authorizing a sale of the land..... | 392 |
| If at the date of the original entry the land is not occupied for purposes of "trade and business," the subsequent use of the land by others for such purposes will not defeat the right of the claimant..... | 205 | An intervening pre-emption claim bars the right of purchase..... | 410 |
| Entry of land occupied by the entryman, at time of entry, for purposes of "trade and business" is illegal, and the illegality extends not only to the land covered by the buildings and improvements but to the entire entry. (See <i>Soldiers' Additional</i>).... | 649 | Relinquishment of the entry defeats the right of the entry to purchase..... | 538 |
| Right is defeated by the sale, prior to final proof, of an undivided half interest of the land entered, and such defect can not be cured by a reconveyance in the presence of a contest charging said illegality..... | 274 | ADDITIONAL. | |
| On the death of an entryman leaving adult and minor heirs, the title inures to the minors, to the exclusion of the adult heirs. | 543 | Under the act of 1889, patent may issue on, without further proof where final proof has been made under the original entry.... | 681 |
| If the entryman dies before final proof, and his widow also dies, not having made proof, the right vests in the heir or devisee of the entryman, and not in the heir or devisee of the widow..... | 240 | Of contiguous land, under section 5, act of March 2, 1889, may be based upon a homestead entry, made in conformity with legal requirements..... | 78 |
| The phrase "had the benefit of such law," as used in the act of March 2, 1889, section 2, construed..... | 635 | Entry of contiguous land may be made under section 5, act of March 2, 1889, by one who prior to said act had entered less than 160 acres and continues to own and occupy the land so entered..... | 681 |
| Right is restricted to the exclusive use and benefit of the entryman, and on cancellation of an entry for non-compliance with law, he can not re-enter the same tract under the act of March 2, 1889, for the benefit of a transferee..... | 79 | ADJOINING FARM. | |
| ACT OF JUNE 15, 1880. | | | |
| Right of purchase suspended by a contest..... | 111, 410, 678 | Entry is a settlement claim, that will defeat the right of a pre-emptor who has failed to file within the statutory period..... | 485 |
| | | Right of, under section 2289 E. S., requires residence on the original farm..... | 579 |
| | | Residence on the original farm prior to entry can not be computed as forming part of the requisite statutory period..... | 488 |
| | | Under section 2289, R. S., may be based upon the equitable ownership of an adjacent tract, and residence upon said tract for the period of five years after such entry warrants the submission of final proof..... | 100 |
| | | Validity of, not affected by the entryman's acquiring title to other adjacent lands prior to final proof..... | |

COMMUTED. Page.

After the submission of satisfactory proof and tender of payment, the entryman is under no obligation to remain on the land or show further compliance with law..... 555

A widow by commuting her deceased husband's entry secures the equitable title to the land..... 209

SOLDIERS.

The right of the entryman dates from filing declaratory statement..... 622

A declaratory statement, filed by one who is residing upon and claiming another tract under the pre-emption law, which he afterwards secures under said law, does not reserve the land covered thereby, as against an intervening right during the subsequent period of residence on the pre-emption claim..... 642

Under entry made for minor orphan child residence is not required..... 528

Made for minor heirs requires cultivation and improvement of the land..... 482

SOLDIERS' ADDITIONAL.

Exercise in person of the additional right precludes further action on a pending application for the certification of such right.... 354

The circular of February 13, 1883, does not authorize the certification of the additional right for the benefit of an assignee..... 354

Right is not assignable, but personal, and can be only exercised by the soldier, or in case of his death, by his widow if unmarried, or if she be dead or married, by the guardian of his minor children..... 354

A certificate of right will not be issued for the benefit of one claiming under an assignment of the soldier's interest..... 354

The right accorded to the minor child of the soldier must be exercised during his minority..... 424

If the heir of a deceased soldier attain his majority prior to the completion of his entry he must thereafter act in person, or through a duly authorized agent, in all matters pertaining to said entry..... 424

Entry of land occupied for purposes of trade and business is illegal, and the subsequent withdrawal of the protest, filed on behalf of such occupancy, will not legalize said entry..... 691

Illinois.

See *Swamp Land*.

Improvements.

See *Final Proof*.

Indemnity.

See *Railroad Grant, School Land, Swamp Land*.

Indian Lands. Page.

See *Filing, Final Proof* (sub-title *Pre-emption*), *Reservation*.

Deed for, will not be approved after the death of the grantor, in case the decedent leaves heirs..... 606

Deed for, executed by Shawnee, does not convey title if not approved by the Secretary..... 606

Withdrawal of land for the benefit of Indian claimants under the homestead law... 144

Circular of March 25, 1890, under the act of March 2, 1889, providing for the disposition of Sioux lands..... 562

Under section 21, act of March 2, 1889, settlers on Sioux lands are required to pay for the land when final proof is made..... 323

The price of Sioux lands is fixed by the date of the first entry, and settlers on lands once entered and then abandoned are required to pay the same amount per acre as the first entryman..... 323

The approved cession by the Chippewa band of the Mille Lac Indians of their right of occupancy is a condition precedent to the right of proceeding, under section 6, act of January 14, 1889, with entries made on lands covered by said right..... 3

The Department may withhold from Osage filing lands within an abandoned military reservation, on which are situated government buildings, pending the sale of said buildings..... 602

That the claimant of Osage land is in fact an "actual settler" must be shown by residence following the alleged act of settlement and preceding entry..... 23

The only conditions prerequisite to an entry of Osage land under section 2, act of May 28, 1880, are that the claimant should be an actual settler and have the qualifications of a pre-emptor..... 23, 36

The proof required to establish the fact of an actual settlement under the act of May 28, 1880, is no less in degree than the proof required under the pre-emption law..... 36

One who settles in collusion with and for the benefit of another is not an "actual settler" under the act of May 28, 1880..... 39

Instructions and Circulars.

See *Tables of, and Circulars, Cited and Constructed*, pages XVIII and XIX.

Iowa.

See *Swamp Land*.

Isolated Tract.

See *Public Sale*.

Judgment.

See *Res Judicata*.

Of the Department deprives the General Land Office of further jurisdiction except in the matter of enforcing the decision..... 230

| | Page. | | Page. |
|---|-------|---|-------|
| Jurisdiction. | | | |
| See <i>Practice</i> (sub-title <i>Notice</i>). | | | |
| Land Department. | | | |
| The disqualification to enter public lands contained in section 452, R. S., extends to officers, clerks, and employes in any branch of the public service, under the control of the Commissioner of the General Land office | 97 | In the survey of, a connecting line run to a section corner on a township line is sufficient, though such township may not be subdivided. | 391 |
| REGISTER AND RECEIVER. | | Amended survey may be allowed, where, through error of the surveyor, the connecting line is incorrectly located, but the claim is sufficiently identified by the description given and good faith is apparent. After such amendment the entry may be equitably confirmed. | 173 |
| Instructions to, of January 6, 1890 (July 16, 1885), in the matter of official correspondence. | 2 | The register may exercise his official judgment in the selection of a newspaper nearest to the claim for the publication of an application. | 655 |
| SURVEYOR-GENERAL. | | The surveyor-general's certificate should show what expenditure is exclusively credited to the claim for which patent is asked, where expenditures are made for the benefit of several claims | 198 |
| Employe in the office of the surveyor-general not allowed to enter lands. | 97 | Patent will not issue on an application that expressly excludes therefrom the land on which are situated the discovery shaft and improvements, and where the proof fails to show the discovery of mineral on the claimed ground, or the requisite expenditure for the benefit thereof | 53 |
| Military Reservation. | | To exclude a lode or vein from a placer claim it must appear that a valuable deposit exists, in vein or lode formation, and was so known to exist prior to, or at the date of, the placer application. | 156 |
| See <i>Reservation</i> . | | Lode within a placer claim limited in width only when patent is asked for such lode, and the claimant has no application therefor, perfected by another, prior to the date of the placer application | 200 |
| Mineral Land. | | If the record shows a lode claim within a placer, not owned by the placer applicant, said lode in its full extent should be excluded from the placer patent. | 200 |
| The right of a successful contestant cannot be exercised upon lands reported valuable for coal prior to the act of March 3, 1883, and not thereafter offered at public sale, but his application may be suspended pending such offering, and considered as of the date presented, if the land is not sold. | 140 | An outstanding placer patent issued on a record that shows the absence of a known lode within the placer claim, is a bar to any subsequent application for a lode claim within said placer. | 200 |
| The burden of proof is upon an agricultural claimant for land returned as, to show the fact of its non-mineral character, but he is not required to prove affirmatively its agricultural character | 311 | The validity of a placer patent, and its extent, as in conflict with an alleged known lode, are questions for judicial determination | 200 |
| In case of contest, where the land is returned as, the burden is not shifted to the mineral claimant by the non-mineral affidavit and publication of notice by the agricultural claimant. | 311 | A mill site cannot be included within an application for a lode, unless such site is used for mining or milling purposes in connection with said lode. | 196 |
| The character of land as a present fact is the question for determination on issue joined between a mining and agricultural claimant | 536 | A qualified corporation may obtain title to a mill site | 194 |
| Mining Claim. | | The date of location by an adverse claimant, and the competency of a corporation under State laws to make such location, are properly matters for judicial determination. 194 | |
| The right to purchase mineral land is restricted to citizens of the United States, or those who have declared their intention to become such | 641 | A hearing may be ordered to determine whether there has been due compliance with law, though the charge is not made until after entry. | 157 |
| Cannot be entered by a citizen of the United States, acting as a trustee, for the benefit of an alien corporation | 641 | | |
| Proof of citizenship is required from the beneficiaries where the applicant for entry is a trustee. | 641 | | |
| A notice of application that does not connect the claim with the public surveys is insufficient; and the defect cannot be cured by equitable action in the presence of adverse claimants who have not had legal notice | 198 | | |

| | |
|--|-----------------------|
| | Page. |
| The validity of a re-location cannot be questioned by the original locator in a proceeding instituted to determine whether said locator has complied with the law in the matter of the statutory annual expenditure..... | 157 |
| A judgment favorable to the applicant, in judicial proceedings instituted by an adverse claimant, is no bar to a subsequent investigation on behalf of the government to determine whether said applicant has in fact complied with the law..... | 184 |
| An agricultural claimant who asserts no claim in himself during the period of publication is not thereafter entitled to an order for a hearing..... | 572 |
| A hearing may be ordered on a protest, filed by a prior applicant, against an entry based upon a relocation, alleging that the claim was not subject to relocation, and the counter-charge that the right of the protestant had been finally excluded by adverse proceedings prior to said relocation..... | 534 |
| A discrepancy between the adverse claim as filed in the local office, and that upon which suit is instituted, will not warrant the Land Department in the resumption of proceedings during the pendency of the suit in court..... | 194 |
| Motion to dismiss an application will not be entertained during the pendency of adverse proceedings..... | 270 |
| Defect in, caused by non-compliance with local regulations, cured by the formal annulment of said regulations prior to the allowance of the entry..... | 178 |
| Naturalization. | |
| Of the father, inures to the benefit of the minor, under section 2172 Revised Statutes..... | 445 |
| Relates back, in the absence of an adverse claim, to the date of settlement..... | 475 |
| Certification of, should be received only when made under the hand and seal of the clerk of the court in which the record appears, unless such record is lost or destroyed, when, upon proof of that fact, secondary evidence may be received..... | 625 |
| Notice. | |
| See <i>Practice.</i> | |
| Offering. | |
| See <i>Public Sale.</i> | |
| Whether the lands have been included within, should appear of record in every case transmitted to the Department on appeal.. | 684 |
| Officer. | |
| Rights not defeated by negligence of.... | 210, 415, 421, 673 |
| Oklahoma. | |
| Town sites in, circular of May 24, 1890 ... | 604 |
| Town sites in, circular of June 18, 1890 ... | 666 |

Osage Land.

See *Filing, Final Proof* (sub-title *Pre-emption*), *Indian Lands.*

Patent.

See *Mining Claim.*

| | |
|---|-----|
| Issuance of, terminates the jurisdiction of the Department over the land covered thereby..... | 694 |
| Issuance of, duly signed, sealed, countersigned, and recorded deprives the Department of further jurisdiction over the land or the title thereto..... | 343 |
| Issuance of, deprives the Department of jurisdiction over the land included therein, even though such patent by its terms amounts only to a quitclaim deed..... | 155 |
| Date of, must be taken as the date of the record, and parol testimony to contradict such record is not admissible..... | 343 |
| On a reconveyance by the State of lands erroneously certified thereto, new title may be made under the proper law..... | 165 |
| Suit to vacate, on the ground that it was procured through fraud, will not be advised where the evidence is not convincing, and the land is in the hands of a purchaser without notice..... | 449 |
| Suit to vacate, issued to the Central Pacific advised, where the land was covered by pre-emption claim at date of withdrawal on general route, and definite location..... | 466 |

Practice.

See *Contest, Evidence, Judgment, Res Judicata.*

GENERALLY.

| | |
|--|-----|
| Proceedings on the report of a special agent..... | 385 |
| A decision that amounts to the determination of a substantial right is not interlocutory..... | 111 |
| After decision in a case the local officers are without jurisdiction to enter an order of dismissal on their own motion..... | 673 |
| The local office, in the exercise of a sound discretion may dismiss a contest for want of diligence in prosecution, but the refusal to make such order, on the motion of a stranger to the record, is not an abuse of such discretion..... | 91 |
| The appearance is "general," where defendant's attorney appears and cross-examines the witnesses; the effect of such appearance can not be avoided by calling it "special"..... | 405 |
| Disposition of the record in cases dismissed by the local office for want of prosecution, circular of January 3, 1890..... | 2 |
| Commissioner appointed under rule 35 to take testimony should be unprejudiced and disinterested..... | 436 |

| | Page. |
|--|-------|
| Officers before whom testimony is taken under rule 35, are governed by the rules applicable to trials before the local office..... | 433 |
| Papers presented for filing, but refused by the local office on account of press of business, should be held as filed of the date when presented..... | 139 |
| Case may be disposed of, if the entire record is before the Department, though such action may involve the consideration of evidence not passed upon by the General Land Office..... | 142 |

AMENDMENT.

See *Contest* (sub-title *Timber Culture*.)

| | |
|---|----------|
| May be allowed where the charge is defective..... | 181, 407 |
| Right to amend is barred by an intervening adverse right..... | 105 |
| That it was not filed within the time allowed is an objection that can not be raised after trial..... | 405 |
| May be allowed on suggestion of defendant's death..... | 261 |

APPEAL.

| | |
|---|----------|
| Cases of, from the General Land Office should be transmitted separately..... | 472 |
| In the transmission of, to the Department the record should show whether the land is "offered" or "unoffered"..... | 684 |
| Specification of errors must be filed..... | 111 |
| Will not be entertained in the absence of due notice and specification of errors..... | 546 |
| Without notice of, to the opposite party in interest will not be entertained by the Department..... | 408, 595 |
| Of intervenor requires a disclosure of interest..... | 111 |
| By transferee must be within the time prescribed by the rules..... | 111 |
| Will not lie from an order of the General Land Office requiring an entryman to submit a supplemental affidavit in support of his entry..... | 110 |
| Does not lie from the denial of a motion for review..... | 159 |
| Pendency of, precludes the allowance of an entry for the land involved..... | 15 |
| That the appellant is not notified, under rule 82, of his default in omitting proof of service until too late to make the service, can not affect his status or the rights of appellee..... | 595 |
| The filing of, does not operate to remove a case from the Commissioner's jurisdiction in cases where he holds that the right of appeal does not exist..... | 572 |
| Is not received as such, in cases where the Commissioner holds that the right of appeal does not exist..... | 572 |
| Rule 82, not applicable in cases where the Commissioner holds that the right of appeal does not exist..... | 572 |

| | Page. |
|--|-------|
| Will not lie from a decision of the Commissioner refusing to order a hearing unless such refusal amounts to the denial of a right..... | 572 |
| Failure to take, from an order of dismissal made without jurisdiction, will not affect the rights of a contestant..... | 678 |

CONTINUANCE.

| | |
|---|-----|
| Agreement of counsel to an indefinite postponement of the hearing works a discontinuance of the case..... | 459 |
| May be granted to take depositions, though a hearing has been held under rule 35..... | 480 |

COSTS.

| | |
|---|-----|
| In contests under rule 55, each party must pay for taking the testimony of his own witnesses, both on direct and cross-examination..... | 625 |
| Rule 56 amended..... | 680 |

HEARING.

| | |
|--|-----|
| Discretion of Commissioner in ordering, not controlled except a clear abuse thereof is shown..... | 250 |
| Local officers have no authority to order, in a case involving a final entry..... | 604 |
| May be ordered by the local office to determine the right of a homestead applicant as against a railroad grant..... | 281 |
| Will not be ordered as between an agricultural and mineral claimant, where the former asserts no right in himself during the period of publication, and the refusal of such an order is not the denial of a right..... | 572 |
| On a general order to an entryman to show cause why his entry should not be canceled and the application of another allowed, he may set up any charge affecting the invalidity of the adverse claim..... | 250 |

NOTICE.

| | |
|--|-----|
| Of contest, must be issued by the local office, but the service thereof rests with the contestant..... | 268 |
| That does not set forth the grounds of contest is defective and does not authorize proceedings thereunder..... | 583 |
| Of contest must be served in accordance with the departmental rules, and not under the civil procedure of the State..... | 477 |
| Of a contest against the entry of an insane person must be served in accordance with the statutory regulations of the State or Territory..... | 238 |
| New, to the defendant not required, where an objection to the charge is sustained and leave to amend allowed..... | 405 |
| Service of, by registered letter is personal service as required by rule 15..... | 388 |
| An allegation that the post-office address of the claimant is unknown, does not excuse failure to mail notice to the <i>last known</i> address of such claimant..... | 666 |

| | Page. |
|--|---------|
| In service of, by publication a copy must be mailed by registered letter to the last known address of the defendant | 664 |
| In service of, by publication the day of the first insertion in the newspaper may be computed as forming a part of the required period | 620 |
| Any defect in the service or proof of service is waived by the defendant appearing and procuring a continuance | 273 |
| If the fact of service is not denied, and such service is duly made, the manner in which proof thereof is made is not material | 273 |
| Of proceedings against an entry should be given a transferee who has filed in the local office a disclosure of his interest..... | 506 |
| A transferee who has not filed in the local office a statement of his interest can not plead want of | 446 |
| Failure to give, to a transferee who has filed a disclosure of his interest, will not authorize re-instatement of an entry in the absence of reversible error in the judgment of cancellation | 566 |
| Of the cancellation of an entry to the contestant's attorney, is notice to the contestant..... | 324 |
| Of a decision will not be presumed, it must affirmatively appear of record..... | 678 |
| REHEARING. | |
| Should not be granted in the absence of a prima facie case made out for investigation | 485 |
| Newly discovered evidence, to justify, should be such as could not have been, with reasonable diligence, discovered in time for the trial..... | 483 |
| Motion for, based upon newly discovered evidence, should show that the alleged discovery was acted upon without unnecessary delay, and the proof of diligence should be clear | 96 |
| Unsworn statement of the applicant's neighbors, showing his compliance with law, cannot be considered on motion for, in a contested case | 96 |
| May be allowed where the applicant acting in good faith and believing that the officer before whom the testimony is to be taken is prejudiced and interested in the result, does not submit his testimony before such officer..... | 433 |
| REVIEW. | |
| Motion for, must be accompanied by an affidavit that it is made in good faith, and not for the purpose of delay | 43, 446 |
| Time allowed for filing motion, except in case of newly discovered evidence, is limited to thirty days after notice of decision..... | 43, 413 |
| Pendency of motion for, excludes intervening claims..... | 192 |
| Will not be granted unless it clearly appears that manifest injustice has been done | 311 |

| | Page. |
|---|-------|
| Will not be granted in the absence of specific allegations of error..... | 43 |
| Not warranted, where the evidence is such that fair minds might reasonably differ as to the conclusion that should be drawn therefrom | 36 |
| On the ground that the decision is not supported by the evidence should point out the particular evidence relied on for the change of ruling | 446 |
| If allowed on the ground that the decision is contrary to the weight of evidence, where there is some evidence to sustain the decision, it must appear that the latter is clearly against the palpable predominance of the evidence | 487 |
| If granted on the ground of newly discovered evidence it must appear that such evidence could not have been discovered by reasonable diligence in time for the trial.. | 489 |
| In support of a motion for, testimony as to facts that occurred after the hearing can not be considered newly discovered evidence | 43 |
| That a decision has been overruled, is no ground for, if the decision has become final as between the parties | 413 |
| That applicant's attorney did not conduct the case skillfully is no ground for | 483 |
| Not warranted on the ground that a witness was prevented by intimidation from testifying fully if the importance of the testimony is not shown | 483 |
| Will not be granted where the claimant or transferee is allowed a further opportunity to support the entry, unless there is a palpable abuse of discretion, as shown by the record, in directing the hearing or requiring new proof..... | 651 |
| Of a decision that approves the action of the Commissioner in ordering a hearing, will not be granted except on the most cogent and conclusive reasons..... | 600 |
| Of a departmental decision affirming the action of the General Land Office will not be granted where, prior to the appeal, the appellant had acquiesced in the adverse judgment, and subsequently complied with its requirements | 439 |
| Will not be granted on the application of a transferee, who, with notice of the pendency of the case, fails to disclose his interest therein while it is under consideration.. | 81 |
| Pre-emption. | |
| See <i>Application, Entry, Filing, Final Proof, Residence.</i> | |
| Right of, not acquired by the purchase of the possessory right of a prior pre-emption claimant | 504 |
| Right of, can not be exercised by one who owns 320 acres of land, and a pretended transfer of title will not remove the disqualification | 461 |

| | Page. |
|---|----------|
| Transmutation of a filing exhausts the pre-emptive right..... | 493, 188 |
| A settler whose claim is initiated prior to the act of March 2, 1889, is authorized by section 2 of said act to transmute his filing into a homestead entry although he has already perfected title to another tract under the homestead law..... | 634 |
| Right of, can not be acquired by one who removes from land of his own to reside on public land in the same State..... | 326 |
| Removal from land held under equitable title to reside upon public land in the same State is within the second clause of section 2260, R. S..... | 208 |
| The second inhibition of section 2260, R. S., is applicable though the removal is from land incumbered by mortgage..... | 447 |
| Temporary removal, prior to the establishment of residence on the pre-emption claim, does not take such claim out of the inhibition contained in the second clause of 2260, R. S..... | 117 |
| In the presence of an adverse right, failure to make payment for offered land within twelve months from settlement, defeats the right of..... | 387 |
| Right of, not defeated by the intervention of an adverse claim, on failure to make proof and payment for unoffered land within the statutory period, unless such claim is made in good faith by one who has complied with the law..... | 612 |
| Under the act of June 21, 1860 the occupancy of public land for a mail station does not form the basis of a pre-emptive right.. | 167 |
| Private Claim. | |
| Survey of, under section 8, act of July 23, 1866, is not effective for any purpose until a copy of the plat is filed in the local office... | 630 |
| Private Entry. | |
| See <i>Public Sale.</i> | |
| Lands suspended from, by the joint resolutions of May 14 and July 16, 1888, were finally excluded from such disposition by the act of March 2, 1889..... | 351 |
| Application to make, may be filed by a homesteader of (Missouri) lands embraced within his entry that can not be confirmed.. | 661 |
| Public Land. | |
| Is that over which the surveys have been extended, or over which it is contemplated to extend them..... | 369 |
| Public Sale. | |
| The Commissioner of the General Land Office is authorized by section 2455 of the Revised Statutes to order into market isolated tracts of unoffered land..... | 615 |
| There is no general statutory authority for the disposition of public lands at auction; authority is given for such action by special statute in each case..... | 652 |

| | Page. |
|--|-------|
| The only statutory authority for the proclamation of May 3, 1870, for the offering of certain lands is found, if at all, in the last clause of section 13, act of July 22, 1854, and as said clause is open to such construction it must be presumed the President acted thereunder..... | 652 |
| The legality of the offering under the proclamation of May 3, 1870, of certain lands in New Mexico, must be held <i>res judicata</i> in view of the lapse of time, and the expenditures of purchasers on the faith of such offering..... | 652 |
| Purchaser. | |
| See <i>Alienation, Homestead (sub-title, act of June 15, 1880), States and Territories.</i> | |
| Railroad Grant. | |
| See <i>Railroad Lands, Wagon Road.</i> | |
| GENERALLY. | |
| The status of land at the date of definite location determines whether it is subject to the grant..... | 167 |
| Definite location of the line of road, excludes the subsequent acquisition of settlement rights on unsurveyed lands subject to the grant..... | 136 |
| Right of a settler as against, may be determined on hearing ordered by the local office..... | 281 |
| Lands granted do not revert after condition broken, until a forfeiture has been declared, either through judicial proceedings or legislative enactment..... | 317 |
| The citizenship of a settler can not be questioned by the company, if, on the date of its selection, a certificate of naturalization issues to the settler who is then on the land..... | 444 |
| A formal declaration of adjustment not necessarily nullified by the subsequent approval of tracts found to be within the grant. | 610 |
| The recognition of the Blanchard-Robertson agreement in section 4, act of February 8, 1887, is limited to the protection of persons who on December 1, 1884, were occupying lands to which the company was entitled (New Orleans and Pacific)..... | 637 |
| The forfeiture of the grant of June 3, 1856, by the act of July 14, 1870, rendered the lands embraced therein at once subject to settlement..... | 637 |
| Settlement claim can not be recognized for land covered by selection until it is shown that the tract was not subject to selection, and the failure of the company to appear at a hearing ordered to determine the status of the land, does not relieve the settler from the necessity of submitting such proof..... | 683 |
| In cases of conflict as to the right to lands within either the primary or secondary limits, the beneficiary should be notified, with due opportunity to be heard..... | 684 |

| | Page. |
|---|----------|
| The acceptance of the benefits of the State act of March 1, 1877, imposes upon the company the conditions of said act, and authorizes a reconveyance by the governor of lands occupied by settlers at the date of said act (St. Paul, M. and M. Ry. Co) | 507 |
| Under the act of June 2, 1864, the right of the company to even sections within the six mile limits of the grant of May 15, 1856, does not attach until selection, and the right of selection cannot be exercised until after definite location of the modified line of road... | 176 |
| The grant of June 3, 1856, is not repealed by the act of May 5, 1864, only to the extent that the later act destroys the continuity of the line provided for, or made possible, under the former grant..... | 63 |
| ACT OF JUNE 22, 1874. | |
| Lands within the indemnity limits of a grant do not afford a basis for relinquishment and selection | 50, 609 |
| A relinquishment confers no right, if the land covered thereby was in fact excepted from the grant..... | 264 |
| ACT OF APRIL 21, 1876. | |
| The confirmatory provisions of section 1 can not be invoked except on behalf of one who was an actual settler prior to the time notice of withdrawal was received, and has shown due compliance with law..... | 136 |
| Section 3 does not include an entry made after the grant has expired, where the grant is revived and the road constructed in accordance with the reviving act prior to the passage of the act of 1876..... | 306 |
| INDEMNITY. | |
| Right of, is a float prior to selection | 504 |
| Selections of unsurveyed lands not allowed | 214 |
| Must be taken from the public lands nearest to the tier of granted sections..... | 147 |
| Right acquired by selection dependent upon the status of the lands at date of selection and not at date of withdrawal | 504 |
| Selection pending on appeal excludes the land covered thereby from entry..... | 15 |
| Pending selection should be acted upon before allowing other disposition of the land | 454 |
| A settlement right existing when an indemnity withdrawal is revoked is superior to a subsequent selection | 444, 454 |
| Lands included within pending selections are not restored by the revocation of the withdrawal | 317 |
| Settlement of an alien no bar to the selection of..... | 463 |
| Procedure in case of application to enter lands covered by an unapproved selection | 504 |
| Land within the second indemnity belt may be selected, on a prima facie basis, without waiting for the final adjustment of the grant within the primary limits and first indemnity (Northern Pacific) belt..... | 15 |

| | Page. |
|---|-------|
| Grant to the Grand Rapids and Indiana Railroad provides for a continuous line, with the right to take indemnity anywhere along said line..... | 676 |
| A deed executed by the company prior to selection does not alter the status of the tract included therein as "public land," or preclude the subsequent selection thereof by the company..... | 504 |
| The right to select indemnity not defeated by the fact that the land is within the primary limits of another grant, if the tract is excepted therefrom, and vacant public land at date of selection | 15 |
| A settlement right within indemnity limits, acquired after revocation of the withdrawal, and prior to selection, excludes the land covered thereby from selection | 31 |
| A selection of land included within an unexpired filing is subject to the rights of the pre-emptor, and the company cannot take advantage of his failure to occupy and improve the land..... | 499 |

LANDS EXCEPTED.

| | |
|--|-------------------|
| A homestead entry of record excepts the land covered thereby from withdrawal on general route (Northern Pacific)..... | 427 |
| The exception in the third section of the grant to the Northern Pacific applies not only to settlers who have made entry, but also to those who are entitled to make entry | 427 |
| Homestead settlement claim of an Indian, who has abandoned the tribal relation, existing at date of definite location excepts from the grant the land covered thereby..... | 440 |
| Failure of the homestead settler to make entry within the statutory period, does not subject to the operation of the grant the land covered by his settlement | 427, 637 |
| Under the express terms of the grant to the Northern Pacific lands "occupied" by homestead settlers at the date when it becomes effective, are excepted therefrom. | 258, 386 |
| A prima facie valid pre-emption filing of record at the date when the right of the company attaches excepts the land covered thereby from the operation of the grant... .. | 54, 288, 568, 645 |
| Existence of a pre-emption claim at date of withdrawal and definite location, excepts the land from the operation of | 464 |
| An unexpired filing by one <i>in esse</i> excepts the land covered thereby from subsequent withdrawal on general route, and the company will not be heard to allege that the pre-emptor has not complied with the law | 662 |
| A prima facie valid unexpired pre-emption filing, of record when the grant becomes effective, raises a presumption as to the fact of the claim that is conclusive as against the grant, in the absence of an allegation which if proven would render the filing void in its inception..... | 645 |

| | Page. |
|--|----------|
| That a pre-emption filing was made without settlement, or that the pre-emptor did not subsequently comply with the law, are facts that can not be shown to defeat the effect of an unexpired filing as against the grant. | 288, 645 |
| An expired filing of record, when the grant becomes effective, is not a "pre-emption claim" that excepts the land covered thereby from the grant | 615 |
| A pre-emption filing, fraudulent <i>ab initio</i> , because there is in fact no such person as the alleged pre-emptor, is a nullity, and ineffective as against the grant. | 662 |
| If an expired pre-emption filing is found of record when the grant becomes effective it will be presumed that the claim of the settler is abandoned, but such presumption is open to rebuttal. | 645 |
| Lands covered by an unexpired pre-emption filing, at the date when the grant becomes effective, are not subject to the operation of a grant from which are excepted lands to which the "right of pre-emption has attached" when the line of road is definitely fixed | 575, 684 |
| The uncontradicted testimony of one witness may be accepted to establish the fact that a tract of land was covered by a pre-emption claim when the grant became effective. | 464 |
| Lands claimed, occupied, and improved by pre-emption settlers at the date of the grant, withdrawal, and definite location, are excepted therefrom | 281 |
| The claim of a qualified settler resting on residence, possession, and cultivation, existing when the grant takes effect, excepts the land therefrom; the subsequent abandonment of the claim does not alter the status of the land under the grant. | 290 |
| Land embraced within a survey of a private claim under section 8, act of July 23, 1866, is not excepted from the grant, if a copy of the plat is not filed in the local office before the grant becomes effective | 630 |
| Under section 2, act of February 8, 1887, lands occupied by actual settlers at definite location, and still remaining in their possession, are excepted from the grant, and not subject to the provisions of section 4. | 637 |
| Lands reserved, by Executive order, for indemnity purposes under the grant of June 3, 1856, are, by the express terms of section 6, act of May 5, 1864, reserved and excluded from the grant made by section 3 of said act. | 63 |
| The act of May 5, 1864, does not confer any rights upon the Wisconsin Central where its grant overlaps the limits of the prior indemnity withdrawal made under the grant of 1856. | 63 |
| The grant of May 5, 1864, of which the Wisconsin Central is the beneficiary, and that of July 2, 1864, to the Northern Pa- | |

| | Page. |
|--|-------|
| cific, did not take effect upon lands within the indemnity withdrawal under the grant of June 3, 1856. | 147 |

WITHDRAWAL.

| | |
|--|----------|
| For indemnity purposes for the benefit of the Chicago, St. Paul, Minneapolis and Omaha Company revoked | 147 |
| The order of August 17, 1887, revoking the indemnity withdrawals made in aid of the grants of June 3, 1856, and May 5, 1864, suspended. | 85 |
| Executive withdrawal for indemnity purposes does not take effect upon land covered by a voidable school selection. | 31 |
| Lands withdrawn by Executive order in aid of a grant can not be diverted therefrom by settlement claims initiated after such withdrawal | 85 |
| On general route excludes the lands embraced therein from settlement rights until after due restoration | 662 |
| On general route does not take effect on land covered by an unexpired pre-emption filing. | 288 |
| Under amended map of general route is without legal sanction, as the company has no authority to file a second map of said route | 288, 440 |
| A homestead entry of record excepts the land covered thereby from, on general route, and the subsequent cancellation of the entry leaves the land open to entry till definite location | 307 |
| A claim resting on settlement, improvement, and occupancy existing at date of, on general route, excepts the land covered thereby | 264 |
| A claim, based upon occupancy and cultivation, existing at the date of indemnity withdrawal under the act of July 25, 1866, excepts the land from the withdrawal | 499 |

Railroad Lands.

| | |
|---|----------|
| Procedure preliminary to suit under the act of March 3, 1887 | 610 |
| The Department can not consider the fact that the lands have passed into the hands of a bona fide purchaser in directing suit under the act of March 3, 1887 | 54 |
| Proceedings authorized under the act of March 3, 1887, for the recovery of lands erroneously certified | 166 |
| Certification of lands, selected in lieu of indemnity lands relinquished under the act of June 22, 1874, is erroneous, and proceedings for the recovery of title should be instituted | 50, 609 |
| Abandonment of land under a decision of the local office, is not the "voluntary abandonment" that precludes re-instatement of the entry under section 3, act of March 3, 1887. | 284, 307 |

| | Page. |
|--|---------------|
| A certification of land excepted from the grant is erroneous, and warrants proceedings for the recovery of title..... | 54, 568, 575 |
| Proceedings for the recovery of title should be instituted under the act of March 3, 1887, in the case of certified lands opposite the uncompleted portion of the Marquette, Houghton and Ontonagon Railroad. | 29 |
| Suit to set aside patent advised where issued for lands excepted by reason of pre-emption claim existing at withdrawal on general route and definite location. (Central Pacific.)..... | 466 |
| Plea of <i>res judicata</i> will not bar re-instatement under section 3, act of March 3, 1887, if the entry was erroneously canceled on account of a railroad grant..... | 307 |
| Proceedings for the recovery of title under the act of March 3, 1887, not authorized, where, long prior to said act, the grant had been declared, by competent authority, to be adjusted..... | 610 |
| Right of purchase conferred by the act of January 13, 1881, can only be exercised by an actual settler, and does not extend to lands excepted from a withdrawal..... | 437 |
| Purchasers of certain lands in the vicinity of Denver authorized by the act of August 13, 1888, to enter said lands at government price..... | 437 |
| Receiver and Register. | |
| See <i>Land Department.</i> | |
| Rehearing. | |
| See <i>Practice.</i> | |
| Re-instatement. | |
| See <i>Entry, Practice</i> (sub-title <i>Notice</i>). | |
| Relinquishment. | |
| Inures to the benefit of the contestant, if the result of the contest, though the charge as laid therein may be insufficient.. | 105 |
| When filed, is at once effective..... | 139 |
| Filed pending contest, does not defeat the right of the contestant to proceed against the entry..... | 256, 302, 398 |
| Of a desert-land entry is at once effective when filed..... | 673 |
| Failure of local officers to promptly act upon, will not prejudice the rights of a subsequent applicant for the land involved... | 673 |
| One who applies to relinquish, and take another tract, on the ground of mistake in the first entry, is estopped from claiming any right thereunder, as against another who, with knowledge of such facts, settles on said land and files therefor..... | 278 |
| Repayment. | |
| Of the first installment paid on a desert entry not allowed on the ground that water can not be obtained for irrigation if no effort toward reclamation is shown.. | 12 |

| | Page. |
|---|-------|
| Only allowed under statutory authority. | 12 |
| May be allowed when it is impracticable for the claimant to comply with an order requiring new final proof, and good faith is apparent..... | 34 |
| Relinquishment accompanying an application for, does not defeat the right of..... | 34 |
| May be allowed on cancellation of an entry made in good faith for a tract of swamp land..... | 39 |
| No claim for, where one purchases land from the State, claimed by it as swamp, and it subsequently appears that such land did not pass under the swamp grant. | 393 |
| Of fee and commissions may be allowed, where second homestead entry is made... | 469 |
| Can not be allowed if the entry was canceled for the reason that it was procured on false testimony..... | 553 |

Reservation.

See *Entry* (sub-title *Desert Land*).

| | |
|--|-----|
| An entry of record excepts the land covered thereby from the effect of an Executive order reserving land for the benefit of Indian claimants under the homestead law, but such order becomes effective on the cancellation of the entry..... | 144 |
| Land withdrawn for the benefit of designated claimants is not subject to appropriation by others..... | 144 |
| Of alternate sections from a grant to a State for railroad or canal purposes, effect of..... | 396 |
| Act of July 5, 1884, does not legalize settlements made with full knowledge that the lands were reserved..... | 489 |
| Pending the sale of government buildings on an abandoned military, the Department may withhold from disposition the land on which such buildings are situated..... | 602 |
| The authority of the Executive in making the treaty of December 26, 1854, carried with it the right to reserve the lands therein set apart for the use of the Indians, and empowered the President to make such additional reservations as might be necessary..... | 513 |
| The Puyallup additional, created by Executive order of January 20, 1857, was within the scope of the authority conferred upon the President by the sixth article of the treaty..... | 513 |
| The construction of the treaty of December 26, 1854, adopted by the Executive, with the assent of the Indians, in the matter of the Puyallup additional reservation, having been recognized by Congressional action, should be accepted as conclusive. | 513 |
| For the use of Indians, not limited by the act of September 27, 1850, and amendatory acts, relative to public lands in Oregon..... | 513 |

| | Page. |
|---|---------------|
| General authority of the Executive to create, recognized..... | 513 |
| Residence. | |
| See <i>Settlement.</i> | |
| GENERALLY. | |
| Not maintained by mere visits to the land | 472 |
| In good faith must be shown by acts indicative of an intention to make the land a home to the exclusion of one elsewhere.... | 240 |
| | 326, 339, 388 |
| If once established, the continuity thereof is not broken by absence caused by judicial restraint | 551 |
| Continuity of, not broken by temporary absences made necessary by the poverty of the claimant..... | 492 |
| Continuity of, not broken by a temporary absence occasioned by the fatal illness of a friend | 526 |
| Maintained as the employé of another, who asserts a possessory right to the land, confers no rights under the settlement laws... | 276 |
| In good faith in a house supposed to be on the land claimed is constructive residence upon the land..... | 83 |
| The home of a married woman is presumptively with her husband..... | 30 |
| Separate, can not be maintained at the same time by husband and wife, living together in such relation, in a house built across the line between two settlement claims, so that each can secure a claim thereby | 266 |
| Upon a tract held by a possessory right of the claimant, adjacent to, and included within, the inclosure of the homestead claim, will not support an entry under the homestead law | 130 |
| HOMESTEAD. | |
| Not required prior to the allowance of application to enter..... | 510 |
| Essential prerequisite to the acquisition of title under the homestead law.... | 79, 211, 294 |
| In the absence of, improvement or cultivation of a tract confers no right thereto | 346 |
| Not required after submission of satisfactory commutation proof, and tender of payment..... | 555 |
| On the original farm essential to the right of making adjoining farm entry..... | 579 |
| On the original farm, prior to adjoining farm entry, can not be credited as part of the statutory period of inhabitancy under an adjoining entry..... | 488 |
| Under a soldier's entry the claimant is entitled to credit for the full period of enlistment, where his resignation as an officer is accepted on a surgeon's certificate of disability | 622 |
| Not required under an entry made by a guardian for the benefit of the minor orphan child of a deceased soldier..... | 528 |

| | Page. |
|---|-------|
| It is no evidence of bad faith that the house of the homesteader is built across the line between two claims | 88 |
| A homesteader may receive credit for, during a period while the land was covered by a prior entry under which no right was asserted, and which was subsequently canceled..... | 276 |

PRE-EMPTION.

| | |
|---|-----|
| Continuous actual personal presence on the land for six months immediately preceding final proof not required | 337 |
| Not required pending action on application to file declaratory statement..... | 616 |

Res Judicata

See *Railroad Lands.*

| | |
|---|----------|
| The head of a Department can not, with certain exceptions, reverse the action of his predecessor | 94 |
| Adjudication of an applicant's claim for a tract of land under one law is no bar to a subsequent application of the same party under a different law and upon a different state of facts..... | 281 |
| The doctrine of, applicable to proceedings before the Land Department..... | 453 |
| With certain exceptions, the Commissioner of the General Land Office has no authority to review or modify a final decision of his predecessor..... | 200, 603 |
| Lapse of time, and the rights of parties acquired in good faith under executive action, justify the application of the doctrine..... | 652 |
| Final decision of the Secretary conclusive upon subordinate officers of the Land Department..... | 93, 200 |

Review.

See *Practice.*

Revised Statutes.

See *Statutes*, also *Revised Statutes, Cited and Construed*, page xx.

Salt Springs.

See *States and Territories.*

School Land.

| | |
|--|-----|
| Selection of, excludes the land covered thereby from entry | 263 |
| A selection on a basis already used in a prior selection is invalid, but the defect may be cured, in the absence of an adverse claim, by cancellation or relinquishment of the first selection | 303 |
| Settlement prior to survey extends only to those tracts on which improvements are placed, and the indemnity therefor is measured by the extent of the settler's appropriation | 348 |

| | Page. |
|---|-------|
| Settlement on, prior to survey excludes the land from the reservation for school purposes; but a purchaser, after survey, from such settler acquires no right against the State..... | 348 |
| Settlement right of another can not be set up to defeat the grant to the State..... | 419 |
| A prior settlement claim can not be set up against a selection of, except in the interest of such settler | 263 |
| Selections on behalf of different fractional townships should be so apportioned that each township will receive credit for the amount to which it is entitled | 498 |
| Indemnity may be allowed for the loss of section thirty-six in a fractional township, prior to the subdivision of such township, if the exterior lines thereof are established, and the loss thus made certain..... | 498 |
| Scrip. | |
| See <i>States and Territories.</i> | |
| Valentina, not locatable upon unsurveyed lands within the Territories lying below high-water mark, and above low-water mark | 365 |
| Location of, upon unsurveyed lands, confers only a preference right to perfect the location after survey as against every one except the United States; but until after the location is adjusted the government has full power to dispose of the land covered thereby | 365 |
| Porterfield, not locatable upon land dedicated by statute to municipal uses..... | 375 |
| Issued under the act of June 22, 1860, locatable only on land subject to private cash entry | 616 |
| Selections. | |
| See <i>Railroad Grant, School Land, States and Territories, Swamp Land.</i> | |
| Settlement. | |
| On unsurveyed land should indicate the boundaries of the claim | 234 |
| In the absence of actual, the ownership of improvements on public land, or the use of such land for ranch purposes, does not confer any right under the settlement laws..... | 276 |
| Rights under the homestead and pre-emption laws can not be maintained for different tracts at the same time | 419 |
| Of an alien on public land confers no rights | 463 |
| On military reservation with knowledge of the existing reservation not legalized by the act of July 5, 1884 | 489 |
| No rights of, acquired on lands reserved by competent authority | 513 |
| No rights acquired by one who remains on public land through the consent of others, and without asserting any right of his own, or performing the acts required of a settler. | 510 |
| Not acquired by one who occupies land as the tenant of another | 582 |

| | Page. |
|--|-------|
| Effected by one who goes upon public land with the intention of making it his home, and does some act in execution of that intention sufficient to give notice thereof to the public | 25 |
| Act of, complete from the instant the settler goes upon the land with the intention of making it his home, and performs some act indicative of such intent..... | 582 |
| Long continued occupancy of land as a home, and the cultivation and improvement thereof, are acts that indicate an intention to claim the land under the settlement laws | 637 |
| Sioux Indian Lands. | |
| See <i>Indian Lands.</i> | |
| Soldiers' Homestead. | |
| See <i>Homestead.</i> | |
| Special Agent. | |
| See <i>Practices.</i> | |
| States and Territories. | |
| See <i>Patent, School Land, Swamp Land.</i> | |
| ARKANSAS. | |
| Where title has passed to the State under a railroad grant, no action should be taken looking toward the issuance of patent to the State for the same land under the swamp grant..... | 165 |
| CALIFORNIA. | |
| Prima facie valid selections of record, under section 8, act of September 4, 1841, prior to survey by the government and renewed when the plat of survey is filed, operate as a bar to any other disposition of the land, and may be certified to the State if found valid | 217 |
| Valid selections under section 8, act of September 4, 1841, do not depend upon the act of July 23, 1866, for confirmation..... | 220 |
| Right of purchase under section 7, act of July 23, 1866, not defeated by the fact that the deed under which a claimant holds an undivided interest in a Mexican grant, does not describe the land by metes and bounds, if the claimant thereunder enters into possession of a tract marked by specific boundaries and continues to use and occupy the same according to the lines of the original purchase | 242 |
| The phrase "according to the lines of their original purchase," as used in the act of 1866, construed | 248 |
| COLORADO. | |
| The provision in the act of March 3, 1875, requiring the State to make its selection of salt springs within two years after the admission of the State is directory only, and a failure to select within said period does not work a forfeiture of the grant..... | 222 |

| | Page. | | Page. |
|--|---------|--|----------|
| The act of March 3, 1875, is not repealed by that of January 12, 1877, nor does the proviso in the later act amount to a legislative declaration that the right to select salt springs conferred by the act of 1875, expires at the end of two years after the admission of the State..... | 222 | Excepted from the grant by reason of previous reservation to the government are not confirmed to the State by the act of March 3, 1857..... | 393, 394 |
| WASHINGTON. | | Included within the alternate sections reserved to the United States from the grant to the State (Illinois) for railroad purposes, did not pass under the subsequent swamp grant..... | 393 |
| On the admission of a State to the Union it acquires absolute title to all tide lands within its borders, to the exclusion of any rights under pending unadjusted scrip locations for such lands..... | 365 | Included within the alternate sections reserved to the United States from the grant to the State (Ohio) for canal purposes, did not pass under the subsequent swamp grant, and no indemnity can be allowed therefor.. | 394 |
| Statutes. | | Fee of, passed to the State (Iowa) at the date of the grant, subject to the right of Indian occupancy, and the right of possession attached to the fee when such right of occupancy was extinguished..... | 285 |
| See <i>Acts of Congress, Cited and Construed, and Revised Statutes, cited</i> , pages XIX and XX. | | An adverse finding and report by a special agent is not conclusive against the State in the absence of final testimony submitted by the State..... | 22 |
| Repeal by implication not favored..... | 70 | Claim should not be rejected on the report of a special agent, but a further investigation may be ordered thereon..... | 121 |
| The rule protecting vested rights on a change of ruling does not apply to one who asserts no such right in himself, or through another, acquired under the former construction of the law..... | 136 | The decision of a commission, appointed by the State and General Land Office, as to the character of a tract does not preclude the Department from resorting to other evidence..... | 39 |
| Distinction between mandatory and directory..... | 224 | That the returns do not show the land to be of the character granted is not conclusive against the State, even though the field-notes of survey have been adopted as the basis of adjustment..... | 39 |
| Recurrence to the history of the times at the date of the act proper in the construction of..... | 329 | When proof has been submitted by the State in accordance with the regulations then in force, the General Land Office should render judgment thereon, if found sufficient, and if not, direct further investigation..... | 121 |
| The doctrine of <i>stare decisis</i> followed in the Department..... | 396 | When the State files a list of indemnity selections, it signifies thereby its readiness to have its claim adjusted in accordance with existing regulations, and should not thereafter be heard to allege that its claim was considered before final proof was furnished. | 121 |
| Legislative recognition of the departmental construction conclusive..... | 513 | If located by warrant or scrip, section 2482, R. S., does not provide for cash indemnity..... | 446 |
| Survey. | | The claim of the State (Illinois) for indemnity for lands located with scrip or warrants may be adjusted..... | 125 |
| Of lands bordering on navigable waters only extends to high-water mark..... | 369 | The character of all tracts, on which proof is submitted for indemnity, should be determined, but separate lists should be made of tracts sold for cash, and those located with land warrants or scrip..... | 121 |
| Authorized under the deposit system though portions of the land are heavily timbered, if such lands are more valuable for agriculture than for the timber..... | 577 | If patent for, has erroneously issued to individual grantees the remedy of the State is in the courts..... | 393 |
| Maximum rates for, allowable if the land is heavily timbered, mountainous, or exceptionally difficult to survey..... | 577 | Tide Lands. | |
| Swamp Lands. | | See <i>Scrip, States and Territories.</i> | |
| The grant of, included such lands as were from their wet and swampy condition not cultivable without artificial irrigation..... | 315 | | |
| Land at the date of the grant which was unfit for cultivation by reason of its wet or swampy condition, is of the character contemplated by the grant..... | 121 | | |
| A periodical overflow that subsides in time for cultivation does not render the land subject to the grant..... | 321 | | |
| Selections of vacant lands, reported to the General Land Office prior to the act of March 3, 1857, were confirmed by said act..... | 45, 163 | | |
| In adjudicating claims for, the State alone is recognized as the beneficiary, and not counties..... | 121 | | |
| The original grant of, not enlarged by the act of March 3, 1857..... | 393 | | |

Timber Culture.

Page.

See *Contest, Entry, Final Proof.*

Osage orange regarded as a timber tree when cultivated for such purpose..... 409

Breaking done on land by a former occupant inures to the benefit of the entryman, if properly utilized..... 322

No fixed rule can be laid down as to what constitutes satisfactory cultivation..... 10

Character of soil and season, age and kind of trees, to be considered in passing upon question of cultivation..... 10

Though subsequent transplanting may be required to secure the requisite growth such fact does not warrant a finding of bad faith or improper planting..... 10

Trees should be protected from inroads of cattle and horses..... 341

Non-compliance with law not excused because the default resulted from the negligence of the entryman's agent..... 341

Plea of sickness will not excuse non-compliance with law, if the claimant was in default at the time he was disabled for further compliance with law..... 352

In entries made prior to the regulations of June 27, 1887, the time occupied in preparing the soil and planting the trees may be computed as part of the statutory period of cultivation..... 409

The instructions of July 16, 1889, with respect to the rule to be observed in computing the period of cultivation, did not change decisions that had become final or authorize the General Land Office to modify said decisions..... 93

Timber and Stone Act.

See *Alienation.*

Entry may be made by a married woman, acting in her own interests, if she possesses the requisite qualifications of citizenship.. 47

The restrictions imposed by the circular of May 21, 1887, are intended to prevent an entry by a married woman for the benefit of her husband, but not to limit the right of entry in any State or Territory in which the act is applicable, and where title would not vest in the husband by virtue of marital rights..... 47

Page.

Entry made by an employé in the office of the surveyor-general of the district in which the land is situated is illegal..... 97

Entry not allowed if the land contains mining improvements made and maintained by another in good faith..... 271

Right of purchase not defeated by the intervention of an adverse claim, where through error of the local office the applicant failed to appear on the day fixed for proof and payment..... 415

Townsite.

No specific number of inhabitants requisite to the right of entry..... 208

In Oklahoma, circular of May 24, 1890... 604

In Oklahoma, circular of June 18, 1890... 666

Transferee.

See *Alienation, Entry, Practice* (sub-title *Notice*).

Wagon Road Grant.

Of July 5, 1866, one of quantity, to be selected within certain limits, and without selection no right attaches to any specific tract..... 456

Does not attach to any specific tract by definite location or construction of the road..... 456

Land within limits of, not within by definite location and construction..... 456

Executive withdrawal in aid of, does not take effect on land covered by valid settlement claim..... 456

The act of March 2, 1889, does not deprive the Department of jurisdiction over lands within the grant of July 5, 1866, or bar the issuance of patents for lands excepted from said grant..... 456

During pendency of suit under the act of March 2, 1889, no patents will be issued to the company or its assignee..... 459

Water Right.

Sections 2339 and 2340 of the Revised Statutes do not authorize the Department to reserve land for reservoir purposes..... 171